The Rise of Smart Camera Networks, and Why We Should Ban Them
by Michael Kwet, The Intercept

There’s widespread concern that video cameras will use facial recognition software to track our every public move. Far less remarked upon — but every bit as alarming — is the exponential expansion of “smart” video surveillance networks.

Private businesses and homes are starting to plug their cameras into police networks, and rapid advances in artificial intelligence are investing closed-circuit television, or CCTV, networks with the power for total public surveillance. In the not-so-distant future, police forces, stores, and city administrators hope to film your every move — and interpret it using video analytics.

The rise of all-seeing smart camera networks is an alarming development that threatens civil rights and liberties throughout the world. Law enforcement agencies have a long history of using surveillance against marginalized communities, and studies show surveillance chills freedom of expression — ill effects that could spread as camera networks grow larger and more sophisticated.

To understand the situation we’re facing, we have to understand the rise of the video surveillance industrial complex — its history, its power players, and its future trajectory. It begins with the proliferation of cameras for police and security, and ends with a powerful new industry imperative: complete visual surveillance of public space.

Video Management Systems and Plug-in Surveillance Networks

In their first decades of existence, CCTV cameras were low-resolution analog devices that recorded onto tapes. Businesses or city authorities deployed them to film a small area of interest. Few cameras were placed in public, and the power to track people was limited: If police wanted to pursue a person of interest, they had to spend hours collecting footage by foot from nearby locations.

In the late 1990s, video surveillance became more advanced. A company called Axis Communications invented the first internet-enabled surveillance camera, which converted moving images to digital data. New businesses like Milestone Systems built Video Management Systems, or VMS, to organize video information into databases. VMS providers created new features like motion sensor technology that alerted guards when a person was caught on camera in a restricted area.

As time marched on, video surveillance spread. On one account, about 50 years ago, the United Kingdom had somewhere north of 60 permanent CCTV cameras installed nationwide. Today, the U.K. has over 6 million such devices, while the U.S. has tens of millions. According to marketing firm IHS Markit, 1 billion cameras will be watching the world by the end of 2021, with the United States rivaling China’s per person camera penetration rate. Police can now track people across multiple cameras from a command-and-control center, desktop, or smartphone.

While it is possible to link thousands of cameras in a VMS, it is also expensive. To increase the amount of CCTVs available, cities recently came up with a clever hack: encouraging businesses and residents to place privately owned cameras on their police network — what I call “plug-in surveillance networks.”

By pooling city-owned cameras with privately owned cameras, policing experts say an agency in a typical large city may amass hundreds of thousands of video feeds in just a few years.

Detroit has popularized plug-in surveillance networks through its controversial Project Green Light program. With Project Green Light, businesses can purchase CCTV cameras and connect them to police headquar-
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Smart Camera Networks (cont.)

ters. They can also place a bright green light next to the cameras to indicate they are part of the police network. The project claims to deter crime by signaling to residents: The police are watching you.

Detroit is not alone. Chicago, New Orleans, New York, and Atlanta have also deployed plug-in surveillance networks. In these cities, private businesses and/or homes provide feeds that are integrated into crime centers so that police can access live streams and recorded footage. The police department in New Haven, Connecticut, told me they are looking into plug-in surveillance, and others are likely considering it.

The number of cameras on police networks now range from tens of thousands (Chicago) to several hundred (New Orleans). With so many cameras in place, and only a small team of officers to watch them, law enforcement agencies face a new challenge: How do you make sense of all that footage?

The answer is video analytics.

Video Analytics Takes Off

Around 2006, a young Israeli woman was recording family videos every weekend, but as a student and parent, she didn’t have time to watch them. A computer scientist at her university, Professor Shmuel Peleg, told me he tried to create a solution for her: He would take a long video and condense the interesting activity into a short video clip.

His solution failed: It only worked on stationary cameras, and the student’s video camera was moving when she filmed her family.

Peleg soon found another use case in the surveillance industry, which relies on stationary cameras. His solution became BriefCam, a video analytics firm that can summarize video footage from a scene across time so that investigators can view all relevant footage in a short space of time.

Using a feature called Video Synopsis, BriefCam overlays footage of events happening at different times as if they are appearing simultaneously. For example, if several people walked past a camera at 12:30 p.m., 12:40 p.m., and 12:50 p.m., BriefCam will aggregate their images into a single scene. Investigators can view all footage of interest from a given day in minutes instead of hours.

Thanks to rapid advances in artificial intelligence, summarization is just one feature in BriefCam’s product line and the rapidly expanding video analytics industry.

Behavior recognition includes video analytics capabilities like fight detection, emotion recognition, fall detection, loitering, dog walking, jaywalking, toll fare evasion, and even lie detection.

Object recognition can recognize faces, animals, cars, weapons, fires, and other things, as well as human characteristics like gender, age, and hair color.

Anomalous or unusual behavior detection works by recording a fixed area for a period of time — say, 30 days — and determining “normal” behavior for that scene. If the camera sees something unusual — say, a person running down a street at 3:00 a.m. — it will flag the incident for attention.

Video analytics systems can analyze and search across real-time streams or recorded footage. They can also isolate individuals or objects as they traverse a smart camera network.

Chicago; New Orleans; Detroit; Springfield, Massachusetts; and Hartford, Connecticut, are some of the cities currently using BriefCam for policing.

To Search and Surveil

With city spaces blanketed in cameras, and video analytics to make sense of them, law enforcement agencies gain the capacity to record and analyze everything, all the time. This provides authorities the power to index and search a vast database of objects, behaviors, and anomalous activity.

In Connecticut, police have used video analytics to identify or monitor known or suspected drug dealers. Sergeant Johnmichael O’Hare, former Director of the Hartford Real-Time Crime Center, recently demonstrated how BriefCam helped Hartford police reveal “where people go the most” in the space of 24 hours by viewing footage condensed and summarized in just nine minutes. Using a feature called “pathways,” he discovered hundreds of people visiting just two houses on the street and secured a search warrant to verify that they were drug houses.

Video analytics startup Voxe51 is also adding more sophisticated searching to the mix. Co-founded by Jason Corso, a professor of electrical engineering and computer science at the University of Michigan, the company offers a platform for video processing and understanding.

Corso told me his company hopes to offer the first system where people can search based on semantic content about their data,
such as, “I want to find all the video clips that have more than 3-way intersections ... with at least 20 vehicles during daylight.” Voxel51 “tries to make that possible” by taking video footage and “turning it into structured searchable data across different types of platforms.”

Unlike BriefCam, which analyzes video using nothing but its own software, Voxel51 offers an open platform which allows third parties to add their own analytics models. If the platform succeeds, it will supercharge the ability to search and surveil public spaces.

Corso told me his company is working on a pilot project with the Baltimore police for their CitiWatch surveillance program and plans to trial the software with the Houston Police Department.

As cities start deploying a wide range of monitoring devices from the so-called internet of things, researchers are also developing a technique known as video analytics and sensor fusion, or VA/SE, for police intelligence. With VA/SE, multiple streams from sensors are combined with video analytics to reduce uncertainties and make inferences about complex situations. As one example, Peleg told me BriefCam is developing in-camera audio analytics that uses microphones to discern actions that may confuse AI systems, such as whether people are fighting or dancing.

VMSs also offer smart integration across technologies. Former New Haven Chief of Police Anthony Campbell told me how ShotSpotters, controversial devices that listen for gunshots, integrate with specialized software so when a gun is fired, nearby swivel cameras instantly alter their direction to the location of the weapons discharge.

Officers can also use software to lock building doors from a control center, and companies are developing analytics to alert security if one car is being followed by another.

**Toward a “Minority Report” World**

Video analytics captures a wide variety of data about the areas covered by smart camera networks. Not surprisingly, the information captured is now being proposed for predictive policing: the use of data to predict and police crime before it happens.

In 2002, the dystopian film “Minority Report” depicted a society using pre-crime analytics for police to intervene in lawbreaking before it occurs. In the end, the officers in charge tried to manipulate the system for their own interests.

A real-world version of “Minority Report” is emerging through real-time crime centers used to analyze crime patterns for police. In these centers, law enforcement agencies ingest information from sources like social media networks, data brokers, public databases, criminal records, and ShotSpotters. Weather data is even included for its impact on crime (because “bad guys don’t like to get wet”).

In a 2018 document, the data storage firm Western Digital and the consultancy Accenture predicted mass smart camera networks would be deployed “across three tiers of maturity.” This multi-stage adoption, they contended, would “allow society” to gradually abandon “concerns about privacy” and instead “accept and advocate” for mass police and government surveillance in the interest of “public safety.”

Tier 1 encompasses the present where police use CCTV networks to investigate crimes after-the-fact.

By 2025, society will reach Tier 2 as municipalities transform into “smart” cities, the document said. Businesses and public institutions, like schools and hospitals, will plug camera feeds into government and law enforcement agencies to inform centralized, AI-enabled analytics systems.

Tier 3, the most predictive-oriented surveillance system, will arrive by 2035. Some residents will voluntarily donate their camera feeds, while others will be “encouraged to do so by tax-break incentives or nominal compensation.” A “public safety ecosystem” will centralize data “pulled from disparate databases such as social media, driver’s licenses, police databases, and dark data.” An AI-enabled analytics unit will let police assess “anomalies in real time and interrupt a crime before it is committed.”

That is to say, to catch pre-crime.

**Rise of the Video Surveillance Industrial Complex**

While CCTV surveillance began as a simple tool for criminal justice, it has grown into a multibillion-dollar industry that covers multiple industry verticals. From policing and smart cities to schools, health care facilities, and retail, society is moving toward near-complete visual surveillance of commercial and urban spaces.

Denmark-based Milestone Systems, a top VMS provider with half its revenues in the U.S., had less than 10 employees in 1999. Today they are a major corporation that claims offices in over 20 countries.

Axis Communications used to be a net-work printer outfit. They have since become a leading camera provider pushing over $1 billion in sales per year.

BriefCam began as a university project. Now it is among the world’s top video analytics providers, with clients, it says, spanning over 40 countries.
Over the past six years, Canon purchased all three, giving the imaging conglomerate ownership of industry giants in video management software, CCTV cameras, and video analytics. Motorola recently acquired a top VMS provider, Avigilon, for $1 billion. In turn, Avigilon and other large firms have purchased their own companies. Familiar big tech giants are also in on the action. Lieutenant Patrick O’Donnell of the Chicago police force told me his department is working on a non-disclosure agreement with Google for a video analytics pilot project to detect people reacting to gunfire, and if they are in the prone position, so the police can receive real-time alerts. (Google did not respond to a request for comment.) Video monitoring networks inevitably entangle and implicate a whole ecosystem of vendors, some of whom have offered, or may yet offer, services specifically targeted at such systems. Microsoft, Amazon, IBM, Comcast, Verizon, and Cisco are among those enabling the networks with technologies like cloud services, broadband connectivity, or video surveillance software.

In the public sector, the National Institute of Standards and Technology is funding “public analytics” and communications networks like the First Responder Network Authority, or FirstNet, for real-time video and other surveillance technologies. FirstNet will cost $46.5 billion, and is being built by AT&T.

Voxel51 is another NIST-backed venture. The public is thus paying for their own high-tech surveillance three times over: first, through taxes for university research; second, through grant money for the formation of a for-profit startup (Voxel51); and third, through the purchase of Voxel51’s services by city police departments using public funds.

With the private and public sector looking to expand the presence of cameras, video surveillance has become a new cash cow. As Corso put it, “there will be something like 45 billion cameras in the world within a few decades. That’s a lot of (video) pixels. For the most part, most of those pixels go unused.” Corso’s estimate mirrors a 2017 forecast from New York venture capital firm LDV, which believes smartphones will evolve to have even more cameras than they do today, contributing to the growth.

Companies that began with markets for police and security are now diversifying their offerings to the commercial sector. BriefCam, Motionloft, and the industrial complex driving it.

How to Rein in Smart Surveillance
Those who do not like new forms of Big Brother surveillance are presently fixated on facial recognition. Yet they have largely ignored the shift to smart camera networks — and the industrial complex driving it.

Thousands of cameras are now set to
Smart Camera Networks (cont.)

scrutinize our every move, informing city authorities whether we are walking, running, riding a bike, or doing anything “suspicious.” With video analytics, artificial intelligence is used to identify our sex, age, and type of clothes, and could potentially be used to categorize us by race or religious attire.

Such surveillance could have a severe chilling effect on our freedom of expression and association. Is this the world we want to live in?

The capacity to track individuals across smart CCTV networks can be used to target marginalized communities. The detection of “loitering” or “shoplifting” by cameras concentrated in poor neighborhoods may deepen racial bias in policing practices.

This kind of racial discrimination is already happening in South Africa, where “unusual behavior detection” has been deployed by smart camera networks for several years.

In the United States, smart camera networks are just emerging, and there is little information or transparency about their use. Nevertheless, we know surveillance has been used throughout history to target oppressed groups. In recent years, the New York Police Department secretly spied on Muslims, the FBI used surveillance aircraft to monitor Black Lives Matter protesters, and the U.S. Customs and Border Protection began building a high-tech video surveillance “smart border” across the Tohono O’odham reservation in Arizona.

Law enforcement agencies claim smart camera networks will reduce crime, but at what cost? If a camera could be put in every room in every house, domestic violence might go down. We could add automated “filters” that only record when a loud noise is detected, or when someone grabs a knife. Should police put smart cameras inside every living room?

The commercial sector is likewise rationalizing the advance of surveillance capitalism into the physical domain. Retailers, employers, and investors want to put us all under smart video surveillance so they can manage us with visual “intelligence.”

When asked about privacy, several major police departments told me they have the right to see and record everything you do as soon as you leave your home. Retailers, in turn, won’t even approach public disclosure: “They are keeping their video analytics practices secret.”

In the United States, there is generally no “reasonable expectation” of privacy in public. The Fourth Amendment encompasses the home and a few public areas we “reasonably” expect to be private, such as a phone booth. Almost everything else — our streets, our stores, our schools — is fair game.

Even if rules are updated to restrict the use of video surveillance, we cannot guarantee those rules will remain in place. With thousands of high-res cameras networked together, a dystopian surveillance state is a mouse click away. By installing cameras everywhere, we are opening a Pandora’s box.

To address the privacy threats of smart camera networks, legislators should ban plug-in surveillance networks and restrict the scope of networked CCTVs beyond the premise of a single site. They should also limit the density of camera and sensor coverage in public. These measures would block the capacity to track people across wide areas and prevent the phenomenon of constantly being watched.

The government should also ban video surveillance analytics in publicly accessible spaces, perhaps with exceptions for rare cases such as the detection of bodies on train tracks. Such a ban would disincentivize mass camera deployments because video analytics is needed to analyze large volumes of footage. Courts should urgently reconsider the scope of the Fourth Amendment and expand our right to privacy in public.

Police departments, vendors, and researchers need to disclose and publicize their projects, and engage with academics, journalists, and civil society.

It is clear we have a crisis in the works. We need to move beyond the limited conversation of facial recognition and address the broader world of video surveillance, before it is too late.

This article by Michael Kwet was originally published by The Intercept (theintercept.com) on January 27, 2020; republished with permission from The Intercept, an award-winning nonprofit news organization dedicated to holding the powerful accountable through fearless, adversarial journalism. Sign up for The Intercept’s Newsletter. Copyright, First Look Media Works, Inc.

Iowa Supreme Court: Officer’s Delay of Traffic Stop to Investigate Other Matters Unconstitutional

by David M. Reutter

The Supreme Court of Iowa reversed a motion court’s denial of a motion to suppress. The Court held a police officer failed to develop a reasonable suspicion of other criminal activity before unreasonably prolonging a traffic stop.

Johnson County Sheriff Office Deputy Cody O’Hare was responding to another call on eastbound Interstate 80 when he came upon a rental car driven by Juan Salcedo. O’Hare was cruising at about 75 mph when he came upon Salcedo, who was in the left most lane at a speed of about 60 mph in a 70 mph zone. Salcedo failed to move to the right, and after about three miles, O’Hare initiated a traffic stop for traveling too slowly in the left-hand lane in violation of Iowa Code § 321.297(2).

Once pulled over, Salcedo handed over his documentation and the rental agreement. He was pat searched and sat in the front of O’Hare’s patrol car as requested. O’Hare inquired about Salcedo’s travel plans, which he provided in detail. Although O’Hare spent virtually the entire time he was talking with Salcedo flipping through the rental agreement, he failed to notice that the person who signed the agreement wasn’t present in the car.

Body camera footage showed that O’Hare made no effort to process the traffic infraction, but he requested assistance. When back up arrived seven minutes after the stop began, O’Hare was disappointed that a drug dog was not available. He then questioned the passenger. After about 14 minutes, O’Hare received Sacedo’s consent to search the vehicle, yet he had still made no effort to process the

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The initial lawful traffic stop may be expanded to suspected criminal activity unrelated to the traffic infraction, but “the officer must identify specific and articulable facts which, taken together with rational inferences from those facts, amount to reasonable suspicion that further investigation is warranted.” United States v. Murillo-Salgado, 854 F.3d 407 (8th Cir. 2017). The determination of whether reasonable suspicion exists is based upon the totality of the circumstances encountered by the officer during the traffic stop. State v. McIver, 858 N.W.2d 699 (Iowa 2015).

At the suppression hearing, O’Hare testified that he knew from the time of the stop that he would be investigating issues other than the traffic infraction. He admitted, “I was never — never entered information into a traffic citation.” The Court noted the body camera shows him “repeatedly thumbing through the rental agreement” without “any attempt to gain understanding of the document.” Such “incessant page flipping appears to be a stalling tactic to keep the conversation going until the drug dog arrived,” the Court determined. The Court concluded that “Deputy O’Hare’s complete lack of effort to address Salcedo’s specific traffic infraction” transformed the initial lawful traffic stop into an unlawfully prolonged one. Consequently, the Court ruled that the “delay of Salcedo’s stop was measurable, unreasonable, and in violation of his Fourth Amendment rights.”

Accordingly, the Court reversed the district court’s judgment and remanded the case for further proceedings. See: State v. Salcedo, 935 N.W. 572 (Iowa 2019).
Spirited (But Problematic?) Advocacy for Bernie Madoff to Receive Compassionate Relief

by Professor Douglas A. Berman, Sentencing Law and Policy blog (sentencing.typepad.com)

The New York Times has this notable new opinion piece authored by Colleen Eren headlined “Let Bernie Madoff, and Many More, Out of Prison: Compassionate release has to apply to unsympathetic prisoners, if we mean what we say about ending mass incarceration.” I think the spirit of this piece is quite sound, but I am not entirely sold on all of its particulars. Here are excerpts (with a few lines emphasized for comments to follow):

“Recently, Mr. Madoff re-entered the news, as he filed for compassionate release from federal prison. He is entering the final stages of kidney disease and has less than 18 months to live. The Bureau of Prisons denied his petition, as it does to 94 percent of those filed by incarcerated people. But the reforms provided in the First Step Act of 2018 allow him to file an appeal with the sentencing court.

Even some who claim to detest the ravages of mass incarceration argue that Mr. Madoff should be denied compassionate release. He is as close to the financial equivalent of a serial killer as one might encounter. Still, there is a good argument to be made for compassionate release. It has little to do with Bernie Madoff, though, and how we feel about his horrendous actions.

If our societal goal is to reduce incarceration, we are going to have to confront the inconvenient truth that retribution cannot be our only penological aim, and justice for victims has to be much more extensive than the incarceration of those who have caused them harm. We desperately need to shift our cultural impulse to punish harshly and degradingly, and for long periods.

The visceral, retributive reactions to Mr. Madoff’s petition, including from liberals who claim to want to end mass incarceration, reveal the obstacles to transformational criminal justice reform. The truth is, there is only a small number of entirely “sympathetic” people in prisons who could be released without any scruples by the public or affront to their victims. Those incarcerated for violent offenses compose a vast majority of our prison population, in spite of a false narrative that most people are in there for nonviolent drug offenses. The pain and harm experienced by their victims is real, and that’s also true for Mr. Madoff’s victims. But criminal justice policy cannot be constructed in response to our feelings about individual, high-profile cases — the so-called worst of the worst.

This “worst of the worst” argument, for example, has long undergirded the death penalty, which still stands in 30 states despite its racial and class biases and other flaws that have led hundreds of innocent people to death row. It is also part of why the Democratic presidential candidates, with the exception of Bernie Sanders, don’t support the enfranchisement of those in prison. But creating a separate category for Mr. Madoff, sex offenders or those “others” in the criminal justice system will not help end mass incarceration. There will always be another high-profile case that can impede the implementation of more humane policies.

Those on the left who press for criminal justice reform emphasize “empathy” in their attempts to reframe the conversation about people who have committed crimes. Conservatives use the word “redemption.” These words carry a profound responsibility: What do they mean for sympathetic and unsympathetic prisoners? There are 200,000 people over the age of 55 incarcerated in the United States. The question of compassionate release for Mr. Madoff affects not only him but these others and their victims as well.

Mr. Madoff lost both his sons while incarcerated (one died of cancer) and was unable to attend their funerals; is a social pariah, almost universally condemned; and has spent 11 years in federal prison. This is not to say he deserves sympathy; but he has been punished. In Norway, where Anders Breivik was sentenced to 21 years in prison for a horrific mass murder, 11 years would be considered harsh enough. Our American punitiveness has distorted our sense of what is an adequate sentence for serious offenses.

When considering compassionate release, we also have to ask: Has the person been rehabilitated? Does the punishment serve legitimate penological objectives (like deterrence and public safety) other than retribution? (Something to consider, for instance: The number of Ponzi schemes prosecuted went up, not down after Mr. Madoff’s incarceration.)

Criminal justice reform will fall far short of the dramatic institutional changes needed if the dominant impulse continues to be retribution, and if high-profile cases continue to drive policy. Compassionate release for those who are aging, terminally ill and dying should be assumed after they’ve served at least 10 years. It was the offenders’ worst impulses that led them to commit their crimes. Our justice system should appeal to our higher ethical ambitions.”

I agree fully that “retribution cannot be our only penological aim, and justice for victims has to be much more extensive than the incarceration of those who have caused them harm.” I also agree fully that criminal justice policy should not “be constructed in response to our feelings about individual, high-profile cases — the so-called worst of the worst” and that we should be troubled if “high-profile cases continue to drive policy.” And whether a person has been rehabilitated also seem to me to be an important consideration here. But I am not sure granting compassionate relief to Bernie Madoff furthers these interests, and I worry it could undermine them.

For starters, it is critical at this stage to realize that we are not really dealing with a “policy” matter, as the FIRST STEP Act altered the policy for compassionate release and did so in a way that included Bernie Madoff and all other federal prisoners. Though the FIRST STEP Act has some “worst of the worst” carve-outs in other parts of the Act, but its new process for pursuing compassionate relief applies to all federal prisoners (which is one reason I think it is such an important and valuable part of the Act). In other words, in this context there is no need to worry about creating any ‘separate category for Mr. Madoff, sex offenders or those ‘others’ in the criminal justice system.” If a federal judge decided to deny Madoff compassionate relief, after considering all the facts of Madoff’s case and all the factors of 3553(a), that judge will be adjudicating and resolving a single case, not creating any broad “criminal justice policy.”

As to the facts of Madoff’s case, I have
but it seems he has not really done all that
the worst white-collar offense in US history,
work). Madoff not only committed arguably
assets have been recovered after a decade of
justice achieved here (though a whole lot of
they have not seen any other form of extensive
than the incarceration,” but are concerned that
to a vision of “justice ... much more extensive
on these matters, I suspect many are open
expecting unrealistic returns which he claims
in an effort to rehabilitate his own image and
Public or Affront to their victims.” The
truth is, there are tens of thousands, proba-
hundreds of thousands, of entirely
“sympathetic” people in US prisons who
could be released without any scruples
by the public or affront to their victims.
Just a quick look at “The Whole Pie” of
incarceration shows over 275,000 persons
imprisoned for drug offenses and another
200,000 in for “public order” offenses. Not
all of these the underlying crimes were vic-
timless, but even if only one of every ten
of these prisoners are “sympathetic,” that still
gets us to nearly 50,000 sympathetic prisons
to consider for release. Mass incarceration
is so very troubling in part because there re-
ally are quite a large number of sympathetic
cases, and I am particularly eager for there to
be continued efforts to give voice to, and get
relief for, the huge number of sympathetic
folks wasting time (and taxpayer resources) in
unduly lengthy prison terms.
This piece rightly notes “there are
200,000 people over the age of 55 incarcer-
ated in the United States” and it is rightly
called that “compassionate release for
Mr. Madoff affects not only him but these
others and their victims as well.” But these
data and my fears tethered to Madoff’s fail-
ure to demonstrate remorse run the argu-
ment the other way in my view: though
I hope there would not be a backlash were
Madoff to receive compassionate release, I
worry he could become the poster child for
restricting this important relief mechanism
for tens of thousands of other prisoners
who would seem a lot more sympathetic.
That said, I do like imagining a (realistic?)
future in which a decision to release Madoff
prompts many federal judges to grant
compassionate release to many more federal
prisoners.

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This article was originally published February
17, 2020, on the Sentencing Law and Policy blog
(sentencing.typepad.com), an Affiliate of the Law
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The Supreme Court of Connecticut clarified the standard of review for claimed violations of the Sixth Amendment’s Confrontation Clause and reversed the judgment of the Appellate Court affirming the convictions of Horvil F. Lebrick.

Lebrick was charged with attempted robbery and felony murder, among other things, for actions that resulted in the shooting death of Shawna Lee Hudson. Lebrick told police he had been present at the apartment of Omar Barrett, located in Hartford, Connecticut, assisting twin brothers Andrew and Andrew Moses “move some boxes” on May 6, 2010, when “a guy showed up shooting.”

Lebrick further told police he did not have a gun and did not know the Moses twins had guns before the shooting began. Lebrick explained to police that he escaped from the apartment by following behind some other men “as they shot their way out of the apartment.” But the State compelled a reluctant Keisha Parks — Andrew Moses’s fiancée — to testify at Lebrick’s probable cause hearing. Parks testified that on May 5, 2010, she observed the Moses brothers enter Lebrick’s van in Brooklyn. The next day she heard that the Moses brothers had been killed.

