Changing Perception, Changing The Law

by Jean Trounstine, DigBoston

With 2.3 million people behind bars, the United States is the world’s largest jailer. Yet after decades of holding this dubious honor, many Americans have begun to question what Fordham law professor John Plaff calls “this massive experiment in punitive social control.” Decarceration is being discussed in states across the country.

In the debate over decarceration, advocates have realized that it is not enough to merely push for “low-level nonviolent drug offenders” to be let out. Decarceration defies such “easy fixes,” Plaff said. Rather, in order to reduce our prison population, we must change how we respond to violent crimes. As a recent article in Slate argued, “replacing the death penalty with an alternative” (states with capital punishment also have LWOP) and other cognitive impairments.”

A growing movement is calling for an end to harsh sentencing, and in particular, an end to “death by incarceration.” Sometimes called “bring them home,” in recent years, education campaigns have taken hold to end what many call “perpetual punishment.” From Vermont to California, activists are finding pathways to upend the “the other death sentence” — a fractured practice known as life without parole.

**Debunking LWOP**

Life without parole, explains Ashley Nelligs of the Washington, DC, nonprofit the Sentencing Project, is often touted as a “humane” replacement for the death penalty. Yet, after decades of holding this dubious honor, many Americans have begun to question what Fordham law professor John Plaff calls “this massive experiment in punitive social control.” Decarceration is being discussed in states across the country.

In the debate over decarceration, advocates have realized that it is not enough to merely push for “low-level nonviolent drug offenders” to be let out. Decarceration defies such “easy fixes,” Plaff said. Rather, in order to reduce our prison population, we must change how we respond to violent crimes. As a recent article in Slate argued, “replacing the death penalty with an alternative” (states with capital punishment also have LWOP) and other cognitive impairments.”

A growing movement is calling for an end to harsh sentencing, and in particular, an end to “death by incarceration.” Sometimes called “bring them home,” in recent years, education campaigns have taken hold to end what many call “perpetual punishment.” From Vermont to California, activists are finding pathways to upend the “the other death sentence” — a fractured practice known as life without parole.

**Debunking LWOP**

Life without parole, explains Ashley Nelligs of the Washington, DC, nonprofit the Sentencing Project, is often touted as a “humane” replacement for the death penalty. Yet, after decades of holding this dubious honor, many Americans have begun to question what Fordham law professor John Plaff calls “this massive experiment in punitive social control.” Decarceration is being discussed in states across the country.

In the debate over decarceration, advocates have realized that it is not enough to merely push for “low-level nonviolent drug offenders” to be let out. Decarceration defies such “easy fixes,” Plaff said. Rather, in order to reduce our prison population, we must change how we respond to violent crimes. As a recent article in Slate argued, “replacing the death penalty with an alternative” (states with capital punishment also have LWOP) and other cognitive impairments.”

A growing movement is calling for an end to harsh sentencing, and in particular, an end to “death by incarceration.” Sometimes called “bring them home,” in recent years, education campaigns have taken hold to end what many call “perpetual punishment.” From Vermont to California, activists are finding pathways to upend the “the other death sentence” — a fractured practice known as life without parole.

Life without parole, explains Ashley Nelligs of the Washington, DC, nonprofit the Sentencing Project, is often touted as a “humane” replacement for the death penalty. Yet, after decades of holding this dubious honor, many Americans have begun to question what Fordham law professor John Plaff calls “this massive experiment in punitive social control.” Decarceration is being discussed in states across the country.

In the debate over decarceration, advocates have realized that it is not enough to merely push for “low-level nonviolent drug offenders” to be let out. Decarceration defies such “easy fixes,” Plaff said. Rather, in order to reduce our prison population, we must change how we respond to violent crimes. As a recent article in Slate argued, “replacing the death penalty with an alternative” (states with capital punishment also have LWOP) and other cognitive impairments.”

A growing movement is calling for an end to harsh sentencing, and in particular, an end to “death by incarceration.” Sometimes called “bring them home,” in recent years, education campaigns have taken hold to end what many call “perpetual punishment.” From Vermont to California, activists are finding pathways to upend the “the other death sentence” — a fractured practice known as life without parole.

**Debunking LWOP**

Life without parole, explains Ashley Nelligs of the Washington, DC, nonprofit the Sentencing Project, is often touted as a “humane” replacement for the death penalty. Yet, after decades of holding this dubious honor, many Americans have begun to question what Fordham law professor John Plaff calls “this massive experiment in punitive social control.” Decarceration is being discussed in states across the country.

In the debate over decarceration, advocates have realized that it is not enough to merely push for “low-level nonviolent drug offenders” to be let out. Decarceration defies such “easy fixes,” Plaff said. Rather, in order to reduce our prison population, we must change how we respond to violent crimes. As a recent article in Slate argued, “replacing the death penalty with an alternative” (states with capital punishment also have LWOP) and other cognitive impairments.”

A growing movement is calling for an end to harsh sentencing, and in particular, an end to “death by incarceration.” Sometimes called “bring them home,” in recent years, education campaigns have taken hold to end what many call “perpetual punishment.” From Vermont to California, activists are finding pathways to upend the “the other death sentence” — a fractured practice known as life without parole.

Life without parole, explains Ashley Nelligs of the Washington, DC, nonprofit the Sentencing Project, is often touted as a “humane” replacement for the death penalty. Yet, after decades of holding this dubious honor, many Americans have begun to question what Fordham law professor John Plaff calls “this massive experiment in punitive social control.” Decarceration is being discussed in states across the country.

In the debate over decarceration, advocates have realized that it is not enough to merely push for “low-level nonviolent drug offenders” to be let out. Decarceration defies such “easy fixes,” Plaff said. Rather, in order to reduce our prison population, we must change how we respond to violent crimes. As a recent article in Slate argued, “replacing the death penalty with an alternative” (states with capital punishment also have LWOP) and other cognitive impairments.”

A growing movement is calling for an end to harsh sentencing, and in particular, an end to “death by incarceration.” Sometimes called “bring them home,” in recent years, education campaigns have taken hold to end what many call “perpetual punishment.” From Vermont to California, activists are finding pathways to upend the “the other death sentence” — a fractured practice known as life without parole.
Prison Education Guide  
Christopher Zoukis  
ISBN: 978-0-9819385-3-0 • Paperback, 269 pages  
Prison Education Guide is the most comprehensive guide to correspondence programs for prisoners available today. This exceptional book provides the reader with step-by-step instructions to find the right educational program, enroll in courses, and complete classes to meet their academic goals. This book is an invaluable reentry tool for prisoners who seek to further their education while incarcerated and to help them prepare for life and work following their release.

The Habeas Citebook: Ineffective Assistance of Counsel, Second Edition  
Brandon Sample & Alissa Hull  
ISBN: 978-0-9819385-4-7 • Paperback, 275 pages  
The Habeas Citebook: Ineffective Assistance of Counsel is the first in a series of books by Prison Legal News Publishing designed to help pro-se prisoner litigants identify and raise viable claims for potential habeas corpus relief. This book is an invaluable resource that identifies hundreds of cases where the federal courts have granted habeas relief to prisoners whose attorneys provided ineffective assistance of counsel.

Dan Manville  
The Disciplinary Self-Help Litigation Manual, Second Edition, by Dan Manville, is the third in a series of books by Prison Legal News Publishing. It is designed to inform prisoners of their rights when faced with the consequences of a disciplinary hearing. This authoritative and comprehensive work educates prisoners about their rights throughout this process and helps guide them at all stages, from administrative hearing through litigation. The Manual is an invaluable how-to guide that offers step-by-step information for both state and federal prisoners, and includes a 50-state analysis of relevant case law and an extensive case law citation index.

The Habeas Citebook: Prosecutorial Misconduct  
Alissa Hull  
The Habeas Citebook: Prosecutorial Misconduct is the second in PLN Publishing’s citebook series. It’s designed to help pro se prisoner litigants identify and raise viable claims for potential habeas corpus relief based on prosecutorial misconduct in their cases. This invaluable title contains several hundred case citations from all 50 states and on the federal level, saving readers many hours of research in identifying winning arguments to successfully challenge their convictions.

Order by mail, phone, or online. Amount enclosed ____________________

By: ☐ check ☐ credit card ☐ money order

Name ________________________________________________________________

DOC/BOP Number ____________________________________________________

Institution/Agency ____________________________________________________

Address _____________________________________________________________

City ________________________________ State _____ Zip ________________

Shipping included in all prices.
Changing Perception and Law (cont.)

end perpetual punishment. Joined by former prosecutors, progressive district attorneys, and others in the criminal legal system, they are challenging what Plaff calls our need for “brutal punitiveness.”

Below, the Boston Institute for Nonprofit Journalism examines some of the strategies and organizations that are moving the needle to eliminate life without parole in states across the country.

Empire State

New York has the highest number of people serving a life sentence in the country — roughly 8,900. More than 10,000 people who live inside New York’s prisons (nearly 20% of the state prison population) are 50 or older. Release Aging People in Prison (RAPP) was founded in 2013 to address the state’s aging prison population through research and advocacy. I talked on the phone to RAPP Director José Saldana about the organization’s fight to end life without parole.

Part of RAPP’s strategy comes from being led by those who are formerly incarcerated and have lived through harsh sentencing. “When US elected leaders talk about who should suffer and die in prison, they’re talking about men I personally know,” Saldana wrote in a recent op-ed. Saldana was released from prison on parole in January 2018, after 38 years, four previous parole board denials, and having mentored hundreds of men inside.

The parole board is a major focal point of RAPP. “New York’s parole release rate has doubled in the last two and a half years since we started challenging the composition of our parole board,” Saldana said. He insists that for death by incarceration to end, New York needs “a board with diversified backgrounds — not just those from law enforcement.” RAPP advocates for parole board commissioners who believe human beings can transform their lives.

In 2019, RAPP and other advocacy groups were able to end the nomination of a candidate they believed would subvert the paroling process. RAPP credits its success to a strong alliance with legislators and community activists — an army of volunteers, many of whom are part of New York’s Parole Preparation Project that supports currently and formerly incarcerated people serving life sentences with parole. Last March, RAPP; the Parole Preparation Project; and the New York State Black, Puerto Rican, Hispanic and Asian Caucus — made up of more than 60 New York state lawmakers — teamed up in a pressure campaign against Gov. Andrew Cuomo, calling on him to fully staff the parole board with qualified commissioners.

While they did not get all the changes they wanted, RAPP members were able to educate lawmakers and the public about the importance of parole. Activists said, “We feel proud that as a result of our advocacy efforts, the decision over who may serve as a parole commissioner is now a public process.”

“We measure success by the number of people we are getting engaged in this movement,” Saldana added. The number quadrupled in the last year or so, and at least 150 organizations now support their legislative bills and other efforts. In January, more than 500 activists and lawmakers rallied in Albany to end lifetime prison sentences.

“Turnout matters,” Nicole Porter, director of advocacy at the Sentencing Project, said in a phone interview. “Volume of participation is one way to gauge how something is working.” Much of the work of ending perpetual punishment, Porter added, is “laying the foundation.”

Ending LWOP would ultimately give more than 1,000 New Yorkers serving life without parole or virtual LWOP (a minimum sentence of 50 years) the opportunity, not the guarantee, of parole. For those whose sentences allow them parole hearings, earning parole often takes many trips to the board. Failure, meanwhile, can often take a toll on prisoners; in one example, 70-year-old John MacKenzie hung himself at New York’s Fishkill Correctional Facility in 2016 after being refused parole for the 10th time.

Advocates say the door should be open for redemption. But “Bring Them All Home,” RAPP’s call-out, is a hard sell in a country built on vengeance and retributive justice. As such, RAPP faces stiff opposition. Its proposed legislation, S2144 — a bill that would end LWOP and virtual life sentences by providing consideration of parole release for anyone 55 years or older with 15 or more years served — never made it to the floor last year. Still, Saldana is hopeful for 2020.

“We haven’t dismantled the law yet,” he said, “but we are coming close with our elder parole bill.”

Brotherly Love

Pennsylvania is one of the most punitive states on the matter of life without parole, with more than 5,300 people serving that sentence. Under Pennsylvania law, all adults...
who are convicted of first- and second-degree murder get a mandatory life sentence without the possibility of parole. That means no adult serving a life sentence is ever eligible for parole.

Add to that the particular problem that Pennsylvania has faced since 2012 regarding juveniles convicted of life without parole (JLWOP). That year, the US Supreme Court held in Miller v. Alabama that it was unconstitutional to sentence a juvenile to mandatory life without parole. The ruling meant that juveniles sentenced after 2012 could never serve life without parole, but the court did not specify what to do with those already sentenced to JLWOP.

Initially, the question of retroactivity was left to individual states. It was not until 2016 that the Supreme Court ruled (in Montgomery v. Louisiana) that Miller should be applied retroactively. In some states, like Massachusetts, those serving JLWOP were automatically eligible for parole after a range of years, but Pennsylvania went a decidedly more difficult route for its juveniles. They all had to go through a resentencing process. After being resentenced, they could possibly earn parole. As of Dec 31, 2019, 456 out of 521 Pennsylvania JLWOP prisoners had been resentenced, but only 224 had been released.

Robert Saleem Holbrook, director of community organizing for the Abolitionist Law Center, is one of the juvenile lifers Pennsylvania has released on parole. He was released in 2018 after spending more than two decades behind bars. His activism has deep roots in his experience.

Holbrook is a member of the Coalition to End the Death Penalty (CADBI), a group composed of family members of prisoners who are longtime advocates, community activists, and prisoners on the inside. Like New York, formerly incarcerated people are leaders in CADBI, which now has seven chapters across the state and is one of the main organizations fighting to end LWOP.

CADBI began in 2015 when four advocacy groups — Decarcerate PA, Right to Redemption, Fight for Lifers, and Human Rights Coalition — decided to join forces. “It took us a year,” Holbrook said, to make sure “people had shared values” and to find the language and vision for their campaign. Holbrook noted that language and vision are essential to building a coalition. They felt that the term “life without parole” was “too sterile,” and decided they needed to find language that communicated their position much more urgently. Holbrook, who co-founded the Human Rights Coalition when he was in prison, began conversing with activists both inside and outside about how to advocate around “radical and transformative reform.” People on the outside, he said, met up in apartments and at community centers, while visits and correspondence continued with those on the inside. They all agreed, Holbrook said, that the term that most fervently defined the struggle is “death by incarceration.”

Pennsylvania has had challenges and successes in its battle to end death by incarceration. One win is the commutation strategy (commutation leaves the conviction intact, but reduces the punishment). A commutation, though, can only be recommended in Pennsylvania by a unanimous vote from the Board of Pardons. So far, since Tom Wolf became governor in 2015, 56 petitions for commutation have been heard by the Board of Pardons, with 23 recommended and 19 granted by the governor. Many progressive groups, such as Decarcerate PA, campaigned to educate the incoming governor on mass incarceration. They also campaigned before the election to push for a new commutation strategy in the state.

Philadelphia DA Larry Krasner, a former civil rights and criminal defense attorney, is a key actor in the struggle against harsh sentencing in Pennsylvania. One of the country’s most progressive district attorneys, Krasner has been an outspoken critic of Philadelphia’s culture of prosecuting people for life. “We give out 75 years like we’re giving away candy,” he told the New York Times in 2018.

On Jan 21, 2020, Theophalis “Bilaal” Wilson became the 12th person exonerated by Krasner’s Conviction Integrity Unit (CIU), which, according to the Philadelphia Inquirer, investigates potential wrongful convictions and offers a damming assessment of prosecutorial practices stretching back decades.”

While Holbrook considers the uptick in commutations a success, he said it is essential to view them as more of a short-term fix than a long-term solution. “Although we recognize the progress being made with commutation in Pennsylvania where we are seeing lifers finally being released, we are aware that commutation was opened up by the opposition to halt the mo-

### A CARING HAND UP TO RECENTLY PAROLED AND RELEASED INMATES IN BEAUTIFUL SANTA BARBARA COUNTY CALIFORNIA

Our Rehabilitative Reentry Housing Program (formerly known as Transitional Housing) allows you the client to reside in a comfortable environment with all the amenities of home life: Meals, Entertainment, Recreation, as well as Counseling, Therapy and Educational opportunities! D&J’s Tradesmen* Employment Agency provides training support in Home Renovations, Auto Detailing, Handyman Services, Mobile Mechanics, and Food/Catering Services.

Begin the process of healing with work, D&J’s support and financial independence.

D&J’s Counseling and Support Services
Attn: Amy or Jeff
PO Box 1245
Santa Maria, CA 93456
(805) 862-4901 (No collect calls please)

We would like you to join us upon leaving prison.
WE’RE WAITING FOR YOU!

GIRLS! GIRLS! GIRLS! NON-NUDE PICTURES!

Great Deal on Orders of 300 or More Pics!
Single Sheet, Double-Sided
COLOR CATALOGS OF OVER 220 PICS!
ONE Catalog: $3
MORE than ONE at a time: $3 for 1ST, $1 each additional
CURRENT CATALOGS: 4 Black, 2 White, 2 Latina 2 Asian, 1 Big Girls AND MORE!

Who Want What?, LLC.
PO Box 18499
Philadelphia, PA 19120
Whowantwhat806@yahoo.com
mentum of the campaign for parole for lifers,” Holbrook said. “The only way to decarcerate Pennsylvania’s lifer population … is through parole that individually assesses each case.”

There are several obstacles. Krasner said that the opposition in Pennsylvania, led by people such as Jennifer Storm, has consistently claimed that victims oppose such legislation. Storm, the state’s victim advocate, remains firmly against ending life without parole. The ACLU in Pennsylvania refuted Storm’s assessment, arguing that her office failed to gather a representative view of opinions held by crime victims.

At a national convening in California focused on strategizing to help Californians end LWOP, advocates from Pennsylvania described the obstacles they faced when dealing with passing legislation to end LWOP. Activists wanted to prohibit LWOP and allow parole eligibility after 15 years, but legislators insisted eligibility be set at 25-35 years. This kind of “carve-out” is a common challenge for anti-LWOP activists, forcing them to decide where to draw the line and on which issues they are willing to negotiate. In this case, activists decided their best strategy was to negotiate.

Out West

California has the most people serving life sentences, with 40,691, or 31.3% of its prison population, as of 2016. Of those, 5,100 are serving life without parole.

California is also one of only three states where the governor has the final word on whether convicted murderers can be released on parole (the other two are Oklahoma and Maryland). All lifers in California who are eligible for parole must first see the Board of Parole Hearings and be recommended for release. Only then does the governor weigh in.

Like New York and Pennsylvania, formerly incarcerated people are leading the way in California to deal with what some call a “heinous process.” One such activist is Kelly Savage. After her sentence was commuted in December 2017, Savage sought parole and was finally released in November 2018 after more than two decades in prison. She is now the Drop LWOP coordinator for California Coalition for Women Prisoners (CCWP) — a grassroots organization that has members inside and outside prison — where she works on commutations with people behind the walls.

Savage won her commutation through former Gov. Jerry Brown, so feels she is well-suited to help others. Between 2011 and 2019, Brown pardoned 1,100 prisoners, clearing the records of those who had served out their sentences, and issued 147 commutations to those with LWOP sentences. Gavin Newsom, California’s current governor, issued 21 commutations in 2019, including seven to those serving life without parole.

Savage talked to BINJ about how she joined CCWP as a volunteer, 15 years before she was released, and was able to get a full-time job with them in 2019 after she got out of prison. She is happy to be doing this work, but is barely scraping by: “I spent 23 years, 98 days in prison, and then one year in sober living, and now I share an apartment in the city that costs $3,000 a month.”

Savage helps run CCWP’s letter strategy, designed to urge Newsome to commute the sentences of all those on LWOP. She writes to more than 70 people (mostly women, some transgender), assisting them with filing their commutation packets, a difficult process without legal aid. Savage also helps prepare prisoners to go to the board, fields their disappointment if they get refused, encourages them to try again, and gathers information on laws and new regulations for their cases.

Savage said, “There are lots of volunteers and staff who go inside for visits, but I am mainly the one they want to connect with because I’ve been released.” When a formerly incarcerated person can point to her success as an example, it gives hope to those inside.

Another strategy in California is the use of petitions, in which prisoners collect signatures from the public to support their commutations. Savage doesn’t work with the prisoners on petitions but believes that they can be an incredibly useful tool. She started a petition for her own commutation on change.org and got more than 10,000 signatures in just a few months; she thinks it might have pushed the governor to approve her release.

Another formerly incarcerated advocate is Nick Woodall, who is tackling LWOP through the language of the law. He is currently trying to resurrect an old regulation (repealed in 1993) that allowed those with LWOP to have regular reviews of their
sentences and ideally to be considered for commutation. Woodall said by phone, “I’d like to create a mechanism in which LWOP can be reviewed to determine if a person is suitable for commutation.”

While it’s positive that recent California governors are issuing commutations, Woodall cautions that “so far, it is happening only through an act of grace and mercy.” Woodall’s sentence was commuted on Christmas Day in 2018, and he was released last November after more than 32 years.

“Ultimately, I became a paralegal in prison, because I had witnessed so many abuses of power,” Woodall said. “What I discovered was that despite being pretty good at writing administrative appeals, I had no skill set to go legally to court.”

Woodall earned his paralegal degree through a correspondence program, worked as a prison clerk, and acquired the skills necessary to sue a California corrections officer who violated his rights. Now that he is out, he has a full-time job as a paralegal.

Woodall has also created a newsletter, *Posse Legal Update*, which he sends to prisoners, including all lifers, to educate them about current law. The first issue included an extensive article on the 25 criminal justice bills that Gov. Gavin Newsom has signed.

One of the bills passed this year is SB1437, which Woodall featured in his newsletter. The bipartisan bill redefines the law for felony murder liability by, Woodall writes, “excluding a person who is not the actual killer, while 72% of women serving life sentences for murder in California were not the killer.”

Joanne Scheer, who founded the Felony-Murder Elimination Project, said in a telephone interview that, unfortunately, the new rules won’t apply if the victim was a police officer. But Scheer still considers the bill a success, and she was instrumental in getting the amendment passed after her son Tony was charged with felony murder and sentenced to life without parole.

Scheer recounted how the fight to end felony murder became a crusade. Tony, a Marine, had been out partying with his buddies. One, who’d sustained a severe brain injury in a tank explosion, got into a skirmish with another over a laptop, pulled out a gun, and killed him.

“When I heard the sentence read aloud,” she said, tearfully, “I remember sitting in the courtroom and thinking, would it make you feel better to hang him from the ceiling and peel him alive?” It took her a long time to gather herself and ask, “How do we undo this?”

Re:Store Justice, an organization that creates and advocates for policy change, has been another essential actor in the fight against felony murder. The organization was founded by men in San Quentin prison in 2017 to “re-imagine and reform” the justice system. In a moving New York Times video, co-founder Adnan Khan, formerly sentenced to felony murder and now released, described why getting rid of felony murder is crucial to ending the practice of sending so many people to live (and die) in prison. “That was me,” he said, as a picture of Khan in prison blues came on the screen. “I spent the last 16 years of my life in prison for murder. The only thing is — I didn’t kill anyone.”

Alex Mallick, the other co-founder of Re:Store Justice, said at the national convening in California that they built support for SB1487, in part, with an education campaign to provide information to public officials, many of whom had little knowledge about the felony murder rule.

**Up North**

**Susan Lawrence**, advocate, attorney, and CEO of the Center for Life Without Parole Studies, is hopeful that Vermont will be the first state to pass legislation to end life without parole. S26, introduced by Democrats Sen. Dick Sears Jr., Sen. Philip Baruth, and Sen. Jeannette K. White, was voted out of the Judiciary Committee last month. The bill is expected to make it to the Senate floor, Lawrence said in a telephone interview, and then the legislature has until June 2020 to complete the process.

The bill currently asks for parole eligibility after 35 years for those serving LWOP for first-degree murder, which is significantly more than the Sentencing Project’s demand that “20 years is enough.” But these are the kinds of compromises necessary, Lawrence said, and from her point of view, they may be the way to assure success.

From her home state of California, Lawrence has worked for the past year with Vermonters for Criminal Justice Reform (VCJR), including Executive Director Tom Dalton and student activist Skyler Nash. She has travelled to New England for meetings and to appear before the Judiciary Committee. Lawrence said Vermont, which has only
15 prisoners sentenced to life without parole, “is uniquely positioned to become the first state to affirmatively end LWOP sentences for adults as well as for juveniles.” Her argument rests on Vermont’s creed of restorative justice.

Restorative justice, as spelled out by the Vermont Department of Corrections, is the recognition that crime causes injury to people and communities. Restorative practices seek to repair those injuries by encouraging and supporting parties with a stake in a particular offense to participate in its resolution. For the past 20 years, Vermont has, in many cases, aimed for “repair” not “vengeance,” according to the Community Justice Network of Vermont.

“LWOP is the antithesis of restoration,” Lawrence said.

Testimony this February to the Judiciary Committee included information provided by Azim Karmisa, who called in from California. Karmisa’s son Tarik, reported the VTDigger, “was murdered by a 14-year-old gang member; in the aftermath he committed himself to restorative justice.” Karmisa noted the importance of giving every person sentenced a chance at redemption and underscored Vermont’s restorative justice practices.

However, despite Vermont’s small LWOP population, pushback is strong. An outcry from family members whose loved one was murdered was heard by the Judiciary Committee, as some seek to kill the bill. The bill sponsors have already agreed not to make the bill retroactive.

Lawrence is also concerned that the final bill includes a carve-out for “aggravated murder,” which in Vermont includes a first- or second-degree murder charge with a number of special circumstances aimed at those who kill police, or who both rape and kill. These kinds of crimes stir up so much emotion that the message of restorative justice is often lost, and Lawrence worries that the bill’s carve-outs will encourage prosecutors to charge aggravated murder every time they want defendants to spend the rest of their days behind bars.

As it stands now, the Vermont bill was voted out of the judiciary committee, but is it so watered down that it fails to acknowledge the humanity of many of those sentenced to life without parole? Or is the passage of a bill at any cost what’s important? These are questions that Vermont activists will consider in the coming months.

The Way Forward

Advocates are “trying to create something in a context that is challenging,” Nicole Porter said, and there will always be pushback as groups aim to eliminate life without parole as a sentencing option. But the “conversation is evolving” in a positive direction. “Certainly,” she added, “this is courageous work.”

Part of this courage is demonstrated in how activists are working tirelessly to change the public narrative about a false dichotomy between victims and perpetrators in terms of their desire for justice and mercy. Activists I met agree that building coalitions between those harmed by crime and those who have harmed others is crucial to ending life without parole.

Monalisa Smith, founder of the Boston-based Mothers for Justice and Equality, said that a big part of supporting victims’ families is recognizing that the families of perpetrators are also suffering. Her organization saw early on that many of them had loved ones who were on both sides of such scenarios — they had been a victim of crime and had committed a violent act. Smith is working on creating programs that recognize this duality and serve everyone.

RAPP’s Saldana said that during his incarceration, he saw many prisoners whose children had been murdered, and he “developed victim awareness and felt the harm caused by others.” It is in part because of his work and the hard work of many other formerly incarcerated leaders that RAPP has...
the support of survivors of crime such as the Downstate Victims Coalition Group.

“I know men personally who have committed murder and now are running programs to help at-risk kids — really saving lives, enhancing community safety,” Saldana said. “To see the transformation of those who have caused harm is important for those who have been harmed.”

This article was produced in collaboration with the Boston Institute for Nonprofit Journalism. This series has been supported by the Solutions Journalism Network, a nonprofit organization dedicated to rigorous and compelling reporting about responses to social problems.

About the author: Jean Trounstine is a writer, activist, and professor whose latest book is Boy With a Knife: A Story of Murder, Remorse, and a Prisoner’s Fight for Justice. She is on the steering committee of the Coalition for Effective Public Safety in Massachusetts.

This article was originally published by DigBoston (digboston.com); reprinted with permission. Copyright, 2020 Dig Media Group, Inc. To follow updates in activism across the country, there is a national organization called the Campaign to End Life Imprisonment which supports the work of states, underscoring “to address mass incarceration, we must address life sentences.”

California Supreme Court Finds IAC, Vacates Conviction in LAPD Officer’s Murder Case (Again) – 36 Years Later
by Dale Chappell

The Supreme Court of California granted habeas corpus relief, vacating a conviction and death sentence in the 1983 murder of Los Angeles Police Officer Paul Verna, after finding ineffective assistance of counsel (“IAC”) once again, over three decades later.