Lebrick contacted Parks and told her that he had traveled to Connecticut with the Moses brothers and an unidentified driver with the intent to rob Barrett. He and the brothers kicked open the door to the apartment and found a girl inside (Hudson) with a gun. He took the gun and went into another room of the apartment. Moments later, he heard gunshots. He then shot his way out of the apartment, observing the twins’ bodies on the floor as he left. He told the driver of the van that the Moses brothers were dead and then fled to New York.

Two months before Lebrick’s trial, the State began searching for Parks to secure her presence at trial. Police Inspector Emory L. Hightower attempted to contact Parks at her last known address and phone number; then by conducting an electronic search for criminal records in the Hartford Police Department’s database; and then by searching for criminal records in the National Crime Information Center database.

Obtaining no results, he used a search engine called CLEAR from which he obtained two addresses for Parks in New York and some phone numbers. He emailed an interstate summons to the Kings County District Attorney’s Office, requesting the summons be served to compel Parks’ attendance at the trial. Investigator Frank Garguillo visited each of the addresses and called the phone numbers, but he did not locate Parks. Garguillo was not instructed to conduct any independent investigation to ascertain Parks’ whereabouts, and he did not do so.

At trial, Barrett testified that he had shot and killed the Moses brothers in a gunfight, but Lebrick had shot and killed Hudson. Also at trial, the court — over Lebrick’s objections — allowed the State to enter Parks’ testimony from the probable cause hearing pursuant § 8-6(1) of the Connecticut Code of Evidence, which allows the admission of “[t]estimony given as a witness at another hearing” if “the declarant is unavailable as a witness....” Lebrick was convicted, and the Appellate Court affirmed. The Connecticut Supreme Court granted further review.

The Court acknowledged that it had previously observed in general terms that “[t]he trial court has broad discretion in determining whether a proponent has shown a declarant to be unavailable. A trial court’s determination of the unavailability of a witness will be overturned only if there has been a clear abuse of discretion.” State v. Lapointe, 678 A.2d 942 (Conn. 1996).

However, this ruling was in connection with a claim that the trial court had violated state law, i.e., § 8-6(1). When a defendant claims, as in the instant case, violation of his rights under the Confrontation Clause by the admission of an out-of-court statement of an allegedly unavailable declarant pursuant to Crawford v. Washington, 541 U.S. 36 (2004), the abuse of discretion standard “is at odds with the axiomatic principle that question[s] of constitutional law ... [are] subject to plenary review.” State v. Kirby, 908 A.2d 506 (Conn. 2006).

The Court clarified that claims of violations of the Confrontation Clause are mixed questions of fact and law. Hamilton v. Morgan, 474 F.3d 854 (6th Cir. 2007). Therefore, the Court is bound to accept the factual findings of the trial court unless they are clearly erroneous, i.e., an abuse of discretion, but the Court reviews de novo the trial court’s application of the law to those facts.

Under the Confrontation Clause, a witness is not unavailable unless the prosecution has made a good faith, or reasonable, effort to obtain his presence at trial. Hardy v. Cross, 565 U.S. 65 (2011). There are four objective criteria that guide the reasonableness inquiry: (1) a more crucial witness requires a greater effort to secure his presence for trial; (2) the more serious the crime, the greater the effort must be; (3) if the witness has been granted a special privilege such as immunity, the greater the effort must be; and (4) the State must make the same effort to locate the witness as it would have done if it did not have the out-of-court statement. United States v. Burden, 934 F.3d 675 (D.C. Cir. 2019).

Applying those factors to Lebrick’s claim, the Connecticut Supreme Court concluded that: (1) Parks’ testimony was crucial because it directly contradicted Lebrick’s statement to police on the issue of intent to rob Barrett and whether he was armed before entering the apartment; (2) Lebrick’s charges were the most serious, including felony murder that carried up to life in prison; (3) Parks had not been promised any special privilege; but (4) the State had not been in possession of her out-of-court statement, it would have done exceedingly more to secure her presence at trial.

For example, the Court pointed out that the State did not search popular social media sites such as Facebook or use a search engine like Google. And even though Hightower knew Parks was a New York resident, he did not search New York state agency records such as the Department of Motor Vehicles, social services, housing court, family court, or child support records. Nor did he request Garguilo to undertake such a basic investigation to locate Parks. Hightower and Garguilo’s actions were perfunctory at best and did not meet the required “greater effort” to meet the “relatively high good faith standard” of the Confrontation Clause to locate Parks. United States v. Mann, 590 F.3d 361 (1st Cir. 1978).

The Court concluded that the district court violated Lebrick’s rights under the Confrontation Clause by admitting the out-of-court statement of Parks when she was not present.
Sixth Circuit Adopts ‘Naked Eye Test’ for Altered Firearm Serial Number Enhancement

by Dale Chappell

The U.S. Court of Appeals for the Sixth Circuit adopted a “naked eye test” in holding that a firearm’s serial number is not “altered or obliterated” for a sentencing enhancement if a person must “squint” to view the number, but it’s still readable, overturning a district court’s more liberal interpretation of USSG § 2K2.1(b)(4)(B).

“What, then, does it mean for a serial number to be altered?” That was the question the Court had to answer when Charles Sands appealed the application of a four-level enhancement under the U.S. Sentencing Guidelines (“USSG”) by the district court in finding that the serial number on a firearm he possessed was altered.

Sands was originally charged with being a felon in possession of a firearm under 18 U.S.C. § 922(g) and for possessing a firearm that had a serial number that was “removed, obliterated, or altered, under 18 U.S.C. § 922(k). He agreed to plead guilty to the § 922(g) charge, and the Government agreed to drop the § 922(k) charge. However, that didn’t stop the Government from pursuing an enhancement under the USSG for the supposedly altered serial number, significantly increasing his guideline sentencing range (“GSR”).

The enhancement was applied by Judge Paul Maloney of the U.S. District Court for the Western District of Michigan, who agreed with the probation officer’s response to Sands’ objections to the presentence investigation report (“PSR”), that the serial number was “significantly defaced, but admittedly still readable; albeit barely.”

At sentencing, Judge Maloney, looking at pictures of the firearm’s serial number provided by the parties, said that the serial number was “clearly made less legible and is clearly altered for the purpose of trying to mask the identity of this weapon.” He said it was “more difficult to read, at least on the photograph that I have in front of me right now, than if the weapon was clean” and concluded that “I think it meets the standard” under the USSG.

The enhancement increased Sands’ GSR to 70 to 87 months. Without it, he faced a range of 46 to 57 months. The district court imposed a sentence of 78 months in prison. Sands timely appealed.

Under USSG § 2K2.1(b)(4)(B), a district court may increase the GSR by four levels if just one of the serial numbers on the firearm is “altered or obliterated,” regardless of whether the possessor was aware of it. The issue here was whether the serial number on Sands’ firearm was “altered” for purposes of § 2K2.1(b)(4)(B) since the parties had agreed that it was not “obliterated.”

The Sixth Circuit looked at case law from other circuits and various dictionaries to answer the question of what it means for a serial number to be “altered” since § 2K2.1(b)(4)(B) does not define the term. Finding that these sources generally define the word “altered” to mean to “become different,” the Court then turned to the purpose of the Guideline: “to discourage the use of untraced weaponry.” The Court reasoned that applying § 2K2.1(b)(4)(B) to any “change or modification” of a firearm's serial number, as the district court suggested, would then be “clearly at odds” with the purpose of the Guideline. The Court noted that it would actually give an increased sentence to someone makes a serial number easier to read on a firearm.

Instead, the Court held that a serial number is “altered or obliterated” when it is “materially changed in a way that makes accurate information less accessible.” The Court further held that “a serial number that is visible to the naked eye is not ‘altered or obliterated’ under § 2K2.1(b)(4)(B), even if it does make the serial number’s information technically ‘less accessible’ by requiring one to squint or view the number from a closer position.”

The Court observed that its position on this issue is in line with the other circuits that have addressed it and adopted the standard. United States v. Carter, 421 F.3d 909 (9th Cir. 2005). The Court also noted that other circuits “have cited it [the standard] approvingly and reached consistent holdings.” United States v. Harris, 720 F.3d 499 (4th Cir. 2013); United States v. Justice, 679 F.3d 1251 (10th Cir. 2012); United States v. Love, 364 Fed. Appx. 955 (6th Cir. 2010); United States v. Serrano-Mercado, 784 F.3d 838 (1st Cir. 2015).

The Court defined its “naked eye test” as “any person with basic vision and reading ability [who] would be able to tell immediately whether a serial number is legible.” This means that the serial number must be legible without the aid of microscopes or special chemicals, the Court explained.

Applying the newly announced naked eye standard to the present case, the Court ruled that the district court “erroneously applied the enhancement after finding that the serial number remained visible to the naked eye.” Accordingly, the Court vacated Sands’ sentence and remanded for resentencing. See: United States v. Sands, 948 F.3d 709 (6th Cir. 2020).

Present at trial to testify.

Accordingly, the Court reversed the judgment of the Appellate Court and remanded to that court with instructions to remand to the trial court for a new trial. See: State v. Lebrick, 2020 Conn. LEXIS 27 (2020).
The Chicago Police Department (CPD) recently announced it would be hiring an Americans with Disabilities Act (ADA) compliance officer. The ADA compliance officer will be brought on to monitor CPD’s accordance with federally mandated ADA regulations, implement new policies for CPD and provide disability-related training. While the compliance officer may not have “police power,” they would be closely working with law enforcement officers.

The new position is part of a federal consent decree filed by the attorney general’s office and the city of Chicago in September 2018. The drafting of the consent decree, which contains requirements and policy recommendations for police reform, originated from a 2017 investigation into CPD by the Department of Justice. This investigation found excessive use of force against Chicago residents, specifically Black and Latinx people.

While the local disability rights community has largely cheered on CPD’s new position and celebrated it as a victory, others rightfully question whether these new changes will actually benefit community members of color, low-income communities, homeless people, immigrant communities and other groups who are continuously affected by police brutality. Here, we once again find limitations in applying the typical disability rights framework to address issues of police brutality against disabled people in Chicago.

The Ablest History of Policing

Hiring a new officer is an expansion of the police force, and the police force is grounded in racism — and in ableism. Historically, in the U.S., people who were labeled as deviant, unproductive, dangerous, unworthy and unfit were killed by the police force or arrested and incarcerated in large, segregated institutions. These institutions included asylums, prisons, jails, internment camps, poorhouses and many other facilities. People with disabilities, LGBTQ+ people, poor or homeless people, immigrants, Black, Brown and Indigenous people of color (BIPOC), orphaned children, and other marginalized people were the ones to be subject to such surveillance and confinement.

In Chicago, policing has been used as a tool to enforce racist and ablest policies and regulations; to inflict segregation and displacement of people of color, as well as to exclude disabled and poor people from society. The Ugly Laws: Disability in Public by Susan Schweik refers to how disabled people were fined and incarcerated for being present in public spaces, like streets, under the Chicago City Code of 1881.

While the passage of the ADA in 1990 enabled many disabled people’s access to education, transportation, employment and various other services, it did not eliminate state violence against disabled people who were multiply marginalized. Today, nearly 50 percent of the individuals who are assaulted or killed by law enforcement are disabled, while constituting only 12.7 percent of the population overall. Moreover, Black and Brown people are grossly overrepresented victims of police violence, and the risk is escalated when the person is also disabled. By the age of 28, 55 percent of Black men with disabilities are arrested by law enforcement, compared to their white counterparts’ 40 percent. When it comes to policing in Chicago, such disparity has been grounded in how specific policies are implemented and targeted toward marginalized communities.

More Trainings Are Not the Answer to Police Violence Against Disabled People

by Euree Kim, reprinted from Truthout

More Money for Cops, But Hardly Any for Badly Needed Social Services

Last year, Mayor Lori Lightfoot announced the construction of a $95 million police academy in Chicago’s West Side — a project originally proposed by former Mayor Rahm Emanuel. CPD’s budget is expected to grow to over $1.7 billion (about 30 percent of the entire expenditure) this year, on top of the $115 million needed to meet the requirements of the federal consent decree and several other changes in the department. The total budget for Public Safety in 2020 is $2.7 billion, covering the costs from the Police Board (half a million dollars), Office of Public Safety Administration ($34 million) and Civilian Office of Police Accountability ($13.8 million) — all expanded since 2019.

At the same time, the city has remained reluctant to invest in historically disadvantaged communities, and provide more opportunities for Black and Brown communities on the South and West sides, who have been affected by the violent policing for many years. These communities also have a higher prevalence of disabilities, health disparities and poverty rates than any other parts of the city.

There are around 293,591 people with disabilities (out of 2,693,496 — 10.9 percent of the total population) residing in Chicago. Among the disability population, 27.7 percent are white, 46.1 percent are Black, 20.9 percent are Latinx and 9.4 percent are classified as “other” (Asian, Hawaiian and Pacific Islander, Native American, or two or more races). In Illinois, as of 2012, Black (13.8 percent) and Native American (11.4 percent) people showed the greatest disability prevalence compared to white people (8.2 percent). Poverty, health disparity, frequent exposure to violence, and other environmental factors created by discriminatory policies and a lack of access to necessary resources contribute to this debilitating effect on communities of color. At the same time, disabled BIPOC experience harder times accessing disability-related resources for systemic barriers based on geography, class, language and citizenship status.

Community organizers, advocates and allies have long requested funding for equitable community investment: mental health clinics, essential school resources, such as special education instructors and counselors, affordable and accessible housing, and other basic needs — all of which would clearly serve disabled people. But those requests continue to be either largely ignored or simply receive a token gesture. For many years, mental health advocates and activist groups, such as Mental Health Movement and Collaborative for Community Wellness, have protested against the extreme budget cuts on community mental health services and called for the re-opening of the 6 out of 12 mental health clinics that were closed under the Emanuel administration. During her election campaign in 2018, Mayor Lightfoot promised a revival of the closed clinics, but such a pledge is unlikely to be realized due to budget constraints. While the consent decree has enlarged CPD’s budget, it has not provided the critical community investment and expansion of the social safety net that are proven to be more effective in reducing crime and bringing about safer and healthier communities as a whole.
The Black Hole: Accountability in the Chicago Police Department

The lack of accountability is another issue for CPD. Rarely, as numerous critics have pointed out, are perpetrators officers held to account. The Department of Justice reported that over 30,000 complaints of police misconduct were filed with the City of Chicago between 2011 and 2016, but fewer than 2 percent were sustained, resulting in no discipline in 98 percent of these complaints. Even when such a complaint is received, the actual commitment to accountability is improbable.

While the consent decree has enlarged CPD’s budget, it has not provided the critical community investment and expansion of the social safety net that are proven to be more effective in reducing crime and bringing about safer and healthier communities as a whole.

In 2017, Sergeant Khalil Muhammad shot and injured Ricardo Hayes, a Black and Autistic teenager. In December 2019, the Chicago Police Board found Muhammad guilty of violating four police department rules and suspended him for six months. An attorney for the victim’s caregiver condemned the Board’s decision, saying, “I can’t believe he’s still a police officer.” Despite the implementation of the CPD’s consent decree, it remains unclear whether it will actually work to rein in the criminalization of Black and Brown disabled people and hold officers to account by preventing those who exert violence from re-accessing police power.

Additionally, whether more training will make the system less ableist or harmful is questionable. As recommended in the consent decree, the CPD’s strategic plan for 2019-2022 states that the department would increase procedural justice and implicit bias training and enhance Crisis Intervention Team (CIT) training.

The Problems With Training and Limited Reforms

According to the Anti-Defamation League Midwest, which provides training for law enforcement officers, implicit bias training intends to reduce the influence of bias interactions and decision-making by law enforcement. Procedural justice training, on the other hand, aims to improve the police force’s relationship with communities and police legitimacy, which means people have trust and confidence in the police, accept police authority and believe officers are fair.

CIT training is a type of police training to prepare officers for encounters with people who may be suffering from mental illnesses. The training has been decried by advocates for a long time, as it has been often used as a strategy to replace the public need for mental health clinics and other community-based resources, and it is rarely conducted properly. It also further stigmatizes the mental health and neurodivergent community as calling police becomes a default response to disability-related crises.

Moreover, not only do the police officers who have harmed civilians still occupy their job positions, they are also allowed to facilitate implicit bias training on race, ethnicity, gender, sexual orientation, disability, and more. It was reported that more than 60 percent of the CPD officers who have provided procedural justice training since early 2017 have been accused of violating Black civilians’ rights, with more than half having been accused two times or more of mistreatment of Black civilians.

Furthermore, the problem with positing limited disability rights-oriented reforms as a solution to police violence is that many have merely focused on providing reasonable accommodation or making little alterations within the system while keeping its basic form intact, without diminishing or questioning its influence. This kind of disability rights framework lacks intersectional considerations with regards to how police violence impacts marginalized communities disproportionately.

Police violence against disabled people is deeply rooted in systemic issues of inequity, injustice and oppression in the U.S. It’s about the whole history of colonialism, racism, classism, militarism, capitalism and ableism further harming marginalized communities systemically. Without thinking critically about the complex realities and radically envisioning the liberation of all, this framework only serves to solidify the presence of violent systems and grants them more institutional power and control.

About the author: Euree Kim is a disability justice activist and abolitionist. Kim is a co-founder and former organizer of Alternatives to Calling the Police During Mental Health Crises (ACP) based in Chicago. ACP is a grassroots movement to facilitate community dialogues about state violence on psychiatrically disabled and neurodivergent community members; envision an alternative collective to support community members experiencing mental health crises; and further, empower community resilience. Kim is also an author of #AcceptUs #NotKillUs zine.

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Hepatitis & Liver Disease: A Guide to Treating & Living with Hepatitis & Liver Disease Revised ed. By Dr. Melissa Palmer
See page 54 for more information.

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Seventh Circuit Vacates Guilty Pleas Based on Misinformation of Mandatory Minimum

by David M. Reutter

The U.S. Court of Appeals for the Seventh Circuit vacated the sentences imposed via plea agreements of two defendants due to errors regarding the mandatory minimum sentences they would have faced. The Court held that their prior state convictions were not prior drug convictions under federal law. It affirmed the sentences of three other co-defendants.

Before the Court were appeals of five defendants who faced charges related to their involvement in the Zamudio drug organization, which distributed pounds of methamphetamine and cocaine in the Indianapolis, Indiana, area. Their arrests and indictments came after federal agents executed approximately 40 search warrants. The searches netted over 70 firearms, about 15 pounds of methamphetamine, smaller quantities of cocaine, marijuana, and heroin along with cash. At least 80 people were indicted.

The Seventh Circuit found the district court properly applied the supervisory role enhancement aggregator to Maria Gonzalez. The evidence showed she was a leader who laundered the organization’s money. Her 300-month sentence was affirmed.

Reynold De La Torre challenged on appeal conditions of his supervised release, but the Seventh Circuit found they were waived because he did not object to them in the district court. It also found the below-Guideline 225-month sentence, which was 37 months below the Guidelines, imposed upon Adrian Bennett, was reasonable.

The Seventh Circuit applied a plain error review to the appeals of Christian Chapman and Jeffrey Rush. They argued their guilty pleas were involuntarily entered because he did not object to them in the district court. It also found the below-Guideline 225-month sentence, which was 37 months below the Guidelines, imposed upon Adrian Bennett, was reasonable.

The Seventh Circuit applied a plain error review to the appeals of Christian Chapman and Jeffrey Rush. They argued their guilty pleas were involuntarily entered because they did not object to them in the district court. It also found the below-Guideline 225-month sentence, which was 37 months below the Guidelines, imposed upon Adrian Bennett, was reasonable.

The Seventh Circuit found the district court properly applied the supervisory role enhancement aggregator to Maria Gonzalez. The evidence showed she was a leader who laundered the organization’s money. Her 300-month sentence was affirmed.

Utah District Court Finds First Step Act Gives Court Authority to Reduce Stacked 55-Year § 924(c) Sentence

by Chad Marks

Keapa Maumau was a 20 year old young man when he was arrested and charged with multiple 924(c) offenses. He was eventually sentenced to a total of 55 years in prison. That sentence was driven by the mandatory minimums required under 18 U.S.C. § 924(c).

After the First Step Act became law, Maumau filed a motion for a reduction in sentence pursuant to 18 U.S.C. § 3582. In that motion, he argued that the Court could reduce his sentence if a finding was made that "extraordinary and compelling reasons" exist for such relief.

In considering Maumau’s petition, the Court was tasked with answering three questions: (1) does the Court have discretion to provide relief, (2) should the Court exercise that discretion to modify Maumau’s sentence, and (3) if Maumau is an appropriate candidate, by how much should his sentence be reduced?

The Court first determined that it does have discretion to provide relief. As an initial matter, the Court looked to the text of 18 U.S.C. § 3582 (c)(1)(A)(i). Congress tasked the U.S. Sentencing Commission with defining the phrase “extraordinary and compelling.” The Sentencing Commission’s current policy after passage of the First Step Act still states that courts can grant compassionate release sentence reductions only upon a motion by the Director of the Bureau of Prisons. United States v. Beck, 2019 U.S. Dist. LEXIS 108542 (M.D.N.C. 2019).

However, after the First Step Act, a prisoner is now entitled to make a motion for modification to the courts on his own accord. 18 U.S.C. § 3582(c)(1)(A). In other words, Congress via the First Step Act has removed the Director of the Bureau of Prisons as the gatekeeper.
The Sentencing Commission’s policy outlines four situations in which compassionate release is appropriate. U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)-(D) (U.S. Sentencing Comm’n 2004). The first covers prisoners with terminal conditions. The second addresses prisoners of advanced age. The third applies when a prisoner becomes the sole available caregiver for a child. The last is a catch-all provision that permits relief when, “[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with the reasons described in subdivisions (A) through (C).” Id. at n.1(D).

Maumau argued that relief is appropriate under the catch-all provision. In addition, he argued that the catch-all provision that limits relief to grounds identified by the Director is inconsistent with the law as outlined in the First Step Act.

The Court agreed with Maumau, finding that there has been no new policy statement on the matter since the enactment of the First Step Act. The Court observed that to date no Court of Appeals has addressed this issue and stated that it agrees with the majority of other district courts that have. It announced: “this court joins the majority of other district courts that have addressed this issue in concluding that it has discretion to provide [the defendant] with relief, even if his situation does not directly fall within the Sentencing Commission’s current policy statement. Under the First Step Act, it is for the court, not the Director of the Bureau of Prisons, to determine whether there is an ‘extraordinary and compelling reason’ to reduce a sentence.”

After making its finding that it has the authority to reduce the sentence, the Court was tasked with deciding whether Maumau is entitled to the relief he sought.

The Court agreed with Maumau that there is an “extraordinary and compelling reason” to reduce his sentence. It concluded that “Maumau’s age [20 at arrest, 24 at sentencing], the length of sentence imposed [57 years], and the fact that he would not receive the same sentence if the crime occurred today [due to the First Step Act], all represent extraordinary and compelling grounds to reduce his sentence.” The Court also noted that at the time of sentencing it had agreed with defense counsel that the mandatory minimums associated with multiple 924(c) offenses were unjust.

The Court rejected the Government’s argument that his request for compassionate release should be denied because he is not suffering from medical or age-related issues like the vast majority of compassionate release requesters. The Court stated that “the fact that such cases are uncommon does not mean that Mr. Maumau’s request must be denied.”

Additionally, in making its determination regarding Maumau’s request for relief, the Court also looked to United States v. Urkevich, 2019 U.S. LEXIS 197408 (D. Neb. 2019) (prior CLN coverage, Dec. 2019 issue, p. 28), in which Judge Laurie Smith Camp relied on the First Step Act and compassionate release to reduce Jerry Urkevich’s sentence by 40 years.

The Government in this case argued that Congress could have made the § 924(c) changes retroactive but chose not to. And because of this, the Court should not reduce Maumau’s sentence. The Court responded by saying, “It is not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis. As just noted, that is precisely the approach taken by the Urkevich court.”

The Court set a resentencing hearing in this case for April 7, 2020, to determine what the appropriate sentence should be in this case after considering the 18 U.S.C. § 3553(a) factors.

Accordingly, the Court granted Maumau’s petition for a reduction in sentence consistent with this opinion. See: United States v. Maumau, 2020 U.S. Dist. LEXIS 28392 (D. Utah 2020).

Writer’s Note: Relief is available to defendants in these types of cases as well as those that were sentenced under § 851 enhancements. Specifically, in § 924(c) stacking cases, § 403 of the First Step Act does not entitle people to relief because the change was not made retroactive. However, relief is available under 18 U.S.C. § 3582(c)(1)(A)(i) if a defendant can show extraordinary and compelling reasons for a reduction. The changes to the statute reflect congressional determination that the mandatory sentencing regime to which people were subjected (that is, a mandatory consecutive 25-year term for each additional § 924(c) charge) is so grotesque, cruel, and unintended by Congress that it had to end. This is where a defendant’s first extraordinary and compelling reasons for a sentence reduction should begin. The same can be said for those that were enhanced under prior felony information, 21 U.S.C. § 851.

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Criminal Legal News 15 April 2020
Maine Supreme Court Declares Blood Draw Statute Unconstitutional, Overruling Cormier
by Douglas Ankney

The Supreme Court of Maine declared 29-A M.R.S. §§ 2522(2) and 2522(3) facially unconstitutional, overruling State v. Cormier, 928 A.2d 753 (Me. 2007).

Randall J. Weddle was pinned inside the cab of his tractor-trailer as the result of an accident that involved five vehicles. It took almost an hour to extricate Weddle from the cab. Two officers with the Knox County Sheriff’s Department believed Weddle may have been responsible for the accident and directed an EMT to take a sample of Weddle’s blood to preserve evidence. Neither officer had probable cause to believe Weddle had been under the influence of drugs or alcohol at the time of the accident.

Both officers relied on 29-A M.R.S. § 2522(2) as authority for the seizure of the blood. Several days after the accident, police found a three-quarters-full bottle of whiskey and a shot glass in the cab.

Weddle was charged with several crimes, including two counts of manslaughter and two counts of causing a death while operating under the influence. He moved to suppress the evidence, including the results of the blood draw. The trial court denied the motion, and the jury convicted Weddle on all counts. Weddle appealed, arguing that 29-A M.R.S. § 2522 is unconstitutional and that the trial court erred by denying his motion to suppress the results of the blood draw.

The Maine Supreme Court observed “[s]ection 2522(1) requires every driver involved in a fatal, or likely fatal, motor vehicle accident to submit to testing that will allow the State to determine if there was alcohol or drugs in his or her system at the time of the accident.” And “section 2522(2) explicitly directs that law enforcement officers shall cause a blood test to be administered.” Section 2522(3) provides: “The result of a test is admissible at trial if the court, after reviewing all the evidence, whether gathered prior to, during, or after the test, is satisfied that probable cause exists, independent of the test result, to believe that the operator was under the influence of intoxicants at the time of the accident.”

The Court reiterated “[h]ere is hardly a principle of constitutional law more firmly entrenched than the requirement that law enforcement officers may conduct a search only when they have probable cause to believe that a crime has been committed.” State v. Martin, 120 A.3d 113 (Me. 2015). The Supreme Court of the United States (“SCOTUS”) has insisted upon probable cause as a minimum requirement for a constitutional search. Chambers v. Maroney, 399 U.S. 42 (1970). Even when the “exigent circumstances” exception applies to permit a search without a warrant, the police must still have probable cause. Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974). And probable cause cannot be established after the search. People v. Scott, 227 P.3d 894 (Colo. 2010). Consequently, the bottle of whiskey, the shot glass, and the other evidence discovered after the blood draw could not provide probable cause retroactively after the warrantless search had already been performed.

The “special needs doctrine” does permit a search in the absence of probable cause, but the doctrine refers to “special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable.” New Jersey v. TLO, 469 U.S. 325 (1985). In Skinner v. Railway Labor Executives’ Association, 489 U.S. 602 (1989), SCOTUS upheld a railway regulation that required the testing of employees’ blood following serious train accidents because it was the “[g]overnment’s interest in regulating the conduct of railroad employees to ensure safety” that presented the special needs. The results of the blood testing of the railroad employees were used to discipline the employees but were not used as evidence in criminal trials.

In contrast, in Ferguson v. City of Charleston, 532 U.S. 67 (2001), SCOTUS held that the special needs exception did not permit a hospital to conduct warrantless blood testing for drug use in order to get pregnant women into drug treatment because the results of those tests were frequently handed over to law enforcement for use in subsequent criminal prosecutions. Because the results of blood draws taken under § 2522 were used in criminal proceedings, the special needs doctrine does not apply, the Maine Supreme Court concluded.

The Court acknowledged that in Cormier it had upheld the constitutionality of a warrantless blood draw taken pursuant to § 2522 in the absence of probable cause and in spite of the fact that none of the traditional exceptions to the warrant requirement applied. The Cormier decision allowed for a determination of previously existing probable cause after the search due to exigencies at the scene of the collision that kept officers from developing probable cause before the blood draw. But in light of Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), which highlighted “the important privacy interest that a person holds in his or her blood,” the Court determined that “the approach taken in Cormier is no longer viable.”

The Court then turned its attention to what the appropriate remedy, if any, should be for the violation. It explained that ordinarily when evidence is obtained in violation of the defendant’s Fourth Amendment rights, “the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure.” Illinois v. Krull, 480 U.S. 340 (1987) (evidence may be admissible when police rely on a statute that is subsequently invalidated).

The purpose of the rule is “to deter future unlawful police conduct, not to cure the violation of the defendant’s rights. United States v. Calandra, 414 U.S. 338 (1974). As such, evidence should only be suppressed when the police know or should have known the search was unconstitutional; suppressing evidence obtained as a result of conduct that is “objectively reasonable” doesn’t serve the purpose of the exclusionary rule. Krull.

Consequently, some jurisdictions have adopted the so-called good faith exception to the exclusionary rule established in United States v. Leon, 468 U.S. 897 (1984). However, the Maine Supreme Court noted that “we have not previously relied on the good faith exception, [but] we do so today because … suppression” under these facts “would not serve the purpose of the exclu-
sionary rule.” That is, even though the officers violated Weddle’s Fourth Amendment rights, the Government was still permitted to use the unlawfully seized evidence because the officers believed their conduct was lawful due to their reliance on the statute.

Accordingly, the Court affirmed the judgment against Weddle. See: State v. Weddle, 2020 ME 12 (2020).

Kansas Supreme Court: State Failed to Prove Building Was a Dwelling

by Douglas Ankney

I

n a case of first impression for the Supreme Court of Kansas, the Court affirmed the decision of the Court of Appeals that had reversed the burglary conviction of Charity Downing because the State failed to prove the building allegedly burgled was a “dwelling” as defined by statute.

At Downing’s trial, the owner, Jeff Keesling, testified that the farmhouse was over 100 years old and that people had lived in the house up until three years ago. When asked if the house was basically intended for use as a residence even though it was unoccupied at the time, Keesling answered, “Yes, I would like somebody to live there but I can’t. It’s too dangerous to rent it to somebody with all my stuff out there.”

The district court’s instructions told the jury that to convict Downing of burglary they had to find that she (1) knowingly entered a dwelling, (2) without authority, and (3) with the intent to commit a theft therein. However, nowhere did the district court define the term “dwelling.” After the jury convicted Downing, defense counsel moved for a judgment of acquittal — arguing the State did not prove the structure in question was being used as a dwelling. The district court denied the motion, and Downing appealed. The Court of Appeals reversed, agreeing with Downing. The Kansas Supreme Court granted the State’s petition for review.

The Court observed that “[u]nder the Kansas Criminal Code; (a) Burglary is, without authority, entering or remaining within any: (1) Dwelling, with intent to commit a felony, theft, or sexually motivated crime therein ....” K.S.A. 2018 Supp. 21-5807. “Dwelling” is defined as “a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation, home or residence.” K.S.A. 2018 Supp. 21-5111(k).

The Court, having not previously decided this issue, relied on decisions of the Court of Appeals. In State v. Alvis, 53 P.3d 1232 (Kan. 2002), the defendant had been charged with burgling two houses. The first house was determined to be a dwelling because, although unoccupied and under construction at the time of the alleged offense, the owner intended to move into it five days after the alleged offense. The second home, also under construction, was held not to be a dwelling because there was no evidence that habitation was imminent or even whether it was capable of habitation.

The Court also distinguished and criticized Herrick v. State, 965 P.2d 844 (Kan. 1998), wherein the Court of Appeals correctly determined that the Legislature intended the word “dwelling” to include more than just a “residence” but had incorrectly concluded that a “present, subjective intent” to use it for habitation was “an improper touchstone for determining dwelling status under the statute.” On the contrary, the Court explained that the statute — K.S.A. 2018 Supp. 21-5111(k) — specifies that to qualify as a dwelling, the place “is used or intended for use as a human habitation, home, or residence.”

While Keesling’s testimony expressed a preference to have someone live in the building, the Court concluded that that is insufficient to constitute a “present intent” for the structure to be used as a “human habitation, home, or residence.”

Accordingly, the Court affirmed the judgment of the Court of Appeals reversing the judgment of the district court. See: State v. Downing, 456 P.3d 535 (Kan. 2020).
More light must be shed on the plea-bargaining process, concludes a law review article published by Texas A&M University School of Law.

Transparent data is needed to “promote negotiation effectiveness, competence in representation, and procedural justice.”

The article was written by Andrea Kupfer Schneider, law professor and director of the Dispute Resolution Program at the Marquette University School of Law, and Cynthia Alkon, professor of law and director of the Criminal Law, Justice, and Policy Program at the Texas A&M University School of Law.

The 60-page article takes an in-depth look at the secretive plea-bargain process and uses negation theory as a framework to assert that more information can improve this crucial component of the criminal justice system.

As the Supreme Court of the United States (“SCOTUS”) has stated, “criminal justice today is for the most part a system of pleas, not a system of trials.”

Over 90 percent of all criminal cases nationwide are resolved through plea bargaining.

The article’s authors argue that information, or lack thereof, is a significant limitation in ensuring legitimacy of plea bargaining and the entire criminal legal system. They also assert that more information about the plea bargaining process is needed to enact criminal justice reform.

Over the last five decades, the incarceration rate in the United States grew by 400 percent, giving it the largest prison population and per capita incarceration rate in the world. There are 6.7 million adults on either parole, probation, or in custody. That is one out of every 37 adults.

“Plea bargaining contributed to increased incarceration as it made mass processing of cases easier than it would have been if every conviction relied on a jury trial,” wrote the authors. They pointed to increased sentences, enhancements, and expansion of the definitions of what constitutes a crime as factors that helped tilt the scales of justice. “The impact of these changes was to contribute to the coercive atmosphere of plea bargaining by increasing prosecutorial power and to heighten the sense by many criminal defendants that they have no choice but to accept the plea bargain.”

That is because many defendants are aware of the “trial penalty.” A study of five guideline-sentencing states found that defendants who proceeded to trial “may receive sentences of up to four or five times higher than the plea bargain they were offered.”

Then, there is the anchor effect, which is a negotiation tactic in which the initial offer tends to have more power and “create an anchor” for future negotiations. Prosecutors may hinge future offers on the original, inflated offer “based on the prosecutor’s charges at arraignment (with all of the enhancements and multiple charges added) and the trial outcome (reflecting the trial penalty).” For a defense attorney, the maximum sentence can be a powerful anchor when that attorney has experienced a client getting “maxed out” after trial.

Changes in laws over recent decades increased prosecutorial power and put more pressure on defendants, including those who are innocent. After all, prosecutors have discretion as to what to charge and, during plea bargaining, prosecutors can threaten harsher penalties, even the death penalty. With such power, there is the potential for abuse. Troublingly, fear of receiving the maximum sentence prompts even the innocent to plead guilty.

The authors note that prosecutors can go about their business virtually unchecked: “Only the most egregious cases of prosecutorial misconduct are punished, and there are so few as to be noteworthy when a prosecutor is actually disciplined.”

While SCOTUS mandated that pleas must be voluntary and intelligent and that defendants have a right to effective assistance of counsel in the plea bargaining process, it has not subjected that process to scrutiny. It is doubtful that it will do so any time in the near future, for the Court has found negotiating is a matter of personal style. Moreover, plea bargaining, unlike other proceedings in criminal courts, lacks a record or transcript of what happens during negotiation. The lack of transparency can cast doubt on the system’s fairness and legitimacy.

“For people to have trust in the system, and for it to work, both parties in the system and the public watching the system operate need to believe that parties are treated fairly, that outcomes are just, and that players in the system with power — the prosecutors and judges — wield their power wisely,” wrote the authors. “A key to legitimacy is procedural justice, meaning that the process or rules followed by those in positions of power are perceived to be fair. Procedural justice examines the process, rather than the outcome, to explain why parties believe in systems.”

To examine the inner workings of the plea-bargaining process, the authors argue more information on that process is needed. While it is known how many cases are resolved via a plea, “we do not know much beyond that simple statistic.” Unknown is the number cases in which a plea is offered, when it was offered, or how long the offer was open. What percentage of cases plead out to the filed charges, fewer charges, or entirely different charges than those at arraignment also are unknowns.

We also do not know if prosecutors refuse to make an offer, how often a defendant pleads out to a higher offer after the original offer was rejected, or how often defense lawyers make the first offer or if they make a counter offer. Is a better deal had at arraignment or on the eve of trial?

Courts report on the number and type of cases they handle and the manner and length in which those cases were resolved. “Asking a few simple additional questions could dramatically improve the information available regarding how plea bargaining works in any given state,” the authors wrote. “Current reporting about criminal cases is done by a few of the players, often for very different political reasons.”

District attorneys, who are elected officials, create reports for their government funders and to prepare for the next election. Courts, likewise, submit reports for funding purposes. The authors suggest that courts “move in the direction of collecting data that is by case so that lawyers, policymakers, and researchers can gain a better understanding of what is happening in a given courthouse with particular types of cases.”

Absent better data collection, “No one can make informed policy decisions to improve public safety, reduce costs, or identify patterns of inequity,” says Amy Bach, founder of the Justice Strategies Center.
of Measures for Justice.

During its 2019 legislative session, Florida lawmakers made “the most serious attempt in the country so far to collect system-wide criminal legal data.” While that “law requires that an extensive list of data be collected, including the original charge, basic information about the defendants, whether the defendant is indigent, bail or bond information, the charge actually sentenced to, and the sentence imposed,” it fails to require data collection on “the single most common process for resolving criminal cases: plea bargaining.”

The authors identified eight categories of information that could be easily collected: (1) the charge at filing and for the guilty plea; (2) was defense counsel a public defender, publicly funded private attorney, or a privately retained lawyer; (3) dates of bar entry for both the prosecutor and defense attorney; (4) whether the defendant was a first time or repeat offender; (5) how the plea offer was made; (6) time limits on plea offer; (7) what was the first plea offer; and (8) the defendant’s gender, age, and race in context of the plea.

Collecting some other relevant information is more complicated. “For example, how many offers were made? Who made the first offer? How long did the lawyers talk (if they talked at all)? How long did the prosecutor review the case before making an offer? Were hard bargaining tactics used?” Collecting information on misdemeanor cases would be more difficult than in felony cases due to higher caseloads. Nonetheless, all this data would provide information about legitimacy in the criminal justice system, particularly whether the process is fair.

The article then discussed how negotiation theory helps explain why data is important and how it can increase the legitimacy of the plea bargaining system. In civil cases, judges review and approve settlements, keeping an eye, in certain contexts, toward protecting unrepresented third parties or the public interest. The current plea bargain system is little more than “bargaining in the dark,” the authors assert.

Even where a judge is told a plea offer was made, the court may never be told “that the offer was accompanied by a threat to add additional charges or enhancements if the deal was not accepted by a particular time.” Thus, “there is no process to catch prosecutor misbehavior.” Lack of data also hampers the court’s ability to assess the fairness of an offer. “Judges can evaluate whether a particular offer seems in line with other offers in similar cases that have pleaded out in their courtroom, but they don’t know how representative the offer is with other similar cases in the same county, or in the state as a whole.”

Because many judges are former prosecutors, “they may not recognize as a problem behavior (in discovery) that they engaged in when they were practicing law.” Defense lawyers and prosecutors must work together daily, so if a defense attorney complains about a prosecutor’s behavior in a specific case, it may make negotiation in others harder. While a judge may find an offer is unjust against a defendant for race related reasons, “the average judge would not have enough information to make that evaluation or to be able to come to that conclusion.”

An “exploding offer” is regularly made by prosecutors, meaning they impose a time limit such as “today only” on a plea offer. In the civil context, negotiator’s consent is protected by providing for a cooling off period. Exploding offers require defendants to make a snap decision before “they have come to appreciate the consequences.”

Going into the plea bargaining without the benefit of discovery is not unusual. Only a few states have comprehensive discovery rules. “At this point we do not know how widespread a problem it is that defendants are pleading guilty before getting full discovery.” That basic information can help defendants and their attorneys better evaluate the case. “Pleading guilty before getting full discovery is something that flies in the face of basic concepts of fairness.”

While “take-it-or-leave-it-offers” are volatile of the duty to bargain in good faith, there are no such guidelines in plea bargaining. Lack of data when such tactics are employed by prosecutors puts defense attorneys at a serious disadvantage. More information about the history of when and under what circumstances such tactics are employed could help the defense determine if it should call the bluff when hard bargaining tactics are used.

“In some jurisdictions, for example, it is clear that once the case is sent out for trial, the deal is off,” the authors note. Yet, “[i]n other jurisdictions, the moments before a case is sent out for trial may be the time the real bargaining begins.”

The authors explain they pointed all this out to demonstrate that our “criminal justice system was not created nor intended to provide confidentiality.”

The Constitution requires criminal proceedings to “happen in courtrooms open to the public. Modern day plea bargaining has hijacked this intention as the entire process happens in private and is completely hidden from the public.”

The lack of transparency in that process affects the effectiveness of defense counsel, for the secrecy tilts the scales of justice in favor of the most powerful player within the criminal justice system: the prosecutor.

Another hindrance is that there is no way to determine what is a “standard deal” in a criminal case. “In general, defense lawyers tend to have strong comradery and share in-
Plea Bargain Fairness (cont.)

formation freely. But the lawyer asked might routinely get worse deals than other lawyers in the courthouse and not know it, so they may not be sharing accurate information.”

This lack of information makes it difficult, if not impossible, to use objective criteria to set negotiation goals and to frame persuasive arguments to the negotiation counterpart.

Negotiation theory also focuses on the importance of offering options to achieve optimal outcomes. “In plea bargaining, and particularly in the face of trying to reduce mass incarceration and deal with systemic problems, both prosecutors and defense counsel would benefit by knowing how other defendants have been treated in the system.”

Former prosecutor and negotiation theorist Richard Burke believes defendants accept deals because of poor information and that risk aversion plays a key role. He writes that most deals are not so good as to warrant the risk aversion behavior, “but rather, that institutional pressures cause defense attorneys to induce pleas from their clients.” Thus, if a defendant is better informed about a variety of institutional pressures cause defense attorneys to induce pleas from their clients. This, if a defendant is better informed about a variety of outcomes, he or she would either choose to go to trial or push for negotiation of a better deal.

The authors conclude that the knowledge their article focuses on would help “an individual lawyer in an individual case to assess the deal, and information that helps the lawyers to improve their negotiation skills.” They note that data collection faces barriers. Underfunded courts are already overtaxed. Judges, prosecutors, and defense lawyers fear the information will be used against them or their institution. Finally, improving plea bargains for defendants is not politically popular.

Nonetheless, data collection in the plea bargaining process, the authors argue, is essential to ensuring the perceived fairness of the criminal justice system. Targeted reforms will help the lawyers working in that system perform their jobs more fairly and effectively. “In short, shedding more light on the process will keep us from bargaining in the dark.”


New York’s SARA Requirements Force Sex-Offenders into Homelessness Then Hold Them in Prison Due to Their Homelessness

by Kevin Bliss

Allison Frankel of the Center for Appellate Litigation wrote an article in the Yale Law Journal discussing New York’s archaic sex-offender housing requirement laws and their inherent problems. She touched on the flawed metrics used to substantiate fear-based reactions to sexual assault, the varied potential violations of both state and federal law these regulations carry, and possible solutions to solve New York’s sex-offender placement problem.

Disabled registered sex-offenders in New York are being held in prison an average of three years past their release date awaiting Sexual Assault Reform Act (“SARA”)-compliant housing, which means the residence cannot be within 1,000 feet of a school. Only four shelters in New York City currently meet that standard. To complicate matters, New York City’s shelters refuse to house anyone not able to independently manage their daily activities or require such things as peritoneal dialysis, an oxygen tank, or catheters they cannot insert themselves despite a 2017 federal ruling that disabled applicants receive “meaningful access to shelter or shelter-related services.”

In addition, more than half the city’s subways are not handicap-accessible with many of the older buildings not fitted for elevators or entry ways wide enough to accommodate a wheelchair. This limits options when it comes to finding acceptable housing and effectively bars some of the disabled from the less expensive neighborhoods.

New York Department of Corrections and Community Supervision (“DOCCS”) has two types of community supervision, viz., conditional release and Post-Release Supervision (“PRS”). If a prisoner is given conditional release, they can be held by the DOCCS until either they find SARA-compliant housing or the end of their sentence.

For those with PRS, when their prison sentence is over and they still have not found acceptable housing, the DOCCS can place them in “Residential Treatment Facilities” (“RTF”). Although these facilities are designated as community-based residences offering job training, education, and housing assistance, in reality the DOCCS has reclassified 13 wings of medium- and maximum-security prisons as RTF.

Residents still wear prison clothes, cannot leave the grounds, and may receive disciplinary actions triggering PRS violations carrying up to five more years in prison. Once their PRS term is over, these individuals are no longer required to find SARA-compliant housing, effectively incarcerating these people simply because they are poor and homeless.

Frankel said the regulations created for sex-offenders were grounded in the false premise that the vast majority of sex crimes are committed by repeat offenders. It was a knee-jerk reaction to heinous crimes, such as the abduction, rape, and murder of Jacob Wetterling — when in fact, most are committed by first-time offenders.

The U.S. Supreme Court cited recidivism for sex offenders as a “frightening and high” 80 percent, but Frankel explained that those numbers were based on an unsupported claim in a mass-production publication, not from an academic study or peer-reviewed article.

New studies have shown that the recidivism rate has only been about 6.6 percent for sex crimes compared to robbery, which has a rate of 67 percent. Another study conducted in New York showed that 95.5 percent of sex-offenders between 1986 and 2006 were first time offenders. Furthermore, research consistently shows that 90 percent of all minors who are victims of sexual assault know their assailant; sex-offenders commonly victimize family members and well-known acquaintances.

She said no studies have been conducted that prove limiting where a registered sex-offender lives actually reduces the propensity for recidivism. In fact, residency restrictions lead to homelessness, a strain on family relationships, and difficulty gaining employment – all factors that contribute to the increase of recidivism. Frankel stated that incorrect perceptions perpetuate inappropriate responses and prevent addressing the underlying causes of sexual assault.

She suggested several viable legal challenges to the continued incarceration of sex-offenders after their scheduled release using such avenues as “reasonable accommo-
She noted several states have modified their residency restrictions using more evidence-based approaches. Kansas and Colorado have stated that empirical evidence shows that residency restrictions do not improve public safety and have rejected all such restrictions. Michigan Attorney General filed a brief arguing the registration requirements are counterproductive punishment. U.S. Representative Alexandria Ocasio-Cortez introduced a bill to repeal the statute barring public housing based on a person’s prior criminal history.

Another possibility could be narrowing current SARA regulations. The restricted zone could be reduced to 500 feet or could apply only to those people under a certain age. In addition, risk-assessment tools should be scientifically verified, and the DOCCS should work with other government agencies to help locate and access medically appropriate housing for disabled sex-offenders ready for release. DOCCS’ Directive 9222 already allows for emergency funding to find housing for qualified individuals, and they already pay for a prisoner’s housing and health care. So finding affordable community housing would be more cost effective, especially since Medicaid and SSI benefits would then be available.

Frankel warned that the current system for New York’s sex-offenders is flawed and causes irreplaceable harm. Focus needs to be diverted to the root cause of the problem and affirmative rehabilitation. Patty Wetterling (Jacob’s mother) said that today’s restrictions are a trap. “We want people to be angry about sexual assault. And then when they’re angry about it, they want to toughen it up for these people, you know, these bad boys who do this. And if we can set aside the emotions, what we really want is no more victims. Don’t do it again. So, how can we get there? Labeling them and not allowing them community support doesn’t work,” she said.

Source: yalelawjournal.org
Expert’s Burn-Pattern Conclusions Flawed

by David M. Reutter

The admission of expert opinion based on science is powerful evidence that is supposed to assist the jury in determining the truth surrounding an event. When a flawed opinion comes into play, the scales of justice become tilted.

Those scales were tilted when Dr. Matthew Cox became involved in two child-abuse burn cases in Texas. Cox is part of the growing subspecialty of doctors who assist child-welfare investigations. He completed a pediatric fellowship in Philadelphia and evaluated hundreds of cases of suspected abuse in the years that followed. Then he became the medical director of the Referral and Evaluation of At-Risk Children at Children’s Medical Center in Dallas.

Cox examined a two-year-old with serious burns on her feet up to her ankles. Cox reported the injuries to authorities and later testified, “The pattern of her burn injuries is what I would call a forced immersion.” When pressed by a defense attorney, Cox doubled down: “Absolutely, this is child abuse.”

That testimony was based solely on Cox’s experience and opinion of what occurred. The judicial system gives great weight to the testimony of alleged experts. To be admitted as an expert witness, one needs to have training and experience in the area concerning their testimony. In recent decades, a troubling amount of junk science has passed for hard scientific evidence, resulting in innocents being convicted.

The FBI lab was exposed as a purveyor of bad science. Its lab technicians have been exposed as giving testimony on hair and bullet-lead analysis that was later proven to have no actual basis in science. Yet the testimony of the experts was accepted by courts and juries as scientific fact.

Likewise, when Cox testified at the September 2012 trial of Kenneth and Shelley Walker, then 55 and 60, his opinion testimony was given great weight despite the fact another doctor doubted that child abuse was involved. The Walkers were convicted and sentenced to 25 years in prison.

An October 2016 opinion by the Texas Court of Criminal Appeals found the jury should not have relied upon Cox’s burn-pattern evidence because he “did not base his opinion on the particular facts of this case.” The Court noted he relied on an incorrect estimate of the water temperature, and he never considered the configuration of the sliding-glass-door enclosed bathtub, which could have caused the child to become trapped. He also failed to consider that the Walkers had medical issues that would have made it difficult for them to hold the toddler in hot water.

Other child experts say that failing to consider more than the injuries the child incurred is a flawed technique. Yet Cox never considered factors outside of those injuries.

Jessica Byas-Lurgio said when she moved from Illinois to a Dallas apartment she was burned while taking a shower. Byas-Lurgio, 35 at the time, was caretaker of her half-brother and sister, Nicole, after their father died, as well as her own two boys. She heard three-year-old Nicole call for her on June 27, 2015, from the bathroom. Nicole had one leg in the bathwater and the other out of it. She was seemingly frozen in place as steam rose from several inches of deep water.

When Byas-Lurgio lifted Nicole from the water, it didn’t appear too serious, but as she went to dry her, Nicole’s skin slid. Paramedics were called, and Cox examined Nicole, who suffered second- and third-degree burns on her buttocks, the back of her right thigh, along the majority of her right leg, and on her feet, at Parkland Memorial Hospital. He explained the injuries did not appear accidental.

Two days later, Cox sent a report to Child Protective Services. “The pattern of the burn injuries is not consistent with a history of a child climbing into a tub on her own,” Cox wrote. “The extent a pattern of her injuries is consistent with immersion into scalding hot water and child physical abuse.”