Kenneth Gay was convicted of first-degree murder and was sentenced to die for his part in the shooting death of Verna. The crime happened in 1983, when Verna stopped a stolen vehicle driven by Pamela Cummings. Gay and Pamela’s husband, Raynard Cummings, were also in the vehicle, and they had just committed a string of robberies. When Verna stepped up to ask the two men for their identification, one of the men shot the officer, then got out and kept shooting until Verna was dead.

The question at trial was who did the shooting. There were witnesses. Lots of them. But none was reliable. The witnesses with the best vantage point were just kids, ages 11 to 14. Their stories varied: some said a light-skinned black man shot Verna, and some said it was a taller dark-skinned black man. The adults’ stories were even less reliable.

The prosecutor’s star witness was Pamela, who was charged in the murders and crime spree, but had her charges reduced in exchange for her testimony at trial.

There were also jailhouse witnesses, both prisoners and guards, most of whom said that Raynard admitted that he was the killer. They said that he bragged about shooting Verna, “Here’s your identification, motherf---er,” they quoted him as saying as he shot him. “He took six of mine,” a sergeant said Raynard told him, and “if I see you all on the streets I hope you are quicker than Verna.” But jailhouse witness statements were not brought to light at trial; they were all brought out at the hearing on Gay’s first habeas petition.

Gay was appointed a public defender, but Daye Shinn, a local lawyer, visited Gay at the jail with a minister, and they both convinced Gay to retain Shinn. When Gay told him he didn’t have any money, they (falsely) told him that a group of black businessmen would pick up the tab. All he had to do was tell the court that his parents were paying Shinn. Believing this, Gay “hired” Shinn to represent him at his murder trial.

Shinn also hid the fact that he was under investigation for fraud by the very district attorney’s office that was prosecuting Gay. In that case, Shinn was found to have spent a client’s money that a judge ordered him to put in an escrow account. The prosecutor would later decline to press charges. [Writer’s note: Shinn was one of the defense lawyers in the Manson murder trials in the 1970s. He would eventually be disbarred for incidents unrelated to Gay’s case. He died in 2006.]

As part of Shinn’s pretrial strategy, he had Gay admit to the 10 robberies he and Raynard committed. Shinn had hoped that by playing to the prosecutor Gay would get a break. That never happened. Instead, the prosecutor used Gay’s admission against him — playing the taped confession for the jury — to secure a death sentence for the murder.

The jury found Gay guilty and handed him a death sentence. His automatic appeals
were all denied, and his conviction and death sentence affirmed by the California Supreme Court in 1993. Gay then filed a habeas corpus petition in the Supreme Court, which the Court granted. The Court found that Shinn was ineffective at the death penalty phase for advising him to admit to the robberies that later supported the death sentence. The Court also found “serious misconduct in the very foundation of the attorney-client relationship,” that is, Shinn “used fraudulent means to induce Gay to retain him as his attorney,” which affected the trust that Gay should have had in his lawyer, the Court said.

Gay, however, was again sentenced to death in 2000, and while his automatic appeal was pending, he filed his second habeas petition in the Supreme Court. This time, he claimed that Shinn was ineffective during the guilt phase of his case (the trial). [Writer’s note: Typically, more than one habeas petition cannot be filed to attack a sentence and subsequently a conviction. However, Gay’s first petition was filed before that rule went into effect, so the bar permitted it.] The standard for IAC claims is found in the U.S. Supreme Court’s Strickland v. Washington, 466 U.S. 558 (1984), decision instructing that IAC is found where (1) counsel’s conduct was outside the “professional norms” and (2) that absent counsel’s errors the outcome of the proceeding would have been different (known as the “prejudice” showing). Strickland also explained that counsel’s strategic choices are “virtually unchallengeable” but only if counsel made a “thorough investigation of law and facts.”

Shinn’s advice for Gay to admit to the robberies prejudiced him for three reason, the Court said. First, Shinn acted as a “second prosecutor by creating evidence” that led to Gay’s conviction for the robberies. Second, the admission “portrayed petitioner as an admitted serial robber who killed a police officer to avoid arrest.” Third, the key witness to the robberies was Pamela, who had an interest to protect her husband and implicate Gay. Shinn could have used this to impeach Pamela’s testimony at trial, the Court observed.

But there was more. Shinn’s failure to investigate the witnesses was not a strategy immune from scrutiny, the Court said. His failure to call witnesses that could have shed doubt on Gay as the shooter infected the trial. Not only did Shinn not investigate or call the witnesses who identified Raynard as the shooter, he never called the sheriff’s deputies who heard Cunnings admit to shooting Verna.

“Gay was charged with the murder of a police officer,” the Court noted. “In such as case, peace officers would have had every incentive to ensure that those responsible were convicted.” The Court concluded that exculpatory testimony from the officers “would have been some of the most persuasive evidence a defense attorney could present.”

A totality of the circumstances, including the earlier fraud on the court by Shinn that rendered the death sentence invalid in the first habeas petition, plus the conflict of interest Shinn had by representing Gay when he was under investigation by the same prosecutor’s office, also played a part in the Supreme Court granting Gay habeas relief once again. “From the very outset, Shinn showed himself willing to deceive Gay (and the court) to further his own personal ends,” the Court concluded.

“It is not inconceivable that even with the assistance of competent counsel, the jury might still have voted for guilt,” the Court noted. But that is not the test.”

Accordingly, the Court granted Gay’s habeas petition and vacated his conviction for first-degree murder. See: In re Gay, 457 P.3d 502 (Cal. 2020).
Finally answering a question that had been left open in the Circuit, the U.S. Court of Appeals for the Ninth Circuit held on February 24, 2020, that a person may be “actually innocent” of an erroneous mandatory career offender sentence, opening the door for relief under the savings clause.

In yet another case expanding the reach of the so-called savings clause, Michael Allen brought a challenge to his mandatory career offender sentence in the U.S. District Court for the District of Oregon, arguing that he was “actually innocent” of the sentence imposed on him over 20 years ago. Allen pleaded guilty in 1997 to federal drug and firearm charges and was sentenced to just short of 27 years, the minimum the court could have imposed under the then-mandatory U.S. Sentencing Guidelines.

Allen did challenge his sentence under 28 U.S.C. § 2255 in 2003, but that was denied. Out of options when the law changed much later on, Allen turned to the “escape hatch” of § 2255, as the Ninth Circuit calls it, filing a habeas corpus petition in the district court where he was being held in prison, and not where he was sentenced, as the savings clause requires. This petition, though, was dismissed for lack of jurisdiction because the court ruled that Allen could not meet the criteria for relief under the savings clause in the Ninth Circuit. The court, however, never reached the merits of Allen’s claim about his wrongful sentence.

Allen appealed, and the Ninth Circuit agreed to hear oral argument on whether he could meet the savings clause criteria by being actually innocent of a career offender sentence. But while that appeal was pending, Allen’s sentencing court, the U.S. District Court for the District of Oregon, reduced his sentence to “time served” under the First Step Act and ordered his immediate release. The question before the Court then became whether Allen’s appeal was moot because of his release.

Allen’s Appeal Was Not Moot Because of His Release

The Government argued that Allen’s appeal was moot because he was released from prison. After all, the point of a habeas corpus petition under the savings clause is to “test the legality of [someone’s] detention.” But supervised release counts as “detention,” and Allen was on supervised release after his release. If the Court were to grant his petition, he could have his supervised release reduced, the Court said, because as a career offender, Allen had a minimum four-year term to serve on supervised release. Without the career offender penalty, the sentencing court could go lower or terminate his supervised release. “Allen has a nontrivial argument for reducing his supervised release period under [18 U.S.C.] § 3583(e),” the Court said. “Allen’s appeal therefore is not moot.”

The Savings Clause Criteria

The “exclusive” method by which a federal prisoner may test the legality of his detention is by § 2255. However, § 2255(e) provides an exception to this method, by allowing a classic habeas corpus petition under 28 U.S.C. § 2241 when § 2255 would be “inadequate or ineffective” to raise the challenge.

But when Congress wrote § 2255(e), it failed to define what “inadequate or ineffective” meant. Instead, courts have interpreted and reinterpreted what they think it means, severely dividing the circuits and sometimes the district courts within a circuit. And to date, the Supreme Court has repeatedly refused to take a savings clause case to settle the dispute.

In the Ninth Circuit, the requirement to obtain savings clause relief has two prongs: (1) a claim of actual innocence and (2) no “unobstructed procedural shot at presenting that claim.” Stephens v. Herrera, 464 F.3d 895 (9th Cir. 2006). In other words, the savings clause requires a showing of innocence that could not have been raised earlier for whatever reason.

The savings clause as we know it today was created in the mid-1990s when the Supreme Court interpreted a federal firearm statute in Bailey v. United States, 516 U.S. 137 (1995), which left hundreds of federal prisoners “actually innocent” of their firearms convictions.

The problem, however, was that many of these prisoners had already used their one shot at a § 2255 motion, and Bailey, while clearly a substantive rule that applies retroactively, is not a constitutional decision to allow a second or successive motion under the Antiterrorism and Effective Death Penalty Act’s (“AEDPA”) strict limits on filing more than one motion. For a discussion on the history of the savings clause in light of Bailey, review Triestman v. United States, 124 F.3d 361 (2d Cir. 1997). The AEDPA allows another § 2255 motion based on a new Supreme Court decision only if it is a constitutional decision. Over the years, courts have modified the savings clause numerous times in an effort to shoehorn the cases before them to fit within the clause.

Allen Was ‘Actually Innocent’ of Being a Career Offender

While the Ninth Circuit’s actual innocence criterion for the savings clause was originally premised on a case where the petitioner was innocent of his conviction, the question in Allen’s case was whether he could be innocent of a sentencing enhancement. The Court posed the question this way: “Whether a petitioner who committed a crime that is not a predicate crime may challenge his career offender status under § 2241.” To clarify, the Court was not saying that Allen was innocent of his prior conviction (the predicate crime) but only that it if it did not qualify that he could be deemed “actually innocent” of it being a predicate offense for federal sentencing purposes.

The Ninth Circuit held that Allen being sentenced under the mandatory career offender guideline was no different from being sentenced under a statute. The Court cited Alleyne v. United States, 570 U.S. 99 (2013), in which the Supreme Court held that a fact that increases the mandatory minimum sentence is an “element” of the offense that must be found by a jury. That is exactly what the career offender penalty did in Allen’s case — requiring a minimum sentence the court had to impose, without anything more than the judge finding the facts to support it. This was a violation of Alleyne, the Ninth Circuit suggested.

Allen Did Not Have an Unobstructed Shot at Presenting His Claim Earlier

In the Ninth Circuit, a person can prove he didn’t have an unobstructed shot at presenting his claim earlier by showing (1) the legal basis for the claim did not arise until after the direct appeal and first § 2255 motion, and (2) the law changed relevant to

by Dale Chappell

Ninth Circuit Opens Door for Savings Clause Relief, Recognizes ‘Actual Innocence’ for Mandatory Career Offender Sentences

May 2020 Criminal Legal News
the claim, opening the door for a proper challenge now. “If an intervening court decision after a petitioner’s direct appeal and first § 2255 motion effects a material change in the applicable law, then the prisoner did not have an unobstructed procedural shot to present his claim,” the Court explained. In the present case, the change in law was the *Descamps* and *Mathis* cases that made Allen’s claim possible.

**Conclusion**

With Allen meeting the savings clause requirements, the Court concluded that he had made a “cognizable claim” for the savings clause and that he in fact may have been “actually innocent” of his career offender sentence.

Accordingly, the Court reversed the district court’s dismissal for lack of jurisdiction and remanded for consideration of Allen’s claims “on the merits.” See: *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020).

---

**Seventh Circuit: Trial Judge Violated 5th Amendment by Modifying Instructions to Allow Jury to Convict on Offenses Not Charged in Indictment**

**by Douglas Ankney**

The U.S. Court of Appeals for the Seventh Circuit held that a district court judge violated Ionel Muresanu’s Fifth Amendment right to be tried only on charges brought by indictment when the judge modified the jury instructions to permit conviction on offenses not charged in the indictment.

Muresanu was charged with one count of possessing 15 or more counterfeit access devices in violation of 18 U.S.C. § 1029(a)(3) for his role in making and using counterfeited ATM cards to withdraw money from victims’ accounts. He was also charged with three counts of aggravated identity theft in violation of 18 U.S.C. § 1028(A)(a)(1). But the indictment charging those offenses alleged Muresanu “did knowingly attempt to transfer, possess, and use, without lawful authority, a means of identification ... knowing that said means of identification belonged to another person.”

After the Government presented its case at trial, Muresanu’s counsel moved for judgment of acquittal on the identity theft offenses, arguing that since attempted identity theft as charged in the indictment was not a federal crime, then no rational jury could return a verdict of guilty on those counts. The trial court denied the motion on the grounds that a defect in the indictment was to be raised pretrial in a Rule 12(b)(3) motion. But in order to submit the case to the jury, the judge modified the instructions to remove all references to “attempt,” thus reframing the identity theft offenses to be completed acts and not attempts as charged in the indictment. The jury found Muresanu guilty of all four counts, and he was sentenced to 24 months on each of the identity theft convictions to be run concurrently with each other but consecutively to a 34-month sentence on the possession of counterfeit access devices.

He appealed, arguing, *inter alia*, that the judge’s alteration of the jury instructions led the jury to convict him of offenses not charged in the indictment, violating his Fifth Amendment right to be tried only on charges issued by a grand jury.

The Seventh Circuit observed “[t]he federal criminal code does not contain a general attempt statute; attempts to commit a crime are punishable only if the statutory definition of the crime itself prescribes attempts.” *United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985). While many federal criminal statutes expressly proscribe attempts, section 1028A(a)(1) does not. Consequently, the grand jury failed to charge Muresanu with a federal crime in counts two through four when it charged him with “attempt[ing] to transfer, possess, and use ... a means of identification [that] ... belonged to another person.”

The Fifth Amendment guarantees the right of an accused to be tried only on charges in an indictment returned by a lawfully empaneled grand jury. *Stirone v. United States*, 361 U.S. 212 (1960). Altering an indictment without approval of the grand jury “is per se reversible error.” *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984). There are two kinds of permissible variances in an indictment: (1) a judge may correct a typographical error or a misnomer, *United States v. Leichtam*, 948 F.2d 370 (7th Cir. 1991), and (2) a judge may narrow an indictment to charge fewer offenses or lesser included offenses. *Id.*

But in Muresanu’s case, “the judge altered the substance of the indictment by changing the offense charged in counts two through four from an attempt to a completed crime of aggravated identity theft — hardly a narrowing of the indictment.” Thus, this was an impermissible variance, the Court concluded.

The Court rejected the Government’s argument that Muresanu waived the issue by not raising it pretrial in a Rule 12(b)(3) motion. While a challenge to a defective indictment must be raised by such a motion, Muresanu was challenging the judge’s alteration of the jury instructions which occurred after trial.

Accordingly, the Court vacated the judgment as to counts two through four and remanded to the district court for resentencing.

With Allen meeting the savings clause requirements, the Court concluded that he had made a “cognizable claim” for the savings clause and that he in fact may have been “actually innocent” of his career offender sentence.

Accordingly, the Court reversed the district court’s dismissal for lack of jurisdiction and remanded for consideration of Allen’s claims “on the merits.” See: *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020).

**Writer’s note:** This case also discusses why the Seventh Circuit sided with the Fifth and Tenth Circuits — as opposed to the Eleventh Circuit — in holding that, pursuant to *United States v. Cotton*, 535 U.S. 625 (2002), a court is not deprived of jurisdiction even when an indictment fails to charge a crime. ☑️

---

**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 (61) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth Beach, FL 33460.
Attacking the Guilty Plea: The Ineffective Assistance of Counsel Standard

by Dale Chappell

More than 95 percent of state and federal prisoners plead guilty, and most of them do so on the advice of their lawyer. A successful attack on a guilty plea would then depend on showing that counsel’s bad advice to plead guilty rendered the plea not “knowing and voluntary.”

We covered the knowing and voluntary nature of a guilty plea in my last column in this series on attacking the guilty plea (see March 2020 CLN, p.18). In this column, we will go over the ineffective assistance of counsel (“IAC”) standard in the guilty plea context.

A. The Negotiation of a Guilty Plea of a ‘Critical Phase’ of a Criminal Case

Criminal defendants are expected to rely on their lawyer’s advice in deciding to plead guilty. And the U.S. Supreme Court has recognized as much. In Padilla v. Kentucky, 559 U.S. 356 (2010), the Court reaffirmed its longstanding position on the issue and held that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”

The Court’s statement was hardly a surprise. For over 70 years, the Court has said lawyers are required to give clients their “informed opinion as to what plea should be entered.” Von Moltke v. Gillies, 332 U.S. 708 (1948). The Court further said that an “intelligent assessment” of the advantages to pleading guilty is “impossible” without counsel’s advice. Brady v. United States, 397 U.S. 742 (1970).

These are just a sampling of the Supreme Court cases that have all said the same thing over and over: counsel’s advice on whether to plead guilty is very important. The decision to take or reject a plea, go to trial, plead without a plea agreement, or any combination of these rests so much on counsel’s advice that bad advice can render a guilty plea involuntary.

B. IAC Implicates the Voluntariness of a Guilty Plea

“A guilty plea can be involuntary as a result of the ineffective assistance of counsel,” says the U.S. Court of Appeals for the Sixth Circuit. United States v. Gardner, 417 F.3d 541 (2005). Have you ever wondered why this is true? Sure, bad advice to plead guilty can be “prejudicial” because the outcome of your case could have been significantly different (better) had a different choice been made. But, that’s only part of why IAC makes a guilty plea involuntary.

Your decision to plead guilty stems from the information and advice you received from your lawyer. The amount of prison time you faced, any fallout from the conviction (e.g., deportation), and any rights you waived by pleading guilty are all affected by the decision to plead guilty. All of this formed your understanding of the guilty plea — or the “knowing and voluntary” nature of the plea. Bad advice to plead guilty, then, taints the voluntariness of your plea because it affects your understanding of your plea. United States v. Keller, 902 F.3d 1391 (9th Cir. 1990) (“A claim of ineffective assistance may be used to attack the voluntariness and hence the validity of a guilty plea”).

This reasoning was the basis of the Supreme Court’s decision in Tollett v. Henderson, 411 U.S. 258 (1973). In that case, the Supreme Court held that a defendant who pleads guilty “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [the Court’s decision on effective assistance of counsel].” The Tollett Court recognized that other constitutional violations may “play a part” in determining the voluntariness of a guilty plea, but “they are not themselves independent grounds for federal collateral relief.” Instead, it’s all about the advice of counsel to plead guilty.

Let’s take a look at how counsel’s advice could make a guilty plea not “knowing and voluntary.” In the child sexual exploitation case against Subway’s ex-pitchman Jared Fogle, the former head of Fogle’s charitable foundation, Russell Taylor was charged with multiple counts of producing child pornography, in violation of 18 U.S.C. § 2251, depicting “sexually explicit conduct.” Immediately, Taylor’s lawyer advised him to plead guilty because he faced such a high sentence if he lost at trial. Taylor pleaded guilty to the charges upon his lawyer’s advice and received a 27-year sentence.

When Taylor later challenged in a motion under 28 U.S.C. § 2255 that his guilty plea was not knowing and voluntary, claiming that his lawyer never advised him that his conduct did not amount to the crimes charged, the court agreed and vacated his conviction and sentence.

The court found that Taylor’s lawyer had not only failed to advise him that he didn’t break the law he was charged with, but also that he failed to object to the presentence report’s “inaccurate description” of the offense conduct. Additionally, he failed to advise the court that Taylor’s conduct didn’t meet the elements of the charged offenses. He even stipulated in the plea agreement with the government that Taylor’s conduct met the elements of the charges.

The court tossed his guilty plea based on the shockingly bad advice by counsel to plead guilty, despite the fact that Taylor stood before the court, under oath, and pleaded guilty to the charges, saying that he had understood the charges. His understanding, though, was poisoned by his counsel’s ineffective assistance, and his plea was therefore not knowing and voluntary, the court concluded. Taylor v. United States, 2020 U.S. Dist. LEXIS 34341 (S.D. Ind. 2020).

Not only can counsel’s bad advice kill a guilty plea but so can counsel’s bad acts that led up to the plea. In Missouri v. Frye, 566 U.S. 134 (2012), the Court noted a distinction from its earlier cases that it wasn’t counsel’s advice that led to an invalid plea but “the course of the legal representation that proceeded it.” The Court held that counsel’s failure to advise of a more favorable plea offer made the defendant’s guilty plea under a harsher agreement not fully informed and therefore invalid.

IAC in any form undermines the knowing and voluntary nature of a guilty.

C. Strickland v. Washington in the Guilty Plea Context

“Defendants facing felony charges are entitled to the effective assistance of competent counsel,” the Supreme Court said in Hill v. Lockhart, 474 U.S. 52 (1985). But how do you measure whether counsel was “competent”? The year prior to Hill, the Court had established in Strickland v. Washington, 466 U.S. 668 (1984), a two-part test in assessing whether counsel’s performance meets the Sixth Amendment guarantee to the right to counsel in criminal cases. In Hill, the Court extended the Strickland test to IAC claims in the guilty plea context (Strickland was about
The familiar Strickland standard requires a showing (1) “that counsel’s representation fell below an objective standard of reasonableness” and (2) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The second prong, known as the “prejudice” prong, is crucial because without showing prejudice counsel is not constitutionally ineffective.

The Supreme Court has recognized three different ‘prejudices’ in the guilty plea context: (1) accepting a guilty plea that wouldn’t have been accepted absent IAC, (2) rejecting a favorable plea offer because of IAC, and (3) IAC that led to the failure to communicate a plea offer or option. We go over these in detail in subsequent columns on attacking the guilty plea, so we won’t spend much time on these here. But the whole idea under each prejudice showing is that the guilty plea would have been different without the IAC.

In establishing prejudice after a guilty plea, courts apply the Strickland principles. A “reasonable probability” under Strickland simply means to ‘undermine confidence in the outcome,’ the Court said. This reasonable probability bar is significantly lower than the “beyond reasonable doubt” standard and is even lower than the “more likely than not” standard. As one circuit court of appeals noted, “Strickland asks if a different result is ‘reasonably probable,’ not if it is possible.” Brown v. United States, 729 F.3d 1316 (11th Cir. 2013); see also United States v. Cartheone, 878 F.3d 458 (4th Cir. 2017) (“even when a district court has not committed plain error, counsel can have rendered ineffective assistance when counsel’s errors were the result of a misunderstanding of the law”).

Strickland embraced the idea that counsel’s strategic decisions are insulated from being attacked as IAC. But this doesn’t mean anything if counsel didn’t do her homework. The failure to investigate and research the case and the law is not a “strategy” by anyone’s definition. Taylor (“because I counsel never considered an alternative to a [guilty] plea, his pursuit of a [guilty] plea was not a reasonable strategic decision”).

D. Relief is Available for State Prisoners in Federal Court

After exhausting their state court remedies, state prisoners attacking their guilty pleas can take their challenges to federal court if denied by the state courts. Under 28 U.S.C. § 2254(d)(1), a state prisoner may file a habeas corpus petition in federal court if the state court’s denial “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court.”

Since Strickland is “clearly established federal law,” a state court decision that’s contrary to or is an unreasonable application of the Supreme Court’s holding would be open to further attack in federal court. Lafler v. Cooper, 566 U.S. 156 (2012) (“the state court’s adjudication was contrary to clearly established federal law. And in that circumstance the federal courts in this habeas action can determine the principles necessary to grant relief.”)

But it’s not enough for the state court to apply Strickland incorrectly. You must show that the state court applied Strickland in your case “in an objectively unreasonable manner.” Rompilla v. Beard, 545 U.S. 374 (2005). In other words, the state court’s decision must not only be wrong, you must show that any reasonable judge would not have made the same mistake. That’s the “objectively unreasonable” measuring stick.

Since we’re dealing with IAC and guilty pleas, the actual standard that the state court must apply is the one that the Supreme Court announced in Hill, which applied Strickland to the guilty plea context. You must show that the court violated the Hill standard, not just Strickland. Your research will likely have better results if you include cases that have applied Strickland under the Hill decision, even though Hill was largely about finding Strickland prejudice in the face of a guilty plea.

Conclusion

IAC can clearly lead to a guilty plea that is constitutionally invalid and open to collateral attack. Becoming familiar with Strickland will help in identifying whether your lawyer’s errors were grave enough to render your guilty plea not knowing and voluntary. In the next column in this series, we will begin our journey into the various ways the Supreme Court has recognized Strickland prejudice in attacking the decision to plead guilty, starting with the Hill prejudice standard.

Editor’s note: This is the second column in an ongoing series on attacking the guilty plea.

About the author: Dale Chappell is a staff writer for Criminal Legal News and Prison Legal News. For over a decade, he has helped prisoners challenge their wrongful convictions and sentences, with dozens being released from prison. He is a member of the National Lawyers Guild and was a 20-year career firefighter before becoming an advocate for prisoners. He is the author of two books written in conjunction with attorney Brandon Sample: WinningCites: Section 2255, A Handbook for Prisoners and Lawyers and WinningCites: Attacking the Guilty Plea. Email info@brandonsample.com for more information on these books (prisoner emails accepted).
The right of habeas corpus was important to the Framers of the Constitution because they knew from personal experience what it was like to be labeled enemy combatants, to have their dastardly deeds. While serving as President, Thomas Jefferson addressed the essential necessity of habeas corpus. In his first inaugural address on March 4, 1801, Jefferson said, “I know, indeed, that some honest men fear that a republican government cannot be strong; that this government is not strong enough.” But, said Jefferson, our nation was “the world’s best hope” and, because of our strong commitment to democracy, “the strongest government on earth.” Jefferson said that the sum of this basic belief was found in the “freedom of person under the protection of the habeas corpus; and trial by juries impartially selected.” These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.”

Throughout the twentieth century, the importance of the right of habeas corpus has repeatedly been confirmed by the U.S. Supreme Court. Yet 200 plus years after America’s founders risked their lives to secure their freedoms, we find ourselves right back where we started, with a government determined to strip us of every vestige of our freedoms.

The DOJ’s latest request to Congress is merely a signal that the police state is ready to step out of the shadows, with the current national emergency being a convenient cover for their dastardly deeds.

Bear in mind, however, that these powers the Trump Administration, acting on orders from the police state, are officially asking Congress to recognize and authorize barely scratch the surface of the far-reaching powers the government has already unilaterally claimed for itself.

Unofficially, the police state has been riding roughshod over the rule of law for years from such government abuses.

Translated as “you should have the body,” habeas corpus is a legal action, or writ, by which those imprisoned unlawfully can seek relief from their imprisonment. Derived from English common law, habeas corpus first appeared in the Magna Carta of 1215 and is the oldest human right in the history of English-speaking civilization. The doctrine of habeas corpus stems from the requirement that a government must either charge a person or let him go free.

While serving as President, Thomas Jefferson addressed the essential necessity of habeas corpus. In his first inaugural address on March 4, 1801, Jefferson said, “I know, indeed, that some honest men fear that a republican government cannot be strong; that this government is not strong enough.” But, said Jefferson, our nation was “the world’s best hope” and, because of our strong commitment to democracy, “the strongest government on earth.” Jefferson said that the sum of this basic belief was found in the “freedom of person under the protection of the habeas corpus; and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.”

Throughout the twentieth century, the importance of the right of habeas corpus has repeatedly been confirmed by the U.S. Supreme Court. Yet 200 plus years after America’s founders risked their lives to secure their freedoms, we find ourselves right back where we started, with a government determined to strip us of every vestige of our freedoms.

The DOJ’s latest request to Congress is merely a signal that the police state is ready to step out of the shadows, with the current national emergency being a convenient cover for their dastardly deeds.

Bear in mind, however, that these powers the Trump Administration, acting on orders from the police state, are officially asking Congress to recognize and authorize barely scratch the surface of the far-reaching powers the government has already unilaterally claimed for itself.

Unofficially, the police state has been riding roughshod over the rule of law for years from such government abuses.

Translated as “you should have the body,” habeas corpus is a legal action, or writ, by which those imprisoned unlawfully can seek relief from their imprisonment. Derived from English common law, habeas corpus first appeared in the Magna Carta of 1215 and is the oldest human right in the history of English-speaking civilization. The doctrine of habeas corpus stems from the requirement that a government must either charge a person or let him go free.

While serving as President, Thomas Jefferson addressed the essential necessity of habeas corpus. In his first inaugural address on March 4, 1801, Jefferson said, “I know, indeed, that some honest men fear that a republican government cannot be strong; that this government is not strong enough.” But, said Jefferson, our nation was “the world’s best hope” and, because of our strong commitment to democracy, “the strongest government on earth.” Jefferson said that the sum of this basic belief was found in the “freedom of person under the protection of the habeas corpus; and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation.”

Throughout the twentieth century, the importance of the right of habeas corpus has repeatedly been confirmed by the U.S. Supreme Court. Yet 200 plus years after America’s founders risked their lives to secure their freedoms, we find ourselves right back where we started, with a government determined to strip us of every vestige of our freedoms.

The DOJ’s latest request to Congress is merely a signal that the police state is ready to step out of the shadows, with the current national emergency being a convenient cover for their dastardly deeds.

Bear in mind, however, that these powers the Trump Administration, acting on orders from the police state, are officially asking Congress to recognize and authorize barely scratch the surface of the far-reaching powers the government has already unilaterally claimed for itself.

Unofficially, the police state has been riding roughshod over the rule of law for years from such government abuses.
now without any pretense of being reined in or restricted in its power grabs by Congress, the courts or the citizenry.

As David C. Unger, observes in The Emergency State: America’s Pursuit of Absolute Security at All Costs:

“For seven decades we have been yielding our most basic liberties to a secretive, unaccountable emergency state—a vast but increasingly misdirected complex of national security institutions, reflexes, and beliefs that so define our present world that we forget that there was ever a different America.... Life, liberty, and the pursuit of happiness have given way to permanent crisis management: to policing the planet and fighting preventative wars of ideological containment, usually on terrain chosen by, and favorable to, our enemies. Limited government and constitutional accountability have been shouldered aside by the kind of imperial presidency our constitutional system was explicitly designed to prevent.”

This rise of an “emergency state” that justifies all manner of government tyranny in the so-called name of national security is all happening according to schedule.

The civil unrest, the national emergencies, “unforeseen economic collapse, loss of functioning political and legal order, purposeful domestic resistance or insurgency, pervasive public health emergencies, and catastrophic natural and human disasters,” the government’s reliance on the armed forces to solve domestic political and social problems, the implicit declaration of martial law packaged as a well-meaning and overriding concern for the nation’s security; the powers-that-be have been planning and preparing for such a crisis for years now, not just with active shooter drills and lockdowns and checkpoints and heightened danger alerts, but with a sensory overload of militarized, battlefield images—in video games, in movies, on the news—that acclimate us to life in a police state.

Whether or not this particular crisis is of the government’s own making is not the point: to those for whom power and profit are everything, the end always justifies the means.

The seeds of this present madness were sown several decades ago when George W. Bush stealthily issued two presidential directives that granted the president the power to unilaterally declare a national emergency, which is loosely defined as “any incident, regardless of location, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the U.S. population, infrastructure, environment, economy, or government functions.”

Comprising the country’s Continuity of Government (COG) plan, these directives (National Security Presidential Directive 51 and Homeland Security Presidential Directive 20), which do not need congressional approval, provide a skeletal outline of the actions the president will take in the event of a “national emergency.”

Mind you, that national emergency can take any form, can be manipulated for any purpose and can be used to justify any end goal—all on the say so of the president.

Just what sort of actions the president will take once he declares a national emergency can barely be discerned from the barebones directives. However, one thing is clear: in the event of a national emergency, the president will become a dictator because while the COG directives ensure the continuity of executive branch functions, they do not provide for repopulating or reconvening Congress or the Supreme Court.

Thus, a debilitating attack would give unchecked executive, legislative and judicial power to the executive branch and its unelected minions. The country would then be subjected to martial law by default, and the Constitution and the Bill of Rights would be suspended.

Originally devised as a plan for quickly restoring constitutional government, the COG concept arose during the Cold War. The fear was that a nuclear strike would paralyze the federal government.

These concerns continued into the 1980s. Under President Ronald Reagan, an elaborate plan was created in which three teams consisting of a cabinet member, an executive chief of staff and military and intelligence officials would practice evacuating and directing a counter nuclear strike against the Soviet Union from a variety of high-tech, mobile command vehicles. If the president and vice president were both killed, one of these teams would take control, with the ranking cabinet official serving as president.

Among those Reagan handpicked to advise an inexperienced and potentially incompetent successor in a time of crisis were Congressman Dick Cheney and Donald Rumsfeld, then a business executive with G. D. Searle & Co. At least once a year during the 1980s, Cheney and Rumsfeld vanished on top-secret training missions, where each of the teams practiced evacuating and directing a counter nuclear strike against Russia.

This all changed after the attacks of September 11, 2001, when it became clear that the assumptions that drove COG planning during the Cold War no longer applied: there would be no warning against a so-called “terrorist” attack. Thus, instead of relying on part-time bureaucrats and evacuation schematics, the Bush administration permanently appointed executive officials, stationed outside the capital, to run a shadow government.

The U.S. military has reportedly already been given standby orders under COG for this present coronavirus pandemic.

The plans for the shadow government administered by those who run the Deep State are more elaborate than many realize. Massive underground bunkers the size of small cities are sprinkled throughout the country for the government elite to escape to in the event of a national emergency. Mount Weather, near Bluemont, Va., is one of a number of such facilities. Built into the side of a mountain, this bunker contains, among other things, a hospital, crematorium, dining and recreation areas, sleeping quarters, reservoirs of drinking and cooling water, an emergency power plant and a radio/television studio.

There is also an Office of the Presidency at Mount Weather, which regularly receives top-secret national security information from all the federal departments and agencies. This facility was largely unknown to everyone, including Congress, until it came to light in the mid-1970s. Military personnel connected to the bunker have refused to

---

CORONAVIRUS PANDEMIC

Are you:
• Over the age of 50?
• Have heart disease?
• Lung problems?
• Diabetes?
• Other immune system issues?

If so, you may be HIGH RISK and qualify for EARLY RELEASE.
Contact us to see how we can help.
Motions starting at $3,500.00.

PINIX & DONOVAN, LLC
1200 E. Capitol Dr., Milwaukee, WI 53211
414-426-5509
covid@getoutearly.com
Lockdown Powers (cont.)

reveal any information about it, even before congressional committees. In fact, Congress has no oversight, budgetary or otherwise, on Mount Weather, and the specifics of the facility remain top-secret.

What is the bottom line here?

We are, for all intents and purposes, one crisis away from having a full-fledged authoritarian state emerge from the shadows, at which time democratic government will be dissolved and the country will be ruled by an unelected bureaucracy.

This is exactly the kind of mischief that Thomas Jefferson warned against when he cautioned, “In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”

Power corrupts.

Absolute power corrupts absolutely.

Thus far, we have at least pretended that the government abides by the Constitution.

Those who wrote our Constitution sought to ensure our freedoms by creating a document that protects our God-given rights at all times, even when we are engaged in war, whether that is a so-called war on terrorism, a so-called war on drugs, a so-called war on illegal immigration, or a so-called war on disease.

The attempts by each successive presidential administration to rule by fiat merely plays into the hands of those who would distort the government’s system of checks and balances and its constitutional separation of powers beyond all recognition.

Remember, these powers do not expire at the end of a president’s term. They remain on the books, just waiting to be used or abused by the next political demagogue.

So, too, every action taken by Trump and his predecessors to weaken the system of checks and balances, sidestep the rule of law, and expand the power of the executive branch of government has made us that much more vulnerable to those who would abuse those powers in the future.

Although the Constitution invests the President with very specific, limited powers, in recent years, American presidents (Trump, Obama, Bush, Clinton, etc.) have claimed the power to completely and almost unilaterally alter the landscape of this country for good or for ill.

The Trump Administration’s willingness to circumvent the Constitution by leaning heavily on the president’s so-called emergency powers constitutes a gross perversion of what limited power the Constitution affords the executive branch.

The powers amassed by each successive president through the negligence of Congress and the courts—powers which add up to a toolbox of terror for an imperial ruler—empower whomever occupies the Oval Office to act as a dictator, above the law and beyond any real accountability.

As law professor William P. Marshall explains, “every extraordinary use of power by one President expands the availability of executive branch power for use by future Presidents.” Moreover, it doesn’t even matter whether other presidents have chosen not to take advantage of any particular power, because “it is a President’s action in using power, rather than forsaking its use, that has the precedential significance.”

In other words, each successive president continues to add to his office’s list of extraordinary orders and directives, expanding the reach and power of the presidency and granting him- or herself near-dictatorial powers.

This abuse of presidential powers has been going on for so long that it has become the norm, the Constitution be damned.

We no longer have a system of checks and balances.

“The system of checks and balances that the Framers envisioned now lacks effective checks and is no longer in balance,” concludes Marshall. “The implications of this are serious. The Framers designed a system of separation of powers to combat government excess and abuse and to curb incompetence. They also believed that, in the absence of an effective separation-of-powers structure, such ills would inevitably follow. Unfortunately, however, power once taken is not easily surrendered.”

All of the imperial powers amassed by Barack Obama and George W. Bush and now Trump—to kill American citizens without due process, to detain suspects (including American citizens) indefinitely, to strip Americans of their citizenship rights, to carry out mass surveillance on Americans without probable cause, to wage wars without congressional authorization, to suspend laws during wartime, to disregard laws with which he might disagree, to conduct secret wars and convene secret courts, to sanction torture, to sidestep the legislatures and courts with executive orders and signing statements, to direct the military to operate beyond the reach of the law, to establish a standing army on American soil, to operate a shadow government, to declare national emergencies for any manipulated reason, and to act as a dictator and a tyrant, above the law and beyond any real accountability—have become a permanent part of the president’s toolbox of terror.

These presidential powers—acquired through the use of executive orders, decrees, memorandums, proclamations, national security directives and legislative signing statements and which can be activated by any sitting president—enable past, president and future presidents to operate above the law and beyond the reach of the Constitution.

Think on this: the presidential election is right around the corner.

Suddenly, the improbable possibility of any incumbent president attempting to extend the police state’s stranglehold on power by using current events to justify postponing or doing away with an election—forfeiting the people’s rights to govern altogether—and establishing a totalitarian regime seems less far-fetched than it did even a few years ago.

The emergency state is now out in the open for all to see. Unfortunately, “we the people” refuse to see what’s before us. Most Americans, fearful and easily controlled, would sooner rouse themselves to fight for that last roll of toilet paper than they would their own freedoms.

This is how freedom dies.

We erect our own prison walls, and as our rights dwindle away, we forge our own chains of servitude to the police state.

Be warned, however: once you surrender your freedoms to the government—no matter how compelling the reason might be for doing so—you can never get them back.

As I make clear in my book Battlefield America: The War on the American People, no government willingly relinquishes power.

If we continue down this road, there can be no surprise about what awaits us at the end.

The America metamorphosing before our eyes is almost unrecognizable from the country I grew up in, and that’s not just tragic—it’s downright terrifying.

About the author: Constitutional attorney and author John W. Whitehead is founder and president of The Rutherford Institute. His new book Battlefield America: The War on the American People is available at www.amazon.com. Whitehead can be contacted at jw@rutherford.org.

This article was originally published by The Rutherford Institute (rutherford.org) on March 24, 2020. Reprinted with permission. Copyright 2020 The Rutherford Institute

May 2020 16 Criminal Legal News
SCOTUS: ‘Serious Drug Offense’ Under ACCA Is Self-Defining, Match with Equivalent Federal Offense Not Required

by Dale Chappell

The Supreme Court of the United States held on February 26, 2020, that just as the elements clause of the Armed Career Criminal Act (“ACCA”) statute provides the criteria defining what prior offenses qualify as “violent felonies,” so too do the criteria defining what prior offenses qualify as “serious drug offenses,” and therefore there was no need to match the prior drug offense to an equivalent federal offense for it to suffice.

Eddie Shular pleaded guilty in the U.S. District Court for the Northern District of Florida to possession with intent to distribute crack cocaine and possessing a firearm as a convicted felon. He was sentenced to 15 years in federal prison without parole, the minimum sentence the court could have imposed under the ACCA. But Shular did not come to court with a clean background.

In 2012, Shular pleaded guilty to six counts of sales or intent to sell cocaine in Florida, in violation of Fla. Stat. § 893.13(1)(a). Those six convictions, the district court determined, all qualified Shular for the ACCA penalty, which mandates a 15-year minimum sentence for any defendant having had three prior convictions for “violent felonies” and/or “serious drug offenses.”

Shular appealed, and the U.S. Court of Appeals for the Eleventh Circuit affirmed his sentence. He argued that his Florida drug priors did not qualify under the ACCA because Florida does not require proof of a mens rea element, i.e., that he knew he possessed an illegal drug, like its federal counterpart requires. He asserted that the federal “generic” offense did not compare the state prior offense to a federal generic offense.

Shular’s argument that Florida’s cocaine distribution statute lacking the mens rea element took it outside the ACCA was necessarily foreclosed by the Court’s ruling. Since there was no need to compare a § 893.13 offense to a federal generic offense, mens rea was not an issue in that context, the Court said. However, whether the ACCA itself requires a mens rea element for qualifying prior convictions was not reached by the Court, because Shular had not properly raised the question in the Supreme Court, thereby forfeiting the issue.

The Court called both Shular’s and the Government’s interpretation of the “serious drug offense” language as a “measure of consistency,” but it said that the Government’s interpretation most satisfied Congress’ intent that the ACCA applies to all defendants who engaged in certain drug offense conduct and not just to those who committed certain generic drug offenses.

Accordingly, the Supreme Court affirmed the Eleventh Circuit’s ruling upholding Shular’s ACCA sentence based on his prior Florida drug convictions. See: Shular v. United States, 140 S. Ct. 779 (2020).
SCOTUS: Advocating for Shorter Sentence Sufficient to Preserve Claim that Sentence Imposed Greater Than Necessary to Comply With 18 U.S.C. § 3553(a)

by Douglas Ankney

The Supreme Court of the United States (“SCOTUS”) ruled that when a defendant argues before the trial court for a sentence shorter than that sought by the Government the defendant has preserved for appeal purposes his claim that the longer sentence ultimately imposed was greater than necessary to comply with the statutory purposes of 18 U.S.C. § 3553(a).

Gonzalo Holguin-Hernandez was convicted of drug-trafficking and sentenced to 60 months in prison and five years of supervised release. At the time of this conviction, he was serving a period of supervised release from an earlier conviction. The Government requested the trial court to find that Holguin had violated the conditions of the earlier supervised release and impose an additional consecutive term of 12 to 18 months.

Holguin’s counsel argued that there “would be no reason under [18 U.S.C. §] 3553 that an additional consecutive sentence would get [Holguin’s] attention any better than” the 60 months in prison the court had already imposed for the trafficking offense. Counsel urged the court to impose “no additional time or certainly less than” 12 to 18 months. The trial court imposed a consecutive 12-month sentence. Holguin appealed, arguing that the 12-month sentence was unreasonably long in that it was “greater than necessary to accomplish the goals of sentencing.”

The U.S. Court of Appeals for the Fifth Circuit ruled that Holguin had forfeited the argument by failing to “object in the district court to the reasonableness of the sentence imposed.” The Fifth Circuit then reviewed for plain error and, finding none, affirmed.

SCOTUS, citing the differences on this issue among the 4th, 5th, 6th, 7th, 10th, 11th, and D.C. Circuits, granted Holguin’s petition for certiorari.

SCOTUS observed that Congress has instructed courts to impose sentences that are sufficient, but not greater than necessary, to achieve certain basic objectives, including the need for “just punishment, deterrence, protection of the public, and rehabilitation.” 18 U.S.C. § 3553(a)(2). A district court is obliged to “consider all of the § 3553(a) factors to determine [the] appropriate sentence.” Gall v. United States, 552 U.S. 38 (2007). “By informing the court [of the] action [he] wishes the court to take,’ Federal Rule of Criminal Procedure 51(b), a party ordinarily brings to the court’s attention his objection to a contrary decision ... Rule 52(b).”

When a defendant advocates for a sentence shorter than the one ultimately imposed, judges — knowing their duty under § 3553(a) — “would ordinarily understand that a defendant in that circumstance was making the argument ... that the shorter sentence would be ‘sufficient’ and a longer sentence ‘greater than necessary’” to achieve the purposes of sentencing. Pepper v. United States, 562 U.S. 476 (2011). Thus, SCOTUS concluded that Holguin had properly preserved his claim for appeal.

Accordingly, the Court vacated the judgment of the Fifth Circuit and remanded for further proceedings consistent with the Court’s opinion. See: Holguin-Hernandez v. United States, 140 S. Ct. 762 (2020).

Kansas Supreme Court Holds Threat of Violence Statute Violates First Amendment to Extent it Criminalizes ‘Reckless’ Conduct

by Dale Chappell

The Supreme Court of Kansas held on October 25, 2019, that the statute criminalizing speech determined to be a threat of violence is unconstitutional, at least as far as it prohibits “reckless disregard” for others. When Timothy Boettger was angry about the police refusing to investigate the shooting death of his sister’s dog, he vented his anger in words to a friend, criticizing the cops. He told his friend that “he had some friends up in the Paseo area in Kansas City that don’t mess around, and that [his] friend was going to end up finding [his] dad in a ditch.” His friend’s dad was a Douglas County Sheriff’s deputy.

When this friend reported what Boettger said to the police (and his dad), Boettger was charged with one count of making a criminal threat under K.S.A. 2018 Supp. 21-5415(a) (1). Boettger took his case to a jury, and he was found guilty. He appealed and lost. Then the Kansas Supreme Court granted his petition for review and reversed.

Under § 21-5415(a)(1), a “criminal threat” includes a threat to “[1] commit violence communicated with intent to place another in fear ... or [2] in reckless disregard of the risk of causing such fear.” Boettger’s argument was that the second part of this provision is unconstitutional because it encompasses more than a true threat and could punish someone for uttering distasteful words that don’t constitute a true threat.

The First Amendment to the U.S. Constitution says that “Congress shall make no law... abridging the freedom of speech.” This prohibition applies to states through the Equal Protection Clause of the Fourteenth Amendment.Police Dep’t of Chicago v. Mosley, 408 U.S. 92 (1972). This means that neither the federal nor the state government can prohibit speech “simply because society itself finds the idea itself offensive or disagreeable.” Texas v. Johnson, 491 U.S. 397 (1992). But there are limits. For example, it has been recognized by the Supreme Court that the government may still prohibit speech and freedom of expression that is obscene, defamatory, “fighting words,” incitement to breach the peace, and “true threats.” Virginia v. Black, 538 U.S. 343 (2003).

A famous example of a ‘true threat’ came in the 1960s when a young man was drafted to serve in the Vietnam War. He said during a protest that, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. [Lyndon B. Johnson, the President at the time].” The U.S. Supreme Court held that his speech was not a true threat but mere ‘political hyperbole’ and was therefore protected by the First Amendment. Watts v. United States, 394 U.S. 705 (1969).

Many years later, the Supreme Court
then further defined “true threats” as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.” Virginia v. Black, 538 U.S. 343 (2003). In that case, Barry Black was convicted in Virginia for burning a cross under a state law that made it illegal to do such an act with the intent to intimidate a person or group of people. A plurality of the Supreme Court agreed that the law was unconstitutional.

So, what does the word ‘mean’ mean? The Kansas Supreme Court, in a lengthy and detailed opinion, explained it is a transitive verb, which is defined as “to have as a purpose or an intention; intent; to design, intend, or destine for a certain purpose of end.” This was important for Boettger’s case because it turned on whether actually he “meant” to commit the violent acts to which he alluded.

Does § 21-5415(a)(1)’s “reckless disregard” support a “true threat” not protected by the First Amendment? The Court turned to another U.S. Supreme Court case more closely related to Boettger’s case. In Elonis v. United States, 135 S. Ct. 2001 (2015), Anthony Elonis posted on Facebook a rap song he wrote that contained violent language. He posted it with disclaimers that it was all fake, but the federal government still charged him with transmitting in interstate commerce a “communication containing any threat ... to injure the person of another,” under 18 U.S.C. § 875(c).

At trial, Elonis requested a jury instruction that the government had to prove he intended to harm someone. The court rejected his request and instead told the jury that they could decide what a “reasonable person” would have thought in such a situation. Though the statute didn’t contain a mens rea or mental requirement that a person have the specific intent to harm someone, the Supreme Court said that the mere negligence standard, which is how the trial court instructed the jury, was not enough. The Court sent the case back to the lower courts to resolve this issue.

Canvassing other federal and state courts that have analyzed Black, the Kansas Supreme Court disagreed with their holdings. They held that mere recklessness is enough to find such a threat. “Our reading of Black differs,” the Court said. “The speaker must actually intend to convey a threat. Acting with awareness that words may be seen as a threat [which is all recklessness requires] leaves open the possibility that one is merely uttering protected political speech, even though aware some might hear a threat.”

Thus, the Court held that the portion of § 21-5415(a)(1) requiring that only “reckless disregard” for causing fear is “unconstitutionally overbroad because it can apply to statements made without the intent to cause fear or violence.” The language “provides no basis for distinguishing circumstances where the speech is constitutionally protected from those where the speech does not warrant protection under the First Amendment,” the Court concluded.

Accordingly, the Court reversed Boettger’s conviction and vacated his sentence. See: State v. Boettger, 450 P.3d 805 (Kan. 2019).
The Court of Appeal of California, Fifth Appellate District, held that Senate Bill 1437 (“SB 1437”) abrogates the “natural and probable consequences doctrine” in attempted murder prosecutions, and this holding applies retroactively to cases on appeal.

After being physically threatened by four men at a local park, Martin Sanchez left and later returned with a friend who was armed with a shotgun. They located the four men who had threatened Sanchez. The friend fired the shotgun at one of the men. As the man ran away, the friend gave chase and fired again. The man was shot in the face and the back.

Sanchez was later tried by a jury on charges that included attempted murder. The prosecutor argued two legal theories before the jury to prove attempted murder: (1) Sanchez directly aided and abetted the shooter, alternatively (2) attempted murder was the natural and probable consequence of assault with a firearm. The jury convicted Sanchez of attempted murder but did not specify under which theory the verdict was found.

Sanchez appealed, arguing that the evidence was insufficient and that the natural and probable consequences theory violated his due process rights. The Court of Appeal requested the parties to provide supplemental briefing on a third issue, viz., SB 1437, which was enacted after Sanchez’s conviction and prohibited imputing malice “to a person based solely on his or her participation in a crime.” Pen. Code, § 188(a)(3). Because malice in the context of murder is no longer imputable, the Legislature eliminated the natural and probable consequences doctrine as a viable theory to prove attempted murder. Medrano. This conclusion applies retroactively on appeal. Id.

The Court recognized that People v. Munoz, 39 Cal. App. 5th 738 (2019), and People v. Lopez, 38 Cal. App. 5th 1087 (2019), reached contrary conclusions. The Munoz and Lopez decisions were based on the determination that the absence of the word “attempt” in § 188(a)(3) meant the Legislature intentionally excluded attempted murder from its malice-imputing proscription. But such an interpretation of the statute leads to the absurd result of incentivizing murder; namely, criminal defendants would then take steps to ensure that they killed their victims in order to prevent the malice from being imputed to their accomplices. And a fundamental principle of statutory construction is that the language of a statute is not to be given a literal meaning if doing so results in absurd consequences. People v. Cook, 342 P.3d 404 (Cal. 2015).

The Court explained that “Sanchez was prosecuted under both a valid direct aiding and abetting legal theory and an invalid theory because the natural and probable consequences doctrine is no longer a viable theory to prove attempted murder.” As a result, his conviction must be reversed because the Court could not determine beyond a reasonable doubt that the jury convicted him on the valid theory.

Accordingly, the Court reversed the attempted murder conviction and remanded for further proceedings consistent with its opinion. See: People v. Sanchez, 2020 Cal. App. LEXIS 216 (2020).

Sixth Circuit: Cardiologist’s Right to Due Process Violated Where District Court Ordered Government to Not Disclose Third Party’s Expert Evaluation of Medical Care Provided by Him

The U.S. Court of Appeals for the Sixth Circuit ruled that cardiologist Richard E. Paulus’ Fifth Amendment right to due process was violated when the district court ordered the Government to not disclose to Paulus a third party’s expert evaluation of medical care Paulus had provided to his patients.

Paulus performed an incredible number of angiograms while employed at King’s Daughters Medical Center (“KDMC”). The Government charged Paulus with numerous crimes, including health-care fraud, based on allegations that he intentionally overstated the amount of arterial blockage shown in the angiograms, unnecessarily inserted stents into the arteries, and then billed Medicare and other insurance companies for the unnecessary procedures.

Prior to trial, the Government informed Paulus that KDMC’s experts had flagged 75 of his procedures as “unnecessary.” But at trial, the Government called three of its own expert witnesses who had reviewed Paulus’ work: (1) Dr. Ragosta, who said Paulus overstated the amount of blockage in 62 of the 250 to 300 cases he reviewed; (2) Dr. Morrison, who said more than half of the 11 procedures he reviewed were unnecessary; and (3) Dr. Moliterno, who asserted that all of the stent procedures he reviewed were unnecessary.

The jury deadlocked twice before convicting Paulus. But the district court vacated the convictions, finding insufficient evidence of
KDMC's expert review to Paulus. and ordered the Government and KDMC
sible pursuant to Federal Rule of Evidence 408
decided the issue of privilege
83 (1963), to disclose the letter to Paulus. The
district court discarded the issue of privilege
and ruled instead that the letter was inadmis-

After the remand, Paulus learned of the
events surrounding a document known as the
“Shield’s Letter.” According to the letter, before
Paulus had been indicted, KDMC had hired a
team of independent experts to review Paulus’
work. KDMC’s experts had reviewed 1,049 of
Paulus’ cases and found 75 of his procedures
unnecessary. In an attempt to settle the case
civilly instead of criminally, KDMC offered
to refund Medicare for those 75 cases. But
before Paulus was tried, KDMC argued that
its expert evaluation and the Shields Letter
were privileged and inadmissible.

The Government argued that it wanted
to use the letter in its case-in-chief and that it
had a duty under Brady v. Maryland, 373 U.S.
83 (1963), to disclose the letter to Paulus. The
district court discarded the issue of privilege and
ruled instead that the letter was inadmis-
sible pursuant to Federal Rule of Evidence 408 and
ordered the Government and KDMC “not to disclose” any more information about
KDMC’s expert review to Paulus.

After learning of the Shields Letter and
associated events, Paulus moved for a new
trial, arguing that withholding the informa-
tion had violated his rights under Brady. The
district court denied his motion and
sentenced him to five years’ imprisonment.
Paulus appealed.

The Sixth Circuit observed that a Brady
inquiry has three prongs: (1) the evidence at
issue must be favorable to the accused
either as exculpatory or impeaching; (2) the
evidence must have been suppressed by the
prosecution, irrespective of the good or bad
faith of the prosecutor; and (3) prejudice must
have ensued. Strickler v. Greene, 527 U.S. 263
(1999). Prejudice requires a showing that, if
the evidence had been disclosed to the defense,
there is a reasonable probability that the result
of the proceeding would have been different.
Id. But if a defendant knew or should have
known of the essential facts permitting him to
take advantage of the exculpatory information,
there is no Brady violation. United States v.
Castano, 906 F.3d 458 (6th Cir. 2018).

The Court determined that the withheld
evidence was exculpatory for Paulus because
KDMC’s experts found only 75 of his procedures
unnecessary while the Government’s experts had
tested that more than 50% were unnecessary.

KDMC’s lower percentage supported a find-
ing that the unnecessary procedures were not
intentional. Because intent was a close issue in
the case (as shown by the jury’s deadlock and
by the trial court’s erroneous vacatur based
on insufficient evidence of intent), Paulus was
prejudiced by the Government’s withholding of
the evidence. And since Brady is about the
fairness of the trial and not the good or bad
faith of the prosecutor, it made no difference
that the evidence was withheld solely because
of the district court’s order.