Cox signed an affidavit on June 30, 2015, and the next day, a police investigator went to Byas-Lurgio’s apartment. He cut the padlock of the hot water tank and discovered it was set at the maximum temperature of 150 degrees, which can cause instantaneous second- and third-degree burns. The U.S. Centers for Disease Control and Prevention recommends that hot water heaters be set no higher than 120 degrees. The officer also found the water in the tub reached 134 degrees after 20 seconds but made no measurements after that time. The tub was measured to be just 11 inches high, making it likely for a toddler to climb in on their own. None of these facts were contained in Cox’s report.

When looking for a “classic forced immersion burn pattern,” doctors are trained to look for “well-defined lines between burned and unburned skin.” That is insufficient information, says Dr. Robert Sheridan, the burn unit director at Shriners Hospital for Children in Boston and a professor of surgery at Harvard Medical School.

“I don’t know that you can tell the difference always,” he said. “I don’t know that you can hang your hat entirely on burn pattern in the absence of other information.”

The Department of Justice has issued a training document that instructs it is evidence a child was forcibly held against the bottom of the tub when the soles of the feet are not burned. “A child cannot jump up and down in hot water and not burn the bottoms of the feet,” the document states.

When questioned on the point that the Walkers’ granddaughter had burns on the bottom of her feet, Cox had an alternative theory.

He said it meant the toddler’s feet were dipped in the scalding bathwater without pressing them against the bottom.

Cox also insisted that the lack of splash burns higher up the toddler’s legs was indicative that she was held and not hopping from foot to foot. He was pressed by the Walkers’ attorney about a research paper published in The Journal of Pediatrics that found water below 130 degrees will not typically cause splash burn, but Cox said he was unaware of that research.

While he acknowledged that police measured the water in the Walkers’ tub at 129 degrees, he said the information had no effect on his opinion. “Her pattern of burns, no, couldn’t be accidental,” Cox said. “It’s just flat out nonaccidental.”

The Texas appellate court disagreed. “We do not know, nor can we know, how the child came to be injured without resort to speculation,” the Court wrote in an October 19, 2016, opinion. “Putting a scientific gloss over that speculation does not make the evidence more certain. Both defendants are entitled to acquittal.”

The author of that opinion, Justice Cheryl Johnson, was highly critical of the judge who allowed Cox’s testimony into evidence. “[Cox] was so wrong and so ignorant of the facts,” Johnson said. “I would have stopped the proceedings and said, ‘Just a minute here. You are going to have to justify all of this. Otherwise, I’m kicking you off the stand.’”

The Walkers were acquitted and released.
after four years and have been able to move on with their lives. That, however, has been a harder task for Byas-Lurgio. Following the advice of her attorney, she accepted an open guilty plea of reckless endangerment of a child, for she knew she failed to keep a close eye on her sister. She believed the lesser charge would help her avoid prison.

By the time her sentencing hearing took place, Cox had gone to lead a child abuse team in Boise, Idaho. In his stead, the prosecution called Dr. Suzanne Dakil, who replaced Cox at the Children's Medical Center. She testified Nicole was "either being held in the water or felt that she could not move for some reason." Dakil said it would take "a half a minute or so" for a child to sustain third-degree burns in 150-degree water, contradicting research that finds such burn can occur instantaneously or within seconds at those temperatures.

The court sentenced Byas-Lurgio to 10 years in prison. Nine months later, a judge gave her a break and put her on shock probation. The ruling by e-mail.

The court sentenced Byas-Lurgio to 10 years in prison. Nine months later, a judge gave her a break and put her on shock probation. The experts' opinions in her case caused her to lose custody of her siblings, who were adopted by a Texas family. Back in Illinois, Byas-Lurgio was reunited with her two sons. Prior to her conviction, Byas-Lurgio had been a child therapist and teacher, but she had been unable to pass a background check to continue in those professions. She has hopes of becoming a forensic investigator to help parents in the same position she once found herself, NBC News and the Houston Chronicle reported in 2019.

Research has found that child abuse is enhanced based on economic status and other social factors. Black and Hispanic families are more likely to be investigated for child abuse than white families. "Think less, screen more," is a campaign some doctors push to lessen those disparities.

A 2001 paper authored by two Harvard Medical School researchers looked at nine cases, three of which involved children seriously burned by bathwater. They found the reporting pediatricians did not seem to consider or understand the impact of water temperatures or the time of exposure when making their conclusions.

"The finding of guilty because of inaccurate analysis or basic prejudice is anathema to our system of justice," the report authors concluded, "and the impact on the child and the family can prove devastating and lasting." [A]

Sources: Houston Chronicle, NBC News

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If You Write to Criminal Legal News

We receive numerous letters from prisoners every month. If you contact us, please note that we are unable to respond to the vast majority of letters we receive.

In almost all cases we cannot help find an attorney, intervene in criminal or civil cases, contact prison officials regarding grievances or disciplinary issues, etc. We cannot assist with wrongful convictions, and recommend contacting organizations that specialize in such cases, such as the Innocence Project (though we can help obtain compensation after a wrongful conviction has been reversed based on innocence claims).

Please do not send us documents that you need to have returned. Although we welcome copies of verdicts and settlements, do not send copies of complaints or lawsuits that have not yet resulted in a favorable outcome.

Also, if you contact us, please ensure letters are legible and to the point — we regularly receive 10- to 15-page letters, and do not have the staff time or resources to review lengthy correspondence. If we need more information, we will write back.

While we wish we could respond to everyone who contacts us, we are unable to do so; please do not be disappointed if you do not receive a reply.
After nearly 10 years behind bars, Lydell Grant, now 42, is on his way to being exonerated after the highest criminal appellate court in Texas vacated his conviction following its review of revised DNA evidence analyzed through newly developed proprietary software known as “TrueAllele.”

“I really believe that my story will be able to help someone else’s,” says Grant.

Nearly a decade ago, Grant was handed a life sentence in a Texas courtroom for the stabbing murder of Aaron Scheerhoorn outside a Houston gay bar in December, 2010.

To convict Grant, prosecutors relied mainly upon eyewitness testimony who described the assailant as black, age 25-30, and about 6 feet tall. Police believed the stabbing had been a “crime of passion.”

Following a tip describing the suspect’s car, an officer pulled over a vehicle in which Grant was driving just five days after the murder. At the time, Grant was driving on a suspended license. He also had an extensive criminal record that included aggravated robbery.

Seven witnesses then picked Grant out of a lineup as Scheerhoorn’s attacker. Throughout the investigation, Grant maintained his innocence, insisting he had never met Scheerhoorn and even produced an alibi for the time of the murder.

Fingernail scrapings were collected from the victim and tested for DNA analysis at a Houston-based crime lab. The samples yielded a mix of two individual subjects, Scheerhoorn (victim) and an unidentified male. The Houston lab was unable to establish definitively that the second subject was Grant, although a State expert testified that Grant “could not be excluded.” The jury also heard from a witness who had corroborated Grant’s alibi, attesting that he had been with Grant the night of the stabbing. The jury chose not to believe the witness, and Grant was convicted of felony murder and sentenced to life.

From his Harris County prison where he said he felt “like an animal in a cage,” Grant began seeking legal assistance. His letter eventually reached the Innocence Project of Texas where it sat in a pile with hundreds, if not thousands, of other requests. Finally, in 2018, it was referred to the Texas A&M School of Law, which partners with the Innocence Project on case analysis.

Law students at A&M realized that Grant’s conviction had depended predominantly on eyewitness testimony, which is often skewed and inaccurate. They decided to take a second look at the DNA evidence.

In 2011, the Houston-based crime lab had used a traditional analysis technique on the Scheerhoorn sample in which a scientist gauges the results obtained from the sample to make a “probability” assessment. When the sample contains a mix of more than one subject’s DNA, as in this case, the graphic analysis is made more difficult and less reliable. Flawed DNA readings using this method have convicted innocent people, and there is no telling just how many innocent people remain behind bars today simply because they have not yet had access to new “21st century” proprietary software.

Attorney Mike Ware, executive director of the Innocence Project, decided that a more careful analysis of the Scheerhoorn sample was necessary. Ware contacted an associate, Angie Ambers, associate professor of forensic science at the University of New Haven in Connecticut.

Ambers suggested a new type of DNA technology known as “probabilistic genotyping.” She informed Ware that there had been significant advances in DNA analysis technology since the time of Scheerhoorn’s murder. A proprietary software program called TrueAllele had been developed by a company in Pittsburgh known as Cybergenetics. The company had extensive experience with DNA forensic analysis, having deciphered samples from victims of the 9/11 terrorist attacks.

Ambers had the Scheerhoorn sample analyzed through TrueAllele and determined the Houston lab findings were likely flawed. A number of “Alleles” in the sample were absolutely inconsistent with either Scheerhoorn or Grant. But Ware, understanding the complexities of the justice system, knew that this information would not be enough to vindicate Grant.

Ware commissioned the Innocence Project to move its analysis a step further. It was suggested that Cybergenetics partner with a lab in South Carolina, which had access to the FBI’s DNA database known as the “Combined DNA Index System” or “CODIS.” CODIS contains the DNA profiles of 14 million convicted criminals and recent suspects.

Police and law enforcement labs regularly access CODIS for help with unknown DNA profiles, but CODIS is seldom available to private interests. With this exception, the collaboration between Cybergenetics, a private entity, and CODIS, a law enforcement database, meted out a successful match—a match that was not Scheerhoorn.

The missing DNA profile belonged to a Jermarico Carter, a man in Atlanta who had left Houston shortly after the Scheerhoorn murder. Carter, who also had an extensive criminal record, was interrogated by police and eventually confessed to killing Grant. Houston Police Chief Art Acevedo issued an apology to Grant and to his family, acknowledging they have waited for justice all these years.”

‘Historic Case’

The CEO of Cybergenetics, Mark Perlman, who was the developer of the TrueAllele software algorithm, noted that this was a historic first use of the “probabilistic genotyping” software in response to a third-party request involving a private enterprise (Innocence Project) accessing a law enforcement database. A collaboration, in this case, that, as a result of this new software, successfully yielded a match. “There’s probably 5,000 to 6,000 innocent people in Texas prisons alone,” said Ware of the Innocence Project. “How many of them could benefit from such a reanalysis of DNA that was used to convict them? I don’t really know, but this is a historic case that could open the door for those who thought it was shut forever.”

Still, while TrueAllele has helped both the prosecution and defense in several cases across the country, the software has attracted criticism. The fact that the software is proprietary and can produce results that may only be deciphered exclusively through Cybergenetics, proprietary code introduces a confidentiality problem for those who may wish to challenge its findings in court.

Greg Hampikian, a biology professor at Boise State University, stated it is problematic for a defense team to be sufficiently trained to
“counter the highly sophisticated mathematical programs without having actually used them.”

Defense expert Dan Krane feels that if “probabilistic genotype” software is going to be used within criminal proceedings, defendants have a right to know how results are obtained when such results may be detrimental to their case.

There is now an increasing number of cases in which proprietary software has been challenged by evidentiary suppression motions, forcing judges to demand that companies reveal the inner-workings and trade secrets associated with their brainchild (the software’s algorithmic source code).

Cybergenetic’s Mark Perlin claims that TrueAllele’s source code is a “trade secret,” and one that needs to be protected in a “highly competitive commercial environment.”

Likewise, CODIS remains under the control of the FBI and has proven difficult to access, if not wholly inaccessible to labs representing the private sector.

These conflicts between legality, constitutionality, and science will likely continue. Democrat Representative Mark Takano of California introduced legislation in September 2019 that would require defendants have access to “all” source code and standards in an effort to accurately evaluate the fairness of algorithm use.

The Justice in Forensic Algorithm Act is now in the hands of the Judiciary Committee and The Committee on Space, Science and Technology.

As to how quickly and expeditiously our legal system can leave the 19th century behind, and embrace 21st century technologies, remains a highly debatable subject. In the interim, it is impossible to know how many other “Lydell Grants” are out there languishing in prison and awaiting justice.

Source: yahoo.com, myarklamiss.com

Seventh Circuit Holds Brain Injury May Allow Equitable Tolling to File Late Habeas Petition

by Dale Chappell

The U.S. Court of Appeals for the Seventh Circuit held on February 12, 2020, that a brain injury resulting from a stroke may be an “extraordinary circumstance” that could allow “equitable tolling” of the one-year clock for filing a petition for a habeas corpus.

DeWayne Perry filed a habeas corpus petition in Indiana state court to attack his conviction and sentence for murder. Because he had suffered a stroke and was left aphasic — meaning he cannot speak and struggles to understand words — the state court appointed counsel to help him pursue his claims. That lawyer, however, abandoned Perry and did nothing for him. The court never appointed another lawyer.

Perry then asked the court to dismiss his petition without prejudice so that he could file another one after he found another lawyer who would help him. When Perry did file another petition later, the court dismissed it as an improper second petition, since his first was dismissed with prejudice. Perry then filed a habeas corpus petition in federal court, which was summarily dismissed as untimely filed. The district court judge ruled that Perry’s aphasia was not an “external obstacle” to allow equitable tolling. Perry appealed.

While Perry conceded that his petition was late, he argued on appeal that his brain injury (stroke) allowed “equitable tolling” to make his petition timely. The Seventh Circuit has held that some mental limitations do support equitable tolling. The question before the Court was whether Perry’s inability to use or understand words because of his aphasia could allow equitable tolling. The Supreme Court held in Holland v. Florida, 560 U.S. 631 (2010), that “extraordinary circumstances” could allow equitable tolling in certain cases.

The State argued that because Perry’s court filings were articulate, equitable tolling should not apply. “But this tells us more about Perry’s lawyers than about Perry,” the Court said, noting that Perry’s papers had been amended and filed by volunteer lawyers. The Court concluded that the district court should have investigated further into Perry’s aphasia to see if it was an obstacle, being that he failed to understand that his first petition was dismissed with prejudice (and not without prejudice) to bar another petition.

The Court also rejected the State’s argument that Perry’s claim was procedurally defaulted because his collateral review lawyer (the one who abandoned him) never raised it when he should have. Citing the Supreme Court’s decision in Martinez v. Ryan, 566 U.S. 1 (2012), the Court said the record implies that “Perry received ineffective (really, no) legal aid in pursuing collateral review” when the claim should have been raised and that the ineffective assistance by collateral review counsel in failing to raise the claim may excuse procedural default of the claim.

But because the record is “scanty,” the Court remanded for the district court to determine “whether circumstances as a whole justify equitable tolling.” In particular, the Court instructed that the [d]ecision will depend on medical evidence that the record lacks and that “it is appropriate for the district court to appoint counsel to assist him.”

Accordingly, the Court vacated the judgment and remanded for proceedings consistent with this opinion. See: Perry v. Brown, 2020 U.S. App. LEXIS 4401 (7th Cir. 2020).

Stop Prison Profiteering:
Seeking Debit Card Plaintiffs

The Human Rights Defense Center is currently suing NUMI in U.S. District Court in Portland, Oregon over its release debit card practices in that state. We are interested in litigating other cases against NUMI and other debit card companies, including JPay, Keefe, EZ Card, Futura Card Services, Access Corrections, Release Pay and TouchPay, that exploit prisoners and arrestees in this manner. If you have been charged fees to access your own funds on a debit card after being released from prison or jail within the last 18 months, we want to hear from you.

Please contact Kathy Moses at kmoses@humanrightsdefensecenter.org, or call (561) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth Beach, FL 33460.
Michigan Supreme Court: Defendant Entitled to Self-defense Jury Instruction
by David M. Reutter

The Supreme Court of Michigan held a trial court erred in denying a defendant’s request for a self-defense instruction on the basis that a defendant who claims another person committed the homicide is not entitled to a self-defense instruction. It also held it was improper to exclude testimonial evidence that tended to support the self-defense theory where the trial court improperly made a factual finding that defendant and another person were the initial aggressors and could have fled.

The Court’s ruling came in an appeal brought by Nadeem Yousaf Rajput. Rajput and a man known only as Haus were riding in Rajput’s car on May 7, 2016, when a red Malibu with two occupants approached and fired shots at Rajput and Haus. After returning to Rajput’s home, Rajput and Haus went looking for the Malibu.

When they found the car, its sole occupant was Lakeisha Henry. They gave chase, trapped the vehicle, and approached Henry. An argument ensued, and multiple shots were fired, resulting in Henry’s death. At trial, Rajput argued Haus shot Henry when she reached for the gun in her car. The trial court denied a self-defense instruction. It also improperly made a factual finding that defendant and Haus were the initial aggressors and could have fled instead of responding with deadly force when the victim allegedly reached for a weapon. Rajput testified that they only approached Henry to find out who was shooting at them and why. Additionally, he did not have to flee when the victim reached for the weapon found by police in the car. Whether Rajput and Haus were the initial aggressors was a question for the jury.

Next, the finding that Carr’s testimony was irrelevant was error. His testimony was probative evidence on the material issue of self-defense, and it made it more likely that Henry reached for the gun as instructed by Clay. As such, the appellate court’s rulings were in error.

Accordingly, the Court remanded the case to the appellate court to determine if harmless error applied to the self-defense instruction and Carr’s testimony. If the conviction is affirmed after making that determination, the appellate court must reconsider the improper upward departure sentence, which the trial court remarked was based on Rajput appearing to be guilty of first degree murder, not second, and the jury might have compromised. See: People v. Rajput, 2020 Mich. LEXIS 127 (2020)

Ninth Circuit Orders Habeas Relief After California Concedes Conviction Should Be Overturned Due to Defense Counsel’s ‘Virulent Racism’
by Douglas Ankney

The U.S. Court of Appeals for the Ninth Circuit reversed the district court’s denial of Ezzard Charles Ellis’ petition for a writ of habeas corpus and remanded with instructions to issue a conditional writ after California conceded that Ellis’ conviction should be overturned due to his attorney’s virulent racism.

In 1991, Ellis and his codefendant (both black men) were convicted of murder and other crimes after being tried five times for their roles in a robbery of two men at a McDonald’s drive-thru in 1989. (The first two trials ended in mistrials due to missing witnesses, and the third and fourth trials resulted in hung juries.)

In 2003, Ellis learned that his trial attorney, Donald Ames, was a virulent racist after the Ninth Circuit granted habeas relief in two other cases that had found Ames ineffective. Ellis then obtained declarations from Ames’ former secretary (Ames died in 1999), Ames’ daughters, and a court clerk. The secretary, who is black, stated Ames referred to her as “that dumb little nigger” and more than once called her a “dumb fucking bitch.” Ames’ oldest daughter stated her father “especially ridiculed black people [saying] ‘trigger the nigger’ or ‘shoot the coon to the moon.’”

The youngest daughter recalled a time in 1990 or 1991 when her father was representing two black men accused of robbing someone at a fast-food restaurant, and her father referred to his clients with racial slurs and stated his clients were stupid.

According to the clerk, Ames referred to an Asian-American judge as a “fucking Jap” who should “remember Pearl Harbor.” In 1991, Ames told a legal secretary that his co-counsel was “a big black nigger trying to be a white man.” At work, Ames “consistently referred to his African American clients as ‘niggers.’” One client was sentenced to death, and Ames said the client was a “nigger who got what he deserved” and Ames stated he “did not care what happened to [another client] because [the client] was black.”

Ellis unsuccessfully sought habeas relief in the state courts, arguing Ames’ “racial prejudice against African Americans” created an actual conflict of interest. He then petitioned for habeas relief in federal court. The district
court denied relief, and a three-judge panel of the Ninth Circuit affirmed. Ellis petitioned for a rehearing, and in an unusual twist, in the State’s response to the petition for rehearing, the State conceded that Ellis’ conviction should be overturned and agreed to waive any procedural bars.

A majority of the Ninth Circuit, sitting en banc, summarily reversed the district court’s denial and remanded with instructions to issue a conditional writ releasing Ellis unless the State retried him within a reasonable time. Because the majority did not write an opinion, Judge Jacqueline Nguyen, joined by Chief Judge Sidney R. Thomas and Judge Mary H. Marguia, wrote a concurring opinion to respond to the dissent’s contention that the majority’s order granting relief was forbidden by 28 U.S.C. § 2254(d).

Judge Nguyen, observed that “[w]hile the state acquiesces in Ellis’s legal analysis, we are not entitled to do the same. The Antiterrorism and Effective Death Penalty Act of 1996 (‘AEDPA’), which governs federal habeas review of state convictions, requires ‘substantial deference’ to a state court’s ruling on petitioner’s constitutional claim.” The State cannot waive the deference that the federal court must give to the state court opinion. *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014). Federal courts cannot grant relief under the AEDPA unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established federal law.” 28 U.S.C. § 2254(d)(1).

When the state court decided Ellis’ petition claiming ineffective assistance of counsel, it employed the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), meaning Ellis had to show that Ames performed deficiently and that Ames’ performance prejudiced the defense, i.e., the outcome would have been more favorable to Ellis absent Ames’ errors. The state court denied Ellis’ petition because he had failed to prove “by a preponderance of the evidence” that Ames’ errors resulted in prejudice. This decision was contrary to clearly established federal law because the Supreme Court of the United States has explicitly stated it would be contrary to *Strickland* to require a defendant to show prejudice “by a preponderance of the evidence.” *Williams v. Taylor*, 529 U.S. 362 (2000).

Because the state court’s decision was contrary to federal law, the Court owed no deference to the decision. The Court was then free to decide Ellis’ petition under the standard of *United States v. Cronic*, 466 U.S. 648 (1984). Under Cronic, there are some circumstances where prejudice to the defense is presumed. And in *Frazer v. United States*, 18 F.3d 778 (9th Cir. 1994), the Ninth Circuit held that prejudice could be presumed from counsel’s extreme racial animus. This is because an attorney who is deeply racist cannot be a loyal advocate, especially one who states he does not care what happens to his clients. Additionally, an attorney’s actions — or inactions — throughout his representation are not made a part of the record for a reviewing court to examine in order to determine whether prejudice occurred.

Judge Nguyen concluded the concurring opinion with: “Here, counsel’s extreme racism rendered Ellis’s trial fundamentally unfair and its result unreliable. For this reason, I concur in the majority’s decision to reverse the district court’s judgment denying habeas relief.”

Accordingly, the Court reversed the district court’s denial of Ellis’ habeas petition and remanded to the district court with instructions. See: *Ellis v. Harrison*, 947 F.3d 555 (9th Cir. 2020).
On February 10, 2020, the Supreme Court of Georgia unanimously ruled that reviewing courts are to consider the cumulative effect of trial court and counsel errors, overturning 50 years of prior jurisprudence.

At Antiwan Lane’s murder trial, Kevin Stallworth testified that Lane hired him to kill Hector Gonzalez for $10,000 after Lane had initially tried to hire Eddie Davis to do the deed. Stallworth mistakenly shot and killed Ivan Perez. After the murder, Lane refused to pay Stallworth because he had killed the wrong man.

Detective Delima testified, without objection, that an informant told him the shooting was a murder-for-hire. Delima also testified, over defense counsel’s objection, that Davis, “confirmed” that Lane had initially tried to hire him to kill Gonzalez.

Stallworth’s girlfriend, Brittany Thompson, testified, over defense’s objection, that Stallworth told her on the date of the murder, “I’m going to do it. He want me to do it, I’m going to kill him, I’m going to get the money.” Again over counsel’s objection, Thompson testified that Stallworth told her after the murder that Lane did not pay him because he shot the wrong person. The trial court overruled defense’s objections, ruling that Thompson’s repeating of Stallworth’s statements wasn’t hearsay under OCGA § 24-8-801(d)(2)(E) because Stallworth’s statements were made in furtherance of a conspiracy.

After Lane was found guilty, the trial court granted his motion for a new trial. The court found that Lane’s counsel was ineffective for, among other things, (1) failing to introduce evidence that showed Delima lied when he testified that Davis had “confirmed” Lane had initially tried to hire him to kill Gonzalez and (2) for failing to object to hearsay and bolstering testimony by Delima.

The trial court also granted the motion on the ground that it had erred when it allowed Thompson to testify as to Stallworth’s statements to her. The State appealed, arguing that none of the errors resulted in sufficient prejudice to warrant reversal.

The Georgia Supreme Court observed that the Court considers the cumulative effect of counsel’s errors when deciding claims of ineffective assistance of counsel because of the Supreme Court of the United States ("SCOTUS") requires it. Strickland v. Washington, 466 U.S. 668 (1984). But the Georgia Supreme Court had “said repeatedly that this State does not recognize the cumulative error rule” — meaning we do not consider the collective prejudicial effect of multiple errors by the trial court, or the collective prejudicial effect of trial court error and ineffective assistance of counsel.” Grant v. State, 824 S.E.2d 255 (Ga. 2019).

This rule came from a civil case, Hess Oil & Chem. Corp. v. Nash, 177 S.E.2d 70 (Ga. 1970), that did not say anything about the proper standard for granting a new trial in criminal cases, the Court explained. In fact, the Court stated that it is unable “to identify any legal principle — let alone a compelling, reasoned explanation — behind our existing rule....” It noted that the rule “appears to have been based on the notion that” there’s no way to add up individual errors and determine their cumulative effect.

The Court rejected that rationale, stating “although consideration of the combined prejudicial effects of different types of errors may sometimes be more challenging than considering errors in isolation, it certainly is not impossible.” Finding that Hess Oil’s reason for not considering the cumulative effect of errors is no longer valid, the Court also was persuaded by the fact that all the federal circuits, as well as sister states of Alabama, Tennessee, and Florida do consider the cumulative prejudicial effect of trial court and ineffective assistance of counsel errors. (See opinion for citations of supporting cases from each federal circuit and sister states.)

Furthermore, SCOTUS explicitly requires prejudice from cumulative errors be considered when deciding claims that prosecutors withheld evidence favorable to the defense. Kyles v. Whitley, 514 U.S. 419 (1995). Because the Court concluded that there is no good rationale for the rule prohibiting courts from considering the cumulative effect of errors, it overturned all its prior decisions and those of the Court of Appeals that held the cumulative effect cannot be considered. (The Court cited over 50 specific cases in the decision’s appendix that were overruled, along with the caveat that this was not an exhaustive list.)