The Court rejected the Government’s
argument that since Paulus knew KDMC
had found 75 of his procedures unnecessary,
no Brady violation occurred, i.e., he had the es-
ternal facts permitting him to take advantage
of the exculpatory information. Paulus had
no reason to undertake an investigation to
discover the scope of KDMC’s expert review.
And even if he had, it is unlikely he would have
been granted the evidence since KDMC had
previously argued it was privileged, and the
district court had ruled it was inadmissible.

Accordingly, the Court vacated Paulus’s
convictions and remanded for a new trial. See:
United States v. Paulus, 952 F.3d 717 (6th Cir.
2020).

Is someone skimming money
or otherwise charging you and your loved ones
high fees to deposit money into your account?

Prison Legal News (PLN) is collecting information about the ways that
family members of incarcerated people get cheated by the high cost of
sending money to fund inmate accounts.

Please write to PLN, and have your people on the outside contact us
as well, to let us know specific details about the way that the system is
ripping them off, including:

• Fees to deposit money on prisoners’ accounts or delays in receiving
  no-fee money orders
• Costly fees to use pre-paid debit cards upon release from custody
• Fees charged to submit payment for parole supervision, etc.

This effort is part of the Human Rights Defense Center’s Stop Prison
Profiteering campaign, aimed at exposing business practices that
result in money being diverted away from the friends and family
members of prisoners.

Prison Legal News
Attn: Kathy Moses
PO Box 1151
Lake Worth Beach, FL 33460

Criminal Legal News 21 May 2020
En Banc Ninth Circuit Provides Guidance on When Amended Habeas Petition ‘Relates Back’ to Original Claims to Avoid Dismissal as Untimely

by Dale Chappell

Addressing what can often be a confusing issue for many pro se habeas petitioners, the en banc U.S. Court of Appeals for the Ninth Circuit held on February 24, 2020, that attaching a court order to a habeas application to support the claims is sufficient to allow a later amended petition to “relate back” to the original claims to avoid dismissal as untimely filed new claims.

The issue came before the Court after Ronald Ross filed a pro se federal habeas petition in the U.S. District Court for the District of Nevada raising eight claims for relief. In support of his claims, Ross attached a state court opinion that detailed the factual basis for the claims, which were the same ones he had raised in state court. Ross also moved for appointment of counsel, which was granted, and counsel filed a “First Amended Petition” adopting Ross’ eight claims, plus added three more.

Was Ross’ Amended Petition’s Claims Timely Filed?

The overarching question before the Ninth Circuit was whether Ross’ three new claims in the amended petition that counsel filed were time-barred. Ross had until October 27, 2014, to file his federal habeas petition, and he filed it on September 14, 2014. He duly met the original filing date. But counsel’s amended petition wasn’t filed until June 8, 2015, after extensions of time and new counsel. If those three additional claims by counsel “related back” to Ross’ original claims, then all 11 claims would be within the limitations period.

The district court granted the State’s motion to dismiss, arguing that those three additional claims were not related to the original claims. District Judge James Mahan concluded that the attached state court opinion was not properly referred to in Ross’ original petition to be considered in support of his claims, so there was nothing to which the amended petition could relate back. Ross timely appealed.

The “Relate Back” Doctrine

Under Federal Rule of Civil Procedure 15(c)(1), an amended petition filed after the statute of limitation has expired raising additional grounds to support the original claims may still be timely filed if the amendment “relates back to the date of the original pleading when ... the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading.” The primary purpose of Rule 15(c) is to fix any deficiencies in the original petition. Amended grounds that correct or modify the original facts, restate the original claim with more particularity, or that amplify the details of the claims relate back under Rule 15(c).

Interpreting Rule 15(c), the Supreme Court held in Mayle v. Felix, 545 U.S. 644 (2005), that an amended petition does not relate back “when it asserts a new ground for relief supported by facts that differed in both time and type from those the original pleading sets forth.” But an amendment that raises grounds “tied to a common core of operative facts” of the original claims does relate back, the Court explained.

This “core of operative facts” is the cornerstone in any amended petition filed after a deadline.

The Ninth Circuit pointed to one of Ross’ claims as a perfect example of meeting this requirement. Counsel had claimed in the amended petition ineffective assistance of counsel (“IAC”) when Ross’ trial counsel failed to object to the State’s failure to “provide any notice that it intended to present expert testimony” at trial. In Ross’ original petition, he claimed IAC for trial counsel’s failure to object “to the state’s use of an expert witness.” The “common core” was that trial counsel failed to challenge the State’s use of expert testimony, the Court said, finding that the amended claim did relate back to the original claim.

Was Ross’ Original Petition Sufficient to Allow the Relate-Back Doctrine?

The § 2254 application clearly warns petitioners to “state concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional” and to “summarize briefly the facts supporting each ground.” A petitioner may attach additional pages to provide these grounds or facts. Thus, the petition forbids asserting generic claims of IAC without any details as to why counsel was ineffective.

The district court rejected Ross’ amended petition because it said he filed factually empty claims and simply referred to the state court opinion for the facts. The court said he failed to provide the facts in the petition itself, so the amended petition had nothing to relate back to. The Ninth Circuit, however, referred to its two-step rule to assess the relate-back doctrine. First, the court looks to the “core facts,” as defined in Mayle, and then it looks “to the body of the original petition and its exhibits to see whether the original petition set out or attempted to… set out a corresponding factual episode....”

Even when a new “legal theory” is proposed in an amended petition, but the facts are the same, there is a common core of facts to meet the relate-back doctrine, the Court instructed. The Court cited its decision in Nguyen v. Curry, 736 F.3d 1287 (9th Cir. 2013), where it determined that an amended claim of IAC for appellate counsel’s failure to raise a double jeopardy claim related back to an original claim of double jeopardy that did not include IAC.

The Ninth Circuit concluded that Ross’ amended petition, even if it offered a new legal theory, could still relate back to the factual bases of Ross’ original claims.

Was Ross’ Reference to the Attached State Court Opinion Enough?

Federal Rule of Civil Procedure 10(c), titled “Adoption by Reference; Exhibits,” says that “a statement in a [prior] pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion” and that “a copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes.” The State argued that the state court opinion attached to Ross’ petition as an “exhibit” was not a “written instrument” to allow adoption under Rule 10(c). The Court flatly rejected the State’s position.

In Dye v. Hofbauer, 546 U.S. 1 (2005), the Supreme Court held that a habeas petitioner could rely on an attached brief to his petition to state his claim in more detail,
The U.S. Court of Appeals for the First Circuit affirmed the suppression of evidence seized from a suspected drug dealer’s home as fruit of the poisonous tree.

Jamal Roman was alleged in a search warrant application submitted by DEA Special Agent Scott Smith to be “a known cocaine trafficker” who “oversaw distribution of narcotics” for Javier Gonzalez. That suspicion was the result of the cooperation of a confidential informant (“CI”) who in January 2014 was caught with three kilograms of cocaine. The CI subsequently agreed to cooperate with law enforcement, who then initiated surveillance of Roman and Gonzalez.

Two months later, Smith drafted an affidavit to support a search warrant application of seven locations. The search warrants were granted on March 21, 2014, and the searches conducted four days later. Roman was indicted on March 24, 2016, by a grand jury on one count of conspiracy to distribute cocaine and heroin and a count of distribution and possession of cocaine.

He moved to suppress the fruits of that search, the district court’s grant of the motion to suppress evidence obtained from Roman’s residence. The Government appealed as to the search of the home only, arguing there was a nexus between drug activity and the home. The First Circuit noted that the nexus element requires a showing that “enumerated evidence of the offense will be found at the place searched.” United States v. Dixon, 787 F.3d 55 (1st Cir. 2015).

The inquiry is whether “the owner of the property is suspected of crime” but rather whether “there is reasonable cause to believe that the specific things to be searched for and being seized are located on the property to which entry is sought.” Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

The First Circuit saw “no basis to conclude … that drug related evidence would be present at Roman’s home.” The Government failed to show he dealt drugs from the home, and it agreed the drug headquarters was among the other searched places. There was no showing in the affidavit that Roman had even been at the home in question, was his residence or that he had taken contraband there. The statement that he was a known drug dealer was conclusory.

The affidavit also failed to offer corroboration that Roman was a close associate of Gonzalez or oversaw a narcotics operation. The statement that Roman was a known drug dealer was found to be conclusory and unsupported by any facts. The affidavit was found to rely upon “speculative inferences piled upon inferences” that Roman’s home would yield evidence. As it failed to establish “a clear and substantial connection between the illegal activity and the place searched,” the district court properly suppressed the fruits of that search, the Court ruled.

Accordingly, the Court affirmed the district court’s grant of the motion to suppress evidence obtained from Roman’s residence. See: United States v. Roman, 942 F.3d 43 (1st Cir. 2019).

First Circuit: Home Search Affidavit Failed to Establish Nexus of Crime and Evidence

by David Reutter

T
First Circuit: Securing a Weapon Not Used in Offense Is Not Exigent Circumstance Permitting Warrantless Entry and Search of Suspect's Home

by Anthony Accurso

The U.S. Court of Appeals for the First Circuit reversed a district court’s order denying a defendant’s motion to suppress on the basis that exigent circumstances did not exist solely because officers wanted to secure the defendant’s service weapon, absent the weapon’s proximate use to the crime or arrest.

Officer Murillo-Rivera (“Murillo”) of the Domestic Violence Division for the Ponce Region of Puerto Rico received a complaint in which the victim claimed Gabriel Rodríguez-Pacheco (“Rodríguez”), an officer in the Puerto Rico Police Department, sent her text messages threatening to publish explicit photos and videos of her if she did not rekindle their relationship.

Murillo was directed to arrest Rodríguez immediately and to secure his service weapon pursuant to General Order 2006-4 because, he testified, “according to the procedure ... anyone alleged to have committed domestic violence must immediately be placed under arrest.”

Murillo and an unspecified number of other officers located the home Rodríguez shared with several family members, and Rodríguez immediately came outside. Murillo notified Rodríguez about the complaint, his impending arrest, and the need to seize his service weapon. Murillo did not handcuff Rodríguez because he “was very cooperative and his family looked like really decent people.” Rodríguez stated his weapon was inside the house.

While Rodríguez testified later that he did not consent to Murillo’s entry (and subsequent search), Murillo followed Rodríguez into the home.

However, after locating the weapon, he also seized a Go-Pro camera, a laptop, and a cellphone — items he believed were related to the complaint. Murillo later obtained a search warrant for the contents of the electronic devices, and the search resulted in evidence that led to 16 counts of production of child pornography and one count of possession of child pornography.

Rodríguez went to trial, was found guilty on all counts, and received 262 months’ imprisonment followed by 15 years’ supervision. On appeal, he claimed the district court improperly denied his motion to suppress the evidence resulting from the search.

“On a motion to suppress evidence seized on the basis of a warrantless search, the presumption favors the defendant, and it is the government’s burden to demonstrate the legitimacy of the search.” United States v. Delgado-Perez, 867 F.3d 244 (1st Cir. 2017).

“The Fourth Amendment has drawn a firm line at the entrance to the house, and warrantless entries into a home are presumptively unreasonable.” Morse v. Coultier, 869 F.3d 16 (1st Cir. 2017). However, warrantless entry may be justified by consent or “exigent circumstances.” United States v. Almonte-Baez, 857 F.3d 27 (1st Cir. 2017).

The First Circuit found that though consent was the Government’s original argument justifying the warrantless entry into the home, the district court bypassed that argument. It instead found exigent circumstances existed for the need to secure Rodríguez’s service weapon. The Government’s brief on appeal cited United States v. Lopez, 989 F.2d 24 (1st Cir. 1993).

However, in Lopez “the most important element was that the police reason to believe that the defendant had a sawed-off shotgun nearby, which had been used only shortly before to threaten the victim.” The Court found that Rodríguez’s gun had not been used in connection with the complaint, nor had the officers felt he posed any threat during his arrest since they never bothered to handcuff him. The Court stated, “In the end, this particular record, viewed in its totality, does not reflect one of those crisis situations when there is compelling need for official action and not time to secure a warrant.”

Quoting from United States v. Irizarry, 673 F.3d 554 (1st Cir. 1982).

The Court thus ruled that “the facts of this case simply do not square with our exigent-circumstances case law, and it was error to deny the motion to suppress on this basis.” Accordingly, the Court reversed the district court’s denial of Rodríguez’s motion to suppress and remanded the case to the district court “to make factual findings and determine whether consent to the entry was given.” See: United States v. Rodríguez-Pacheco, 948 F.3d 1 (1st Cir. 2020).

Massachusetts Supreme Judicial Court Reverses Murder Conviction Due to Insufficient Evidence

by Douglas Ankney

The Supreme Judicial Court of Massachusetts reversed Jean Carlos Lopez’s murder conviction because the evidence was insufficient to establish beyond a reasonable doubt that Lopez knowingly participated in the killing with the requisite intent.

When Lopez and Erving Cruz arrived at a convenience store around 11:30 p.m., Lopez’s brother Etnid was chasing Tigan Hollingsworth in the parking lot with a knife. Cruz shouted to Etnid, “Is that him? Is that him? Get him. Get him.” Cruz joined the chase.

Surveillance video showed Etnid was wearing a white T-shirt (presumably Etnid) and the other had on a black tank top and black pants (presumably Cruz).

Hollingsworth got away and went down the street. Matthew D’Alessandro and Brittany Machado observed Hollingsworth being chased by two men — one wearing a white T-shirt (presumably Etnid) and the other had on a black tank top and black pants (presumably Cruz).

Hollingsworth ran up a driveway and scaled a chain-link fence and was in a nearby backyard when the two men caught him. The two men hit Hollingsworth repeatedly, then jumped the fence and fled. D’Alessandro later testified that the two men chasing Hollingsworth down the street were the same two men seen chasing him in the surveillance
video (Etnid and Cruz). After the attackers fled, D’Alessandro and Machado tended to Hollingsworth until police arrived.

Hollingsworth had been repeatedly stabbed in the lungs and head, and blood pooled on the ground beneath his body. Janet Dinneen testified that she saw three men attack Hollingsworth in the backyard — one attacker wearing white and the other two wearing dark clothing. Lawrence testified that Etnid, Cruz, Garnham, and Lopez chased Hollingsworth down the street and into a driveway. She saw the four men fighting with Hollingsworth in the driveway. Torrey then drove up and called for everyone to get into her car. Etnid, Garnham, and Lawrence got into Torrey’s vehicle and left. She said she last saw Hollingsworth alive and groaning in pain on the ground.

Lawrence further testified that she didn’t enter the back yard and that after leaving the scene, she and Garnham hid a knife in a storm drain. The knife was introduced at trial as the murder weapon. The Commonwealth’s theory was that Etnid, Cruz, and Lopez stabbed Hollingsworth in the back yard. Etnid then left with Lawrence and Garnham in Torrey’s vehicle while Cruz and Lopez jumped back over the fence and returned to Lopez’s vehicle. The jury convicted Lopez, and he appealed, arguing, inter alia, the evidence was insufficient to support his conviction of murder in the first degree as a joint venture.

The Supreme Judicial Court observed that to sustain the conviction, “the Commonwealth must prove beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime, alone or with others, with the intent required for the offense.” Commonwealth v. Rakes, 82 N.E.3d 403 (Mass. 2017). Although reviewing claims of insufficient evidence required the Court to examine the evidence in the light most favorable to the prosecution, Commonwealth v. Deane, 934 N.E.2d 794 (Mass. 2010), the Court “must find that there was enough evidence that could have satisfied a rational trier of fact of each element beyond a reasonable doubt.” Commonwealth v. Latimore, 393 N.E.2d 370 (Mass. 1979). And even though a jury is permitted to draw rational inferences from the evidence, “no essential element of the crime may rest in surmise, conjecture, or guesswork.” Commonwealth v. Kelley, 268 N.E.2d 132 (Mass. 1971).

Lawrence’s testimony was the only evidence implicating Lopez in the attack on Hollingsworth. She said she saw the men fighting in the driveway. But the stabbing couldn’t have occurred in the driveway because no blood was found at that location. Another possibility was that after Etnid, Garnham, and Lawrence had left the scene with Torrey, Hollingsworth managed to scale the fence, and then Lopez and Cruz stabbed him in the backyard. But this was contradicted by the other witnesses’ descriptions of the attackers in the backyard, i.e., D’Alessandro and Machado described Cruz and Etnid as the attackers in the backyard while Dinneen saw a third attacker in dark clothes. None saw Lopez in a light blue sweatshirt. Further, this would require the jury to engage in speculation or conjecture, especially regarding how Hollingsworth could have been stabbed in the backyard with the knife that had already been taken from the scene with Lawrence and Garnham.

The Court concluded there was insufficient evidence to prove Lopez guilty of murder beyond a reasonable doubt under either scenario. Accordingly, the Court reversed the conviction, set aside the verdict, and remanded to the superior court with instructions to enter a judgment of not guilty. See: Commonwealth v. Lopez, 140 N.E.3d 427 (Mass. 2020).
Second Circuit Holds Denial to Proceed Under Pseudonym by Magistrate Judge Is Immediately Appealable

by Dale Chappell

In a question of first impression that implicated the Court's jurisdiction, the U.S. Court of Appeals for the Second Circuit held on February 6, 2020, that a magistrate judge's order denying a prisoner's request to file a motion pursuant to 28 U.S.C. § 2255 under a pseudonym or to seal the filings in order to protect his confidentiality was an immediately appealable order under the "collateral order doctrine."

The question landed before the Court after John Pilcher filed a letter with his § 2255 motion asking to file under a pseudonym and to file the motion under seal to protect his identity. The magistrate judge appointed to hear his motion and make a recommendation to the district judge denied outright Pilcher's request in an order, finding that his criminal conviction was already public knowledge and that his grounds for sealing the motion were not enough to overcome the right of the public to open records under the First Amendment to the Constitution. Pilcher appealed.

The first thing the Second Circuit addressed was whether it has jurisdiction to hear Pilcher's appeal from a non-final order of the district court denying his motion to proceed anonymously. Typically, the Court of Appeals only has jurisdiction to hear "final decisions of the district court," under 28 U.S.C. § 1291. But the "collateral order doctrine" allows an appeal from a non-final order if it: (1) conclusively decides the disputed question, (2) resolves an important issue completely separate from the merits of the case, and (3) would be effectively unreviewable on appeal from the final judgment in the case. United States v. Culbertson, 598 F.3d 40 (2d Cir. 2010).

The Court found that all three criteria were satisfied to allow Pilcher's appeal under the collateral order doctrine because: (1) the magistrate judge's order conclusively decided the issue, (2) the magistrate judge's decision was completely separate from his § 2255 claims regarding his supervised release conditions, and (3) the magistrate judge's ruling would be unreviewable on appeal from the final judgment later on.

Finding that Pilcher's arguments lacked merit to allow him to file his motion anonymously, the Court affirmed the district court's order denying his request.

The Court also took a moment to address the authority of the magistrate judge in entering such an order, when magistrates typically do not possess authority to enter dispositive orders in § 2255 cases. Pilcher had argued that the district court judge had "outsourced" the decision on his motion to proceed anonymously to the magistrate judge without his consent. But two provisions allow a magistrate judge to perform dispositive functions in § 2255 cases, with the exception of dismissing or denying the entire case. Magistrates are, however, allowed to enter orders granting or denying non-dispositive issues, such as appointment of counsel and, as here, the ability to proceed anonymously. Rule 10 of the Rules Governing Section 2255 Cases; 28 U.S.C. § 636(b)(1)(A).

The magistrate judge's order dealt only with the manner in which Pilcher would proceed on his underlying claim and was not dispositive, the Court concluded. However, the Court did recognize that an exception may exist in cases where a magistrate's ruling, while not dispositive, could have a "chilling effect" on the party's efforts to pursue their claims, effectively making the order dispositive. The Court found that this was not the case here, though.

Another point the Court noted was how the appeal made it before the Court, i.e., coming from a magistrate judge's order.

[Writer's note: See United States v. Renfro, 620 F.2d 497 (5th Cir. 1980) ("The law is settled that appellate courts are without jurisdiction to hear appeals directly from federal magistrates."). First, Pilcher had to "appeal" to the district court judge. The district judge then reviewed the magistrate judge's order for "clear error" or to see if it was contrary to law. § 636(b)(1)(A). Once the district judge affirmed the magistrate judge's order, only then could Pilcher take his appeal to the Second Circuit.

In the end, the Second Circuit concluded that, in this case, the magistrate judge's order denying Pilcher's request to seal his filings or to allow him to proceed anonymously did not meet the standards to allow such an exception to the policy of keeping court records open to the public."

Accordingly, the Court affirmed the district court's order denying Pilcher's request. See: United States v. Pilcher, 950 F.3d 39 (2d Cir. 2020).

Fifth Circuit Setstle In-Circuit Confusion, Holds Implicit Extension of Time to File State Appeal Tolls AEDPA Clock to File Federal Habeas Petition

by Dale Chappell

The U.S. Court of Appeals for the Fifth Circuit held on February 3, 2020, that when a Louisiana state court grants an extension of time, even implicitly through other actions, a state post-conviction action remains "pending" to toll the one-year clock under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The Court's decision settled conflicting opinions among the federal district courts in Louisiana on the issue.

When Colby Leonard's post-conviction relief motion was denied by a Louisiana state court in 2013, he applied to the state appellate court for a supervisory writ to appeal the denial. However, Leonard failed to properly file the application for the writ, so the appellate court dismissed it. But the court gave him a break: "In the event Leonard elects to file a new application with this Court, the application must be filed on or before October 22, 2013." Leonard then filed a proper application in the appellate court before that date.

When Leonard's writ was denied on the merits and the Louisiana Supreme Court denied review, he filed a federal habeas corpus petition in the U.S. District Court for the Middle District of Louisiana less than a month later. This time, Leonard's claims were never addressed, because the district court dismissed it as too late, never reaching the merits.

The district court found that Leonard's one-year AEDPA clock started on April 8,
was not "properly filed," his post-conviction application for a supervisory writ to appeal was not "properly filed," that ended the tolling of the clock, and it expired long before he filed his federal petition. This was despite that fact the state appellate court granted Leonard more time to file a proper application.

While the district court acknowledged that the law was "unclear" on whether a state appellate court extending the time to file another application for a writ "effectively amounted to an extension of time that operated to toll the limitation period," it still denied a certificate of appealability ("COA") to allow Leonard to take an appeal to the Fifth Circuit.

The Fifth Circuit, however, granted a COA, noting that it was "arguable" whether the state court's implicit grant of an extension of time to file a supervisory writ tolled the AEDPA clock, being that the federal district courts within Louisiana have come up with conflicting rulings on the question.

Under 28 U.S.C. § 2244(d)(1), a federal habeas corpus petition by a state prisoner must be filed within one year of a conviction becoming "final." However, the one-year clock stops while a state post-conviction action that is "properly filed" in the state court remains "pending." A state post-conviction application or motion "is properly filed when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4 (2000). And under § 2244(d)(2), a state post-conviction action remains "pending as long as the ordinary state collateral review process is in continuance" — i.e., until the completion of that process, the Supreme Court explained in Carey v. Saffold, 536 U.S. 214 (2002). In other words, it is pending until the state post-conviction process has made its way through the state courts, including any appeals.

The purpose of this rule, Saffold explained, is to allow a prisoner to invoke one complete round of the state's established review process, giving the state courts the first chance to fix any constitutional errors.

The district court ruled that Leonard's post-conviction motion did toll the AEDPA clock while it was pending, but because Leonard's application for a supervisory writ to appeal was not "properly filed," his post-conviction action did not remain "pending" to toll the clock. The court concluded that the rejection of his application effectively ended his post-conviction procedures, so the AEDPA clock started running.

Such a situation has divided the federal district courts in Louisiana, the Fifth Circuit noted. Under Louisiana law, a prisoner may appeal the denial of a post-conviction motion not by filing an appeal, but only by "invoking the supervisory jurisdiction of the court of appeal," the Court explained. Here, the Louisiana appellate court rejected Leonard's application for a writ, but it did authorize him to file another application within a set time. "The only logical reading of the appellate court's action is that it granted Leonard an extension of time for filing a proper writ application," the Court reasoned.

It made no difference that Leonard was not the one who asked for the extension of time. "In light of the appellate court's extension of time — and Leonard's filing a prior writ application within that period — we conclude that Leonard's state post-conviction process remained 'in continuance' and therefore pending under § 2244(d)(2)," the Court concluded, citing Saffold.

The Court also said that the district court focused on the wrong "application" when it determined that Leonard's post-conviction action ended when his application for a supervisory writ was rejected. "The pleading that must be properly filed under [§ 2244(d)(2)] is a trial-court petition — namely an application for state post-conviction [review]" in the state trial court, the Fifth Circuit clarified.

The state appellate court granting Leonard authorization to refile a proper application for a supervisory writ to appeal the trial court's denial was effectively an extension of time for him to appeal, which made his state post-conviction action still "pending" to toll the clock, the Court held. Therefore, his federal habeas petition was timely-filed.

Accordingly, the Fifth Circuit vacated the district court's dismissal of Leonard's petition as untimely, and remanded to the district court. See: Leonard v. Deville, 949 F.3d 187 (5th Cir. 2020).

---

**Pennsylvania Prosecutors Cash in on Low-Level Drug Crimes**

*by Ed Lyon*

State after state is legalizing the use and possession of small amounts of marijuana. Because of the revenues prosecuting low-level drug crimes saps from prosecutors, more and more of them in major jurisdictions are refusing to accept and prosecute these small-time crimes.

Examples include Rachel Rollins of Boston, Kim Ogg of Houston, Joe Gonzales of San Antonio, and Dan Satterberg of Seattle.

Bucking this trend in a major way is Democratic district attorney Stephen Zappala Jr. of Pittsburgh, Pennsylvania. The Appeal pored over 30,000 criminal docket entries for Allegheny County from 2017 and discovered some extremely disturbing numbers. For that year alone, over 1,700 low-level, misdemeanor drug cases were referred to his office for prosecution. Even more disturbing, Zappala actually prosecuted over 90 percent of those referred cases. The convictees were found to have accrued over $2 million in court-imposed debt resulting from their convictions.

As is usually the case, the overwhelming majority of those arrested and prosecuted for those low level misdemeanor drug cases were people of color and the city's poorest citizens.

Northwestern University's law and health sciences professor Leo Beletsky is less than enamored by Zappala's choice to waste law enforcement monies better used for more serious offenses. In his words: "This is just a gross mislocation of resources. If you talk to [police and prosecutors] one on one, they will rightly tell you that [prosecuting low level drug cases] is shoveling shit against the tide. This is a futile exercise."

These 1,700 plus cases primarily resulted in probation or just fines and fees after convictions.

Of the remainder, persons of color were jailed far more often than whites after being convicted. Failure to pay these fines and fees results in driver's license suspensions for a lucky few. Many others will suffer imprisonment resulting from probation revocations with additional fines and fees for the revocation proceedings.

Also, recidivism rates among that group of more than 1,700 people ran approximately 33 percent, very high for a low-level misdemeanor conviction.

Source: theappeal.org
A former Florida sheriff's deputy was charged with 50 counts related to evidence tampering and discrepancies related to drug arrests made during his 11 months with the Martin County Sheriff's Office.

During his tenure as a deputy from May 2017 to January 2018, Steven O’Leary made 80 drug-related arrests. An arrest warrant says O’Leary arrested 26 people accused of having drugs on them who either did not have illegal drugs or who did not have the actual amount or type of drugs he said they did.

Matthew Crull was arrested by O’Leary on December 5, 2018. Crull was asleep in a used van he had recently purchased when O’Leary approached him and made a search. During that search, O’Leary pulled a plastic bag cinched with a wire tie from the inside of the driver’s door. O’Leary field-tested the substance and determined it was 92 grams of heroin.

That landed Crull in jail on drug trafficking charges, which carried a possible 25-year prison sentence. A lab test determined the substance was Tide detergent. Officials soon proved the substance in Morales’ possession was not a controlled substance.

O’Leary took Morales to jail and reported that during a search he “observed a white substance fall out of Melissa’s pant leg and onto the ground . . . the same substance I had located in Melissa’s purse.” That substance also field-tested positive for methamphetamine, and he charged her with possession of the drug and introducing contraband into a correctional facility.

Morales spent 49 days in jail before entering a guilty plea. She was sentenced to six months in jail, assessed hundreds of dollars in fines, and had her driver’s license revoked.