The Court stated that “weighing prejudice cumulatively is simply a natural implication of the harmless-error doctrine.” United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990). The appropriate legal standard for harmless error depends upon the type of error claimed. Cargle v. Mullins, 317 F.3d 1196 (10th Cir. 2003). The burden is on the defendant to identify to the reviewing court the type of error and explain how the error resulted in prejudice. Id. Ineffective assistance of counsel requires a defendant to show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. Strickland. A nonconstitutional trial court error is harmless if the state shows it is “highly probable that the error did not contribute to the verdict.” Bansmister v. State, 830 S.E.2d 79 (Ga. 2019). This requires consideration of the other evidence heard by the jury. Id.

Turning to the present case, the Court agreed with the trial court that Lane’s counsel was deficient for failing to object to Delima’s bolstering and hearsay testimony and for failing to present evidence that Delima had lied about Davis. Because these errors served to corroborate Stallworth’s testimony — as did Thompson’s testimony, there was a reasonable probability that, absent counsel’s errors, the result would have been different. Likewise, Thompson’s testimony corroborated Stallworth’s testimony. Since Stallworth had reason to put blame on Lane, his credibility was diminished.

The State’s case centered on Stallworth’s credibility, so the State could not show it was highly probable Thompson’s testimony didn’t contribute to the verdict — especially considering defense counsel’s errors regarding Delima.

Accordingly, the Court affirmed the trial court’s decision granting Lane’s motion for a new trial. See: State v. Lane, 2020 Ga. LEXIS 98 (2020).
The U.S. Court of Appeals for the Third Circuit ruled that Arthur Johnson’s right to confront his accusers was violated when his non-testifying codefendant’s statement identifying “the other guy” as the shooter was read to the jury, and the jury was told that “the other guy” referenced in the statement was Johnson.

Johnson and his codefendant, Tyrone Wright, were tried together for the murder of alleged drug dealer Donnie Skipworth in Philadelphia. Prior to trial, Wright confessed to his involvement in the crime, stating that he and Abbas Parker were sitting in Wright’s van when Johnson approached. According to Wright’s statement, Johnson told the two men that he saw Skipworth up the street and that he was going to talk to him. Parker exited the van and accompanied Johnson. Johnson and Parker both had handguns. Moments later, Wright heard gunshots, and then Parker came running back, jumped into the van, and yelled for Wright to go. While the two were fleeing in the van, Parker told Wright that Johnson had shot Skipworth.

Over Johnson’s objections, Wright’s statement was read to the jury by the detective who had taken it, James Burns. However, the Superior Court ruled that whenever the statement mentioned Johnson by name, Burns had to either substitute the pronouns “he” or “him” or use the phrase “the other guy” or “some guy.” But during opening statements, Wright’s counsel told the jury that Wright had written in his statement that Johnson and Parker went there to shoot Skipworth. And during closing arguments, the prosecutor told the jury that Wright had identified Johnson in his statement.

The trial court instructed the jury that they could not use Wright’s statement against Johnson. Shortly thereafter, the jury convicted Johnson, and he appealed, arguing that his rights under the Confrontation Clause were violated pursuant to Bruton v. United States, 391 U.S. 123 (1968).

The Pennsylvania Superior Court affirmed, ruling there was no Bruton error. Johnson then sought federal habeas relief. The federal district court ruled that the trial court had erred under Bruton, but that the error was harmless. Johnson appealed to the Third Circuit.

The Court observed that “[t]he Confrontation Clause of the Sixth Amendment guarantees a criminal defendant’s right to be ‘confronted with the witnesses against him.’” This includes the right to cross-examine them. Pointer v. Texas, 380 U.S. 400 (1965). When a non-testifying codefendant’s statement is introduced, it is in effect the testimony of a witness who cannot be cross-examined. Bruton. If that statement implicates the other defendant, a trial court’s instructions to the jury to ignore or to not use the statement against the other defendant is insufficient because “the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” Id. However, if a confession is redacted to eliminate “not only the defendant’s name, but any reference to his or her existence,” then there is no constitutional violation. Richardson v. Marsh, 481 U.S. 200 (1987). But the redactions cannot be so ineffectual as to allow the jury to infer that the codefendant’s name was deleted. Gray v. Maryland, 523 U.S. 185 (1998).

Here, only Johnson and Wright were on trial. Wright’s statement mentioned Parker and “the other guy.” “The limited participants in this case made it obvious to a juror who ‘need only lift his eyes to [Johnson], sitting at counsel table,’ to determine that he was the other guy, i.e., the shooter.” Gray. And the remarks of Wright’s counsel and those of the prosecutor clarified this to the jury. The jury’s question about Wright’s statement and using it against Johnson removed any doubt as to whether they understood that “the other guy” was Johnson. The Third Circuit concluded the trial court violated Johnson’s right to confrontation.

The Court further concluded the error was not harmless. If there is grave doubt as to whether an error had an injurious effect in determining a jury’s verdict, courts are to resolve that doubt in the defendant’s favor. O’Neal v. McAninch, 513 U.S. 432 (1995). The Court examined the evidence against Johnson and concluded it was not overwhelming. Further, the jury’s six-day deliberation indicated it wasn’t an easy decision. And the jury’s question about Wright’s statement shortly before returning the verdict revealed the statement played a major role in the verdict.

Accordingly, the Court affirmed the district court’s finding that a Bruton error occurred but reversed the finding that the error was harmless. It remanded with instructions to grant Johnson’s habeas petition and order the State to release him unless he is retried within a time fixed by the district court. See: Johnson v. Superintendent Fayette State Corr. Inst., 949 F.3d 791 (3d Cir. 2020).

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D.C. Circuit: 18 U.S.C. § 1114 Does Not Apply Overseas But § 924(c) Does

by Douglas Ankney

The U.S. Court of Appeals for the D.C. Circuit held that 18 U.S.C. § 1114 does not apply to territories outside the United States. However, the Court ruled that 18 U.S.C. § 924(c) does apply extraterritorially in specific circumstances.

While in Mexico, Jose Emanuel Garcia Sota and another defendant, Jesus Ivan Quezada Piña, attacked American special law enforcement agents Victor Avila and Jaime Zapata. Zapata was killed, but Avila survived. The defendants were tried in Washington, D.C., where each was convicted of two counts of killing an officer or employee of the United States in violation of 18 U.S.C. § 1114, one count of killing a person protected by international law in violation of 18 U.S.C. § 1116, and one count of using a firearm while committing a crime of violence in violation of 18 U.S.C. § 924(c). On appeal, they argued that §§ 924(c) and 1114 are not extraterritorially enforceable.

The D.C. Circuit observed “[a]ccording to a longstanding canon of statutory interpretation, our courts presume that American laws do not apply outside of the United States — unless Congress directs otherwise.” And “[t]he canon rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters.” Morrison v. Nat’l Australia Bank, Ltd., 561 U.S. 247 (2010). The presumption may be rebutted and is overcome when Congress affirmatively and unmistakably instructs that the statute will apply abroad. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016).

Since § 1114 does not say anything regarding extraterritorial application, the presumption against such application was unrebutted. Additionally, the Court opined that Congress, in nearby § 1116, stated that § 1116 explicitly applies to conduct outside America’s borders. When Congress explicitly provides for extraterritorial jurisdiction in one section but makes no such provision in a nearby section, it is presumed the omission is intentional. United States v. Thompson, 921 F.3d 263 (D.C. Cir. 2019). The Court was also persuaded by the fact that §§ 1114 and 1116 were both amended at the same time in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Most significantly, the AEDPA revised § 1116 to make it apply extraterritorially but inserted no similar provision into § 1114. The Court concluded that Congress intended § 1114 to apply only to domestic crimes committed within the territorial jurisdiction of the United States.

But regarding § 924(c), the Court observed the statute “renders criminal the use of a firearm ‘in relation to any crime of violence or drug trafficking crime.’” Section 924(c) requires a defendant to be convicted of a predicate crime before he or she may suffer liability under that section. In RJR Nabisco, the Supreme Court dealt with a similar circumstance in relation to the Racketeer Influenced and Corrupt Organizations Act (“RICO”).

The Supreme Court clarified that before RICO could apply overseas, it is absolutely required that “the predicates alleged in a particular case themselves apply extraterritorially.” In the instant case, the defendants were convicted of a violent crime in violation of § 1116, and as already discussed, that section applies extraterritorially. That crime also qualifies as a predicate to support their convictions under § 924(c). Following the reasoning of the Supreme Court in RJR Nabisco, the D.C. Circuit ruled that in this specific instance § 924(c) applies extraterritorially because the predicate offense was obtained under § 1116, which is applicable extraterritorially.

Accordingly, the Court vacated only the defendants’ convictions under 18 U.S.C. § 1114 and remanded for limited resentencing. See: United States v. Sota, 948 F.3d 356 (D.C. Cir. 2020).

Louisiana Supreme Court: When an Identified Attorney Seeks to Assist a Person in Custody and Police Fail to Inform the Person, Inculpatory Statements Must Be Suppressed

by Douglas Ankney

The Supreme Court of Louisiana reaffirmed that the law of Louisiana requires law enforcement to inform a person in custody whenever an identified attorney is seeking an opportunity to assist the person. If the police fail to inform the person in custody of the attorney, any statement obtained and any fruits thereof must be suppressed.

Donovan Alexander gave police consent to search his residence on Vintage Drive in Kenner. Officers seized two pounds of marijuana, a firearm, and Carisporol pills. Alexander was arrested at the residence, and police then traveled to Alexander’s “stash house” on Curran Boulevard in Orleans Parish. A female occupant gave permission to search. Police recovered eight grams of heroin and a loaded firearm from a dresser-drawer.

Alexander was arrested at Kenner Police Headquarters where he signed a waiver-of-rights form and told police not to charge the woman at the Curran Boulevard residence because the drugs and firearm were his. Alexander was taken to Kenner Police Headquarters where he signed a waiver-of-rights form and told police not to charge the woman at the Curran Boulevard residence because the drugs and firearm were his.
Alexander, and that he was at the Kenner Police Headquarters when Alexander waived his rights and gave his statement.

The district court ruled that, because the State offered no evidence to rebut the allegation that police had failed to inform Alexander that Burrell had expressed a desire to assist Alexander, the statement would be suppressed. The State appealed. Relying primarily on Moran v. Burbine, 475 U.S. 412 (1986), the court of appeal reversed. The Louisiana Supreme Court granted Alexander further review.

The Court observed that “[a]t a hearing on a motion to suppress a statement, the State bears the burden of proving the free and voluntary nature of the confession given while in custody.” State v. Scarborough, 256 So.3d 265 (La. 2018). For an inculpatory statement or confession to be admissible, the State must establish that it was made freely and voluntarily and not the result of fear, duress, intimidation, menace, threats, inducements, or promises. La. R.S. 15:451; La. C. Cr. P. art. 703 (D); State v. Anderson, 996 So.2d 973 (La. 2008).

In addition, the Fifth Amendment to the U.S. Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself...” Because custodial questioning creates “compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely,” law enforcement are required to give suspects in custody warnings that advise them of their right to remain silent, of their right to have an attorney present, of their right to stop answering questions at any time, and that anything they say will be used against them. Miranda v. Arizona, 384 U.S. 436 (1966).

The Burbine decision involved a case similar to Alexander’s situation that also interpreted and applied Miranda. In Burbine, the police failed to inform the defendant that an attorney had called the police and told them he was representing the defendant. The defendant later signed a waiver stating he did not want an attorney, gave statements, and appeared in a lineup. The U.S. Supreme Court ruled that the waiver was valid, and police were under obligation only to give the Miranda warnings, determine the suspect understood them, and to obtain a valid waiver. The police had no duty, however, to inform a suspect that an attorney was ready to represent him.

But the Louisiana Supreme Court further observed that Burbine also instructed that nothing in the opinion “disable[d] the States from adopting different requirements for the conduct of its employees and officials as a matter of state law.” That is, the states are free to provide greater protections under state law than that provided under federal law.

In keeping with that principle, in State v. Matthews, 408 So. 1278 (La. 1982), the Louisiana Supreme Court determined that refusal by police to inform a defendant that his lawyer wanted to assist him was “unwarranted interference” with an accused’s right to assistance of counsel in violation of Article 1, Section 13 of the Louisiana Constitution. Furthermore, once one officer is made aware that an identified attorney is ready to assist a suspect, it is presumed that all officers possess this knowledge. State v. Weedon, 342 So. 642 (La. 1977). Applying the foregoing law to the facts in this case, the Court concluded that the court of appeal erred in reversing the district court’s grant of the motion to suppress.

Accordingly, the Court reversed the judgment of the court of appeal and reinstated the judgment of the district court. See: State v. Alexander, 2020 La. LEXIS 224 (2020).
On January 24, 2020, the Court of Appeals of Maryland announced that henceforth trial courts, when requested, must ask potential jurors during voir dire if any of them are unwilling or unable to follow the court’s instructions on the presumption of innocence, the burden of proof, and the right not to testify. In so doing, the Court of Appeals expressly overruled Twinning v. State, 198 A.2d 291 (Md. 1964), which held that courts need not ask such questions of potential jurors.

Prior to jury selection for Tshibangu Kazadi’s murder trial, the defense asked the trial court to ask potential jurors the following questions during voir dire: (1) “Are there any of you who would be unable to follow and apply the Court’s instructions on reasonable doubt in this case?” (2) “Is there a member of the jury panel who would hesitate to render a verdict true in Maryland, where the [jury] instructions are only advisory.”

But there had been substantial changes in the law since Twinning was decided, as well as a significant increase in the Court’s understanding of the minds of jurors. For instance, 16 years after Twinning was decided, the Court held that juries did not have “the power to decide all matters that may be correctly included under the generic label ‘law.’ Rather, [a jury’s] authority is limited to deciding the law of the crime, or the definition of the crime, as well as the legal effect of the evidence before the jury.” Stevenson v. State, 423 A.2d 558 (Md. 1980), “[A]ll other aspects of law (e.g., the burden of proof, the requirement of unanimity, the validity of a statute) are beyond the jury’s pale, and … the [jury] instructions on these matters are binding upon that body.”

A year later, in Montgomery v. State, 437 A.2d 654 (Md. 1981), the “Court observed that fundamental rights, such as the presumption of innocence, the burden of proof, and the right not to testify, are not the law of the crime; they are not advisory. They are binding. They are the guidelines of due process to which every jury is required to adhere.”

Additionally, it could no longer be said, as the Twinning Court did, that it “is generally recognized that it is inappropriate to instruct on the law [during voir dire], or to question the [prospective jurors] as to whether or not they would be disposed to follow or apply stated rules of law.” Kentucky, Illinois, New Hampshire, Louisiana, Missouri, New Jersey, Florida, and the U.S. Court of Appeals for the Sixth Circuit have all held that prospective jurors may be asked during voir dire whether they are unable or unwilling to follow the court’s instructions regarding the prosecution’s duty to prove guilt beyond a reasonable doubt, the defendant’s presumption of innocence, and the fact that the jury cannot hold it against a defendant for not testifying or “telling his side of the story.” (See Court opinion for listing of supporting citations from those other jurisdictions.)

Furthermore, when Twinning was decided, no empirical studies had been done to evaluate jurors’ abilities to comprehend a court’s instructions or their willingness to follow them. But beginning in the 1970s, studies “have consistently revealed comprehension levels at or below fifty percent for samples of actual and mock jurors for a wide range of [jury] instructions[,] including [jury] instructions on the reasonable doubt rule.... Less than a third ... understood the burden of proof. Other studies ... [found] comprehension error rates ranging between twenty percent and fifty percent.” The Rhetoric of Innocence, 70 Wash. L. Rev. 329 (1995).

Based on these changes in the law and the increase in the knowledge of jurors’ minds in following instructions, the Court concluded that the reasoning of Twinning is no longer valid.

While the doctrine of stare decisis requires a court to follow earlier judicial decisions on the same points raised again in later litigation, the doctrine is not absolute. Meyer v. State, 128 A.3d 147 (Md. 2015). When, as in the case at bar, changes in conditions or increases in knowledge have made the precedent “unsound in the circumstances of modern life, a vestige of the past, and no longer suitable to the people,” a reviewing court may overrule the precedent. Wallace v. State, 158 A.3d 521 (Md. 2017). On that reasoning, the Court overruled Twinning.

However, the Court recognized that all federal circuits except the Sixth, as well as courts in other states, continue to abide by
Sixth Circuit: Ohio’s Stringent Post-Conviction Filing Deadline Opens Window for Federal Review Under Trevino

by Anthony Accurso

The U.S. Court of Appeals for the Sixth Circuit held that Ohio’s strict application of its post-conviction challenge deadline deprived a defendant of meaningful review of his ineffective assistance of counsel claim.

Vincent White was convicted in an Ohio court of several violent crimes, including six counts of murder, and he was sentenced to life without parole. While preparing his direct appeal, White discovered that his trial attorney, Javier Armengau, was under indictment for 18 serious felonies during the time he represented White. Armengau was convicted on nine of the counts.

White filed a timely direct appeal which asserted, among other things, a claim that Armengau’s indictment constituted a conflict of interest amounting to ineffective assistance of counsel (“IAC”). The Ohio Court of Appeals decided it could not adequately weigh White’s IAC claim because the record on appeal was insufficient, and the court was limited to facts established by the trial court. The Court of Appeals implied that a motion for post-conviction relief would be the proper vehicle for his claim because it would allow for an expansion of the record.

However, the Court of Appeals issued its decision four months after the deadline for White to file a motion for post-conviction relief. White then filed a habeas motion under 28 U.S.C. § 2254 with the federal district court. The district court denied it, but issued a certificate of appealability as to the IAC claim relating to conflict of interest.

The Sixth Circuit began by determining whether White’s claim was adjudicated on its merits. The Ohio Court of Appeals expressly rejected it could review his claim on the merits despite direct appeal in Ohio being a valid avenue for IAC claims. For this reason, the federal district court should have engaged in de novo review of the legal issues, not a merits review, especially since White never had the opportunity to expand the record regarding his IAC claim.

The Court then considered whether White’s late filing of his post-conviction relief motion precluded the federal court from considering his claim for lack of exhaustion. The Court used the four-prong analysis from Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986), in determining whether his claim is procedurally defaulted.

The Court found White met the first three prongs because he failed to comply with Ohio’s procedural deadline, the State enforced the rule, and his failure foreclosed federal review. The Court was then required to determine whether White had cause to fail to follow the rule and was prejudiced by this failure. This fourth Maupin prong hinged on White’s appellate attorney’s understanding of the case and applicable law. White’s attorney correctly saw the IAC claim as reviewable on direct appeal but was mistaken as to whether the record was sufficiently developed to allow for review. It was because his lawyer made this mistake that White did not timely file a motion for post-conviction relief.

The Court then explained that generally “a claim of ineffective assistance of appellate counsel is unavailable as a means of showing cause for petitioners whose default occurs during post-conviction proceedings, as White’s did here.” It noted that defendants are not guaranteed a right to a lawyer during collateral proceedings, so they can’t rely on their pro se status as a means of overcoming a procedural default during the post-conviction stage. West v. Carpenter, 790 F.3d 693 (6th Cir. 2015).

However, the U.S. Supreme Court announced a narrow exception to the general rule if the petitioner can show (1) he has a “substantial” claim of IAC, (2) he had “no counsel or counsel … was ineffective” during collateral-review stage, (3) that stage was the “initial” review of his claim, and (4) state law mandates IAC (trial counsel) claims be made initially in a collateral-review proceeding, Martinez v. Ryan, 566 U.S. 1 (2012). The following year, the Supreme Court modified the fourth prong by applying the Martinez framework to any state where “by reason of its design and operation, [state procedure] makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.” Trevino v. Thaler, 569 U.S. 413 (2013).

The Court applied Trevino and recognized Ohio’s procedure regarding IAC claims, which require additional fact-finding “do not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal,” and they “deprive the defendant of any opportunity at all for review of that claim.” In short, between White’s appellate attorney and the state’s procedural rules, he was deprived an opportunity to develop a factual record for his IAC claim. Thus, the Court ruled that “White is not procedurally barred from raising his ineffective-assistance claim....”

Accordingly, the Court vacated the decision of the district court and remanded with instructions to consider, in the first instance, White’s claim de novo and whether he is entitled to an evidentiary hearing to supplement the record. See: White v. Warden, 940 F.3d 270 (6th Cir. 2019).
The Faulty Science of Breathalyzers

by Jayson Hawkins

The forensic sciences, once believed to offer infallible evidence against a wide spectrum of crimes, have in many instances been exposed as little more than smoke and mirrors.

To the growing list of faulty, misleading, or disproven methods can be added alcohol breath-testing.

A recent investigation by The New York Times has exposed the supposedly scientific devices that conduct the tests to often be unreliable at best; at worst, they are generators of bogus results that have condemned untold number of drivers to undeserved criminal convictions.

According to the Times, there are a million drunk-driving arrests annually in the U.S. While they often begin with an impairment test such as balancing on one foot, they almost always end with blowing into a black box meant to measure the percentage of alcohol in the driver’s system. If the machine spits out an estimate greater than or equal to 0.08, the driver’s luck is about the take a downward turn.

The seeming conclusiveness of a breath-alcohol reading discourages anyone from fighting the result in court. The best option is often pleading guilty for a reduced sentence or to avoid jail time even when the accused know they are innocent. As the Times puts it, “When it’s the state armed with fake science vs. an individual motorist who had a couple of beers, everyone knows who wins.”

Massachusetts, a state whose forensic laboratory already had a reputation for committing fraud, found that its lab had no procedure to test the Alcotest 9510 machines currently in use—and that technicians had covered up hundreds of unsuccessful attempts to calibrate the machines. The problems ran so deep that the state’s courts have discarded over 36,000 test results and halted use of the machines until significant reforms are made.

New Jersey has experienced a similar crisis wherein 13,000 cases have had to be overturned because of programming errors in the Alcotest 7110. Although the manufacturer, Drager, fixed the software when experts pointed to the problems in 2007, the state neglected to implement the update.

Washington state also ran into trouble with Drager products, including the 9510 model that sometimes rounded up results to push drivers past the .08% threshold.

Issues in other states have made it clear that problems with breath-alcohol test devices are not limited to a single manufacturer. Vermont discovered that Intoxilyzer BODO machines were consistently unreliable as early as 2005, yet Florida, Mississippi, Oregon, Ohio, and other states have continued to use them.

The problem, in a nutshell, is that the only valid means of determining blood-alcohol content is through a blood test—a particularly invasive procedure that law enforcement should neither be expected nor trusted to perform.

Rather than base arrests on the amount of a substance in one’s blood, then, the Times points out that the logical solution would be to predicate them on reckless driving.

If the growing list of faulty forensics has taught but one lesson, it should be the inherent danger in mixing political power with pseudoscience. As the Times report concludes, “The state cannot be trusted to police its own application of science in service of itself. It will always face an incentive to exaggerate to gain more money and more convictions.”

Sources: aier.org, reason.com

Fact or Fiction, Television Crime Shows Ignore Racism and Reality

by Michael Fortino, Ph.D.

Both fictional and non-fictional depictions of crime and justice abound on television, film, and throughout the media, yet nearly all exist in an alternate reality ignoring racism and balance. Americans have developed a boundless appetite for such fare in our society, yet they are being fed a skewed and unrealistic version of the criminal justice system.

Recently, Color of Change, a not-for-profit civil rights organization studied 26 scripted series that focused on crime and justice in the 2017-2018 season. The study claims that many of these productions advance “distorted representations of crime, justice, race and gender in media and culture.” According to Valencia Gunders, a Miami community activist, “the media continues to represent preconceived notions based on stereotypes.” She goes on to suggest, “The crime genre glorifies, justifies and normalizes the systematic violence and injustice meted out by police, making heroes out of police and prosecutors who engage in abuse, particularly against people of color.”

Non-fiction shows like Live PD and Cops, which follow the “reality” show format, often portray police as beleaguered defenders and public servants who sometimes overstep constitutional limits in order to promote safety. This simplistic idea of “justice” heralds back to childish notions of “cops and robbers” and “good guys and bad guys,” stereotypes that have, after several generations, taken deep roots in the American imagination. Often these so-called “reality” shows are pumped up with music, editing, and an on-going or post-facto commentary which is meant to rationalize and justify the actions.

Other shows like 60 Days In, and countless similar offerings on the A&E and History Channel, purport to depict “real” life in prison when nothing could be further from the truth. These shows are also underscored with dramatic music and voice-over theatrics. Prison officials are shown as faithful and dedicated servants called upon to perform a heroic task or to “help” or “guide” the prisoner through the difficult time of incarceration.

Most prison reality shows are shot on location in the worst possible facilities and feature the most hardened offenders, all while the cameras are rolling so that these “non-actors” may enjoy a moment in the spotlight. The point being made is that prison is a necessary evil existing in order to keep these violent people out of society, forever if need be. There are no prison “reality” shows about the squalor of small jails and county lock-ups where many, unable to afford bail, sit and wait for months with little more than cards or dominos while awaiting trial.

According to the study by Color of Change, “television and streaming shows always ignore racial disparities in the criminal system.”
Third Circuit Holds ‘Bare’ Arrest Record Insufficient to Support Higher Sentence

by Dale Chappell

In a case that reiterated the limits a federal sentencing judge may consider at sentencing, the U.S. Court of Appeals for the Third Circuit held that when a sentencing judge relies on ‘bare’ arrest records in a defendant’s criminal history to justify imposing a higher sentence, it is a violation of due process and plain error, requiring remand for resentencing.

After a confidential informant set up Tyrone Mitchell in three controlled drug buys, the Pennsylvania Bureau of Narcotics Investigation (working with federal agencies) obtained search warrants to comb through two houses where it believed Mitchell kept his drugs. Between the two houses, police seized drugs and guns and charged Mitchell with 17 counts of various drug and gun crimes. At the end of a seven-day trial, a jury found Mitchell guilty of all charges.

The issue in Mitchell’s case came down to sentencing. Mitchell himself described his criminal history as ‘staggering,’ and indeed, he did qualify as a career offender. That put him at a sentencing range of 30 years to life. But the sentencing judge did more than just rely on Mitchell’s prior convictions to impose a sentence of 85 years in prisons without parole. He relied on Mitchell’s 18 arrests that didn’t result in convictions.

“This is as long and serious of a criminal record as I’ve seen in twelve and half years on the bench,” Judge Paul S. Diamond, of the U.S. District Court for the Eastern District of Pennsylvania, said in imposing the sentence.

The Court reiterated that ‘under the Due Process Clause, a defendant cannot be deprived of liberty based upon mere speculation.’ Speculation about a defendant’s criminal history, the Court said, ‘is problematic whether it results in an upward departure, denial of a downward departure, or causes the sentencing court to evaluate the § 3553(a) factors with a jaundiced eye.’

Accordingly, the Court vacated Mitchell’s sentence and remanded for resentencing without reliance on the bare arrest record. See: United States v. Mitchell, 944 F.3d 116 (3d Cir. 2019).
Nigeria is implementing a U.S.-style public registry for sex offenders. “Campaigners have hailed the launch of Nigeria’s first sex-offender registry as a vital step toward tackling reported cases of sexual abuse, which are rising across the country,” reports The Guardian. Despite a dearth of statistics, UNICEF estimates that one in four girls has experienced sexual violence by age 18. However, offenders often go unpunished because of cultural and institutional reasons. Victims are treated poorly, and complaints are not treated seriously.

Oluwaseun Osowobi, the director of a nonprofit victim support organization, said of the registry: “It enables bodies such as schools and hospitals to conduct background checks and it will deter sex offenders because they will know their names will be published, affecting their employment and role in society.”

This is almost certainly true, as the U.S. experiment has shown. Offenders are shamed into homelessness and joblessness in the United States, often for life.

But will the registry prevent sexual assault of women and children? If the U.S. experience is any indication, the Nigerian registry will not reduce incidents of sexual assault. Registries were implemented in the 1990s based on two erroneous notions: (1) that sex offenders have high recidivism rates that do not decline over time and (2) that parents, given knowledge of their names will be published, affecting their employment and role in society.

Parents are no better off because there are so many low-risk individuals on registries — they cannot reasonably sort through the mountains of vague data to properly assess risks posed by individuals. Also, since most child sexual abuse is perpetrated by a family member or friend of the victim, it is highly unlikely that strangers would pose a legitimate threat to the vast majority of children. And this assumes parents bother to check registries. Many don’t, which means the sole purpose of registries at this point is to drive offenders from communities by depriving them of access to jobs and housing, regardless of their actual risk to society.

According to the editorial board of Georgia’s Union-Recorder, this is exactly the purpose. “As a society we have determined that in the case of convicted sexual offenders, the potential danger to the general public, and especially children, outweighs their rights to resume a normal life after their debt to society is paid.” The board advocates for harsher restrictions and stiffer enforcement but proposes no real solutions.

Such rhetoric is untethered from the facts that we have learned of the cause-and-effect relationship between the stigma and isolation that men and boys (who are primarily prosecuted for sex crimes) suffer and their sexual offending. Only by addressing the cultural causes of this problem will we reduce sexual violence. Nigerians would do well to learn from our mistakes before making them all over again themselves.

Source: theappeal.org

Pennsylvania Supreme Court Holds Retention of Defendant’s ID Card Constitutes ‘Seizure’ for Fourth Amendment Purposes

by Dale Chappell

The Supreme Court of Pennsylvania held on January 22, 2020, that the retention of a person’s identification card by law enforcement constituted a “seizure” under the U.S. Constitution, triggering the protections of the Fourth Amendment’s prohibition on unreasonable seizures.

The case came before the Court after Harold Cost was successful in his efforts to suppress evidence found after an arrest, where Philadelphia police officers had retained his ID card during questioning and subsequently found that he had a firearm. The Commonwealth appealed that decision, arguing that the incident was merely an encounter and not a seizure. The Superior Court agreed on appeal and reversed the suppression court’s decision, and the Supreme Court agreed to hear the case.

At the suppression hearing, one of the officers testified that Cost and his friends were stopped in an alley in the city known for high crime activity. In an incident that the officer said “lasted less than a minute,” Cost handed the officer his ID card, and a warrant check came back all clear. The officer also admitted that he didn’t see any criminal activity by Cost and his friends.

However, the two officers that stopped the men assumed a “field interview stance” and asked further questions about their intentions in the alley. Maybe there was some “gambling, you know, maybe smoking a little weed,” one of the officers testified at the suppression hearing. Cost had a backpack, and an officer asked, “you have anything in that backpack I need to know about?” Cost acknowledged that he had a firearm in the backpack. Throughout the encounter, the police held the ID cards of the men.

Yet, when questioned at the hearing about the stop, an officer said that the men, including Cost, could have “walked off at any time,” and they didn’t have to answer any questions. The suppression court disagreed and concluded that Cost and his friends had been seized illegally by the police and suppressed the firearm evidence.

The court found that, under a totality of the circumstances, the officers’ actions did “escalate the incident” beyond a mere encounter. The judge explained that the officer’s question about whether there was anything in the backpack “that would hurt me” put the incident “way past” an encounter. “That’s what you ask when the guy is under arrest,” the judge said.

The superior court, on appeal, did not agree: “The officer posed innocuous questions to the men while on a public street, and did not display their weapons. Accordingly, under the totality of the circumstances, we find that the incident was a mere encounter.”

Before the Supreme Court, Cost argued.
that the officer retaining his ID card while interrogating him constituted a "seizure" under the Fourth Amendment to the U.S. Constitution, and that was the legal issue the Supreme Court was called upon to decide.

The Court canvassed numerous state and federal courts, noting a "deeply divided" split over whether retaining an ID card constitutes a "seizure" under the Fourth Amendment. It noted that this case does not call for us to consider the adoption of a bright-line rule." Rather, the Court reiterated that courts within the state must engage in a totality-of-the-circumstances inquiry to decide whether a reasonable person would feel "free-to-leave" in determining whether a citizen-police interaction is a mere encounter or an investigative detention.

Such an inquiry requires courts to examine "all surrounding circumstances evidencing a show of authority or exercise of force, including the demeanor of the police officer, the manner of expression used by the police officer, the manner of expression used by the police in addressing the citizen, and the content of the interrogatories or statements." Commonwealth v. Mendenhall, 715 A.2d 1117 (Pa. 1998). A request for ID does not automatically transform a mere encounter into an investigative detention. Commonwealth v. Au, 42 A.3d 1002 (Pa. 2012).

Even though Cost's ID card was held only briefly, a citizen "may not be detained even momentarily without reasonable, objective grounds for doing so," the Court explained.

Further, when an officer continues to retain someone's ID card during questioning, "such treatment of another's property is a substantial escalating factor in terms of the assertion of authority," the Court said. After all, "an individual is practically immobilized without adequate identification," the Court reasoned.

In addition to retaining Cost's ID card during questioning, the Court cited four other factors that contributed to the finding that he was seized for Fourth Amendment purposes: (1) the announcement of "police" as the officers approached Cost and his friends escalated the incident, (2) the "field interview stance" assumed by the officers implied to the men that they were a "threat," (3) the questioning of the backpack implied an "authoritative right to know about the content," and (4) the officer never told Cost what he intended to do with his ID card.

Finding the evidence at the suppression hearing in the light most favorable to Cost (because he was the prevailing party at the hearing), the Court held that a totality of the circumstances review of the facts in this case results in a determination that Cost was subject to "an investigatory detention at the relevant time" and "that he was indeed seized."

Accordingly, the Court reversed the superior court. See: Commonwealth v. Cost, 2020 Pa. LEXIS 315 (2020). ■

**Kansas Supreme Court: Claim of Illegal Sentence Raised for First Time on Appeal Entitled to Merits Review**

by Michael Berk

The Supreme Court of Kansas held that a court of appeals must consider a claim that a criminal defendant's sentence is illegal even when raised for the first time in the appellate court.

In 1995, Billy Sartin was convicted of several crimes in Kansas. His sentence was enhanced under the Kansas Sentencing Guidelines, K.S.A. 21-4701 et seq., based on five prior convictions in Illinois.

In Kansas v. Murdock, 323 P.3d 846 (Kan. 2014) (Murdock I), overruled by Kansas v. Keel, 357 P.3d 251 (Kan. 2015), the Kansas Supreme Court ruled that all prior out-of-state convictions must be scored under the Guidelines as "nonperson," rather than "person," crimes. Before Keel, in June of 2015, Sartin filed a motion to correct an illegal sentence under K.S.A. 22-3504(1), alleging that his Illinois conviction for "aggravated criminal sexual abuse" should have received less weight in determining his lengthy sentence.

The district court denied Sartin's motion because the holding in Murdock I, on which his argument depended, had been abrogated. On appeal, Sartin expanded his claim to contest all five of his prior convictions on constitutional matters of law subject to unlimited review. The Kansas Supreme Court restricting judicial fact-finding in determining his lengthy sentence.

The Court rejected the Court of Appeals' narrow view of its jurisdiction as limited to Sartin's appeal of the district court's denial. Effectively, Sartin's motion under K.S.A. 22-3504(1) opened the door to original review of any "illegal sentence" claims he made in his appellate brief, regardless of what was raised below.

Consequently, although Sartin's motion in the district court had not addressed his four other prior Illinois convictions, he asserted on appeal that "if any one of the prior convictions was misclassified, the resulting criminal history score would not have conformed to statutory provisions and the Kansas sentence would have been illegal."

Accordingly, since the Court of Appeals had erred in refusing to consider these claims raised in his appellate brief, the Kansas Supreme Court remanded with instructions that it review them on the merits. See: State v. Sartin, 446 p.3d 1068 (Kan. 2019). ■
Reform-Minded Prosecutors Use Charging Discretion to Benefit Communities

by Anthony Accurso

Now that the nation is evolving from “tough on crime” to “smart on crime” tactics, reform-minded prosecutors are making big changes by exercising their discretion on how and when to prosecute low-level offenders.

At the highest levels of government, politicians in both parties have been embracing new modes of thinking about criminal justice. However, local district attorneys have long been incentivized to prosecute as harshly as possible, as failing to do so costs elections. Changing this narrative has been the focus of reform movements for the last half-decade, and the results are that new DAs have been elected on platforms of reducing prosecutions, usually in favor of diversionary programs.

From March 2014 to June 2016, Milwaukee County District Attorney John Chisholm used diversion or deferred prosecutions in more than 1,100 cases with success rates of 81 percent and 77 percent, respectively. Using research-backed risk-assessment models, Chisholm identifies likely candidates for such programs, and the success rates have made for a safer city and an improved relationship between the police and the communities they serve.

King County, Washington, DA Daniel Satterburg, whose jurisdiction includes Seattle, introduced the Law Enforcement Assisted Diversion (“LEAD”) program, which diverts low-level drug offenders and suspected prostitutes to case workers for access to “wrap-around services.” This program was evaluated in a 2015 study, which found it reduced recidivism by 60 percent, and it has since been implemented by 20 other cities in the U.S.

There has been push-back, though. Critics say such programs fuel homelessness by leaving drug addicts to wander the streets.

Source: bloomberglaw.com

Nevada Supreme Court: Duress Defense May be Used for Non-Death Penalty Charges, Even When Connected to Charges Punishable by Death

by Dale Chappell

The Supreme Court of Nevada held on December 26, 2019, that the defense of duress — as codified in NRS 194.010(8) but is not available in connection with any crime that’s punishable by death — can be asserted as a defense to a crime that is not punishable by death but requires “proof of intent to commit a crime that is punishable by death.”

The question of first impression came before the Court when Ivonne Cabrera appealed her convictions and life sentence for murder, attempted murder, conspiracy to commit murder, and burglary. She was found guilty by a jury of all charges after the district court ruled that she could not raise a defense to any of the charges except the burglary charge. The State amended the burglary charge to broaden it to burglary with intent to commit assault and/or battery. The district court then said it would allow the duress defense to that charge but not the others. Cabrera elected not to use the defense at all.

The district court instructed the jury that the duress defense could not be raised as a defense to any of the charges except the freshly amended burglary charge. The State argued to the jury at closing that Cabrera could have used the duress defense for the burglary charge but didn’t.

Cabrera was found guilty and sentenced to life in prison without parole, plus additional years for the other convictions. She appealed.

The duress defense is an ancient common law affirmative defense that provides a defendant with a “legal excuse” for the commission of a criminal act, the Supreme Court noted. United States v. Lafleur, 971 F.2d 204 (9th Cir. 1991). However, under common law, duress cannot be used as a defense for murder. Id.

Nevada law, like the common law, does allow a duress defense for most crimes. Nevada Revised Statutes 194.010(8) states that a duress defense is available for persons “who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.” Because Nevada codified the duress defense, whether Cabrera “should have been allowed to assert duress as a defense to all of the charges presents a question of statutory interpretation,” the Court explained.

The duress defense is unavailable when the crime charged is punishable by death. Because Cabrera’s murder charge was punish-
able by death, she could not invoke the duress defense for that charge, the Supreme Court said. This was true even though Cabrera did not pull the trigger. An aider and abettor is equally punishable by death, the Court reasoned, finding that the district court did not err in its conclusion on that point.

However, the rest of Cabrera’s charges were open to a duress defense, the Court announced. The Court dismissed the State’s argument that because Cabrera intended to commit murder under the other charges, the law precluded the duress defense. The State relied heavily on a Washington Supreme Court case that held that attempted murder precluded a duress defense. The Washington statute stated that the defense is unavailable for murder or manslaughter, and thus the court concluded it would be an “absurd and strained interpretation” of the duress statute if the exclusion were not also applied to attempted murder. State v. Manneing, 75 P.3d 961 (Wash. 2003).

But in Nevada, the law reads differently, the Supreme Court pointed out. Instead of listing offenses for which duress may not be raised as a defense, the Nevada statute limits the duress defense to the potential punishment, i.e., death penalty. When interpreting a statute, a court must look only to what it plainly says, the Court explained. “Because this Court cannot go beyond the plain meaning of a statute when it is clear on its face, we cannot adopt the reasoning outlined in Manneing,” the Court stated.

“We hold that because duress may be raised as an affirmative defense to any crime not punishable with death, the district court erred in precluding Cabrera from asserting duress as a defense to the charges “other than the murder charge,” the Court concluded.

The Court also found that the error was not harmless. Cabrera “presented ample evidence” to support a duress defense,” the Court said. And the State’s argument to the jury that she failed to raise a duress defense turned “what would have been a shield for Cabrera, into a sword against her.” The district court’s instructional error also had a “substantial and injurious effect or influence in determining the jury’s verdict.”

Accordingly, the Court affirmed Cabrera’s murder conviction but held that the duress defense was available to all the other charges. The case was remanded for further proceedings. See: Cabrera v. State of Nevada, 454 P.3d 722 (Nev. 2019).

New Orleans Sheriff’s Office Tracked Cellphones Absent Warrants

by Chad Marks

Securus Technologies, one of the leading providers of phone-messaging services for correctional facilities, reportedly captured thousands of coordinates showing cellphone locations for clients absent a warrant. Through Securus, both Jefferson and Orleans Parish sheriff’s offices were able to capture data used for criminal investigations, The Appeal reports.

Contracts showed that Securus gave its clients access to location data for cellphones that made or received calls from correctional facilities. As part of the contract, Securus also provided location data regardless of whether or not the phone connected with a call at the prisons.

In circumventing the Fourth Amendment, all the sheriff’s office had to do was provide a technology company with the cellphone number. In return, Securus handed over the phones’ location data.

In mid-2018, Securus disabled the technology that intruded upon citizens’ cellphone data. Surprisingly, the dismantling occurred just a few short weeks before the U.S. Supreme Court ruled that historical cell-site location information is protected by the Fourth Amendment. In that case, Carpenter v. United States, 138 S. Ct. 2206 (2018), the Court made it clear that acquisition of such data constitutes a search under the Fourth Amendment and that a warrant is necessary to obtain the data.

Securus provided a caveat in its contracts that it made “no representation or warranty as to the legality” of the technology’s use. Apparently, Securus attempted to protect itself in the event its actions of warrantless intrusion were discovered.

Katie Schwartzmann, an attorney for the American Civil Liberties Union’s Louisiana office, commented, “with such powerful technology, come substantial government responsibility to build out safeguards, and it sounds like that didn’t happen here.”

An attorney for the Orleans Parish Sheriff’s office, Blake Arcuri, said the agency did not get a chance to use the technology before it was disabled. However, the sheriff’s office did admit its contract was amended in March 2018 to add the location data service. Captain Jason Rivarde from the Parish Sheriff’s Office explained they secured the cellphone location data through Securus because it was easier than going to the service providers of cellphone users.

Once technology tracks citizens, serious constitutional concerns are triggered. Had it not been for the U.S. Supreme Court decision in Carpenter, it is possible Securus might have reignited its data retrieving technology. As technology increases, citizens should be aware that their movements might just be tracked by companies like Securus and turned over to the government.

Sources: theappeal.org

Dictionary of the Law
Thousands of clear, concise definitions. See page 53 for ordering information.
Sex Offenders Go to W.A.R.
by Ed Lyon

Still identifying herself as a Christian, Henry points out this about her church: “there seems to be no forgiveness,” Henry stated.

The lack of forgiveness is among the least documented and prosecuted cases of assaults and even murders of sex offenders whose locations were published in sex offender registries.

Henry’s worries are well founded. [1]

Source: vox.com

California Court of Appeal:
Hunch That Proves Correct Is Not Reasonable Suspicion for Traffic Stop
by Douglas Ankney

Division Two of the Fourth Appellate District for the California Court of Appeal ruled that an officer must have reasonable suspicion based on articulable facts to initiate a traffic stop, and a hunch, even when it proves correct, is insufficient.

After a jury convicted Blanca Luna Mendoza of transporting for sale more than 4 kilograms of cocaine, she appealed, arguing that the trial court erred when it denied her motion to suppress the evidence. U.S. Border Patrol Agent Arturo Acosta testified at the suppression hearing that his training included behavior analysis, which he described as “being able to — for us to be able to pull over a vehicle, we need reasonable suspicion. For me, reasonable suspicion is a hunch of articulable facts that will allow us to pull over a vehicle. The explanation could be something simple [like] a lane change, the behavior [of] the person in the vehicle, the vehicle slowing down.”

In November 2017, Acosta was patrolling Interstate 15 in San Diego County near the U.S.-Mexico border (a known drug trafficking corridor) in an unmarked car when he ran Mendoza’s license plate and learned of the vehicle’s recent border crossing. Because of the “nexus” with “crossing the border”, Acosta pulled up next to the passenger’s side of Mendoza’s vehicle, rolled down his tinted window and leaned forward to get a better look after “she got a really good look at me.”

Acosta testified that Mendoza then slowed down and got behind him. He stated she would not pass him even though he slowed to 50 mph and switched his vehicle to the slow lane to the right of Mendoza. After about three miles, Mendoza did pass him, but “she had both hands on the wheel and didn’t look at [Acosta] as she passed.” Acosta testified he initiated the traffic stop based off those facts.

Once the vehicle was stopped, Mendoza consented to a search, and Acosta discovered seven bricks of cocaine inside a backpack within the vehicle. The trial court described Acosta’s reasons for the stop as “weak,” but because Acosta was able to articulate four or five reasons that weren’t “something he made up,” the motion to suppress was denied.

The Court of Appeal observed that “[t]he Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures.” Terry v. Ohio, 392 U.S. 1 (1968). A traffic stop is a seizure within the meaning of the Fourth Amendment, which imposes a standard of “reasonableness” on government officials when conducting a traffic stop. Delaware v. Prouse, 440 U.S. 648 (1979). “[T]o justify an investigative stop or detention the circumstances known or apparent to the officer must include specific or articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or is about to occur, and (2) the person he intends to stop or detain is involved in that activity.” In re Tony C., 582 P.2d 957 (Cal. 1978). An investigative stop predicated on mere curiosity or hunch is unlawful even if the officer is acting in good faith. In re James D., 741 P.2d 161 (Cal. 1987).

Innocuous acts, even when done in a high-crime area, do not become reasonable suspicion of criminal activity. People v. Loeven, 672 P.2d 436 (Cal. 1983). There is no reasonable suspicion where the criteria relied upon by officers does not differentiate a suspect from any number of innocent persons. People

Caution versus compassion.
Rancor versus forgiveness.

Henry has always considered herself a Christian and a Southern Baptist. She became appalled at the church’s perceived notion that redemption and forgiveness do not extend to sex offenders.

“We’re not saying that people shouldn’t be punished [when they commit a sex crime]. We’re just saying they shouldn’t be annihilated.”

[1] Still identifying herself as a Christian, Henry points out this about her church: “there seems to be no forgiveness,” Henry stated.

The lack of forgiveness is among the least documented and prosecuted cases of assaults and even murders of sex offenders whose locations were published in sex offender registries.

Henry’s worries are well founded.

Source: vox.com

April 2020

If a search or seizure without a warrant was unreasonable, the evidence may be suppressed. Pen. Code, § 1538.5(a)(1)(A).

In the instant case, Acosta ran Mendoza’s plates because she was driving in a known drug-trafficking corridor, but that fact alone was not sufficient to warrant a stop because that section of I-15 is traveled by more than 295,000 vehicles daily. Merely crossing the U.S.-Mexico border also failed to provide reasonable suspicion because it is the most crossed border in the world. Guinness World Records, Random House Digital, Inc. p. 457.

Regarding Mendoza slowing and pulling her vehicle behind Acosta, she did so only after Acosta pulled alongside her in an unmarked and unidentified vehicle, rolled down his window, and leaned his head to stare at her.

Mendoza, a female driving alone, took action consistent with a woman who interpreted Acosta’s actions as threatening and not because she attempted to evade contact with law enforcement as she was unaware Acosta was an officer.

Finally, when Mendoza passed Acosta, it was perfectly natural for her to keep both hands on the steering wheel and to keep her eyes on the road.

The Court concluded that Acosta acted on a hunch that proved correct, but he failed to articulate facts giving rise to reasonable suspicion to justify the traffic stop. Accordingly, the Court reversed the judgment of the trial court. See: People v. Mendez, 2020 Cal. App. LEXIS 90 (2020).

Massachusetts Supreme Judicial Court: Police Must Inform Arrested Driver That Passenger Can Assume Custody of Vehicle if Lawful and Practical as Alternative to Impoundment

by Douglas Ankney

The Supreme Judicial Court of Massachusetts ruled that, where officers are aware that a passenger could lawfully assume control of a vehicle, it is improper to impound the vehicle upon the arrest of the driver without first offering the option to the driver.

Two Boston police officers observed a Honda Accord with what appeared to be a defective taillight. A check of the vehicle’s registration number revealed that its owner, Wilson Goncalves-Mendez, had an outstanding misdemeanor default warrant. The officers stopped the vehicle and verified Goncalves-Mendez was the driver.

There was a passenger in the front seat who complied with one officer’s request for identification. Computer checks revealed the passenger had no outstanding warrants, his license was valid, and he was not a suspect in any other crimes. Furthermore, the passenger did not appear to be under the influence of any intoxicating substances.

One of the officers informed Goncalves-Mendez he was under arrest because of the default warrant and that his vehicle would be towed. Per departmental policy, the vehicle was searched and inventoried in preparation for impoundment. During the search, a firearm was discovered under the driver’s seat, and Goncalves-Mendez said it was his. He was charged with multiple firearms violations.

He moved to suppress the evidence seized during the inventory search and his subsequent statement on the ground that the search was unlawful. A municipal court judge granted Goncalves-Mendez’s motion, and the Commonwealth appealed. The appeal was ultimately transferred to the Massachusetts Supreme Judicial Court.

The Court observed that “[t]he Commonwealth bears the burden of proving that a warrantless inventory search is lawful.” Commonwealth v. Oliveira, 47 N.E.3d 395 (Mass. 2016). For an inventory search to be lawful, the Court explained the “[i]mpoundment must be undertaken for a legitimate, noninvestigative purpose, and must be reasonably necessary based on the totality of the circumstances.” Id.

The Court stated that “[t]he propriety of an impoundment turns on whether police could have concluded that they had no lawful, practical alternative.” It examined precedents where impoundment was found reasonable notwithstanding the presence of a passenger and concluded that in each case the passenger was not lawfully able to assume custody of the vehicle, e.g., the passenger was inebriated, didn’t have a driver’s license, had outstanding warrants, etc.

The Court noted that it has previously held that “police officer were required to honor an owner’s or authorized driver’s requested alternative to impoundment where doing so was ‘lawful and practical.’” Id. And the Court has ruled an inventory search of personal belongings was unreasonable where police were independently aware of an alternative to seizing them. Commonwealth v. Abdallah, 54 N.E.3d 1100 (Mass. 2016).

Finally, the Court observed that departmental policy provides that one alternative to impoundment when a driver is arrested is to “leave [the vehicle] with a person having apparent authority to assume control over it.” Boston Police Department Rules and Procedures, Rule 103 § 31.

The Commonwealth conceded that transferring custody to the passenger was a reasonable alternative to impounding the vehicle and one that the officers would have been required to honor had Goncalves-Mendez requested it. But the Commonwealth argued that, pursuant to the Court’s jurisprudence, the burden was on Goncalves-Mendez to suggest the alternative. In rejecting that argument, the Court pointed out that it had never held the police could disregard a readily apparent alternative merely because a defendant didn’t request it. The Court concluded that officers cannot determine if impoundment is reasonably necessary unless they first ask the driver if he or she wishes to exercise the option of having a passenger assume lawful custody of the vehicle. The Court instructed that because this duty articulated in this case is not dictated by precedent, “it shall apply prospectively.”

In the instant case, the impoundment was not reasonably necessary, which meant the search was unreasonable, and the evidence uncovered was unlawfully obtained. Accordingly, the Court affirmed the Municipal Court’s order granting the motion to suppress. See: Commonwealth v. Goncalves-Mendez, 4138 N.E.3d 1038 (Mass. 2020).
Ohio Supreme Court: Ineffective Assistance of Counsel Analysis Applies to Failure to Seek Waiver of Court Costs

by David M. Reutter

The Supreme Court of Ohio held that when trial counsel fails to request a waiver of costs on behalf of a defendant who has previously been found indigent, the reviewing court must make a prejudice determination under the ineffective assistance of counsel analysis.

The Court’s decision came in a certified-conflict case in which the Court was asked to determine whether trial counsel’s failure to file a motion to waive costs at a defendant’s sentencing hearing constitutes ineffective assistance of counsel when the defendant has previously been found indigent. This question arose after the Fifth and Eighth District Court of Appeals reached differing conclusions on the matter.