She was freed on January 16, 2018, after a judge granted a motion filed by Assistant Public Defender Shane Manship. The motion was based “newly discovered issues surrounding the arresting officer in this case.” It was the first to generate actual statistics on this career path.

A recent study by the Cato Institute found that the odds are almost 50 percent that those filing civil rights or criminal cases in federal court will come before judges whose previous career experience included acting as courtroom advocates on behalf of the government. The chances of landing before judges who opposed the government were a slim six percent.

It has long been a truism in the legal field that the easiest route to obtaining a position as a federal judge was to start by serving as a prosecutor. The Cato study, however, was designed to help the 11 people who were released to expunge their records and to pay their court costs. Some

Prosecutors Overrepresented Among Federal Judges

by Jayson Hawkins

Imagine your alma mater was about to play its rival in the season’s biggest game. Imagine also that, the day before the game, it was revealed that the majority of the referees were alumni of the other school. Even though these individuals were sworn by their profession to be impartial on the field, it would be hard not to believe that their personal experiences might shade their calls, thus putting your side at a disadvantage. Such a scenario would rightly be considered unfair and objectionable, yet it is precisely the situation that many people face in federal court.

A recent study by the Cato Institute found that the odds are almost 50 percent that those filing civil rights or criminal cases in federal court will come before judges whose previous career experience included acting as courtroom advocates on behalf of the government. The chances of landing before judges who opposed the government were a slim six percent.

It has long been a truism in the legal field that the easiest route to obtaining a position as a federal judge was to start by serving as a prosecutor. The Cato study, however, was
minors to federal judge positions, the disparity in their professional background remained.

Casey Tolan, in an article titled “Why Public Defenders Are Less Likely to Become Judges—and Why That Matters,” reported that up to mid-2015, “just 14% of President Obama’s nominees for district and appeals court judges had experience working in public defense. Meanwhile, 41% of his nominees had experience working as prosecutors.” This ratio of roughly 3 to 1 marked a small improvement compared to the status quo, but it also highlighted the gap that exists. The Alliance for Justice applauded Obama’s steps toward balancing demographics on the federal bench yet emphasized that succeeding presidents must consider professional diversity as well, if the system is to be fair and just for all Americans.

More recent selections to the bench have not trended in that direction. A March 2017 article on vox.com pointed out that, after the confirmation of Justice Neil Gorsuch, it had been a quarter of a century since anyone with a history in criminal defense had sat on the Supreme Court. This was especially poignant following a 2016 piece in the *Tennessee Law Review*, which presented the argument that deep-level diversity—a wide array of experiences—is equally or more important than race or gender diversity. “The New Diversity Crisis in the Federal Judiciary” demonstrated how the upsides of demographic diversity flattened out over time when appellate judges worked together drafting opinions; whereas, a variety of prior professional experiences affected the collaborations from start to finish.

The Cato study utilized district and appellate court websites, judges’ questionnaires regarding their work history submitted as part of their confirmation process, and Westlaw’s *Almanac of the Federal Judiciary* to compile their statistics.

The data were sorted into six categories: public defender, non-public defender, criminal defense lawyer, civil rights litigator, prosecutor, noncriminal courtroom advocate for the government, and non-litigating government attorney.

**Judiciary ‘tilted’**

The conclusion that emerged from comparing the results was that “the federal judiciary is massively tilted in favor of former prosecutors over former criminal defense attorneys, and in favor of advocates for government more generally over advocates for individuals in cases against government.”

Critics have shunned such findings, arguing that concerns surrounding impartiality are overstated because judges are oath-bound to be unbiased in their rulings. Relying on an individual’s integrity and objectivity might be adequate in an ideal situation, but in the real world it seems either naive or negligent to imagine that one’s formative career experiences exert no influence over their judgments.

As the Cato Institute concluded, “No prosecutor would relish the prospect of trying a case before a jury half-filled with former criminal defense attorneys—just as no criminal defendant relishes the idea of going before a judiciary half-filled with former government advocates. But for now at least, that’s the system we have.”

There is a solution, writes Clark Neily, vice president for criminal justice at Cato, “a temporary moratorium on nominating former prosecutors to the bench and a strong preference for lawyers with substantial experience representing individuals against the government in criminal and civil cases.”

Source: cato.org
Did you ever think we’d reach the point in the United States where you had to have papers to freely travel from one place to another? It appears we’re at the point.

The MTA issued “travel papers” to their workers

On March 17th, a few days before New York issued a shelter in place order, the Metropolitan Transportation Authority issued “travel papers” to their employees to prepare for a potential coronavirus curfew. The NY Daily News reports:

If non-emergency travel is restricted, workers can show law enforcement officials the letter if they’re stopped on the way to work.

“This letter along with current New York City Transit identification identifies this individual as an essential employee who is required to travel during the curfew imposed due to the Coronavirus emergency,” states the letter, which is signed by the Metropolitan Transportation Authority’s Police Department’s acting chief Joseph McGrann. “Please give this individual due consideration during this crisis.”

MTA spokeswoman Abbey Collins said the letter was distributed on Monday to a “limited number of NYCT bus employees living in New Jersey” because the state’s Gov. Murphy suggested imposing a statewide curfew between 8 p.m. and 5 a.m. (nydailynews.com)

Clearly, the wheels have been in motion for several days. And it’s not just the MTA.

Your papers, please.

For everyone who thought the article about the Lockdown of America was a “hysterical overstatement” and that they could still do whatever they wanted because it wasn’t really being enforced, what are you thinking now that “travel papers” are being handed out? To me, this sounds like the lockdowns I wrote of yesterday were just the first incremental step toward a society that nobody hopes to see.

Yesterday, readers sent me photos of “travel papers” provided to them by employers so they could get to and from work. These are employees who work in industries like healthcare, pharmacies, and foodservice, as well as those who work in the production, transport, and sales of essential supplies.

One reader wrote, “We were told to show these if we got stopped on the way to or from work and that if the authorities gave us any trouble, to not argue and just go back home.”

Here are some of the papers that people sent. [Not included in this reprint] Identifying information has been redacted.

Papers that people sent were from Pennsylvania, New York, Arizona, Michigan, North Carolina, Kansas, New Jersey, West Virginia, Virginia, Oregon, Florida, Louisiana, and Ohio. Industries mentioned in the papers were trucking, grocery stores, medical clinics, hospitals, nursing homes, city transit workers, railroads, food production plants, pharmacies, gas stations, stores like Target and Walmart, and automotive repair facilities.

Most people were given their papers on Friday or Saturday and told they’d need them to get to and from work starting the week ahead.

I wonder who’s going to be checking your “travel papers.” Will it be the local PD? The National Guard? The military? Maybe it’ll be all those TSA agents who are currently out of work but already accustomed to molesting innocent travelers.

What does this mean for those told they’d be able to go to the store?

We’ve been repeatedly told during task force press conferences that nobody needs to worry about buying extra supplies because the stores will remain open. We were chastised about stockpiling and “hoarding” supplies. But if you need travel papers just to get to work, how will you get to the store when you need to pick up some groceries? Will these papers only be required during certain hours?

It’s easy to prove you just went to the store when you have a bag of groceries in hand, but how do you prove you are going to the store? Will they just begin distributing the food to us as opposed to allowing people to shop for their own food?

A little clarity and less subterfuge would go a lot further toward preventing concern that we’re about to go full Wuhan here in America.

If I didn’t have supplies already, I would head to the store today and get enough for a couple of extra weeks at the very least. Here are some ideas for finding supplies amidst the picked-over inventory that remains. (See: theorganicprepper.com, March 7)

So, what happens if you get caught without your papers? I’m glad you asked.

It seems like the DOJ is itching to suspend the Constitution.

At this point, the “Department of Justice” sounds like one of those other phrases the government uses to mean the opposite. Like the “Patriot Act” which is as far from patriotic as it gets.

And speaking of the Patriot Act, the government is now introducing what I’d like to dub the Pandemic Patriot Act 2.0.

The DOJ has secretly asked Congress to draft legislation allowing them to indefinitely detain people without due process during the coronavirus pandemic. Because who doesn’t want to add a little spice to our economic crisis with the added threat of indefinite detention?

Documents reviewed by POLITICO detail the department’s requests to lawmakers on a host of topics, including the statute of limitations, asylum and the way court hearings are conducted. POLITICO also reviewed and previously reported on documents seeking the authority to extend deadlines on merger reviews and prosecutions…

…In one of the documents, the department proposed that Congress grant the attorney general power to ask the chief judge of any district court to pause court proceedings “whenever the district court is fully or partially closed by virtue of any natural disaster, civil disobedience, or other emergency situation.”

The proposal would also grant those top judges broad authority to pause court proceedings during emergencies. It would apply to “any statutes or rules of procedure otherwise affecting pre-arrest, post-arrest, pre-trial, trial, and post-trial procedures in criminal and juvenile proceedings and all civil process and proceedings,” according to draft legislative language the department shared with Congress. In making the case for the change, the DOJ document wrote that individual judges can currently pause proceedings during emergencies, but that their proposal would make sure all judges in any particular district could handle emergencies “in a consistent manner.” (politico.com)

What the heck are “pre-arrest” procedures, anyway? Is that the part where government investigators go and set someone up to commit a crime like all those “bombing plots” the FBI keeps saving us from?

I wouldn’t be surprised to see another 300-page legislation like the original Patriot
Act that was rolled out just weeks after 911, giving us the TSA, indefinite detention, and all sorts of other dystopian nonsense.

Never let a serious crisis go to waste.

In the infamous words of Rahm Emanuel, the former mayor of Chicago, “You never let a serious crisis go to waste. And what I mean by that it’s an opportunity to do things you think you could not do before.”

It looks like the government is taking those words to heart with travel papers and new draconian laws.

Since I wrote the article about America locking down yesterday, more states have joined in. Now New York, California, Illinois, Connecticut, and New Jersey are all under restriction.

Is your state coming soon? Are these lockdowns being rolled out incrementally, starting out gently (sure you can walk your dog?) and then moving on to the point where you can’t leave your house without “travel papers?”

So far, 2020 has brought us an out-of-control deadly pandemic, an economic collapse, statewide lockdowns, and now travel papers and a potential new law to eradicate the Fifth Amendment.

I hesitate to ask what’s next. 

About the author: Daisy Luther writes about current events, preparedness, frugality, voluntaryism, and the pursuit of liberty on her website, The Organic Prepper. She is widely republished across alternative media and she curates all the most important news links on her aggregate site, PreppersDailyNews.com. Daisy is the best-selling author of 4 books and runs a small digital publishing company. You can find her on Facebook, Pinterest, and Twitter.

This article was originally published by The Organic Prepper (theorganicprepper.com) on March 22, 2020, with minor edits; reprinted with permission. Copyright, The Organic Prepper.

FBI ‘Assessing’ Black Americans

by Jayson Hawkins

A 2017 leak of FBI documents reveals a classification of domestic terrorism previously unknown to the public — “black identity extremism,” The Intercept reports. Although there have been no violent crimes connected to this category that would justify an official investigation, the FBI has spent considerable resources conducting “assessments” of groups and individuals under this heading.

Unlike sanctioned investigations, assessments do not require any evidence of wrongdoing or threat to be implemented, nor are they subject to other limitations. Agents are allowed to mislead interviewees and do not have to identify themselves as federal officials. They also can select their targets based on religion, ethnicity, and other factors normally protected by the First Amendment as long as these are not the only criteria.

Numerous Freedom of Information requests submitted by civil rights activists have exposed hundreds of FBI documents related to assessing African Americans, yet these represent only a small fraction of the total. Despite calls for transparency from lawmakers, the pages that had been released were heavily redacted. Often entire pages were blacked out, and any information that might reveal the subject’s identity or location had been removed.

What could be ascertained from the most recent bunch of documents acquired as the result of a lawsuit by the American Civil Liberties Union and MediaJustice was that the FBI had invested significant resources from 2015 to 2018 on assessments of “black separatist extremists.” The public backlash over this designation caused the Bureau to adopt the more inclusive label of “racially motivated violent extremism,” but critics have charged this merely masks the fact that surveillance of African Americans has never abated.

Another revelation from the recent documents was the extent of “liaisons” between the FBI and outside agencies to further the former’s information-gathering abilities. So-called “strategy meetings” with local law enforcement groups, particularly those around Ferguson, Missouri, in the wake of the Michael Brown killing by police there in 2014, asked cops to help them gather “better intelligence on possible Black Separatist Extremists.” The Burea had already been spying on individuals who participated in the initial protests after the young man’s death, tracking them across state lines and telling local police that the protesters were being recruited by ISIS.

“These documents suggest that since at least 2016, the FBI was engaged in a national intelligence collection effort to manufacture a so-called ‘Black Identity Extremist’ threat. They are spending a lot of energy on this and they are clearly reaching out to other law enforcement,” Nusrat Choudhury, ACLU Racial Justice Program deputy director, told The Intercept.

The concern about local police cooperating with “Joint Terrorism Task Forces” headed by the FBI is that the normal rules protecting civil liberties may not apply, thus unlocking the door for potential abuses.

“This is happening at the same time when jurisdictions across the country, our police departments, are actively acquiring surveillance tools in really secretive ways, without any sort of oversight and regulation,” observed Myaisha Hayes, campaign strategies director for MediaJustice. “And it makes me worry that those tools can be used against activists given the sort of environment that the FBI is creating around criminalizing dissent.”

Source: theintercept.com

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.
California Supreme Court: Refusing to Testify Insufficient to Constitute Accessory After the Fact

by Anthony Accurso

The Supreme Court of California held that a defendant with alleged knowledge of a crime cannot be prosecuted under Penal Code § 32 as an accessory after the fact to the crime for refusing to testify when presented with a valid subpoena.

In 2006, Starletta Partee allowed her brother to borrow her rental car, which she learned later was used in the commission of a murder. When she tried to report the car as stolen, she was questioned by a homicide detective who surreptitiously recorded the interview. She told the detective what she knew about her brother’s conduct on the condition that it was off the record, because she had previously been harassed and intimidated after testifying when her boyfriend had been murdered.

Shortly thereafter, her brother, cousin, and their two friends were charged each with one count of murder. Partee could not be located in time for the 2008 trial, so the charges were dismissed.

In April 2015, law enforcement located Partee and took her into custody as a material witness. The charges against the four were reinstated, and Partee was granted use immunity for testifying, which meant she could not rely on the Fifth Amendment to avoid taking the stand. She refused to testify anyway, even in the face of a prosecution for contempt of court under Penal Code § 166(a)(6). After seven-and-a-half months in jail, she also was charged with four counts of being an accessory after the fact for refusing to testify. She was ultimately convicted, given credit for time spent in jail, and placed on probation for three years.

On appeal to the California Supreme Court, she argued that her conduct did not rise to the level of an “affirmative act” required for conviction as an accessory, simply for failing to speak.

The Court has previously found the accessory statute to include four elements:

1. someone other than the accused, that is, a principal, must have committed a specific, completed felony; (2) the accused must have harbored, concealed, or aided the principal; (3) with knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment.” People v. Nuckles, 298 P.3d 867 (Cal. 2013).

The parties agreed that the first, third, and fourth elements were satisfied and that Partee neither harbored nor concealed the principals. The question is whether by not testifying she “aided” them in avoiding prosecution. The State argued that her failure to testify, coupled with the result that such failure allowed the principals to escape punishment, amounts to the requisite finding of the elements of the crime.

The Court, reiterating the finding from Nuckles, stated that the word ‘aids’ in this context requires “overt or affirmative assistance.” When considering other cases where defendants have been convicted and affirmed on appeal as an accessory, the Court noted that lying to investigators qualifies. People v. Duty, 269 Cal. App. 2d 97 (1969). And so does driving the principal away from the scene of an attempted murder. People v. Gunn, 197 Cal. App. 3d 408 (1987). On the other hand, mere “incitement or encouragement” are not sufficient under the statute. People v. Elliot, 14 Cal. App. 4th 1633 (1993).

The Court refused to conflate Partee’s intent (the fourth element) with the necessary overt act (the second element), explaining that to do so would “place California on the extreme outer edge of jurisdictions — indeed, in a group unto itself” and make “accessory charges for recalcitrant witnesses … now fair game.” Thus, the Court held that “a witness’s refusal to testify in the face of a valid subpoena, while punishable as contempt, does not by itself amount to harboring, concealing, or aiding a principal” for purposes of the statute.

Accordingly, the Court reversed the convictions against Partee with respect to the four § 32 convictions. See: People v. Partee, 456 P3d 437 (Cal. 2020).

Seventh Circuit: Unsupported CI Statements Insufficient to Justify Higher Drug Quantity for Sentencing

by Dale Chappell

The U.S. Court of Appeals for the Seventh Circuit held on January 28, 2020, that the unsupported statements by confidential informants (“CI”) about drug amounts and transactions outside the direct criminal charges were not enough to support a sentence based on a drug total 32 times higher than the actual drugs seized.

There was no dispute in this case that police seized 143 kg of marijuana and two firearms from Joel Helding’s car and apartment. They also found methamphetamine residue on some digital scales. What was in dispute was how the sentencing judge, William Conley of the U.S. District Court for the Western District of Wisconsin, took the word of CIs which the Presentence Report (“PSR”) used to increase the total drug amount for sentencing to impose a higher sentence.

Helding was charged with possessing with intent to distribute more than 100 kg of marijuana, under 21 U.S.C. § 841(a), and possessing a firearm in furtherance of a drug trafficking crime, under 18 U.S.C. § 924(c). The charges were brought after a CI told Wisconsin police that Helding was transporting drugs into the state. Helding pleaded guilty to both counts, which exposed him to a minimum of 15 years in prison – 10 for the drugs, plus five for the firearms, to run consecutively.

However, drug quantities drive sentencing in drug cases, and Helding’s case provided a stark illustration of how things can escalate in drug sentencing. In this case, the CIs said they had received or purchased large amounts of methamphetamine from Helding in the past. This information was then passed on to the probation officer writing Helding’s PSR. That 143 kg of marijuana quickly jumped to 4,679.7 kg of marijuana, once the methamphetamine was converted to the “marijuana equivalent” under the Federal U.S. Sentencing Guidelines (“USSG”). That amount was 32 times higher than what Helding was actually
Helding properly objected to the PSR’s use of the uncorroborated statements to push his drug amount through the roof. He argued that the case did not involve any controlled buys with the CIs and that the only methamphetamine tied to the case was the residue on the scales that he said was for personal use.

But Judge Conley disagreed. “Both confidential informants were able to provide specific information related to the defendant’s involvement in sales of drugs, including dates and quantities,” he said. “Absent contrary evidence, therefore, I overrule that objection.”

On appeal, the Seventh Circuit recognized that USSG § 1B1.3(a)(1)(B) allows a sentencing court to consider “relevant conduct” when crafting a sentence. This includes considering drug amounts that are attributed to a defendant by way of CI testimony.

But that CI’s statements must be corroborated. This is usually done by law enforcement describing to the court a CI’s past work with them, the CI’s criminal history, the reliability of the CI in the past, or reasons why law enforcement deems the CI to be trustworthy.

Here, none of that happened, the Seventh Circuit noted. Instead, the district court simply took the CI’s statements as credible based on the specificity of the information in the PSR. “But specificity alone, in the face of a defendant’s objection, does not make information reliable,” the Court said.

The Government, nonetheless, argued that the error was “harmless” since Helding was a career offender. And indeed the PSR said he was a career offender, and his GSR wasn’t driven by the drug amounts — at least not in the PSR. But, the Seventh Circuit pointed out, the district court imposed a sentence “driven almost exclusively by the guidelines range resulting from the drug quantity finding.” The Court concluded that “we cannot agree that any error with the drug quantity finding was harmless.”

The Court also took a moment to address due process concerns with a sentencing court using uncharged and uncorroborated conduct at sentencing. “Reliability is a central ingredient of the due process analysis,” the Court said. A sentencing judge may rely on a PSR — but only if it is “well-supported and appears reliable.”

The Court reiterated that when a PSR asserts “nothing but a naked or unsupported charge, the defendant’s denial of that information suffices to cast doubt on its accuracy.”

In other words, if a defendant objects to uncharged or uncorroborated information in the PSR, the sentencing court must ensure it’s reliable.

Though the threshold is low to prove a PSR’s information is reliable, the Court restated that a CI’s out-of-court statement without any further support is not enough to get over that bar.

Accordingly, the Court reversed and remanded Helding’s sentence that was based entirely on the CIs’ uncorroborated statements. See: United States v. Helding, 948 F.3d 864 (7th Cir. 2020).

Ninth Circuit: Proposition 47 Creates New, Intervening Judgment to Allow Another Federal Habeas Petition Attacking Entire Case

by Dale Chappell

The U.S. Court of Appeals for the Ninth Circuit held on January 30, 2020, that the ‘reclassification’ of a prior conviction as a misdemeanor under Proposition 47 created a new judgment in the case that allowed a new federal habeas corpus petition attacking the entire case, which would not be a “second or successive” petition.


That petition was denied by the district court as untimely filed. Years later, the state court granted Morales motion to “reclassify” his grand and petty theft convictions in the same case as misdemeanors but left his robbery conviction and sentence intact.

Morales then filed another federal habeas petition challenging his robbery conviction, raising the same claims as his previous petition that was dismissed. The district court this time dismissed Morales’ petition as an unauthorized “second or successive” petition, finding that Proposition 47 did not create a new judgment in the state case and Morales was therefore trying to challenge the same judgment as before, which is prohibited under the Antiterrorism and Death Penalty Act without authorization from the Court of Appeals.

Without requiring a certificate of appealability, the Ninth Circuit agreed with Morales that Proposition 47 created a new judgment to allow a second-in-time § 2254 habeas petition.

Under 28 U.S.C. § 2244(b), a federal habeas petition is deemed “second or successive” and cannot be heard in the district court without authorization from the Court of Appeals if it challenges the same judgment as the earlier petition. In Magwood v. Patterson, 561 U.S. 320 (2010), however, the Supreme Court held that when a ‘new, intervening judgment’ is entered by the court, another habeas petition challenging that new judgment is not “second or successive.”

The remedy under Proposition 47, the Ninth Circuit determined, met the qualifications under Magwood. In Morales’ case, the state court had “recalled” its original sentence and then resentenced him to 180 days in county jail (time served) for those counts reduced to misdemeanors. Even though the court never changed the robbery conviction or sentence, the Ninth Circuit still concluded that it was a new, intervening judgment on all of the counts. The Court reasoned that “because these actions led to a change in the sentence and judgment, the abstract of judgment had to be amended as well.”

And not only did Proposition 47 create a new judgment to allow another federal habeas petition in Morales’ robbery case, it even allowed Morales to raise the same claims he had raised in his earlier petition years ago. The rule in the Ninth Circuit is that another habeas petition challenging a new judgment allows an attack on the entire judgment, not just the changed portion of it. Wentzell v. Neven, 674 F.3d 1124 (9th Cir. 2012). [Writer’s note: The circuits are split on this, with some allowing another petition to challenge only the new changes to the judgment.] Thus, the Court ruled that Morales’ petition was not “second or successive” because Proposition 47 created a “new, intervening judgment” to allow another habeas petition attacking that entire judgment.

Accordingly, the Court reversed the judgment of the district court and remanded. See: Morales v. Sherman, 949 F.3d 474 (9th Cir. 2020).
Seventh Circuit Vacates Sentence for Failure to Explain Extreme Departure of Guidelines Range

by Anthony Accurso

The U.S. Court of Appeals for the Seventh Circuit vacated a defendant’s sentence because the district court failed to explain its reasoning for a 160 percent upward departure on remand where the original sentence involved only a 10 percent upward departure.

Jesse J. Ballard pleaded guilty to being a felon in possession of a firearm in 2018, his first federal offense. However, Ballard had accrued more than 30 state felony convictions between 1985 and 2017, which placed him in Criminal History Category VI of the United States Sentencing Guidelines (U.S.S.G.).

Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), he was enhanced further, resulting in a Guidelines range of 180 to 210 months. The court sentenced him to 232 months, a 10 percent upward departure on the grounds that the Guidelines did not adequately account for his extensive criminal history.

On appeal, Ballard prevailed on the argument that he had been improperly enhanced under the ACCA. The Government conceded it had erred in counting his two Illinois attempted burglary convictions. His sentence was vacated and remanded for resentencing.

The district court calculated an amended Guidelines range of 33 to 41 months. However, without articulating any additional reasons beyond those cited in its original sentencing, the court imposed 108 months’ imprisonment, a 160 percent upward departure.

Ballard again appealed, claiming that the district court imposed an unreasonable sentence and failed to articulate a reason for doing so.

Judges may depart from the Guidelines range at sentencing; however, when doing so, the judge must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variance.” United States v. Miller, 601 F.3d 734 (7th Cir. 2010). Citing United States v. Castillo, 695 F.3d 672 (7th Cir. 2012), the Court observed, “it follows that more significant justification is necessary for more substantial departures.” And, “regardless of whether the judge gave a sufficient explanation for [an upward departure at the original sentencing], a more substantial departure from a lower guidelines range on resentencing should be supported by a more significant justification.” United States v. Johns, 732 F.3d 736 (7th Cir. 2013).

The Court noted that sometimes a district court may vary higher from a lower Guidelines range than a higher one based on factors articulated as part of its analysis of applicable 18 U.S.C. § 3553(a) factors. However, the district court did not invoke this rationale or otherwise explain why a 160 percent departure was warranted on the same grounds it had earlier justified a 10 percent departure.

Further, the Court noted neither party on appeal could cite a similar case where a district court had gone beyond even a 95 percent upward departure. The sentence applied to Ballard fell into a Guidelines range 10 levels higher than was calculated. The Court admonished that “emphasizing the defendant’s criminal history alone does not adequately explain a departure as extreme as the one in this case.” Thus, the Court ruled that the district court committed procedural error in failing to provide an adequate explanation for its extreme upward departure.

Accordingly, the Court vacated the sentence and once again remanded for resentencing. In doing so, as per Koon v. United States, 518 U.S. 81 (1996), the Court observed that it “cannot place absolute parameters on the district court’s selection of a new sentence.” However, the Court recommended that the district court align the new sentence “more closely to the Guidelines by moving incrementally down the Category IV column of the sentencing table until it finds an appropriate Guidelines range, as suggested in U.S.S.G. § 4A1.3(a)(4)(B).” See: United States v. Ballard, 950 F.3d 434 (7th Cir. 2020).

Coronavirus: Will Courts Continue To Operate, Preserving the Rule of Law?

by Austin Sarat, Professor of Jurisprudence and Political Science, Amherst College, The Conversation, March 19, 2020

The coronavirus outbreak is affecting broad swaths of American life, including all levels of government. On March 16 the U.S. Supreme Court took the unusual step of indefinitely postponing oral arguments scheduled for at least the next two weeks.

The court held oral arguments in 2012, when Hurricane Sandy had closed the rest of official Washington. It often continues to do business when other government agencies shut down due to snowstorms. In this latest move, the court’s statement said the justices were taking this action “in keeping with public health precautions recommended in response to COVID-19 ... The Court will examine the options for rescheduling those cases in due course in light of the developing circumstances.”

The court said it would continue “to be open for official business,” and, as if caught up in the logic of legal argument, noted that “postponement of argument sessions in light of public health concerns is not unprecedented. The Court postponed scheduled arguments for October 1918 in response to the Spanish flu epidemic. The Court also shortened its argument calendars in August 1793 and August 1798 in response to yellow fever outbreaks.”

As someone who has studied law and catastrophe, I think that the court should be focused less on the precedent set when courts need to adapt to conditions such as the coronavirus crisis — and more on their readiness and capacity to continue to discharge their obligations under the Constitution. The courts address some of the most pressing legal issues in the country today. Stopping their work has repercussions for citizens and government officials needing resolution of disputes and authoritative interpretations of the law.

The coronavirus crisis and other federal courts

Beyond the Supreme Court, courts throughout the United States are adapting on the fly to the current crisis.

Last week, the federal court system set up a task force to share information and guidance for the 94 district courts and 13 circuit courts. That task force includes representatives from the U.S. Marshals Service — which helps...
provide security for judges and courts – and Federal Occupational Health officials, who oversee worker job safety.

Because the task force has yet to issue guidance for the entire federal judiciary, courts are devising their own ways of proceeding. On March 17, the Northern District of California closed four federal courthouses to the public and suspended all jury trials and criminal cases across the district until May 1. If any judge believes a hearing is necessary, the hearing will be by telephone or videoconference.