The Eighth District in State v. Gibson, 2017 Ohio App. LEXIS 107 (2017), found that “a prior finding by the trial court that a defendant was indigent demonstrated a reasonable probability that the trial court would have waived costs had counsel made a timely motion.” In the case before the court, the Fifth District rejected that rationale. It found that opinion predated a 2013 amendment to R.C. 2947.23(C), which allows a trial court to waive costs of prosecution at any time after sentencing. As the appellant, Benjamin A. Davis, could seek waiver of those costs at a later time, the Fifth District held an ineffective assistance of counsel claim for failing to seek a waiver of costs at sentencing “no longer exists.”

The Ohio Supreme Court concluded that both courts got it wrong. “Whether the defendant may move for a waiver of costs at a later time has little to no bearing on whether the trial court would have granted a motion to waive costs at the time of sentencing,” the Court wrote. “Furthermore, a determination of indigency alone does not rise to the level of creation of a reasonable probability that the trial court would have waived costs had defense counsel moved the court to do so.”

In reviewing a claim such as that at bar, the Court held that the trial court must assess the matter under the standard set forth in State v. Bradley, 538 N.E. 2d 373 (Ohio 1989), which adopted the ineffective assistance of counsel test announced by the U.S. Supreme Court in Strickland v. Washington, 104 S. Ct. 2052 (1984). The prejudice outcome in cases such as Davis’ depends upon “whether the facts and circumstances presented by the defendant establish that there is a reasonable probability that the trial court would have granted the request to waive costs had one been made.”

The Court declined to answer the certified question in either the affirmative or the negative, explaining that “a court’s finding of ineffective assistance of counsel depends on the facts and circumstances in each case.”

Accordingly, the Court reversed the Fifth District’s judgment and remanded for it to conduct the ineffective assistance of counsel analysis set forth in Bradley. See: State v. Davis, 2020 Ohio LEXIS 231 (2019).

California Supreme Court: Positioning Computer Monitor to Obstruct Defendant’s View of Complaining Witness Violates Confrontation Clause

by Douglas Ankney

The Supreme Court of California ruled that repositioning a computer monitor so that it blocked the defendant’s view of the witness testifying against him violated the Confrontation Clause.

Jason Arron Arredondo was tried by a jury on several sexual offense charges against F.R., Ar.R., An.R., and M.C. At the time of trial, F.R. was 18 years old. When she entered the courtroom to take the witness stand, she began crying. After the court asked her if she needed a moment, F.R. answered, “I think so.”

The court took a 30-minute recess to allow her to regain her composure. After the jury returned to the courtroom, F.R. reentered and gave her testimony. About 45 minutes later the court took another recess. Outside the jury’s presence, the court stated that during the previous recess, the monitor had been repositioned to block some of F.R.’s view of Arredondo. Defense counsel objected because the monitor blocked Arredondo’s entire view of the witness. The court observed that it was a very small computer monitor, and it was repositioned so the witness didn’t have to look at the defendant.

The prosecution then stated that the defendant had “looked at her for the first time when she came in” — implying that was the reason F.R. became upset and began crying. The court replied, “And whether that happened or it didn’t, I think it’s appropriate.”

Defense counsel then interjected, “For the record, Your Honor, when the witness first came in, she began crying before she was even able to see [defendant’s] face. So [defendant] made no effort to look at her, intimidate her, or make any kind of eye contact or suggestive contact with her.” The court answered, “I understand. I’m not casting any aspersions at this point. But it clearly affected her, and I think it’s appropriate for the court to take whatever small efforts it can to make the witness more comfortable without infringing on any of [defendant’s] constitutional rights, and I don’t believe that his rights have been infringed at this point.” The court overruled the objection.

The jury convicted Arredondo on all counts, including the three counts involving F.R.

Arredondo appealed, alleging, inter alia, that repositioning the monitor violated his constitutional right to confrontation. The Court of Appeal affirmed, and the California Supreme Court granted Arredondo’s petition for review.

The Court observed that in Coy v. Iowa, 487 U.S. 1012 (1988), the Supreme Court of the United States ("SCOTUS") “considered whether the trial court had violated a defendant’s right to confrontation by placing ... a large screen between him and the witness stand while two complaining witnesses testified that he had sexually assaulted them.” The witnesses could be dimly seen by the defendant while they couldn’t see him at all. SCOTUS explained that the Confrontation Clause guarantees a face-to-face meeting with witnesses in the presence of the trier of fact. Id. This serves the truth-finding process because it is more difficult for a witness to lie about a person to
his face than it is to lie behind his back. Id.

While it is true that a face-to-face confrontation may upset a truthful rape victim, it is equally true it may confuse and undo a false accuser. Id. SCOTUS ruled that the screen violated Coy’s constitutional right to confront his accusers. But in Maryland v. Craig, 497 U.S. 836 (1990), SCOTUS stated that the right to face-to-face confrontation is not absolute, and it may be dispensed with when “necessary to further an important public policy and only where the reliability of the testimony is assured.” Id.

In Craig, the alleged child abuse victim testified in a room separate from the courtroom, in the physical presence of the prosecutor and defense counsel, while the judge, the jury, and the defendant remained in the courtroom and observed the testimony by one-way closed-circuit television. This procedure was undertaken because an expert testified that the child witnesses would be traumatized and unable to communicate if they were required to testify in the courtroom in the presence of the defendant. SCOTUS reasoned that the Maryland procedure provided sufficient assurances of reliability because the witnesses were deemed competent, they testified under oath, the defendant could cross-examine them, and the jury could observe their demeanor. Id. Further, the procedure served the important public policy of protecting minor victims of sex crimes from being further traumatized. Id.

But SCOTUS cautioned that before a court may undertake such a procedure, there must be evidence the witness will suffer trauma that was more than nervous excitement or intimidation from being in the courtroom — and the trauma must be caused by the presence of the defendant. Id.

The California Supreme Court determined that in the instant case the trial court had no evidence that 18-year-old F.R. would be traumatized by testifying in the courtroom in the presence of Arredondo. Further, from the statements of the judge, prosecutor, and defense counsel, it wasn’t clear that F.R.’s emotional disturbance was caused by Arredondo’s presence. The trial court made no finding that Arredondo had looked at F.R. or had caused her to cry and only stated “it clearly affected her” without defining the “it.” Her emotional disturbance may have been caused by having to testify in court. The Court concluded Arredondo’s right to confrontation was denied, and the error wasn’t harmless.

Accordingly, the Court reversed the three convictions involving F.R. and remanded for further proceedings consistent with the Court’s opinion. See: People v. Arredondo, 454 P.3d 949 (Cal. 2019).

New Lie Detectors Are On the Way, But Are They Better Than the Old One?

by Anthony Accurso

New “lie detectors” are being marketed as viable replacements for the aging, debunked polygraph and are being tested in environments where the polygraph never penetrated. But questions remain whether such devices are any improvement on the old one.

Many people are familiar with the classic “lie detector,” aka the polygraph. It has been a mainstay in popular fiction, especially police shows such as Law & Order, where it is used to determine whether someone is guilty or innocent. It also was popular in the U.S. for employment screening until several studies called its results into question in the 1980s, and the government passed the Federal Employee Polygraph Protection Act of 1988 preventing its use by private employers.

The polygraph — “poly” meaning “many” and “graph” meaning “writing” — measures activity of the sympathetic branch of the autonomic (involuntary) nervous system as expressed by fluctuations in heart rate, respiratory rate, blood pressure, and skin conductivity (perspiration).

The problem is that, while these vectors are often influenced by the fear of being caught lying, the reactions associated with lying can be quite variable, and no scientific studies have demonstrated that the emotional response linked to lying can be measured.

Despite being featured often in television and movies almost since its creation, it has been deemed inadmissible in court because of its unreliability. While members of the American Polygraph Association often tout the test as being 95 percent accurate, research shows otherwise. Several studies have shown that the “sensitivity” of the test is around 76 percent — meaning that of 100 liars, only about 76 will be detected. If that wasn’t alarming enough, the “specificity” of the device is around 52 percent — meaning that of 100 people telling the truth, only 52 will be identified as having done so while 48 will be branded as liars. That’s a whole lot of false positives.

Two companies are now touting products that they claim are more accurate. Converus is marketing “EyeDetect,” which measures subtle changes in pupil size and eye movement. Discern Science is marketing “Avatar,” a device that has a microphone, an infra-red eye-tracking camera, and an Xbox Kinect sensor to measure body movement. These devices have been tested at the borders of the U.S. and Europe to try to detect terrorists and drug smugglers. They’re being used in the U.K. to monitor sex offenders, and they’re used by FedEx, Uber, and Experian to monitor employees outside the U.S.

The problem is that these devices were not rigorously tested before deployment in these contexts and may be causing an immeasurable amount of harm. The companies tout “algorithms,” which employ “AI” and “machine learning” to achieve a claimed accuracy of between 83 percent and 85 percent, according to Discern Science’s marketing materials.

But tech buzzwords like these may simply mask a bigger problem that plagued the polygraph: that such physiological variations are only partially correlated with deception, and people respond differently under pressure. It’s also difficult to establish an accurate baseline for deception in a testing environment where the emotional stakes aren’t so high. The tech industry has long used the phrase “Garbage In, Garbage Out” to denote the faulty results achieved from faulty inputs. Does aggregating larger data sets, which may be terribly flawed in the beginning, create better results? Only time and rigorous testing will tell.

According to sociologist Andy Balmer, such technologies pop-up at “pressure cooker points” in politics, where governments lower their requirements for scientific rigour and seek certainty in science. Historian Ken Alder cautions that these devices are almost always deployed against the most politically vulnerable, such as dissidents and homosexuals in the 1960s and asylum seekers and migrants today.

Any solution, like the U.S. legislation passed in the 1980s, will necessarily be born of politics. According to Alder, the test “cannot be killed by science because it was not born of science.”

Sources: theguardian.com, Skeptical Inquirer
Jury Nullification as a Cure for Prosecutorial Overreach

by Anthony Accurso

A n article published by ProsecutorialAccountability.com seeks to educate the public about the history of jury nullification and how reversing statutes and case law that prevent juries from knowing a defendant’s possible sentence could help curb prosecutorial overreach.

Jury nullification is the term applied when a jury refuses to convict a defendant despite sufficient evidence of guilt. Juries are rarely told that this is even an option (standardized jury instructions often do not include language about it), but its purpose goes to the heart of the reason for empaneling a jury: to seek justice, not merely to obtain a conviction. In times when prosecutorial overreach is rampant and political solutions are not forthcoming, jury nullification can be an effective tool for a community to reject laws and punishments that it deems unjust.

Unfortunately, defendants and their attorneys are often barred from informing juries about applicable mandatory minimum sentences. The U.S. Court of Appeals for the Second Circuit has held that a trial court may, with good reason, inform a jury of the potential sentence, but “it is not the proper role of courts to encourage nullification.” Even this attitude is enlightened compared to most jurisdictions, which entirely bar defendants from informing juries of the consequences of a conviction. Because such information can undermine a prosecutor’s goal of obtaining a conviction, district attorneys will often lobby at state capitol against well-informed juries. Jurors, however, are not mere bystanders. They are crucial members of a jury trial, whose constitutional purpose is to impose community oversight on the justice system. With the current debates about mass incarceration and criminal justice reform, jury nullification is an overlooked feature of our system that can provide for direct accountability to local communities. Juries should be educated about their powers, and reforms should not overlook the power of legislatures or grassroots ballot initiatives to provide juries with sentencing information.

Judge Thomas Wiseman of Tennessee wrote, “The government, whose duty it is to seek justice and not merely a conviction … should not shy away from having a jury know the full facts and law of a case.”

Source: prosecutorialaccountability.com

Louisiana Supreme Court: State Abused Charging Authority by Dismissing and Reinstituting Charges to Circumvent Adverse Court Ruling

by Anthony Accurso

T he Supreme Court of Louisiana held that the district attorney’s office abused its charging authority when it dismissed, then immediately refiled, charges against a defendant to circumvent the trial court’s decision to exclude the State’s expert witness.

In December 2016, Fred Reimonenq was indicted in Orleans Parish on charges of first-degree rape, attempted first-degree rape, and sexual battery of a victim under the age of 13. Reimonenq’s trial was scheduled to start September 25, 2018.

Two days prior to trial, the State submitted to defense counsel the curriculum vitae of Dr. Anne Troy, Ph.D., a sexual assault nurse examiner. However, it wasn’t until the morning of the trial that the State notified the defense that it planned to use Dr. Troy as a witness to interpret the results of the victim’s post-assault exam.

The defendant filed a motion to exclude Dr. Troy’s testimony because the State had failed to notify the defense of its intent to use Dr. Troy in a timely manner under La.C.Cr.P. art. 719, which made it difficult or impossible to prepare a defense without such notice. The trial court granted defense’s motion citing prejudice to the defendant. In response, the State entered a nolle prosequi, dismissing the charges.

It refiled those same charges two days later, and a new trial was set for December 3. On November 27, the State filed to supplement its evidence, seeking to add Dr. Troy’s testimony. The defense again sought to exclude the testimony, this time on the grounds that the State’s actions denied the defendant a fair trial on its original date. The trial court denied the defense’s motion without elaboration.

On appeal of this decision, the Louisiana Supreme Court discussed the separation of powers inherent in the State Constitution and a defendant’s right to a speedy and fair trial under the Fourteenth Amendment to the U.S. Constitution.

The State, through district attorneys, has broad discretion to file or dismiss charges, subject to very few limitations. A dismissal is generally not a bar to subsequent prosecution for the same offense. La.C.Cr.P. art. 693. However, the Court explained that district attorneys do not have unfettered “authority to undermine trial court proceedings and evade appellate review.”

The Louisiana Supreme Court has primarily explored the limits of prosecutorial authority and discretion through the speedy trial lens, generally when such refilings cause prejudice to the defense through extended delays in prosecution.

In this vein, the Court recounted previous cases in which the prosecution appropriately exercised its discretion, including State v. Battiste, 939 So.2d 1245 (La. 2006). In Battiste, the State dismissed and the refiled charges because the victim was unsure if she was willing to testify in court, but she later (about a month) rallied her courage to do so. The court in that case found that “there was a legitimate reason for a nolle prosequi” because “the record reveals no intentional delay on the State’s part for the purpose of gaining a tactical advantage.”

Similarly, in State v. King, 60 S.3d 615 (La. 2011), the State entered an order of nolle prosequi and later reinstated the charges. The State entered the order only after a bank failed to produce records that had been subpoenaed, and the trial court denied a request for a continuance. The King Court concluded that the State’s behavior was appropriate, explaining that the State didn’t dismiss and reinstitute the charges to gain “a tactical advantage over the defense, or that it was whipsawing defense...
witnesses by forcing them to make repeated but futile trips to the courthouse...."

According to the Court, the current case is distinguished from the foregoing cases because the record was clear that the State’s reason for the dismissal and refiling was to circumvent the trial court’s decision to exclude the State’s witness as a result of the State’s “failure to follow the applicable procedures.” Such conduct violates the balance of powers by depriving the trial court of its authority “to so control the proceedings that justice is done.” La.C.Cr.P. art. 17.

The Court ruled that the State abused its authority by dismissing, then refiling the charges against Reimonenq. In doing so, the State violated defendant’s right to due process and fundamental fairness when it exercised its authority to dismiss and reinstate a prosecution not only to gain a continuance, but to nullify a trial court’s correct evidentiary ruling and flout appellate review,” the Court concluded.

Accordingly, the Court allowed the prosecution to continue with the stipulation that the State is prohibited “from offering the testimony of Dr. Anne Troy or any other expert who may offer comparable testimony.” See State v. Reimonenq, 2019 La. LEXIS 2692 (2019).

NYC Drug Prosecutor Bucks Trend of Releasing List of Cops with Credibility Issues

by Douglas Ankney

Through the Freedom of Information Law, communications, memos, and correspondence were obtained that reveal the Office of the Special Narcotics Prosecutor’s ("OSNP") database has information flagging police officers with potential credibility issues.

The database purportedly contains judges' assessments of officers' testimony, NYPD disciplinary records, and notes about officers that the prosecutors made. But unlike the DAs from the five boroughs of New York City who released lists of officers linked to concerns about their ability to be truthful, the OSNP has refused to release all but nine disclosure letters.

Bridget G. Brennan, who was appointed to lead the OSNP, justified the refusal by citing a recent court ruling that blocked the disclosure of similar records in Manhattan, plus cited other public records exemptions.

In a statement, the OSNP said it places "great value on transparency" and claims it was only because of technical problems that records of judicial findings were not released.

However, attorney Janos Marton — a Manhattan DA candidate who has called for the abolition of the OSNP — said, "Any other district attorney is going to have to face voters and put their record before voters, but this office does not have to face voters[.] [S]o they’re able to continue with a culture that doesn’t promote accountability for police officers, and that’s likely reflected in the disclosures they’re providing now."

One of the disclosure letters revealed that a Manhattan Supreme Court judge refused to believe that a detective had observed a drug transaction from 70 to 100 feet away across a crowded street.

In another disclosure, a federal judge discredited a detective’s testimony that a man "spontaneous[ly]" confessed to a friend’s pending marijuana deal as soon as officers approached him. The judge noted that the detective made no mention of the confession in his arrest report and that officers did not take any steps to investigate the deal.

Source: gothamist.com

Racial Disparity at Sentencing on the Rise

by Anthony Accurso

A new Council on Criminal Justice report shows disturbing trends in worsening sentencing disparities for black and Latinx people, even as the U.S. softens its stance on non-violent and drug crimes, The Appeal reports.

The report aggregated data from the years 2000 and 2016 and compared the statistics for each racial category as a population in prison, in jail, on probation, and on parole.

The only trend that seems to be running contrary to increasing disparity is that white people were being sent to prison or jail, or placed on probation or parole, more often in 2016 than in 2000.

This is partly a function of long sentences getting longer and possibly influenced by the opioid crisis spreading through poor and middle-class white communities.

However, black people are still five times more likely to be in prison and 3.8 times more likely to be in jail than white people. This, despite the number of black men in prison for drug offenses dropping by half, and the number of black men incarcerated for property offenses being down 24%.

The report’s authors point out that this is being driven by more black men being incarcerated for violent offenses and public order offenses. So while fewer black men are incarcerated as a whole, their sentences, especially for violent crimes, are rapidly increasing.

According to Weihua Li of the Marshall Project, "the prison time for black people grew at a rate almost twice as fast [as white people]."

While life sentences are a rarity elsewhere in the world, one in nine prisoners are serving life sentences. Black people are overrepresented in this group. The report’s authors found that in 35 of 44 stats examined, “racial disparities in prison were starkest among people serving the longest 10 percent of terms.” The authors point to how criminal history data is used to enhance sentences, especially for black men younger than 25, and how such factors prejudice minority communities that experience draconian policing and prosecution.

Most shocking is data on death sentences. Aggregating data since the Supreme Court reinstated the death penalty in 1976 shows that 51 percent of those sentenced to death since then have been people of color. However, when you narrow the window to the last 10 years, that figure jumps to 75 percent. Texas, the state that hands out more death sentences than any other, sent seven people to death row in 2018. All of them were men of color.

Source: theappeal.org

Criminal Legal News 45 April 2020
Colorado Supreme Court Announces Implied Bias the Same as Actual Juror Bias, Requiring Automatic Reversal

by Anthony Accurso

The Colorado Supreme Court announced a rule, which holds that when a defendant raises a for-cause challenge to an impliedly biased juror under 16-10-103(1), C.R.S., a structural error arises when that juror serves on the jury. The Court instructed that “a juror who is presumed by law to be biased is legally indistinguishable from an actually biased juror” with respect to a criminal defendant’s constitutional right to an impartial jury.

Abdu-Latif-Kazembe Abu-Nantambu-El was charged with numerous offenses, including first-degree murder, second-degree murder, and two counts of first-degree burglary in Colorado. After a jury trial, he was convicted on the above-listed counts and sentenced to life without parole.

On appeal, he raised an issue of juror bias stemming from the trial court’s denial of a for-cause challenge to a potential juror under 16-10-103(1), C.R.S. The Legislature codified a list of relationships that constitute implied bias and, upon challenge, must result in the excusal of the potential juror. At issue was subsection (k), which states implied bias exists if the prospective juror “will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.”

The Colorado Court of Appeals reversed his conviction and remanded for a new trial, though the judges were divided about the reasons for reversal and the proper standard of review.

The Colorado Supreme Court upheld the reversal and clarified the decision with its new rule. It framed the issue as follows: “What standard of reversal applies where a trial court erroneously denies a challenge for cause, the defendant exhausts his peremptory challenges, and the challenger juror ultimately serves on the jury? More specifically, should reversal be automatic if the challenged juror should have been excused because she was implied biased as a matter of law, even if she did not evince actual enmity toward the defendant?”

A fair and impartial jury is a key element of a defendant’s constitutional right to a fair trial under both the U.S. and Colorado Constitutions. U.S. Const. amends. V, IV, XIV; Colo. Const. art. II §§ 16, 25. Further, 16-10-103(1)(j) states a trial court must grant a challenge for cause to a prospective juror who “evinces enmity or bias toward the defendant or the state,” unless the court is satisfied that the prospective juror “will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.”

While the People argued that the error should be analyzed such that the defense should bear the burden of proof to demonstrate the error was not harmless, the Court explained that implied bias is no different from actual bias. The list of relationships in 16-10-103(1) codify various forms of implied bias, and seating someone on a jury with such bias, after a challenge has been raised, is a structural error requiring automatic reversal. Further, an impliedly biased juror “is not susceptible to rehabilitation through further questioning because implied bias, once established cannot be ameliorated by the juror’s assurances that she nonetheless can be fair.” Quoting from People v. Lefebre, 5 P.3d 295 (Colo. 2000).

Accordingly, the Court upheld the decision of the Colorado Court of Appeals, which reversed the convictions of Abdu-Latif Kazembe Abu-Nantambu-El and remanded for a retrial based on the trial court’s error allowing a juror to serve after she should have been struck by a for-cause challenge. See: People v. Abu-Nantambu-El, 454 P.3d 1044 (Colo. 2019).

Rhode Island Supreme Court Reverses Conviction Due to Prosecutor’s Remarks and Jury Consideration of Inadmissible Evidence

by Douglas Ankney

The Supreme Court of Rhode Island vacated the first-degree child molestation sexual assault conviction against Henry G. Bozzo due to a remark made by the prosecutor during closing argument together with the trial court’s abuse of discretion in admitting evidence of prior bad acts.

Seven-year-old Veronica told her parents that Bozzo had placed his finger inside her vagina. She and her parents did not immediately report it to the authorities because they believed it to be an accidental touching. But when Bozzo was later arrested for possessing child pornography, they reported it. The defense claimed the touching was accidental. Prior to trial, Bozzo and the State entered into a stipulation that was read to the jury: “[O]n May 9, 2016, Henry Bozzo before a justice of the Superior Court pled nolo contendere to one count of possession of child pornography and was sentenced to four years suspended sentence and four years of probation with specific condition of the sentence and probation.”

The Superior Court instructed the jury that they could consider the stipulation only for the purpose of determining if the touching was intentional. However, over Bozzo’s objection, the Superior Court also permitted Detective Kevin Petit to testify as to the graphic contents of the child pornography. Petit testified that Bozzo’s computer contained a video of a 4-year-old girl masturbating and several other videos of girls under the age of 10. Petit also testified that Bozzo had admit-
state generally speaking, evidence of crimes — other position on the employment of stipulations served that "[w]e have not yet taken a definitive pass the case.

During closing arguments, the prosecution stated: "This man, Henry Bozzo, molested that young girl. It wasn't a mistake. He did it intentionally. He stared at her as she was walking out of the courtroom. He stared her down. I saw it. It was right there. That is no mistake there."

The defense made a "motion to pass the case" (similar to a motion for a mistrial), arguing that the prosecutor was testifying. The trial court determined the remark to be improper but denied the motion — choosing instead to tell the jury to disregard the remark and reminding the jury that statements made during closing arguments are not evidence.

The jury convicted Bozzo, and he appealed. Among other things, Bozzo argued that the trial court abused its discretion when it permitted Petit to testify about the contents of the videos of child pornography and about Bozzo's statements made during the investigation of those videos. Bozzo also argued the trial court erred when it denied his motion to pass the case.

The Rhode Island Supreme Court observed that"[w]e have not yet taken a definitive position on the employment of stipulations to preclude the use of other crimes evidence under Rule 404(b)." Rule 404(b) provides that, generally speaking, evidence of crimes — other than those being adjudicated at trial — is to be excluded subject to certain exceptions, e.g., to show intent or absence of mistake.

The Court determined that in this case it was permissible for the jury to consider the stipulation. "A stipulation 'entered into with the assent of counsel and their clients, relative to an evidentiary fact or an element of a claim, is conclusive upon the parties and removes the issue from the controversy.'" State v. Huy, 960 A.2d 550 (R.I. 2008).

The trial court had properly instructed the jury to consider the stipulation only as evidence of intent. But the Supreme Court further stated, "By contrast, the evidence that was admitted about the child pornography case was highly prejudicial and created a real risk of juror confusion." The Court ruled that the stipulation foreclosed evidence of the child pornography investigation and the videos and that the trial court erred in admitting the evidence. However, Bozzo’s statements were admissible because the statements were not prior bad acts.

Regarding the prosecutor's statement during closing, the Court observed that "[r]ehearing of closing argument is to sharpen and clarify the issues for resolution by the trial court in the context of fact in a criminal case." State v. Boillard, 789 A.2d 881 (R.I. 2002) (quoting Herring v. New York, 442 U.S. 853 (1975)). Prosecutors are given considerable latitude in closing argument as long as their statements pertain only to evidence presented and represent reasonable inferences from the record. Boillard.

In the instant case, there was no testimony or other evidence offered concerning the manner in which Bozzo may or may not have looked at Veronica. Bozzo was denied any opportunity to challenge the prosecutor's assertion. Furthermore, Bozzo did not take the stand, so the prosecutor's remark affected Bozzo's Fifth Amendment right not to testify at trial. The Court concluded, "We are of the opinion that the prosecutor's statements exceeded the considerable latitude he was allowed because his statements were not based on evidence or testimony adduced at trial, were extraneous to the issues in the case, and had the potential for unfair prejudice." State v. Lastarza, 203 A.3d 1159 (R.I. 2019).