Emergency planning in state courts

Following the 9/11 attack, the 2005 Hurricane Katrina disaster in New Orleans which closed courts in that city, and Hurricane Sandy, many state court systems created emergency plans.

In 2007, for instance, Texas issued a pandemic preparedness report that recommended technological changes so courts could continue operating when times required them to “limit face-to-face interactions and … provide for remote proceedings.”

In 2019, Florida officials issued a guide for judges in case of pandemic influenza, which recommended using videoconferencing systems.

Justice by videoconference?

Those recommendations build on long experience that state courts have in using videoconferencing.

But it’s still an exception to the normal practice of having plaintiffs, defendants, lawyers and witnesses in court in person. Videoconferences are used when parties cannot be physically present in the courthouse because of disability or illness or when, as in sexual abuse cases, the presence of one party might be dangerous or traumatic for a victim.

However, compared to many other advanced countries, both federal and state court systems in the United States are behind in using videoconferencing in court settings.

Major nations including Australia, Canada, the United Kingdom and India all use videoconferencing quite regularly.

In the U.S., remote testimony is especially controversial when presenting evidence in criminal trials. The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses against him” – which has been interpreted as, largely, requiring a face-to-face encounter.

In 1990, the Supreme Court found that the Sixth Amendment does not completely ban videoconferencing for witness testimony in a criminal trial. Instead, the court ruled, trial judges should only consider videoconferencing when the prosecution argues for it, and still should consider the constitutional importance of confrontation when deciding whether to allow a witness to testify from a remote location.

Preserving justice amid catastrophic conditions

Because of their reverence for tradition, courts are not known as particularly nimble and adaptive institutions. But their existing preparations will help. However, some lawyers and scholars worry that in a time of catastrophe due process of law will fall by the wayside in the name of expediency. Criminal defendants, they suggest, might be deprived of full and fair hearings of their case.

All agree, though, that the continued and smooth operation of the courts is especially important to maintaining order, stability and accountability in disorderly and unstable times.

This article is republished from The Conversation (theconversation.com, March 19, 2020) under a Creative Commons license. Copyright 2010-2020, The Conversation US, Inc.
Repeat Offenders May Be the Result of Different Brain Composition

by Michael Fortino, Ph.D.

W ith consideration for the age-old adage, “nurture versus nature,” a recent study suggests that the single common characteristic shared by repeat offenders may be isolated to the structure and composition of the brain itself, suggesting “nature” may trump “nurture” as the key to identifying a future career criminal.

According to the Ministry of Justice in England and Wales, a 2006 study showed that although criminal behavior may arise in adolescence, most who may have stolen a candy bar or picked a fight on the schoolyard go on to become well-balanced, law-abiding adults. The study suggested that only about 10% continue along a path of criminality, but it is unclear if this non-conformity to social rules could be the product of a broken home, a deprived lifestyle, misguided role models, or a biological anomaly that presents itself as a striking difference in the makeup of the brain.

“These findings,” suggests Professor Essi Viding, “underscore prior research that really highlights that there are different types of young offenders—they should not all be treated the same.” Terrie Moffitt, a professor at Duke University, and part of the research team behind the study, upon evaluating biological differences in brain structure, concluded that it is within the brain itself that we may be able to trace the origin behind “persistent, anti-social behavior.” She goes on to conclude that the data show the subjects who have been identified with a differing composition of grey matter may be “operating under some handicap at that level of the brain.”

The research panel studied 672 people from age 7 until 26, then upon reaching age 45, became the subject of brain-scan imaging in an effort to evaluate differences in the thickness of grey matter within the regions of the brain that control emotion, motivation, and behavior. It found 441 of the subjects showed negligible criminal tendencies throughout their life, 151 showed slight anti-social behavior, and 80 subjects displayed criminal tendencies throughout adolescence and on into adulthood. The study did take into account some environmental (nurturing) differences, such as socio-economic status and IQ; then determined that this “career criminal” subgroup displayed a smaller surface within specific regions of the brain, and a thinner grey matter in social cognition areas. Within this “repeat offender” group, there was a higher documented history of mental health challenges, drug use, and violence.

The “chicken and the egg” quandary persists in that it is possible that the data suggest nurture may actually shape nature. The study itself did not seem to account for alternate factors that might include childhood deprivation such as deficiency in adolescent nutrition, exposure to second-hand smoke, alcohol abuse, stress, anxiety, drug use, pollution, and other environmental factors that may play a part in altering the development of the brain at an early age.

Furthermore, the study may not reflect a true cross-section of the world populace and certainly not that of the United States. Ninety percent of the subjects studied were white, and 100% of the subjects were from the somewhat isolated country of New Zealand, a far cry from the diverse and complex environments of New York, Los Angeles, Chicago, Miami, London, or Tokyo.

Washington Supreme Court Announces PRP Petition ‘Final’ Upon Issuance of Certificate of Finality to Allow Tolling of Federal Habeas Clock

by Dale Chappell

A nswering a question certified to the Court by the U.S. Court of Appeals for the Ninth Circuit, the Supreme Court of Washington held on February 27, 2020, that a personal restraint petition (“PRP”) is not “final” until a certificate of finality (“COF”) is issued. The question was posed by the Ninth Circuit because Washington law was unclear on when the one-year clock restarts when filing a federal habeas corpus petition after the denial of a PRP petition.

The case came before the Court in a not so unusual fashion. In 2011, Phongsavanh Phongmanivan was convicted in state court and sentenced to just over 25 years in prison. After his direct appeal was denied, he filed a timely PRP petition, which also was denied. Phongmanivan then took his PRP appeal to the Supreme Court, and on December 3, 2015, the state’s highest court denied discretionary review. On February 10, 2016, the court of appeals issued a COF.

Too often it seems, research findings are consistent with a pre-determined hypothesis therefore suggesting that criminal behavior, in this case, can be attributed to one specific biological factor, which may then be isolated for social engineering. Unfortunately, researchers often develop a hypothesis based upon their own pre-conceived notion and one in which complex society challenges may be reduced to a single common denominator. It becomes a dangerous and slippery slope to suggest that criminality originates only with a brain composition abnormality. By ignoring all other factors that may equally contribute to criminality, society may wish to use brain scan technology to begin to identify specific children as future criminals. The question then remains — do the findings prove the hypothesis, or was the hypothesis designed to prove the findings?

Source: theguardian.com
terrorism and Death Penalty Act (“AEDPA”) establishes a one-year time limit to file a federal habeas petition after the denial of a state postconviction action. The AEDPA clock starts on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” § 2244(d)(1)(A). However, any time during which a state postconviction action is pending is excluded from those 365 days (366 days during a leap year).

This case came down to how the appellate rules apply to PRP cases in determining finality of the appeal. Washington Rules of Appellate Procedure (“RAP”) determines when a case becomes final after an appeal. Under RAP 12.5(a), there is a “mandate” that issues as well as a “certificate of finality.” They are not the same thing. The main difference is that the mandate terminates appellate review, and a COF notifies the parties of the completion of appellate review after the Supreme Court denies discretionary review.

Titled “Finality of a Decision,” RAP 12.7(a) says that the court of appeals loses authority to change or modify its decision upon issuance of a mandate or COF, as provided in rule 12.5(e) and rule 16.15(e).” Washington law also provides that a conviction does not become final for a PRP petition until a man-date is issued. RCW 10.73.090(3)(b).

Considering these rules on mandates and COFs “as a whole,” the Supreme Court concluded that “a PRP proceeding becomes final upon issuance of a certificate of finality,” expressly citing to RAP 12.7(a). The Court reasoned that since COFs have a similar purpose — a signal of finality — they alone say when a proceeding on appellate review is final, not the order of the court denying the appeal.

The Court thus announced: “In Washington, a certificate of finality is more than a redundant instrument of general notice. The date of issuance of the certificate of finality by the clerk of the appropriate appellate court establishes the date of finality for a PRP or other state collateral proceeding.”

The Court also recognized that Washington courts of appeals routinely delay issuance of COFs, instructing that “whatever practices the courts of appeals engaged in in the past, today’s holding should serve to provide greater clarity as to both the legal meaning of the issuance of certificates of finality and the importance of timely compliance with the RAPs.” In other words, the delay in issuing a COF should not count against a petitioner.

Accordingly, the Court held that “April 1, 2016, the date of issuance of Phongmanivan’s certificate of finality, marks the date his PRP became final.” See: Phongmanivan v. Haynes, 2020 Wash. LEXIS 124 (2020).

Hawaii Lawmakers Propose Transparency from Prosecutors

by David M. Reutter

Prosecutors are the “most powerful actors in the criminal justice system” proclaims Hawaii House Bill 2749. That bill would follow the lead of Florida, Colorado, and Arizona in increasing transparency into court proceedings.

A Texas A&M Law Review article highlighted the need to increase transparency in plea bargaining. (See July 2019 CLN, p.41) This bill does that and more. It would require a prosecutor’s office to collect and publish data about a defendant’s race, gender, disability status, where they were arrested, whether diversion was offered, bail or bond information, pleas offered, and substance abuse screening.

In all, the bill requires 11 data points to be collected and publicized online by a newly created criminal justice research institute. It also requires the governor to establish a prosecutorial transparency advisory board.

“The intent of the bill is generally to bring more transparency to the process in prosecutor’s offices to make sure the public can have faith and confidence that the right people are being prosecuted,” said House Judiciary Committee Chair Chris Lee.

“The bill is not popular with prosecutors. Maui County Prosecutor Son Guzman said it was in ‘strong opposition’ to it. “This bill creates an unfunded state mandate with an effective date of July 1, 2020, without any significant consultation with the affected agencies,” he wrote in a letter to the House Judiciary Committee.

“As taxpayers, we have a right to know what’s going on. We should know the rationale behind their decision-making,” said Mandy Fernandez, policy director at the ACLU of Hawaii.

“‘To make good policy first we need to start with information. We can’t have information if the prosecutors are operating in secrecy.”

Source: civilbeat.org

New Fingerprint Test Can Distinguish Whether Person Ingested Cocaine or Only Touched It

by Douglas Ankney

Forensic researchers from the University of Surrey in southeast England have revealed they can examine fingerprints to determine whether a person has ingested cocaine or merely touched cocaine. In 2017, Melanie Bailey and her team utilized a new test that used high-resolution mass spectrometry (“HRMS”) to examine fingerprints taken from persons who had testified to taking cocaine within the previous 24 hours. These subjects were then asked to wash their hands and give another set of prints. This same procedure was followed to examine fingerprints taken from another group of people who had only touched street cocaine. Those who had ingested cocaine produced a molecule known as benzylecgonine that was not detected in the fingerprints taken from those who had only touched the drug.

Because 1-in-10 non-drug users are exposed to cocaine through environmental factors such as handling money, the ability to determine who has ingested versus who has merely touched cocaine is critical. This is especially true with the “war on drugs” and the legal ramifications of positive field-tests.

Bailey said, “At the roadside it would be possible to carry out a screening test, but you would still need to collect a sample to take back to the lab for confirmation.”

Researchers also believe the testing method will eventually be used to detect if people are receiving the correct dosage of therapeutic drugs.

Source: Forensicsmag.com

Dictionary of the Law
Thousands of clear, concise definitions. See page 53 for ordering information.
Wyoming Supreme Court Finds IAC Where Counsel Failed to Challenge Prolonging of Traffic Stop After Citation Completed

by Anthony Accurso

The Supreme Court of Wyoming held that a defendant’s counsel was ineffective for failing to challenge the extension of the traffic stop that eventually uncovered evidence resulting in his conviction on multiple drug-related charges.

On July 10, 2017, Deputy Kyle Borgialli received notification from DCI agents regarding the description of two vehicles that agents believed had been involved in a drug transaction.

Borgialli located the vehicles and pulled one over on the premise that he had witnessed the driver commit a traffic violation, since the DCI notice did not constitute reasonable suspicion to initiate an investigatory stop.

During the stop, Borgialli ran the documents belonging to James Leonard Mills and verified that he had a valid license and insurance.

Borgialli then asked Mills to exit the vehicle so he could “explain” the traffic citation. Mills told the deputy to “explain it right here” and refused to exit the vehicle.

Officer Steven Dillard arrived on the scene with a drug-sniffing dog when Mills was refusing to exit the vehicle. Several officers were required to forcibly remove Mills from his vehicle. A pat search found methamphetamine and cocaine in his pockets. The drug dog alerted on the vehicle, and several items classified as drug paraphernalia were found in the vehicle along with $3,600 in cash.

Mills filed for suppression of the evidence on the grounds that Borgialli lacked reasonable suspicion required to initiate a traffic stop, alleging that Borgialli was lying about the violation he purportedly observed. Despite the dash-cam evidence not demonstrating the traffic violation (ostensibly because it was pointing in the wrong direction), the court found Borgialli’s testimony about the violation credible and denied the motion to suppress. Mills was subsequently convicted at trial.

On appeal, Mills claimed his attorney had been ineffective for failing to argue at the suppression hearing that the officers had unreasonably extended the traffic stop amounting to an unconstitutional seizure.

To prevail on an ineffective assistance claim, a defendant must show that his trial counsel rendered a constitutionally deficient performance, and, absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict. Wall v. State, 432 P.3d 516 (Wyo. 2019).

Terry v. Ohio, 392 US 1 (1968), articulated a two-part test to judge the constitutionality of an investigatory traffic stop: “(1) whether the initial stop was justified, and (2) whether the officer’s actions during the detention were reasonably related in scope to the circumstances that justified the interference in the first instance.” Quote from Garvin v. State, 172 P.3d 725 (Wyo. 2007).

To be reasonable, an “investigative detention must be temporary, lasting no longer than necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification,” Brown v. State, 439 P.3d 726 (Wyo. 2019). And, “generally a driver must be allowed to proceed on his way without further delay once the officer determines the driver has a valid driver’s license and is entitled to operate the vehicle.” Harris v. State, 409 P.3d 1251 (Wyo. 2018).

The Court noted the suppression hearing focused on whether the initial stop was justified by the traffic violation. The State never presented evidence regarding whether officers had valid reasons to prolong the stop. However, on the evidence available on appeal, the Court declined to rule that Borgialli’s desire to “explain” the citation was sufficient cause to extend the stop, stating “a conclusion to the contrary would permit law enforcement to retain a citation and documents indefinitely in order to extend a stop that reasonably ought to have been completed.”

The Court concluded Mills’ counsel could reasonably have been expected to file a suppression motion on the ground that the stop was unconstitutionally extended and that, if granted, the suppression would have prevented his conviction. Thus, the Court held that counsel was ineffective on the suppression issue.

Accordingly, the Court reversed the convictions and remanded for a new hearing to allow the State to argue whether there were additional, valid reasons to extend the stop. See: Mills v. State, 458 P.3d 1 (Wyo. 2020).

North Carolina Supreme Court Announces Defendant Can Forfeit Right to Counsel by Egregious Misconduct; Trial Court May Forgo Compliance with N.C.G.S. § 15A-1242

by Douglas Ankney

In a case of first impression in the Supreme Court of North Carolina, the Court announced that when a defendant forfeits the right to counsel, a trial court may forgo compliance with N.C.G.S. §15A-1242 (required court inquiry before allowing defendant to proceed without assistance of counsel).

Jeffery Martaez Simpkins was charged with various offenses related to his failure to maintain a valid driver’s license. After being tried and convicted in Stanly County District Court, he appealed to the Stanly County Superior Court where he was tried de novo.

Because Simpkins did not have counsel, the superior court examined him to determine whether he waived counsel. During this time, the court analyzed whether he had some desire to “explain” the citation.

The Court noted that a defendant’s counsel was ineffective for failing to challenge the extension of the traffic stop that eventually uncovered evidence resulting in his conviction on multiple drug-related charges.

On appeal, Mills claimed his attorney had been ineffective for failing to argue at the suppression hearing that the officers had unreasonably extended the traffic stop amounting to an unconstitutional seizure.

To prevail on an ineffective assistance claim, a defendant must show that his trial counsel rendered a constitutionally deficient performance, and, absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict. Wall v. State, 432 P.3d 516 (Wyo. 2019).

Terry v. Ohio, 392 US 1 (1968), articulated a two-part test to judge the constitutionality of an investigatory traffic stop: “(1) whether the initial stop was justified, and (2) whether the officer’s actions during the detention were reasonably related in scope to the circumstances that justified the interference in the first instance.” Quote from Garvin v. State, 172 P.3d 725 (Wyo. 2007).

To be reasonable, an “investigative detention must be temporary, lasting no longer than necessary to effectuate the purpose of the stop, and the scope of the detention must be carefully tailored to its underlying justification,” Brown v. State, 439 P.3d 726 (Wyo. 2019). And, “generally a driver must be allowed to proceed on his way without further delay once the officer determines the driver has a valid driver’s license and is entitled to operate the vehicle.” Harris v. State, 409 P.3d 1251 (Wyo. 2018).

North Carolina Supreme Court Announces Defendant Can Forfeit Right to Counsel by Egregious Misconduct; Trial Court May Forgo Compliance with N.C.G.S. § 15A-1242

by Douglas Ankney

In a case of first impression in the Supreme Court of North Carolina, the Court announced that when a defendant forfeits the right to counsel, a trial court may forgo compliance with N.C.G.S. §15A-1242 (required court inquiry before allowing defendant to proceed without assistance of counsel).

Jeffery Martaez Simpkins was charged with various offenses related to his failure to maintain a valid driver’s license. After being tried and convicted in Stanly County District Court, he appealed to the Stanly County Superior Court where he was tried de novo.

Because Simpkins did not have counsel, the superior court examined him to determine whether he waived counsel. During this time, the superior court warned Simpkins that he could not ask the court for legal advice and that he could not ask the court questions.

When informed he could have counsel assigned to him if he qualified, Simpkins responded that he “would like counsel that’s not paid for by the State of North Carolina.” The court understood this to mean Simpkins desired to hire private counsel to which the State objected on the grounds of delay because Simpkins had known of the impending trial for more than a year and should’ve already hired counsel if he intended to do so.

The court then acknowledged that the district court judgment sheet stated Simpkins had waived counsel in that court. There also
was a “Waiver of Counsel” form signed by the district court judge with a handwritten notation explaining that Simpkins had refused to sign the form. Based on this, the superior court determined in less than 20 minutes that Simpkins waived counsel and Simpkins proceeded to trial pro se. He was convicted by a jury of failing to exhibit or surrender a license and of resisting a public officer.

On appeal, Simpkins argued that the trial court erred by not thoroughly inquiring into his decision to proceed pro se as required by N.C.G.S. § 15A-1242. The State argued that the inquiry wasn’t required because Simpkins had forfeited, not waived, his right to counsel. A majority of the Court of Appeals vacated the judgment, concluding that Simpkins did not forfeit his right to counsel, and therefore, the trial court erred in not conducting the statutorily required inquiry. On the basis of the dissent, which had concluded the opposite, the State appealed to the North Carolina Supreme Court.

The Supreme Court observed “[w]e have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel.” The Court then observed that the Court of Appeals had recognized that “a defendant who engages in serious misconduct may forfeit his constitutional rights to counsel.” State v. Forte, 817 S.E.2d 764 (N.C. Ct. App. 2016). Forfeiture of counsel is “restricted to situations involving egregious conduct by a defendant.” State v. Blakenscy, 782 S.E.2d 88 (N.C. App. 2016).

The Court announced: “We agree and hold that, in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel.”

The right to counsel guarantees “that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” Strickland v. Washington, 466 U.S. 668 (1984). But in rare cases, a defendant’s actions frustrate the proceeding and prevent any outcome from occurring by which he, therefore, forfeits the right to counsel. For example, in State v. Montgomery, 530 S.E.2d 66 (N.C. Ct. App. 2000), the defendant switched counsel three times and then on the date of trial informed the court that he did not want to be represented by then-current counsel. The defendant refused to allow his counsel to meet with witnesses, repeatedly disrupted the proceedings with profanity, and assaulted his attorney in court. It was determined the defendant forfeited the right to counsel because his actions undermined the purpose of counsel by making representation impossible and by seeking to prevent a trial from happening. And in State v. Brown, 768 S.E.2d 896 (N.C. Ct. App. 2015), the defendant refused to participate in the proceedings, refused to answer questions as to whether he desired to proceed without counsel, and repeatedly hired and fired counsel to delay trial. It was determined that by engaging in such conduct he forfeited the right to counsel.

Simpkins, by contrast, participated in the proceedings, answered the court’s questions, stopped asking questions when instructed, and did nothing to delay the proceeding. Consequently, his actions did not warrant forfeiture of the right to counsel.

Tellingly, the trial court did not rule that Simpkins had forfeited counsel, finding instead that he had waived counsel. But to determine if the waiver of counsel was knowing, intelligent, and voluntary, N.C.G.S. § 15A-1242 requires the trial court to conduct a colloquy to determine that Simpkins (1) had been clearly advised of his right to assistance of counsel and his right to appointment of counsel if he was entitled, (2) understood and appreciated the consequences of the decision to proceed without counsel, and (3) comprehended the nature of the charges and proceedings and the range of permissible punishments. The superior court failed to make such inquiry.

The Court concluded that only when a defendant’s egregious dilatory or abusive conduct undermines the right to counsel and prevents the court from complying with N.C.G.S. § 15A-1242 is the right to counsel forfeited and the trial court permitted to forgo compliance with the statute. Simpkins’ conduct did not rise to that level, the Court ruled.

Accordingly, the Court affirmed the judgment of the Court of Appeals. See: State v. Simpkins, 2020 N.C. LEXIS 98 (2020).

Report: LAPD Engaged in Racial Profiling in Traffic Stops

by Kevin Bliss

The Los Angeles Times used traffic stop data released by the Los Angeles Police Department (“LAPD”) under a new California law to calculate racial breakdowns of stops. The newspaper found that blacks and Latinos had a much higher chance of being pulled over than whites, although more drugs and weapons have been found on white motorists. The racial disparity has led to Promoting Unity Safety and Health in Los Angeles (“PUSH LA”) to call for a moratorium on pretextual stops and financial compensation for those unlawfully stopped and searched.

The population of LA is roughly 47 percent Latino, 27 percent white, 11 percent Asian, and 9 percent black. The Times analyzed 385,000 traffic stops between July 2018 and April 2019 and found that blacks represented 27 percent of drivers pulled over, Asians 4 percent, Latinos 47 percent, and whites 18 percent.

Equipment violations accounted for 20 percent of stops for blacks and Latinos but only 11 percent for whites. Activists are concerned that these kind of stops are conducted as an excuse for police to search and harass people of color.

Melina Abdullah, co-founder of Black Lives Matter LA, said, “These stops lead to the deaths of our people. For anybody who lives in communities like mine, the data is not a surprise. It’s a validation of what we already know.”

Her organization, along with American Civil Liberties Union of Southern California and other local groups, joined to form the coalition PUSH LA, intent on scaling back traffic stops, ending pretextual stops to look for drugs and weapons, and recognition that the LAPD has engaged in racial profiling with compensation for those affected.

PUSH LA also called for Los Angeles Mayor Eric Garcetti to withdraw the Metropolitan Division of the LAPD from South LA because they had been excessive in racial profiling. LAPD Chief Michael Moore implemented a study of stop-and-search data to better understand differences occurring across races, neighborhoods, and with various police. This will help deploy resources more appropriately and without discrimination, he stated.

He announced he is also making changes to the Metropolitan Division. Crime suppression units will focus on “specific dangerous criminals while engaging in more substantive community outreach, thereby reducing our reliance on investigative stops.”

Sources: theguardian.com, latimes.com
The Supreme Court of California held that an appellate claim of a confrontation clause violation based on an expert’s testimonial hearsay is not forfeited due to defense counsel’s failure to object where the trial occurred before People v. Sanchez, 374 P.3d 320 (Cal. 2016), was decided.

Jose Luis Perez, Edgar Ivan Chavez Navarro, and Pablo Sandoval were tried together for their roles in the kidnappings and murders of two men and the attempted murder of another.

Sabas Iniguez testified to the following: A drug dealer named Max owed a debt involving methamphetamine to the three victims (who were also drug dealers). Max was a Sinaloa cartel member, and Sandoval reported to him. Chavez reported to another cartel member named Eduardo Alvarado (whom the surviving victim identified as the shooter). One of the murder victims also was a member of the cartel to whom the survivor had reported.

The prosecution’s gang expert, Jeff Moran, testified that the Sinaloa drug cartel produces large amounts of methamphetamine and transports it to the U.S. to sell. Moran opined that Iniguez, Sandoval, Chavez, Perez, and Alvarado were all members of the Sinaloa cartel and that their coordinated efforts were consistent with criminal street-gang activities. He testified — without objection — that he based his opinion on, among other things, (1) Iniguez’s admission that he was a cartel member and (2) sources that had told Moran that Sandoval had direct contact with Max who was calling the shots.

All three defendants were found guilty of numerous offenses, including murder and gang enhancements, and they appealed to the Court of Appeal. Before the appeals were decided, the California Supreme Court decided Sanchez.

In Sanchez, the Court disapproved People v. Gardeley, 927 P.2d 713 (Cal. 1996), and People v. Montiel, 855 P.2d 1277 (Cal. 1993), which provided that experts could testify to sufficiently reliable case-specific hearsay sources used to formulate their opinions as long as the trial court issued a curative instruction that the jury should not consider the out-of-court sources as true but that the information was being admitted only to show the basis for the expert’s opinion.

Sanchez explained that this paradigm was no longer tenable because the expert was treating case-specific out-of-court statements as true. As such, those statements were being admitted as true, and the jury was considering them for truth. It would be irrational for a jury to assess the expert’s opinion as credible without first assessing whether the out-of-court statements supporting the opinion were true. Consequently, Sanchez ruled that such statements are hearsay and no longer admissible unless amenable to a recognized hearsay exception, e.g., the proponent of the out-of-court statements would testify at trial, or the proponent was legally unavailable but the defendant had prior opportunity to cross-examine the witness, etc.

After the Sanchez decision was issued, Chavez supplemented his appeal, claiming Moran’s testimonial case-specific hearsay violated his rights under the Sixth Amendment’s Confrontation Clause. The Court of Appeal ruled that the claim was forfeited due to counsel’s failure to object at trial. The Supreme Court granted Chavez’s petition for review.

The Court observed that “ordinarily, the failure to object to the admission of expert testimony or hearsay at trial forfeits an appellate claim that such evidence was improperly admitted.” People v. Stevens, 362 P.3d 408 (Cal. 2015). But parties can be excused for failing to object where the objection would have been futile or wholly unsupported by substantive law then in existence. People v. Brooks, 396 P.3d 480 (Cal. 2017). Failure to object has been excused where requiring counsel to object would place an undue burden on defense to anticipate unforeseen changes in the law and would encourage fruitless objections in other situations where defendants might hope that an established rule of evidence might be changed on appeal. People v. Edwards, 306 P.3d 1049 (Cal. 2013).

In the instant case, defense counsel had no reason to suspect a substantive change in the law. In fact, Gardeley was cited as controlling authority in over 2,000 decisions before Sanchez was decided. In re Ruedas, 23 Cal. App. 5th 777 (2018). Any objection to Moran’s testimonial hearsay would have been futile because the trial court was bound by Gardeley and required to follow it. Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937 (Cal. 1962).

Accordingly, the Court reversed the judgment of the Court of Appeal and remanded for further proceedings consistent with the Court’s opinion. See: People v. Perez, 2020 Cal. LEXIS 1221 (2020).

Fingerprint Analysis: High Stakes, Low Qualifications

Forensic science was long considered a foolproof means of analyzing evidence to determine the identity of individuals involved in a crime or their methods of committing it. If the people in the lab applied their technical expertise to a case and the results pointed toward a certain suspect, a guilty verdict was almost assured. After all, what jury would argue with the objective standards of science?

A 2009 National Academy of Sciences report cast old assumptions about the field of forensics into serious doubt. The study found that all the pattern-matching disciplines, where evidence from a crime scene is compared to a pattern connected to a suspect, are actually very subjective, meaning that experts examining the same piece of evidence can—and often do—reach conflicting conclusions. It went on to say that, except for DNA analysis, most disciplines of forensics had no solid scientific basis.

Some analyses, such as matching bitemarks and handwriting, had already been criticized for uneven results, but perhaps the biggest surprise was that friction ridge, or fingerprint, comparisons lacked objective standards as well. This particular field revolves around the common perception that no two
individual’s prints are identical, but that has never been proven. Even if it were assumed to be true, the bigger problem is that prints taken at a crime scene are rarely whole or clear. Such smudged or “noisy” prints could be matched to a number of individuals, however unique one’s fingerprints might be, with over seven billion people in the world there are many whose prints are near to identical. When investigators lift a print but lack a suspect to compare it against, they run it through a computer database such as the FBI’s Automated Fingerprint Identification System, which in turn generates a list of “close non-matches.” While the actual source of the print may or may not appear on the list, it is certain that the vast majority of those implicated as potential suspects have no connection to the crime. In one case, faulty fingerprint analysis by the FBI led to false allegations against an Oregon lawyer for the 2004 bombing of a train in Spain.

Considering the consequences that errors in this field could exact on people’s lives, either by clearing a guilty party or condemning an innocent one, the examiners tasked with performing latent fingerprint analysis must be forensic experts who are regularly tested and professionally certified.

And they are. Sort of.

Federal sources indicate that 98% of accredited public crime lab employees take proficiency exams. The problem is that almost everyone who sits for the exams—even those with no forensic training—passes them with flying colors, The Intercept reports.

“We looked at the passage rates year in and year out, and they’re all in the mid to high 90s,” said Brendan Max, a public defender in Cook County, Illinois.

To gauge the difficulty of the exam, Max took it in early 2018 along with two of his colleagues. None of them had any background in friction ridge analysis, yet all three missed only one of the 12 questions—a score of roughly 92%. Collaborative Testing Systems (“CTS”), the top provider in the U.S. of exams for the forensic fields, often receives complaints from technicians that the tests are both too easy and do not resemble the actual work done in the lab.

“If they’re trying to test a certain level of competence, it’s not testing that,” said Heidi Eldridge, a research scientist at the nonprofit RTI International.

Test providers like CTS are unable to duplicate the lab conditions that technicians face on a written exam, but the real obstacle limiting more difficult and comprehensive testing is money. With the cost of testing exceeding $300 per person, the crime labs that picked up the bill do not want to pay for something that their employees might not pass. The response has been to simplify the tests to a ridiculous degree. Of the 360 individuals who took the test along with Max and his colleagues, 348 received perfect scores.

The desired effect is to make forensic technicians appear to be infallible experts whom judges and juries will trust without question.

“The problem ... is that we use this as a shield when we go to court,” Eldridge said. “The moment we make that claim and we use the proficiency tests as evidence of expertise, now we’re claiming it’s measuring something that it’s not measuring.”

The federal government funds over 400 crime labs across the country, most of which have no oversight, fewer than two dozen employees, and are attached to local law enforcement. Only a few labs, such as the Houston Forensic Science Center, operate independently and have enough staff to conduct blind tests and other protocols to ensure competency. Employees take the same proficiency exams as technicians at other labs, but they can also testify to error rates and the possibility that mistakes can occur.

The Houston lab is asked to perform around 30,000 forensic analyses annually, which is a small fraction of the cases generated nationwide. For the vast majority facing forensic evidence at trial, justice remains a roll of the dice. That’s a far cry from the perception of near-infallibility many Americans have of forensic sciences.

Source: theintercept.com

Big Brother Is ... Tracking You

by Douglas Ankney

In these Orwellian times, the Detroit Police Department (“DPD”) has obtained a cell-site simulator (“CSS”). It’s a surveillance technology that locates and tracks phones by mimicking cellphone towers.

The DPD bought the technology for $622,000 and began using it in October 2017. From January 1, 2018, through October 31, 2018, the CSS was deployed at least 66 times—an average of three times every two weeks. The phone location information collected by the CSS isn’t limited to targets of police investigations but includes hundreds, even thousands, of innocent passersby.

“If you’re pinging my cellphone for my location, that’s private information,” said Michigan State Representative Peter Lucindo. “These simulators — it’s called overreach of the criminal justice system.”

The Supreme Court ruled last year that cellphone location data is private information, and law enforcement would generally need probable cause and a warrant to track someone through his or her cellphone or other mobile device. Yet some police departments, like Chicago’s, have reportedly used CSS without a warrant by misrepresenting the surveillance technology capabilities, truthout.org reports.

The Michigan State Police (“MSP”) also possesses CSS. Through public records requests, the ACLU of Michigan discovered that the MSP has secretly used the device since 2006. MSP claimed the CSS was “vital to the war on terrorism,” but the technology hadn’t been used in a single terrorism investigation as of 2015.

As law enforcement agencies across the nation use CSS, don’t worry if you lose your cellphone. The cops can tell you where it is—and where you are at all times.

Source: truthout.org
DNA Contamination Threatened Conviction of Innocent Man

by Kevin Bliss

The NYC Medical Examiner’s office ("ME") reviewed the DNA analysis procedure in a burglary case that was the only evidence used to charge Darrell Harris with the crime. They found that the DNA sample could have been contaminated, but only after Harris lost his job and $25,000 in legal fees.

Police responded on December 19, 2018, to a Queens, New York, break-in. DNA samples were collected off the window sill and sent to a lab for testing. The results indicated it was Harris’ DNA, and he was charged with the crime.

Harris had earlier pleaded guilty to a misdemeanor forcible touching charge of an 18-year-old woman. A Grenadian immigrant who had earned U.S. citizenship, Harris had obtained employment with Jet Blue at JFK Airport and pleading to five years' probation on a misdemeanor allowed him to keep this job.

The Port Authority told Harris that with his pending felony charge, he could not maintain his job. He had to quit and pay $25,000 to an attorney for representation in a case that could earn him up to four years in prison. Harris continued to assert his innocence throughout the proceedings. "DNA is good in some ways," he said. "But, it's never 100%, and in my case you had no other evidence, no eyewitnesses. Yet, they were ready to incarcerate me."

Harris submitted his cellphone and E-Z pass records to show he was at a side job as a disc jockey in New Jersey at the time of the incident. His parents gave statements saying they helped him pack his equipment for the job.

This prompted Assistant District Attorney Eric Rosenbaum to ask the ME’s office to reevaluate the test. The ME determined that Harris’ forcible touching DNA sample was processed just prior to the burglary sample. He concluded that the burglary sample could have been contaminated. The DNA sample was recalled and charges were dropped.

Aja Worthy-Davis, spokeswoman for the ME’s office, said that testing guidelines have since been clarified for better accuracy. Terri Rosenblatt of the Legal Aid Society’s DNA unit said the city’s unregulated DNA collection and database could cause more cases of this nature.

"Given the NYPD’s rampant DNA collection of countless New Yorkers, this person could have been nearly anyone ... Lawmakers have an obligation to end this completely unauthorized practice before another New Yorker is wrongfully arrested and prosecuted," she said.

Source: nydailynews.com

Georgia Supreme Court Reverses Dismissal of Second State Habeas Petition

by Douglas Ankney

The Supreme Court of Georgia reversed the Walker County Superior Court’s dismissal of Joseph Samuel Watkins’ second petition for writ of habeas corpus.

Watkins was convicted in 2001 of felony murder, and his conviction was affirmed on appeal to the Georgia Supreme Court in 2003. Watkins subsequently filed a petition for habeas corpus, which was denied. The Georgia Supreme Court also denied his petition for probable cause to appeal in 2012. Then in 2017, Watkins filed a second state habeas petition. Therein, he alleged a claim of juror misconduct and a claim that the State failed to disclose exculpatory evidence, as well as allowed a witness to testify falsely about the existence of the evidence.

In support of the claimed juror misconduct, Watkins provided an affidavit from the juror that revealed the juror had conducted her own timed-drive experiment to the crime scene despite the trial court’s instructions that she not do so. The juror stated that prior to her timed-drive experiment, she and another juror were "leaning towards acquittal." The experiment removed her reasonable doubt, and she — along with the other holdout juror — voted to convict. She further stated that in 2016 she told an investigative reporter about her experiment, and in 2017, she told the Georgia Innocence Project ("GIP") about it. Watkins argued that the juror’s misconduct resulted in a conviction obtained by improperly obtained evidence. Bow v. State, 327 S.E.2d 208 (Ga. 1985).

The second claim involved the testimony of a crime lab manager concerning a dead dog that had allegedly been placed on the victim’s grave. The witness testified that he and a colleague — who had since moved to Pennsylvania — was unable to testify — determined, based on an X-ray, that the dog had been shot between the eyes. During a bench conference, the prosecutor asserted that the bullet had not been removed from the dog’s skull and that the State did not "know what kind of bullet it [was]." The State argued that Watkins had placed the dog on the grave as a ‘calling card’ to send a message to the family that he (Watkins) was responsible for the murder.

Beginning in 2014, the GIP began submitting Open Records Act requests seeking information about the dead dog. An attorney from the GIP was able to locate the colleague — not in Pennsylvania but in Alabama — who disclosed that the bullet had been removed from the dog. The removed bullet was of a different caliber than the bullet that killed the murder victim. Further, all of the testing on the dog had been filed under a case number that was different from the case number assigned to Watkins’ case, explaining why the open records requests had been unsuccessful. Watkins alleged that had this information been known to his trial attorneys, they would have objected to the testimony as being prejudicial and irrelevant.

The Superior Court dismissed Watkins's second habeas petition as "untimely" under OCGA § 9-14-42(c)(4) and "successive" under OCGA § 9-14-51. According to the Superior Court, Watkins could have discovered the facts underlying these claims if his attorneys had exercised due diligence and then presented these claims in the first petition. The Georgia Supreme Court granted Watkins’ application for a certificate of probable cause to appeal.

The Court observed that OCGA § 9-14-42(c)(4) provides that a claim raised in a habeas petition must be raised within four years of “the date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence.” Mitchum v. State, 834 S.E.2d 65 (Ga. 2019). And with respect to habeas
Sealed Records Open for View

by Kevin Bliss

WASHINGTON STATE HAS OVER 5,500 sealed juvenile records that are once again accessible to law enforcement agencies across the nation after a last-minute amendment for “officer safety” was added to a 2015 bipartisan sentencing reformation bill.

Tony Calero conducted an analysis when he was a graduate student in 2013 of Washington’s record-sealing process and found that only 7.5 percent of those eligible went through the process. Similarly, the Washington State Patrol’s electronic identification database was updated July 24, 2015, with cases sealed between 1978 and 2015. As a consequence, people have had their “sealed” records accessed by law enforcement agencies attempting to gain employment or a promotion, renew border passes, and obtain carry permits. Whatcom County clerk Dave Reynolds now provides certified letters to those who have been affected stating that their record was sealed and the claimant can legally say that they have no criminal record.

Patty Kuderer (D-Bellevue) is working to pass a bill limiting the state’s ability to view records after five years post-adjudication to offset these consequences.

Source: theappeal.org

Citizens in California Can No Longer be Prosecuted for Refusing to Risk Their Lives Assisting Police

by Douglas Ankney

In 2014, Norma and Jim Gund were tricked by a Trinity County sheriff’s deputy into responding to a 911 call that the deputy said was “weather related.” Instead, the Gunds were confronted by a maniac who had just murdered two of their neighbors, and Norma was viciously sliced open. The Gunds sued the Trinity County Sheriff’s Office (“TCSO”) for $10 million. But the TCSO invoked the California Posse Comitatus Act of 1872 (“Act”). Under the Act it is a criminal offense — punishable by a fine up to $1,000 — for refusing to respond to a police officer’s call for assistance.

The TCSO claimed the Act made the Gunds de facto employees of the state, despite the fact they had no choice and received no paycheck. A Trinity County judge dismissed the lawsuit in favor of the TCSO’s argument that the Gunds were eligible only for worker’s compensation because they “volunteered” to perform “active law enforcement service.”

But, in September 2019, Governor Gavin Newsome signed a bill striking down the Act. Senate Bill 192 was sponsored by Sen. Bob Hertzberg, D-Los Angeles. The California State Sheriff’s Association opposed the bill, arguing there are situations where a peace officer might look to private citizens for assistance.

Apparently, the legislature and governor thought otherwise. The Act was a relic from America’s early days, and it was enacted to compel citizens to assist with enforcement of the Fugitive Slave Act. Unfortunately, most other states have similar laws making it a crime to refuse assisting a police officer.

Other states, like Maryland, will incarcerate people for refusing to assist police.
Once something is on the internet, it can’t be deleted, they say. Enter the jail mugshot. Proven time and again to be an effective way to ruin someone’s life. Especially when they’re innocent. And news agencies have used them to drive traffic to their websites for years, forever memorializing the worst day of someone’s life.

And that’s why some news agencies are rethinking the use of mugshots on their websites. In January, the Houston Chronicle was the latest major newspaper to stop putting mugshots on its website of those who have been arrested but not yet convicted. In an email to the Marshall Project, Managing Editor Mark Lorado said of the decision against posting mugshots on the paper’s website, “We’re better than that.”

The paper even got an unlikely supporter: “Thank you, @HoustonChron for doing the right thing,” tweeted Jason Spencer, spokesman for the Harris County Sheriff’s Office. “I’m hopeful that other media outlets and law enforcement agencies will follow your lead and rethink the practice of publicly shaming arrested people who haven’t been convicted of a crime.”

Others have raised the same concerns. “It creates this situation when you’re criminalizing folks before they’re convicted of any crime,” says Johnny Perez, a former New York prisoner who’s currently the director of U.S. prison programs for the National Religious Campaign Against Torture. It also creates biases where none exists, he said: “People of color are already more likely to be found guilty than their white counterparts.”

Matt Waite, a former reporter for the Tampa Bay Times, a daily newspaper in Florida, explained how a decade ago he helped the paper scour law enforcement websites to gather images to display on its website to attract traffic. Right away, he saw it would lead to problems. “Legally, it’s public record — but legal is not always right.”

He worked with the paper to fix the problem but still wonders about the images already posted on the internet. And Waite knew all too well about having a mugshot on the internet. He was arrested in 2010 for drugs when his own mugshot spread across the internet. “I was struggling with addiction and the entire internet seemed to be making fun of me,” he said. After prison, he got into journalism and today is a journalism professor at the University of Nebraska–Lincoln.

Some news agencies stopped using mugshots simply because focusing on local crime made the paper’s community look bad. In 2018, the Biloxi Sun Herald took down the mugshots on its website and stopped reporting on low-level crimes in the area, worried it could create a false impression of southern Mississippi.

Some news outlets have even stopped using the names of people charged with crimes. Last year, Cleveland.com/Advance Ohio made changes to its crime coverage by not naming the accused and not using mugshots. “We finally decided we’re causing suffering here,” Editor Chris Quinn said.

Source: themarshallproject.org

Advanced DNA Technology Helps Free Innocent Georgia Man After Nearly 18 Years in Prison

On January 8, 2020, Kerry Robinson began the New Year and a new life as he left Georgia’s Coffee Correctional Facility a free man. He had spent nearly 18 years in prison for a brutal group rape he had nothing to do with.

As science in general and DNA scientific techniques in particular advance, so have avenues available to innocence projects across the nation to exonerate wrongfully convicted citizens. The latest scientific advance called probabilistic genotyping was championed by the Georgia and Idaho Innocence Projects to secure exoneration and release from prison for Robinson.

Sometime prior to 1993, the law-abiding teen Robinson reported Tyrone White to police for an alleged crime. On February 3, 1993, White and two teenage accomplices broke into a 42-year-old woman’s home and raped her. A sexual assault kit (“SAK”) was assembled at the hospital, and the victim gave a detailed comprehensive statement. DNA testing was performed on the fluids found in the SAK. Prominently identified was White’s and the victim’s DNA with the remaining mixture showing two more donors, but with the technology available at the time, those two were not able to be identified to a certainty.

The victim positively identified White and one of the other rapists from their photographs in a school yearbook. She stated that White was in charge of the other two, calling the shots.

Police arrested White and his cohort while the lab did DNA tests, and the investigation was on.

White, apparently remembering Robinson’s earlier report about him to police, now turned the tables. He told investigators it was actually Robinson rather than the person the rape victim had positively identified that had participated in the rape. Police and prosecutors took White’s word for this to the point of cutting White a deal for less punishment to testify against Robinson in court and releasing one of the actual rapists.

According to the DNA analysis, there was a mixture in the SAK’s contents. The two positively identified persons in the mixture that then current technology was able to separate at that time were White and the victim. The remainder had a few markers common to the human race but, according to which expert was consulted, could or could not be attributed to Robinson. Markers further indicated another person as well, which served to also corroborate the victim’s statement, but there is no word as to whether that person has ever been identified to date. The case languished for nine long years before being going to trial. There was the testimony of the victim that solidly incriminated White, as well as the DNA results. Then there was White’s testimony, conflicting nearly everything the victim testified about, thus wholly incredible and unbelievable. The deciding factor in the jury’s verdict against Robinson came from testimony by a DNA analyst employed by the Georgia Bureau of Investigation (“GBI”).

The “left over” DNA in the mixture that had not been attributed to any specific indi-

News Websites Rethink Using Mugshots as Click-Bait
by Dale Chappell

May 2020 Criminal Legal News
vidual was not enough to identify Robinson. Even though the analyst initially testified to this, under continued questioning, it morphed into telling the jury “there was a “very, very low” likelihood that similarities between the DNA mixture and Robinson’s DNA could be explained by random chance.” After the jury found him guilty, Robinson was sentenced to 20 years in prison for a rape he did not commit.

Soon after his conviction, attorneys Rodney Zell and Jennifer Whitfield of the Georgia Innocence Project (“GIP”) began a 15-year long campaign to free Robinson. They were assisted by Idaho’s Boise State University professor Greg Hampikian who is also connected to Idaho’s Innocence Project. Hampikian had conducted a study on people conducting crime lab interpretations with DNA mixtures. He concluded these were “problematic” because of subjective bias then concluded that “subjective analysis of complex DNA mixtures has not been established to be foundationally valid and is not a reliable method.”

With Hampikian’s help, the GIP attorneys put together a team of 17 experts. Of those, only one agreed with the GBI expert’s testimony, four were unable to conclude a result, and twelve stated Robinson’s DNA was not in the SAK mixture. Hampikian also took DNA from four local television employees whose DNA had more random markers matching the SAK mixture than Robinson’s DNA did. Buoyed by these data, the GIP moved for a habeas corpus hearing in 2012. The presiding judge dismissed the case, calling it essentially a “battle of the experts” despite the heavy weight of the evidence falling on Robinson’s side.

All was not lost at that evidentiary hearing. The science was in Robinson’s favor.

An objective method of DNA mixture analysis, compiled by advanced mathematics and computer science, produced what is known as probabilistic genotyping software. The GBI itself adopted this methodology for its laboratories in 2018.

A reevaluation of the DNA mix in Robinson’s case using the new software conclusively proved that the remaining DNA in the SAK mixture was not his. The district attorney’s office joined Zell and Whitfield in a proceeding wherein Judge Brian McDaniel exonerated Robinson and vacated his conviction on January 8, 2020.

Sources: georgiainnocenceproject.org, ajc.com, cnn.com, forensicmag.com

In the Criminal Justice System, Big Brother Gets Bigger Every Day
by Douglas Ankney

According to a report by sciencefriday.com, one in every two American adults is in a law enforcement facial recognition network. Most adults have unwittingly consented to the release of their photos that they have uploaded to social media, including dating sites.

While it’s impossible to determine the exact number of people in a facial recognition database, the Georgetown Law Center on Privacy and Technology reported that over 117 million people are in law enforcement facial recognition networks.

In addition, the Government Accountability Office found that in a four-year period the FBI conducted over 118,000 face recognition searches on its database.

U.S. Immigration and Customs Enforcement has mined the Department of Motor Vehicles databases of states that grant driver’s licenses to undocumented immigrants. And numerous police departments scan the faces of passersby using hand-held surveillance cameras.

City of Grand Rapids to Pay Marine $190,000 After He Was Unlawfully Detained as ‘Illegal Foreign National’
by Douglas Ankney

According to November 14, 2019, news reports from dailykos.com and nytimes.com, the city of Grand Rapids, Michigan, will pay $190,000 to former U.S. Marine Jilmar Ramos-Gomez after he was illegally detained by Immigration and Customs Enforcement (“ICE”) for three days.

Ramos, who suffers from PTSD, was arrested after he pulled a fire alarm at Spectrum Health Butterworth Hospital and then made his way to the hospital’s helicopter pad.

Footage from a body camera worn by one of Ramos’ arresting officers shows a police officer holding Ramos’ U.S. passport. In the video, one officer asks if Ramos has been identified and another answers, “His passport is down there.”

In spite of this evidence, Captain Curt Vanderhooi of the Grand Rapids Police Department sent an email to ICE, requesting the agency check Ramos’ status. Allegedly, the request was based on Ramos’ physical appearance.

ICE Deportation Officer Matthew Lopez interviewed Ramos at the Kent Country Jail and later informed Vanderhooi that Ramos was a foreign national who was in the U.S. illegally and that he should be detained by ICE after his release from local authorities.

In Vanderhooi’s reply, he referred to Ramos as the “Spectrum Helicopter Pad Loco.”

Ramos was held in ICE’s custody for three days, until a lawyer hired by his mother provided documentation proving Ramos was born in Michigan.

Vanderhooi was disciplined with 20 unpaid hours and supplemental training.

Lopez claimed that Ramos stated during the interview that he was a foreign national, but ICE refuses to release the recording of the interview.

Sources: dailykos.com, nytimes.com
‘Constitutional Crisis’ Still Exists Despite California Supreme Court Ruling on Opening Access to Law Enforcement Brady Lists

by Dale Chappell

The latest attempt by the California courts to “harmonize” the state’s brutally secretive police protection statutes with the U.S. Supreme Court’s ruling in Brady v. Maryland, the 1963 case holding that prosecutors cannot be trusted with turning over favorable evidence to the defense in order to satisfy the Due Process Clause of the Constitution, is still no better even after the California Supreme Court’s recent ruling that law enforcement agencies “may” turn over their list of problem officers to prosecutors.

In Association for LA Deputy Sheriffs v. Superior Court, the Court held on August 26, 2019, that a law enforcement agency does not violate [the Pitchess statutes protecting police officer personnel files] by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer’s confidential personnel file.” While the media declared this a major victory for criminal defendants, the ruling is actually anything but that.

Experts who have followed the fallout from the ruling have said that California’s laws on police privacy protection remain in conflict with the Constitution’s due process requirements and undermine the rights guaranteed to defendants by the Constitution. The purpose of Brady, they point out, is that prosecutors cannot be trusted with turning over the information they have in fear that it might damage their case. And they say that the Court’s recent ruling does nothing to cure that problem with the Brady lists.

Other courts have been more firm on the issue. In a 2013 decision in the U.S. Court of Appeals for the Ninth Circuit, which hears cases in California regarding constitutional issues, the court overturned an Arizona murder conviction in part because prosecutors failed to turn over personnel records showing that an officer who was a witness in the case had been suspended for lying. The court held that “the personnel file fit within the broad sweep of [Brady]” and could have been used to impeach (discredit) the officer during trial. And in Harris County, Texas, a judge ordered Harris County DA Kim Ogg to pay a monetary sanction in August 2019 for withholding an officer’s disciplinary record from a defendant.

But California is different. The question in that state is not whether the prosecution would withhold police records but whether they have access to them in the first place. California has Pitchess Statutes, which were created in 1978 to seal off police personnel files from everyone, including the prosecutor, about anything in an officer’s past that may come back to haunt him or her if placed on the stand as a witness in a criminal trial. Many departments around the country have what’s called “Brady lists” identifying officers who have had credibility problems in the past so that prosecutors know to avoid using them as witnesses. Those lists are available to the defense, as well under Brady’s disclosure rule.

In February 2019, the ACLU chapters in California said that a new law, Senate Bill 1421, which opened police files limited to certain major infractions, such as lying on the job and sexual assault, “are still far more limited than what Brady requires.” And an LA Times story found that the Pitchess laws, which still exist after the recent California Supreme Court ruling, still hinder defense lawyers so much that most don’t even bother trying to get the files. “The hell with Pitchess,” Jacque Wilson, a public defender in San Francisco, said. “Pitchess violates every concept of due process,” he said.

The Court’s ruling leaves what the ACLU calls a “constitutional crisis” in the state, because it didn’t make disclosure of Brady lists mandatory, and the Court didn’t even require them to be turned over to the defense (though that is implicitly the rule since Brady requires the prosecutor to turn over favorable evidence).

Kyle Barry, senior legal counsel for The Justice Collaborative, said that any further expansion of Brady into the Pitchess statutes will meet “fierce opposition”: “Unions continue to insist on special protections for their members that both flout the Constitution and treat them differently from others in the criminal legal system.”

“We’ve always had this double standard and it just seems unfair,” Wilson, the public defender, said. “Everything in our client’s history including the kitchen sink comes out, but when it comes to the police officers, everything is so secretive. [Image

California’s Killer Cops

by Douglas Ankney

On the list of cops in California who are convicted felons, 20 former officers are shown as convicted killers.

Recent headlines told us of Joseph DeAngelo — the suspected “Golden State Killer”— charged with a dozen murders and more than 40 rapes, some of which occurred in the 1970s while he was a cop working for the Auburn Police Department near Sacramento. But also listed is Blair Christopher Hall, a former San Bernardino officer convicted of drowning his wife in their backyard hot tub to collect $800,000 in life insurance.

Placer County Sheriff’s Sergeant Paul Koviach Jr. was convicted of killing his wife, who disappeared 26 years ago, and sentenced to 27 years to life.

Los Angeles Police Department Detective Stephanie Lazarus was also convicted for killing an ex-lover’s wife 23 years ago.

Bay Area Rapid Transit police officer Johannes Mehserle claimed he meant to fire his Taser when he shot and killed 22-year-old Oscar Grant, an unarmed African-American who was lying on a station platform. A jury convicted Mehserle of involuntary manslaughter, and he was released from jail after 11 months. Santa Clara County jail deputies Jereh Lubrin, Matt Farris, and Rafael Rodriguez were convicted of second-degree murder for beating a prisoner to death in 2015.

Off-duty Riverside County Sheriff’s Deputy Dayle William Long was drunk and angry when he pulled his gun on a 36-year-old man during an argument inside a bar. The man held his hands up in a position of surrender, but Long shot him four times anyway. And California Highway Patrol Officer Tomieka Johnson is serving 50 years to life for murdering her husband.

Beware of those who say they serve and protect. [Image

Source: theappeal.org

Source: mercurynews.com
A lack of standardization in crime statistics and the complexity of the causes of and cures for crime have made the use of crime statistics difficult.

For instance, whether using marijuana causes crime is an important question as more states consider legalizing recreational marijuana. Legalization proponents could point to a paper in the Journal of Economic Behavior and Organization that found thefts decreased by 20 percent and rapes by as much as 30 percent post-legalization in Washington state.

But, in a survey of 75 sheriffs in states that legalized recreational marijuana undertaken by The New Yorker, the 25 who responded were evenly split between not seeing any change and being certain of an increased crime rate. Thus, The New Yorker survey and the journal paper have two differing conclusions, demonstrating the difficulty in comparing crime statistics.

The most basic problem in crime statistics is defining what a crime is. Behavior that is criminal in some places is not criminal in others.

The definition of what a crime is also changes over time, making historical comparisons difficult.

Further, how does one classify misdemeanors? Is speeding a crime? Is having an overgrown lawn? That is why the paper focused on rape and theft, behavior that is historically criminal in every state.

Even if the definition of crime were settled, there are differing methods of gathering crime statistics. The FBI's Uniform Crime Reporting Program relies on information solicited from around 20,000 law enforcement agencies, while the National Crime Victimization Survey of the federal Bureau of Justice Statistics (“BJS”) is a random survey of households that relies on reports by victims — including those who did not report the crime to authorities.

This can lead to vast differences. For instance, the FBI statistics on rape show it almost doubled between 1973 and 1990, while the BJS data show a decline of 40 percent. Vanderbilt University researchers investigated the discrepancy and reported correlations between the FBI’s figures and an increase in the number of female police officers, the advent of rape crisis centers, and reformed styles of investigation. They concluded that the incidence of rape likely declined while the reporting of the crime greatly increased because of reforms in policing, swamping the decline and giving the appearance of an increase in the FBI statistics.