Accordingly, the Court vacated the judgment of conviction and remanded to the Superior Court for a new trial, See: State v. Bozzo, 2020 R.I. LEXIS 5 (2020). |

Warrant Gives Police Access to DNA Database

by Jayson Hawkins

Advances in DNA technology over recent years have enabled people to discover genetic predispositions, reconstruct family trees, and track down lost relatives. Nearly 30 million users have uploaded their profiles to DNA sites in hopes of reconnecting with their past or catching a glimpse of future health issues. For law enforcement, however, these databases hold another potential — that of solving untold numbers of cold cases virtually at the touch of a button.

Individuals who have submitted their genetic information to the sites generally have done so under a presumption of privacy. Ancestry.com and 23andMe, the largest sites with a combined 25 million users, operate under the promise that they will not share their customers' personal records. Even sites that offer free services tend to shield their users' data from being accessed for ulterior purposes. GEDmatch, for instance, instituted a policy in May 2019 that allowed law enforcement to search only users who had agreed to it. As of November of last year, less than 15 percent of the site's users had.

Before GEDmatch offered the privacy option, a detective in Orlando, Michael Fields, had used the service to find a suspect from a DNA sample in a 17-year-old murder case. Undeterred by the site's subsequent policy shift, Fields requested a warrant in July 2019 that would give him access to the company's entire database of over a million profiles. Judge Patricia Strowbridge of Florida's Ninth Judicial Circuit Court granted the warrant, and the next day, the site opened its records to the detective.

Civil rights advocates are concerned that the warrant set a dangerous precedent. "The company made a decision to keep law enforcement out, and that's been overridden by a court. It's a signal that no genetic information can be safe," remarked Erin Murphy, a professor at New York University School of Law. "I have no question in my mind that if the public isn't outraged by this, they will go to the motherlode: the 15-million-person Ancestry database."

Fields told an audience of the International Association of Chiefs of Police last October how he obtained the warrant. Several officers spanning the wide array of law enforcement in attendance asked for a copy of the document.

The precise nature of DNA makes it likely that any person can be identified through relatives on any of the major sites. Unless the public demands its privacy be protected, critics warn that future warrants could soon turn genealogy sites into police databases.

Thus far, 23andMe has refused to release customer data to law enforcement. Out of 10 "valid law enforcement requests" that Ancestry.com received in 2018, seven were granted, but they were all related to "credit card misuse, fraud and identity theft."

No genetic data was released. How, or if, these companies will be able to withstand warrants for that type of information is a legal battle soon to be tested.
**New York to Seal Convictions for Small Amounts of Marijuana**

*by Anthony Accurso*

The state of New York is abuzz about a new law that eases penalties for low-level marijuana possession and expunges thousands of low-level cannabis convictions. The new law goes into effect on January 29, 2017, and filed to have the charges dismissed due to the delay between charges and arrest, despite the State’s “gross negligence” in approaching the case.

Over 202,000 convictions in New York — from the late 1970s through mid-June 2019 — will be sealed, and 24,409 people will no longer have a record of crime, Janine Kava, the New York State Division of Criminal Justice Services spokeswoman, told CNN.

Through the years, criminal penalties for marijuana use in New York fell disproportionately on blacks and Hispanics. “For too long communities of color have been disproportionately impacted by laws governing marijuana and have suffered the lifelong consequences of an unfair marijuana conviction,” said Gov. Andrew Cuomo, who signed the law July 29, 2019. “Today is the start of a new chapter in the criminal justice system.”

Critics say the law doesn’t go far enough because it is still a violation. It “does not remove the odor of marijuana as justification for a stop or search,” and the accused can also be arrested and taken to a police station for questioning, newsweek.com reports.

Sources: Rolling Stone, CNN, Newsweek

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**Nevada Supreme Court: 26-Month Delay Between Charges and Arrest Constitutes Speedy Trial Violation**

The Supreme Court of Nevada held that a district court did not abuse its discretion after the State’s “gross negligence” caused a 26-month delay between charges filed and arrest.

Rigoberto Inzunza was living with 9-year-old E.J.’s mother in Las Vegas in 2008. During this time, Inzunza is alleged to have sexually assaulted the girl when her mother was at work and her siblings were asleep. This abuse is alleged to have continued until Inzunza moved to New Jersey around 2009.

In late 2014, E.J. disclosed the abuse during therapy, and her mother took her to the North Las Vegas Police Department (“NLVPD”) to file a complaint. During their meeting with Detective Mark Hoyt, E.J.’s mother gave him information from Inzunza’s Facebook profile, which indicated his home and work addresses in New Jersey. Hoyt turned the complaint over to the District Attorney’s Office, which filed charges and issued a warrant for Inzunza’s arrest.

However, the DA’s office did not notify the NLVPD about the warrant being issued, nor did the department follow-up on the case.

Inzunza was arrested 26 months later on January 29, 2017, and filed to have the charges dismissed due to the delay between the issuance of the charges and his arrest. The district court granted his motion, and the State appealed, claiming the district court abused its discretion.

With regards to a defendant’s right under the Sixth Amendment of the U.S. Constitution to a speedy trial, the Nevada Supreme Court “gives deference to the district court’s factual findings and reviews them for clear error, but reviews the court’s legal conclusions de novo.” United States v. Gregory, 322 F.3d 1157 (9th Cir. 2003).

Speedy trial violations are analyzed under a four-part test set forth in Barker v. Wingo, 407 U.S. 514 (1972) and clarified in Doggett v. United States, 505 U.S. 647 (1992). These factors include “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” Barker.

There are no hard and fast rules with respect to speedy-trial challenges; “each case must be decided on its own facts.” United States v. Clark, 83 F.3d 1350 (11th Cir. 1996). In addition, “no one factor is determinative; rather, they are related factors which must be considered together with such other circumstances as may be relevant.” United States v. Ferreira, 665 F.3d 701 (6th Cir. 2011).

The length of delay in this case was 26 months. “Most courts have found a delay that approaches one year is presumptively prejudicial.” United States v. Corona-Verbera, 509 F.3d 1105 (9th Cir. 2007). As for the reason for the delay, the Court determined the State was grossly negligent in failing to proactively apprehend Inzunza despite having ample time and knowing his whereabouts with great specificity. The State countered that it is standard policy to simply enter warrants in to the NCIC database and for the NLVPD to pursue other cases when the case at hand is not "high profile" but rather a "common sexual assault" case.

Regarding the State’s delay, the Court quoted from Barker: “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defense.”

As for Inzunza’s invocation of his Sixth Amendment rights only after arrest, the State failed to produce any evidence that he knew he was under indictment prior to then. A defendant who is ignorant as to the formal charges against him is “not to be taxed for invoking his speedy trial right only after his arrest.” Doggett.

The final prong, prejudice to the defense, is difficult to prove because “time’s erosion of exculpatory evidence and testimony can rarely be shown.” Doggett. Given the length of delay between charge and arrest, despite the State’s having enough information to easily locate him, the Court granted Inzunza the presumption of prejudice, against which the State’s only argument was the accepted policy of the NLVPD regarding the lack of communication with the DA’s office.

The State also claimed that Inzunza...
New Jersey Tightens Reins on Civil Asset Forfeiture
by Douglas Ankney

In following a trend among the states, New Jersey has passed legislation designed to rein in the abuse of civil asset forfeiture.

On January 13, 2020, the Democratic-controlled Senate passed a bill requiring a criminal conviction in certain cases before police and prosecutors may take private property using civil forfeiture. The law will curtail some instances of prosecutors and police seizing private property from owners who were neither convicted nor even charged with a crime.

The bill requires a criminal conviction before authorities may seize up to $1,000 in cash or up to $10,000 in property. Jennifer McDonald, a senior research analyst at the Institute for Justice, said the bill was a "modest improvement" but "[w]e want them to continue to push forward for ending civil forfeiture entirely and replacing it with criminal forfeiture."

And on the same day the bill was passed, New Jersey Governor Phil Murphy signed a bill into law that requires quarterly reporting by police departments explaining their forfeiture activities. Murphy called the law "a huge step forward for transparency and accountability." He added, "New Jersey law enforcement agencies currently have no permanent statutory requirement to disclose civil asset forfeitures. This legislation would boost confidence in our justice system by requiring county prosecutors to track and report data on this practice."

Former Governor Chris Christie vetoed a similar bill in 2017.

In the past 10 years, more than half of the states have passed some civil forfeiture reform due to abuses by police and prosecutors in seizing homes, cars, cash, and other property from innocent citizens.

New Mexico, North Carolina, and Nebraska have essentially abolished the practice by requiring a criminal conviction before any property can be seized.

Source: reason.com

U.S. District Judge Blows Open ATF Fake Stash-House Stings, Wants to Know Why They Only Target Minorities
by Dale Chappell

"Pssst ... Wanna make some easy money? I got this drug dealer who owes me big time. You help me rob him, and I'll split it all with you — drugs, money, everything. You in? Good. Meet me at the High School at 10. Oh, and bring guns and some friends. This house has armed guards."

We all know what happens next. The guys show up at the meeting place, and they're taken down by agents in military gear. They're charged with conspiracy to rob the stash house, plus they get hit with whatever amount of drugs the government says would've been in the nonexistent house. And because they brought guns, at the government's urging, firearms charges are piled on, often with lengthy consecutive sentences.

It's called a fake stash-house sting, and it's the government's laziest form of law enforcement. It's no secret that fake stash-house stings target minorities. Lots of people have argued this point, but now one federal judge is demanding that the government turn over some evidence that fake stash-house stings don't target minorities.

Judge Jed Rakoff of the U.S. District Court for the Southern District of New York ("SDNY") has ordered the government to provide defendants in a fake stash-house sting with "(1) all DEA manuals, circulars, protocols, and the like that provide guidelines for how and when reverse stings should be originated; and (2) all notes, memoranda, or other investigative material showing how defendants were identified and evaluated as targets."

The defendants in that case presented evidence that not one single defendant in a fake stash-house sting in the SDNY in the past decade was white. They brought in an expert who testified that, according to the racial makeup of New York and Bronx counties, the chances of every one of the fake stash-house defendants "randomly" selected being a minority was "highly unlikely."

This expert, Dr. Crystal S. Yang, is a Harvard law and economics professor.

While selective prosecution claims in fake stash-house stings have largely been shot down over the years, Judge Rakoff established when discovery should be allowed for such claims: "The appropriate standard is that where a defendant who is a member of a protected group [i.e., racial group] can show that that group has been singled out for reverse sting operations to a statistically significant extent in comparison with other groups, this is sufficient to warrant further inquiry and discovery."

It's unlikely the government's documents will say, "Target minorities with this fake stash house operation." But the government will still have to explain why all of its fake stash-house stings netted nothing but minorities. If Judge Rakoff isn't satisfied that the government is playing by the rules, the defendants' claims of selective prosecution will get to move forward.


Additional source: techdirt.com

Roget's Thesaurus
Can't think of the right word? Let Roget's help you! Over 11,000 words listed alphabetically. See page 53 for more information.
Cops Killed Nearly 13 Times More People Than Mass Shooters

by Bill Barton

Mass shootings in the U.S. "have claimed the lives of 339 people since 2015," which, while certainly egregious, is a mere drop in the bucket compared to the 4,355 citizens killed by police during the same time-frame, according to thefreethoughtproject.com.

There is no question that some of these people were armed and dangerous, but way too many were innocent and unarmed, such as Daniel Shaver, a father of three who was killed in 2016 by Philip Brailsford, who was charged with murder but eventually acquitted. In fact, he was allowed to retire from the Mesa, Arizona, police force with an accidental disability pension and medical retirement.

Meanwhile, "If we compare the 399 citizens killed by police in the same time frame, the comparison is off the charts. We are talking about a 1,280 percent difference."

According to The Washington Post, 1,004 individuals were "shot and killed by police in 2019," or 12 more than the previous year.

In the U.S., "the overall homicide rate is 4.9 per 100,000 among the citizens," thefreethoughtproject.com reports.

Thanks to independent watchdog groups that decided to document this number on their own, we have a total number of citizens killed by police. "Given that America has roughly 765,000 sworn police officers, that means the police-against-citizen kill rate is more than 145 per 100,000."

This is reported at a time when violent crime "has fallen sharply over the past quarter century," according to pewresearch.org. "Using the FBI numbers, the violent crime rate fell 49% between 1993 and 2017."

However, the "police kill rate," The Free Thought Project reports, "is nearly 30 times that of the average citizen, yet somehow people still call for disarming citizens and say nothing about the police."

Source: thefreethoughtproject.com, pewresearch.org

News in Brief

Alabama: Blake Duke, a former Mobile police officer of the month, was placed on desk duty after video taken by a bystander and posted online showed him choking a handcuffed Howard Green Jr. and slamming him into a squad car during an arrest, thefreethoughtproject.com and WWMT.com reported in February 2020. "Why are you choking him?" an onlooker is heard on the video posted by fox10tv.com. Police were trying to arrest Green for three active warrants for harassment or harassing communications. "He also had resisting arrest and disorderly conduct charges added from [the] incident. Green has been arrested more than 20 times since 1993."

Other charges included having no insurance, running a red light, failure to obey, resisting arrest and disorderly conduct. Police Chief Lawrence Battiste said the suspect might have spit in the officer's face. "He could be the worst criminal in the world, but our job is to make sure that we treat all citizens in this community with dignity and respect in the performance of our duties," Battiste said.

Alaska: The state’s Village Public Safety Officer Program (VPSO) is under fire for failing to recruit, train and ultimately retain qualified police officers for rural areas of Alaska, more than one-third of which have no local cops, ProPublica.org reports. The 40-year-old program uses grant money to pay nonprofits to do the work, but the state has been accused of penny-pinching restrictions. "In 2019, the number of VPSOs fell to an all-time low of 38 — compared with more than 100 in 2012," the news site reports. CLN has reported that former felons convicted of domestic violence and assault have found work as officers in rural Stebbins. A VPSO Working Group hopes to nix the cap on costs VPSO leaders can bill the state and to “place more certified officers in rural Alaska, increase morale among current VPSOs and retain village-based first responders who know their communities best.”

Arkansas: A Camden Fairview High School resource officer who used a chokehold on a teen was fired February 13, 2020, arkansasonline.com reports. Jake Perry was dismissed as an investigation continues into the incident, during which student Dekyron Ellis was lifted off the ground while being choked. "I feared for my life," he told Time.com. "I didn't know what was going to happen. I blacked out. I really didn't see anything until he took me back to the office." The incident was caught on video. Perry had been on the police force between two and three years. The chief, Boyd Woody, told the media that Perry violated departmental procedures.

California: A teen was in the wrong place at the wrong time when Contra Costa cops "brutally choked [him] until he fell unconscious and then [was] beaten even more after — by a cop's flashlight," thefreethoughtproject.com reports. According to a lawsuit, filed in federal court in February 2020, "Hernandez was a passenger in the backseat of a stolen car which he did not know was stolen. Sheriff's Deputy Brandon Battles pulled the car over after noticing it was driving with no lights. When he ran the plates, he found the car was stolen and called for backup. As the video shows, all the teens were ordered out of the car one by one at gunpoint. Hernandez complied with the orders to walk backward with his hands on his head. However, as the video shows, instead handcuffing the compliant teen, Battles put him in a 'carotid hold' — a type of neck restraint — until Hernandez lost consciousness." According to the news site, the claim accuses the county of having "sanctioned and ratified" both the deputies' use of excessive force and the deputies' alleged tactics in filing charges of resisting arrest. The county, the lawsuit says, "failed to train and supervise its Deputies properly." None of the officers in the video faced discipline in this matter.

When he ran the plates, he found the car was stolen and called for backup. As the video shows, all the teens were ordered out of the car one by one at gunpoint. Hernandez complied with the orders to walk backward with his hands on his head. However, as the video shows, instead handcuffing the compliant teen, Battles put him in a 'carotid hold' — a type of neck restraint — until Hernandez lost consciousness." According to the news site, the claim accuses the county of having "sanctioned and ratified" both the deputies' use of excessive force and the deputies' alleged tactics in filing charges of resisting arrest. The county, the lawsuit says, "failed to train and supervise its Deputies properly." None of the officers in the video faced discipline in this matter.
Colorado: City of Aurora Police Officer Nathan Meier was discovered passed out in the driver’s seat of his still-running squad car with his foot on the brake March 29, 2019. However, there was no proper investigation for DUI. “What happened with Officer Meier was a product of him being an Aurora police officer,” 18th Judicial District Attorney George Brauchler told KCNC. “The decisions that were made were made to protect him.” According to reason.com: “Some of the officers on the scene also said they smelled alcohol, while others said they did not. Emergency medical personnel suggested that Meier had a stroke or was exposed to an opioid.” One officer told another that he was “a little intoxicated,” but the department “failed to obtain hospital records of Meier’s blood sample or investigate the matter as a possible DUI.” However, internal affairs noted that “Meier admitted to going home to drink vodka, even though he was still on the clock. He also admitted to being impaired.” His blood-alcohol content was “more than five times the legal limit,” washingtonpost.com reports. Meier was demoted and suspended.

Florida: Jason Gilbert, a former Riviera Beach police officer, faces a first-degree murder charge, WPBF.com reported in February 2020. Investigators alleged that Gilbert fatally shot a man in an altercation during the early morning hours of February 16, 2020 outside Blue Boar Tavern. According to nbcmiami.com, “police, deputies responded to a bar located near the 1300 block of North Military Trail where they found a man who had been shot and rushed him to an area hospital where he later died.” WPTV.com says a public defender is representing Gilbert.

Florida: A former Palm Beach County sheriff’s deputy from Boynton Beach is charged with conducting an organized scheme to defraud $50,000 or more, two counts of money laundering and three counts of grand theft, palmbeachpost.com reports in February 2020. Investigators say former cop and Navy veteran Robert “Bobby” Simeone used his not-for-profit charity Children of Wounded Warriors for personal and business gain, reports palmbeachpost.com. Donors, on the other hand, were reportedly told 80 percent to 90 percent of the monies would go to children of injured or slain military service members, police officers and firefighters, the news site reports. However, at least two-thirds of it went to Simeone, to businesses he ran, such as drug-treatment enterprises tied to previous “patient-brokering charges against him,” the website reports. A review of the charity’s bank records “found total deposits of $73,556. They found that, in 2015, Simeone and a family member, listed respectively as the president and vice president of the charity, had transferred $49,000 of the proceeds into accounts the couple controlled.”

Florida: A student who tried to leave River Ridge High School campus in his pickup truck for an orthodontist appointment was threatened at gunpoint by a school resource officer employed by the Pasco County Sheriff’s Office as the boy sat in his vehicle, washingtonpost.com reports. The 17-year-old told the officer he had an excused absence and would return later in the day with a note. After arguing for several minutes, he tried to pull his SUV around the officer’s golf cart to leave. “You’re going to get shot, you come another f------ foot closer to me,” the deputy said. “You run into me, you’ll get f------ shot.” The deputy and the assistant told the student he was a truant, but the boy’s mother said she informed the school two weeks earlier of the scheduled appointment in Trinity. The body-cam video, which has gone viral, drew criticism from the public. The student was suspended, then expelled and sent to an alternative education program.

Mississippi: A school resource officer is accused of hugging and sexually touching female students at Park High School in the St. Paul suburb of Cottage Grove between September 2018 and early October 2019, according to winonadailynews.com. Officer Adam Pelton, 40, of River Falls, Wisconsin, faces three counts of second-degree criminal sexual conduct and four counts of fourth-degree sexual conduct, all felonies. The complaint alleges the officer initiated hugging and then touched the teens’ buttocks over their clothing; three of the pupils were between 13 and 15 and four were 16 to 17. Dakota County Attorney James Backstrom told the Winona Daily News.

Mississippi: Former Walls police chief Herb Brewer was indicted for embezzling city funds and surrendered in February 2020 to Desoto County Sheriff’s Office special agents, fox13memphis.com reports. “Brewer is accused of selling vehicles seized by the police department for less than they were worth and pocketing the money,” Fox 13 reports. “A demand letter worth $6,943.58 was issued to Brewer at the time of his arrest.” If convicted, the northern Mississippi man faces $5,000 in fines and five years in prison.

Missouri: A former Poplar Bluff cop assigned to a middle school faces child porn charges. Ex-lawman Brandon Hopper, 39, and Amber Longhibler, 28, were arrested in February 2020 after a cyber tip led to an investigation by Missouri State Highway Patrol Division of Drug and Crime Control’s Digital Forensics Investigative and Criminal Investigative Units, KFVS12.com reports. Hopper was a school resource officer. “He was charged with sexual trafficking of a child, promoting child pornography and two counts of possession of child pornography,” the news station reports. Investigators said he admitted to sending and receiving child porn and to photographing a nude 11-year-old girl. She faces sex trafficking charges. Both are being held in the Butler County Jail.

New York: In the aftermath of a suicide, NYPD police are being urged to use crisis hot lines if they’re “going through something,” nypost.com reports. The New York Daily News reports that an NYPD officer hanged himself at his Queens home after he was given modified duties and his gun and shield were removed by the department. He is said to have been a 29-year veteran of the force. His death was the first in the NYPD in 2020, following a string of 10 suicides last year,” foxnews.com reports.

New Hampshire: “What kind of a town lets their chief of police walk out in a snowstorm in his underwear?” That’s what Croydon resident Rick Sampson asked after its police chief, Richard Lee, stripped down to his briefs.
and boots and started to walk home after the
town select board dissolved his job in Febru-
ary 2020. He trekked nearly a mile in temps
around 26 degrees when his wife picked him
up. He told the New Hampshire Union Leader:
“I was told that I had to turn over the keys to
the cruiser and my uniform immediately. I
had no other means of transportation, as
the cruiser is a take-home vehicle, and I have no
spare clothes in the office, so I did as ordered.”
Lee had been working part-time as the depart-
ment’s only member since 2000. The decision
to dissolve was economic. Selectman Russell
Edwards told the Union Leader: “We didn’t
feel we were getting the value for our money.”
State police, which cover in-town incidents
81 percent of the time, will now cover them
100 percent of the time. Lee will receive one
month’s severance pay.

Illinois: A case of mistaken identity had
Jaylan Butler on the ground with a police offi-
cer’s gun barrel to his temple, washingtonpost.
com reports. The incident took place in Febru-
ary 2019 near East Moline. Butler, then 19,
was with his Eastern Illinois University swim
team and their parked bus near a highway rest
stop on the trek home from a regional swim
meet in South Dakota. He took a selfie in front
of a sign that read: “Buckle Up. It’s the Law.”
Police shouted and flashing lights erupted, and
Butler was ordered to the ground. The teen
complied. The bus driver, Todd Slingerland,
unsuccessfully tried to intervene. “If you keep
moving, I’m going to blow your f--ing head off,”
the cop holding the gun reportedly told
Butler, the news site reports. But Butler, now
20, is suing. He contends that police from
three agencies violated his “civil rights when
they mistakenly detained him while looking
for someone else.” The Post reports that “At
least one officer jammed a knee into Butler’s
neck, and at least one pressed onto his neck
while he lay face down in the snow,” quot-
ing Butler’s attorney Rachel Murphy, of the
American Civil Liberties Union of Illinois,
which filed the lawsuit. “The officers detained
Butler for a prolonged period of time, searched
him, placed him in the back of a squad car and
threatened a charge of resisting arrest, then let
him go without explanation after reviewing his
ID, the suit says.” The police chief, Jeff Ramsey,
said officers in the area were searching for a
suspect who shot at a vehicle and fled on foot.
The driver says he was told they “were looking
for a black male and suspected the bus was
being held hostage.”

Texas: Former El Paso police officer
William Ollie Alexander was found guilty
of sexual assault in January 2019, and jurors
recommended a 10-year suspended sentence.
Now Alexander will serve 10 years’ probation
for raping a woman he met after responding
to a domestic dispute between the woman and
her ex-boyfriend at an apartment complex
in March 2018, the El Paso Times reports.
Alexander and another officer dropped the
woman off at a friend’s home, but investiga-
tors said Alexander began texting her, then
left work early, picked her up and took her
to a dark location where he sexually as-
saulted her. Prosecutors had asked the jury
to sentence Alexander to at least 15 years; the
victim testified the rape crushed her sense of
trust and left her afraid to have children. The
ex-officer’s father begged for no jail time. “I
understand he made a moral mistake,” Wil-
liam Ollie Alexander III said. “My son is a
law enforcement officer. I think you, I and all
the men and women of the jury know what
happens to law enforcement officers in prison.”
In addition to probation, Alexander will have
to register as a sex offender and pay a $10,000
fine, KFOX-TV reports.

Utah: Shane Zilles was fired as police
chief in Mantua last April, but since then new
charges have emerged, KUTV reports. Al-
though he pleaded guilty in a DUI arrest from
January 2019 in Cache County, it was recently
reported he faced similar charges from Feb. 6,
2020. “The former police chief was booked into
Cache County Jail on charges of driving under
the influence, five counts of possession of a con-
trolled substance, and driving on suspended/
revoked license,” KUTV reports. Zilles was also
arrested in August by Logan police.

Utah: A state bill now headed to the
full House would prevent children age 11
and younger from being prosecuted and in-
carcerated, deseret.com reports in February
2020. Utah is one of a few states with no age
cutoff in this area, while 32 other states have a
minimum age for children who are prosecuted
and sent to juvenile court. Many children who
land in court have a “history of trauma, mental
health issues or disabilities,” Brett Peterson,
director of Utah’s Division of Juvenile Justice
Services, was quoted as saying. Peterson said
the state is behind the curve. “The justice
system is not appropriate for elementary-
aged children,” Peterson said. “We are talking
about sixth graders. We are talking about fifth
graders. We are talking about fourth graders.”
Last year, there was even a 5-year-old. Of the
90 juvenile cases processed in Utah in 2019,
about 60 kids were booked into a detention
center. With early treatment, the kids have a
chance to turn their lives around, he said.

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