Finding such a coherent explanation is rare. Further, random increases in crime may soon return to average, a common phenomena called “regression to the mean.” However, laws passed in response to the random increase may be incorrectly credited with the subsequent reduction. This makes it difficult to correlate crime rates with legal measures taken to counter crime.

The causes of crime also are hard to correlate to crime statistics because they are complex and interacting, and the results of intervention may be counter-intuitive or ignored simply because people believe in a program regardless of what the statistics show. For instance, a 1992 meta-analysis of 443 published studies on juvenile delinquency programs showed that a third of them did more harm than good. Yet programs such as D.A.R.E. and Scared Straight continue to be popular.

Likewise, a follow-up on the famous Cambridge-Somerville Youth Study, the first large-scale randomized controlled criminology study, showed that the youths selected to receive counseling, tutoring and summer camp were more likely to have committed multiple crimes, be alcoholic, or be mentally ill than those who received no intervention.

Criminologists agree that most people have simple ideas about what causes crimes — violent videos or music, or sexist or racist attitudes — and they are simply wrong. Therefore, we should be wary when simple explanations for changes in crime rates and simple solutions for crime are offered.

Source: newyorker.com

Chicago’s ‘Despicable’ Red-Light Camera System Exposed

by Douglas Ankney

As of October 2019, Chicago’s 300 red light cameras netted $35 million in fines, penalties, and collection fees.

According to an investigation by ABC 7, the city is setting traps for unwary drivers by reducing the length of time the traffic lights remain green and yellow while increasing the red-light time.

At 87th and Lafayette in Chatham, for example, the two directions with cameras have lights that remain green for 20 and 29 seconds, respectively. But the direction without a camera has a green light for 69 seconds.

Mark Wallace, leader of Citizens to Abolish Red Light Cameras, said, “That’s really significant and you just generate a lot more violations by having a shorter green on a red light.”

Wallace’s group tipped off ABC, which led to the investigation. The cameras at 87th and Lafayette had generated $1,041,184.38 from January through October 2019, according to city records.

“The question is why is a green light shorter where the red light camera is at the very same intersection,” said Wallace.

ABC’s investigation found that at Garfield Boulevard and Wentworth Avenue in Fuller Park, the directions with cameras have 30 seconds for green and yellow lights combined while the direction without a camera had 47 seconds. And in one case, drivers had just 20 seconds for green and yellow lights combined.

Kevin O’Malley, managing deputy commissioner of the Chicago Department of Transportation, claimed the time disparities saved lives and reduced injuries. The shortened green light times “should be enough time, for the traffic flow that is there at the time,” O’Malley said.

But traffic safety expert Timothy Galarnyk disagreed. “[A]ctually, it’s kind of despicable,” Galarnyk said, adding, “That’s a trap. The green should be the same length, but if there’s no camera they give you more time. If there’s a camera, they give you half the amount of time, which means they’re going to catch you running that light.”

Sources: zerohedge.com, ABC7chicago.com
How to Clear Your Record of Marijuana Charges in Illinois

by Dale Chappell

While Illinois has legalized recreational marijuana and pardoned more than 11,000 people with marijuana cases, removing marijuana charges and convictions from your record may require more leg work from some who don’t qualify under the automatic clearing of certain marijuana records.

“We are ending the 50-year-long war on cannabis,” Gov. J.B. Pritzker said in a statement just after signing into law a measure that legalized recreational marijuana in Illinois. “We are restoring rights to many tens of thousands of Illinoisans,” he said.

But getting those rights restored may take a bit of work for some but will be automatic for others. Last June, Illinois became the eleventh state to legalize marijuana and was one of the first to do so through legislation instead of a vote from the public.

The new law allows removal of marijuana charges from someone’s record, which will greatly help with employment, housing, and other opportunities. So, how do you take advantage of the new law? If you have a charge or conviction for less than 30 grams of marijuana that wasn’t tied to a violent crime, the process is automatic. You don’t have to do anything. But it can take a while.

If your marijuana record was created between January 1, 2013, and January 1, 2020, it should already be expunged from your record. The deadline for that was January 1 of this year.

If your marijuana record was created prior to January 1, 2013, or after January 1, 2020, it should be expunged by January 1, 2023.

No matter where you fall in this scheme, your job is to make sure that your address is up to date with the clerk of the court where your marijuana case occurred. That’s because notification of expungement will be sent to the last known address the clerk has on file for you.

And be patient. Your record has to pass through at least five governmental offices before it can be cleared. First, the state police must pull your record; next, a prison review board determines which records should be forwarded to the governor’s office for a pardon; then, the governor approves or dismisses the pardon; next, the state’s attorney general gets a chance to challenge the pardon; and finally, the record goes back to the state police to be expunged.

However, if you were convicted of 30 to 500 grams of marijuana, you’ll have to do the work yourself to get your record cleared. Expungement is not automatic for these cases. This means you’ll have to petition the court to remove the marijuana charge from your record, and then a judge decides if you should qualify. There’s no guarantee it will happen.

There’s also a difference between an “expungement” and a “pardon.” A pardon means that the governor has forgiven your crime, but it does not remove it from your record. An expungement, on the other hand, is what erases the crime from your record. While a pardon often leads to an expungement, it is not automatic.

An alternative to expungement, if you can’t get one, is to petition the court to “seal” your marijuana record. This would make your record closed to the public, but it would still show up for law enforcement and for official background checks. It does not erase the marijuana charge from your record.

“Illinois is probably something of a model now,” says Sam Kamin, a professor of marijuana law and policy at the University of Denver. “When marijuana law reform comes up now, social justice and expungement has to be taken on.”

Even if your record is not expunged, you may still be able to do some damage control by removing your information from commercial background check websites. Some advocates recommend that you “opt out” of those sites. They point out that every commercial background site has an option to remove yourself from their service. One site, www.registeryreport.org, offers instructions on how to do this with the major sites.

Source: vice.com

New York Police Department Plays Loose with Freedom of Information Act Laws

by Kevin Bliss

The New York Police Department (“NYPD”) has a history of denying freedom of public information requests, especially when it concerns surveillance equipment and information gathering technology.

Muckrock, an online records request monitoring database, showed that of the 500 requests monitored since 2017 only half were completed.

Vox reporter Rebecca Heilweil submitted a request for public records to obtain a better idea of the artificial intelligence-based technology the NYPD was employing, specifically gun-detection software used to indicate when a brandished firearm appears in a video. Her request was twice rejected because it would “reveal non-routine techniques and procedures” as well as company trade secrets and “affect their competitive position and imminent contract awards or collective bargaining negotiations.”

Heilweil stated that she was not the only person receiving “such an opaque and frustrating response.” Most are forced to sue to get a response, and the NYPD is more apt to make a legal issue of it than most. They routinely used “Glomar” replies to requests. A “Glomar” response is an FBI/CIA tactic that neither confirms nor denies the existence of the documents being requested, thereby stalling for more time.

Executive Director of the Surveillance Technology Oversight Project Albert Fox Cahn said, “The problem is, we have a police department with a decades-long history of trying to do everything within its power to hide its operations from public scrutiny.”

Data received from surveillance cameras, license plate readers and radiological sensors are crunched through an algorithm to predict further potential crime. Liberals are concerned that these algorithms and databases were created under conditions that would continue earlier practices of racial profiling and police bias.

Many organizations push to legislate access to government documents or support acts like the Public Oversight Technology Act, which would force the NYPD to disclose more information about the technology they employ.

Heilweil said failure to process a public records request limits us in our knowledge of what the Department is doing.

Source: vox.com
Could a Second Chance be the Answer?  
*by Kevin Bliss*

Louisiana has one of the U.S.'s toughest second-degree murder sentencing structures. If convicted, it is an automatic life without parole. The state currently has about 5,000 of its approximately 33,000 prisoners serving life sentences, 51 percent of those for a second-degree murder charge.

Hayward Jones is one such prisoner. He was locked up in 1996 for a burglary, which ended with the death of 71-year-old Daryll Van Dan. Although the autopsy and the pathologist's report stated that Van Dan died of cardiac arrest and that there were no strangulation marks, Jones was still convicted of second-degree murder on the basis of his codefendant’s testimony.

Now he mentors students in a reentry program at Elayn Hunt Correctional Center, as well as delivers speeches in surrounding churches and courthouses. "Nobody wants to be known for the worst moment in their life," he stated. "We’ve all made mistakes, but we can move forward."

Louisiana began passing stringent sentencing laws in the 1970s, starting with mandatory minimums and abolishing parole for life sentences, in all in response to popular get-tough-on-crime policies. Discretionary sentencing was taken away from judges. Critics agree that the problem is mandatory sentencing does not take into consideration circumstances surrounding the crime.

It has created a system where the number of prisoners ineligible for parole exceeds that of Texas, Arkansas, Mississippi, Alabama, and Tennessee combined and where more than half of them were 25 or younger when they committed their crime, and 75 percent are black. Nearly one in three prisoners in Louisiana will die before they are released.

Opponents of this sentencing scheme say that it does not take into account that recidivism drops as people get older, nor is it cost-effective to keep the elderly and infirm incarcerated.

Lawmakers attempted passing a criminal justice reform package in 2017. The bill called for parole eligibility for anyone over age 50 who had served at least 30 years on his or her sentence.

It was opposed by the state District Attorneys Association, claiming release of certain prisoners would pose a risk to public safety and would break promises made by prosecutors to victims' families.

The end result was a modified bill that only reduced sentences and parole requirements for minor and nonviolent crimes.

Proponents for the tougher sentencing schemes say that it is important to keep in mind the impact of the crime on the victims and their families when considering reformation proposals for violent criminals. Jones applied for commutation, which saw wardens and many others of note come and testify to his change and accomplishments. It also saw Van Dan’s grandson testify that the life sentence given was appropriate.

Former district court Judge James Kuhn told Jones: “[S]ome may say that you have earned your right to be out, some might also say ... that you’ve earned your right to be right where you are — in prison.”

Wrongfully Convicted NY Man Freed After 24 Years  
*by Jayson Hawkins*

There were many times Pablo Fernandez could have given up. Yet after spending over half his life behind bars, he never wavered in maintaining his innocence.

“It was so difficult for me to be in prison for so many years when I knew the case against me was totally fabricated,” he said.

Fernandez, now 47, was only 22 at the time he was arrested and charged with a murder-for-hire killing of a gang member in Harlem. He was convicted on the word of several witnesses in 1996 and sentenced to 25-to-life.

Fernandez stated his family and attorneys never lost faith in his innocence, and their support was crucial as the appeals process dragged on for years into decades. Cracks began to appear in the prosecution’s case as one witness after another recanted their testimony and other information came to light that had been withheld at Fernandez’s trial.

In denying their original testimony, three eyewitnesses said they had been instructed by Albert Melino, a dirty NYPD cop, to finger Fernandez as the murderer. This ran counter to their first descriptions of the gunman as being middle-aged, light-skinned, with long, graying hair.

Fernandez was 20 and dark-skinned with his brown hair in a fade on the day of the murder.

Melino, it was later revealed, had been under investigation for distribution of a half-kilo of cocaine at the time of Fernandez’s trial. He was eventually fired from the force, but the case against him was dismissed after gathering dust for five years. He has faced no repercussions for his role in falsely convicting Fernandez.

An appellate court threw out Fernandez's conviction in February, but, instead of dropping the charge against him, prosecutors threatened to retry Fernandez unless he could accept a plea of time-served for manslaughter.

He chose to remain in prison rather than admit to a crime he did not commit.

Seven months later, the Manhattan DA's office dropped all charges against him because of a lack of evidence. Fernandez was finally a free man, left to try to rebuild the pieces of a shattered life.

Source: *theadvocate.com, The Sentencing Project*

Source: *nypost.com*

---

Criminal Law in a Nutshell  
Overview of criminal law. See page 53 for ordering information.
Chicago Police Department Ordered to Release 49 Years of Misconduct Files

by Matt Clarke

On January 10, 2020, a judge in Cook County, Illinois, ordered the Chicago Police Department ("CPD") to produce by the end of 2020 all misconduct files from 1967 to 2015. Judge Alison Conlon noted that the CPD had “willfully and intentionally failed to comply” with the Illinois Freedom of Information Act ("FOIA").

The FOIA lawsuit was brought by former Illinois state prisoner Charles Green. He was incarcerated for over two decades after being wrongfully convicted of a quadruple murder that occurred on Chicago’s West Side. Green has continuously maintained his innocence.

Green filed the FOIA request with the CPD in 2015, six years after he was released from prison. He requested all closed complaint register files from 1967 to 2015. According to Green’s attorney, Jared Kosoglad, the request was made “in order to help him discover evidence of his innocence and to preserve and disseminate evidence of innocence to others wrongfully convicted.”

Kosoglad said the files would be published on the website of the Invisible Institute — an organization that has previously publicized FOIA releases from law enforcement agencies. As of January 16, 2020, the CPD had only turned over about 100 of the 174,900 responsive documents it claims to have on hand. Instead of producing the documents as ordered, it appeared to be focusing on publicly complaining about the decision, possibly with an eye toward an appeal. The CPD claims the production of documents will cost taxpayers millions of dollars.

The CPD has a legacy of abusing — even torturing — arrestees. It ran its own “black site” where arrestees were covertly taken for secret interrogations without access to attorneys or being allowed to notify their families. Where they were. There, the arrestees remained until CPD officers decided they had something worth booking them for. Then only did they enter the official jail system.

CPD officers were also infamous for editing video recordings of interrogations to omit the unconstitutional parts. One CPD lieutenant was convicted on federal charges relating to his lying about torturing arrestees. A state torture inquiry concluded that many arrestees were tortured.

With all of that misconduct, one would expect a lot of disciplinary action against officers. Instead, the pattern seems to be one of many complaints but very few punishments. Hopefully, the disclosures will bring to light the corruption and the cover-up.

“The order threatens to expose decades of police corruption and other skeletons out of CPD’s closet, prevents the City from continuing to expend millions in taxpayer dollars to keep police misconduct secret, and makes patterns of police misconduct readily available to the public,” said Kosoglad in a statement.

Sources: chicagosuntimes.com, techdirt.com

News in Brief

Arizona: A sheriff’s deputy who roughed up a 15-year-old quadruple amputee during an arrest at a state-operated group home in September 2019 will not face excessive use of force charges, the Pima County Attorney’s Office announced March 10, 2020. “The teen, in a group home after being abandoned by his family, apparently knocked over a garbage can and verbally threatened a worker. That’s why the deputy was called to the home,” KOLD News reported. Video from the incident went viral. "Imagine you were this boy with no limbs who just got tackled by this large man with a badge and gun and this man is now screaming in your face and he’s now threatening your friend who’s recording this whole incident … Absolutely, that’s egregious,” Pima County Public Defender Joel Feinman told KOLD News. Disorderly conduct charges against the teen were dropped.

California: In an apparent murder-suicide, Law & Crime reported on March 9, 2020, that assistant U.S. attorney Timothy Delgado of Granite Bay fatally shot his wife Tamara Delgado before turning the gun on himself. Delgado was a prosecutor in the Eastern District of California. Delgado prosecuted narcotics and firearms cases. The couple were married for about five months. An investigation continues.

California: A landlord in August 2018 called South Pasadena Police to perform a wellness check on actress Vanessa Marquez, who was known for her roles on ER and Stand and Deliver. The day ended badly, according to thefreethoughtproject.com. When police arrived, Marquez, 49, said she was having a seizure. Officers Gilberto Carrillo and Christopher Perez said they would take her for an examination with a mental health professional at Huntington Memorial Hospital. A county mental health clinician also spoke with her. She pleaded against that. Marquez brought out a BB gun, and officers fired 12 rounds, according to the Los Angeles Times, and it was captured on bodycam video. Marquez is heard telling the cops of the “seizure” and pleading: “don’t take me to the hospital.” Marquez’s mother, Delia McElfresh, filed a wrongful-death claim in 2019 against the city of South Pasadena seeking $20 million.

California: A jury in January 2020 awarded $710,000 to Joseph Green, who filed a civil suit over false arrest and excessive force after a Stockton police officer permanently knocked out his two front teeth in 2011. Green was 16 when he and his 5-year-old sister stopped by a gas station convenience store to buy candy. Green tried using a damaged bill at the checkout, which got the attention of plainclothes cop Robert Johnson and his partner Officer Robert Wong. Johnson ordered Green to exit the store and showed his badge. Green told him: “F you and your badge.” According to KQED.org, “The store’s surveillance cameras captured a violent altercation between Green and Johnson that played out over the next 10 minutes, video that was played over and over again in court.” It “appears to contradict information in Johnson’s police report on the incident and parts of his sworn testimony in the civil case. The arrest for allegedly trespassing and resisting arrest ended with Green being hauled out of the store in handcuffs, his blood and two front teeth left behind on the floor.” Green’s attorney asserted that his client was paid back for ‘mouthing off’ to the officer. Johnson denied excessive use of force. Video footage also showed the officer placing handheld shopping baskets in the aisle after the incident; a photo of it wound up in
the police report. “The jury found Johnson acted with ‘malice, oppression or fraud,’ and that his partner, Officer Wong, failed to stop the excessive use of force and played a role in Green’s false arrest,” the news site reports.

**Florida:** A three-year grant of $1.2 million from Florida first lady Casey DeSantis will help fund Gadsden County’s criminal justice diversion program, a project projected to help 150 people with services over three years. “We really understand that goes to the physical wellbeing of the people of this county,” DeSantis said, “but also the mental health, which obviously they’re struggling and they need some help.” Gadsden County Sheriff Morris Young expects the program will reduce mass incarceration. “The incarceration rate is going to go down, the cycle of violence is going to go down, and the people are going to be much safer in Gadsden County, so I’m looking forward to this.”

**Florida:** Amanda Kondrat’yev was sentenced last November to 15 days behind bars and a year of supervised probation — for lobbying a slushie at a lawmaker, usatoday.com reports. She stood with a group of protesters when she reportedly tossed the red drink at U.S. Rep. Matt Gaetz. He complained about being struck by the beverage. The incident happened as he was leaving a town hall event at a restaurant in Pensacola. According to newsweek.com, “Gaetz was present at the sentencing and asked the court to give Kondrat’yev a jail sentence as opposed to probation to keep people from showing up at his events to cause harm to my supporters or me!” Only incarceration allows me to reinforce to my supporters and opponents alike that Free Speech is welcomed—but assault will not be tolerated,” said Gaetz. The Congressman, meanwhile, had his own run-in. “He was arrested in Okaloosa County on suspicion of driving under the influence of alcohol,” newsweek.com reports. “Those charges were later dropped.” According to usatoday.com: “Kondrat’yev was one of several candidates running against Gaetz for Jeff Miller’s seat in 2016 before she withdrew from the race.

**Indiana:** Galveston Police Department Marshal Steven Jones was arrested in February 2020 by state police detectives for possession of a fraudulent sales document and delivery of a false sales document, theindychannel.com reports. Jones was a bus driver and contracted provider of buses in addition to his law enforcement job. “Detectives turned up evidence that Jones allegedly created fraudulent invoices which were submitted to the school corporation for reimbursement. Police found that repairs were not completed as indicated on the fraudulent invoices,” theindychannel.com reports.

**Kentucky:** Breonna Taylor of Louisville was in bed when police rained bullets into the home where she was sleeping. The 26-year-old died from a gunshot wound, the Jefferson County Coroner’s Office told WAVE News. Narcotics detectives, armed with a drug search warrant and a battering ram, arrived at her home. Taylor’s boyfriend, Kenneth Walker, exchanged gunfire with Metro Police Sgt. Jonathan Mattingly. Walker was charged with the attempted murder of a police officer after Mattingly was struck in the upper thigh. Walker, 27, was released from jail after his arrest. His defense attorney Rob Eggert and the victim’s family said the couple were not drug dealers, and no drugs were found. They said Walker, a registered gun owner, fired in self-defense and that cops were looking for someone who didn’t live at the house. Taylor “was already an accomplished and certified EMT for the City of Louisville and currently worked for UofL as a medical tech. This is not a woman who would sacrifice her life and her family morals and values to sell drugs on the street,” Bonica Austin, Taylor’s aunt, told WHAS 11. “Had Breonna Taylor been killed by anyone except police, the person or persons responsible for her death would have been charged with a homicide,” Eggert said, also alleging Walker is a ‘victim of police misconduct.”

**Maryland:** Ten years ago, the Baltimore Police Department made a record bust: Over 90 pounds of cocaine “valued between $2 million and $3 million” were seized in a truck during a home raid in the Rosemont community, baltimoresun.com reports. Since then, 14 officers who had been involved face criminal charges by the U.S. Attorney’s Office, baltimoresun.com reports. The 14th is Ivo Louvado, former detective and ATF task force member, who was charged March 12, 2020, “with lying to the FBI about participating in a scheme to sell cocaine from that bust. Prosecutors said in court records that he and two others conspired to sell 3 kilograms that were not reported as seized, giving the drugs to a confidential informant to sell and dividing the proceeds among themselves. Louvado’s alleged cut: $10,000.” Prosecutors allege “that Louvado and other officers conducted the surveillance, and entered the home and waited inside as [GTTF Sgt. Wayne] Jenkins and [Craig] Jester obtained the search warrant. Louvado had never before seen the truck parked outside, prosecutors allege now.” The continuing investigation “uncovered long-running misconduct by members of the Gun Trace Task Force, including robbing citizens, lying in police reports and drug dealing.”

**Massachusetts:** Environmental Police slapped four Hampden teens with a total of $750 in fines for not heeding motorcycle permitting regulations — all while riding on a family’s property. “One of the teens’ mothers, Melanie Beck gave permission for the teens to ride on her property,” reports thefreethought-project.com. “She said making contact with police on her own land has put a bad taste in the mouths of the teens who wanted nothing more than to go riding in the woods.” Statewide, recreation vehicles on private and public land must be must be registered and those under 18 complete a safety and responsibility class.

**Nevada:** A former Las Vegas police detective with the Metropolitan Police Department’s major violators unit had an affair with a stripper and ended up with 40 felony and gross misdemeanor charges. Ex-cop Lawrence Rinetti Jr. and police union official Michael Ramirez face charges, according to a recent grand jury indictment, KTNV.com reports. The detective reportedly supplied stolen drugs and jewels to the confidential informant with whom he was having an affair. Rinetti allegedly received unlawfully obtained drugs and minerals “from a man named Dan Dietzel in August 2019,” KTNV.com reports. In addition, Rinetti is accused of stealing from his girlfriend’s mother and helping her “pass court-ordered urine tests numerous times.” He recruited Ramirez to help in December 2018. In addition, “Rinetti drove through a red light without justification and either killed or caused substantial bodily harm to a woman” on November 12, 2018. At another time, “he attempted to commit insurance fraud by telling an insurance company that he was attempting to pull over a reckless driver when he knew that was not true.” Said his lawyer, David Roger, the former district attorney of Clark County. “Officer Ramirez will plead not guilty and require the prosecutors to prove their case against him beyond a reasonable doubt at the time of trial.” In the new year, “Rinetti was at a drug bust on Las Vegas Boulevard North, where witnesses said he stole 1.2 ounces of methamphetamine, which he provided to DiLorenzo to sell,” according to the Las Vegas Reviews.

**New York:** Accused methamphetamine
dealer Rasedur Raihan reportedly violated home detention when he failed drug tests and skipped drug treatment. "The state wanted to send him to the Metropolitan Correctional Center, but the coronavirus made that risky. "If this were a month ago, I think that would be a relatively easy call," said Magistrate Judge James Orenstein, as reported in the New York Daily News March 19, 2020. Of the jail, he said: "And let's not kid ourselves. The more people we crowd into that facility the more we're increasing the risk to the community. I'm really hesitant to respond to drug usage with incarceration given that risk." Raihan was arrested in 2019 after agents at JFK Airport intercepted a mailing from Bangladesh showing his Queens address and containing more than 130 grams of meth.

Ohio: Two former vice cops, who at one time arrested Stormy Daniels in Columbus, have been slapped with charges by a federal grand jury in March 2020. According to reason.com, investigators say the longtime detectives harassed strip club owners, staff and patrons. Steven G. Rosser of Delaware and Whitney R. Lancaster of Columbus allegedly conspired to violate others' civil rights and to commit wire fraud, reason.com reports. Both had been longtime members of the Columbus Division of Police. "In April 2018, Rosser, Lancaster, and some of their colleagues allegedly stopped and searched the owner of the Dollhouse strip club without probable cause." Also, "[a]ccording to the feds, Rosser got in a fight with a patron at Nick's Cabaret in 2015 and allegedly represented that he was acting in the course and scope of his employment as a police officer during the fight and in the days that followed, when he had the man seized and searched without probable cause."

South Carolina: Robert Lewis Beard II, a former Aiken County Sheriff's Office deputy, faces 18 counts of molesting children, thestate.com reports. These include "sexual conduct with a minor, including first, second and third degrees and several counts of lewd act upon a child under 16. The 40-year-old is serving his current sentence from charges of aggravated child molestation and incest," WCIV.com reports. The new arrest warrant alleges he committed "criminal sexual conduct with a girl over 14 years old between December 2003 and December 2005" and with another 'girl between January 2006 and December 2007, and another incident with a 13-year-old girl in January 2013."

Washington, D.C.: Duncan D. Hunter, a former U.S. congressman, was sentenced in March 2020 to 11 months in federal prison and three years of supervised release for misusing campaign funds to enrich his personal life, washingtonpost.com reports. Investigators say the California Republican "used hundreds of thousands of dollars in campaign funds to pay for family vacations, theater tickets and even to facilitate extramarital affairs, while Hunter countered that he was being unfairly targeted by a politicized Justice Department," washingtonpost.com reports. While Hunter ultimately pleaded guilty to misusing campaign funds late last year, the move came after he had successfully sought reelection. He resigned early this year. Hunter, who declared the case a "witch hunt" and "simply about misspending," sought home confinement. Prosecutors wrote in the sentencing recommendation: "Our very democracy is at risk when a criminal like Hunter wins an election by weaponizing the tropes of fake news and the deep state. This is not a mere philosophical debate in the 50th Congressional district; it is a fact."
### Fill in the boxes next to each book you want to order, indicating the quantity and price. Enter the Total on the Order Form on the next page.

**FREE SHIPPING on all book orders OVER $50 (effective 1-1-2019 until further notice).** $6.00 S/H applies to all other book orders.

<table>
<thead>
<tr>
<th>Book Title</th>
<th>Price</th>
<th>Quantity</th>
<th>Subtotal</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SUBSCRIBE TO CLN FOR 4 YEARS AND CHOOSE ONE BONUS!</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. SIX (6) FREE issues for 54 issues total!</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. <strong>THE HABEAS CITEBOOK - 2ND ED. (A $49.95 VALUE!</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Habeas Citebook: Ineffective Assistance of Counsel, 2nd Ed. (2016)</td>
<td>$49.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>by Brandon Sample, PLN Publishing, 275 pages.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Prison Profiteers</strong>, edited by Paul Wright and Tara Herivel, 323 pages.</td>
<td>$24.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$24.95. This is the third book in a series of Prison Legal News anthologies that examines the reality of mass imprisonment in America. Prison Profiteers is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1063</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Prison Nation: The Warehousing of America's Poor</strong>, edited by Tara Herivel and Paul Wright, 332 pages.</td>
<td>$35.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$35.95. PLN’s second anthology exposes the dark side of the ‘lock-em-up’ political agenda and legal climate in the U.S.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1041</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>The Ceiling of America, An Inside Look at the U.S. Prison Industry</strong>, edited by Daniel Burton Rose, Dan Pens and Paul Wright, 264 pages.</td>
<td>$22.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$22.95. PLN’s first anthology presents a detailed “inside” look at the workings of the American justice system.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1001</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$39.99. Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1038</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$9.95. This paperback dictionary is a handy reference for the most common English words, with more than 75,000 entries.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2015</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$19.99. A guide to grammar and punctuation by an educator with experience teaching English to prisoners.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1046</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Legal Research: How to Find and Understand the Law</strong>, 17th Ed., by Stephen Elias and Susan Levinkind, 363 pages.</td>
<td>$49.99</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$49.99. Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1059</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Deposition Handbook</strong>, by Paul Bergman and Albert Moore, Nolo Press, 426 pages.</td>
<td>$34.99</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$34.99. How-to handbook for anyone who conducts a deposition or is going to be deposed.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1054</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Criminal Law in a Nutshell</strong>, 5th edition, by Arnold H. Loevy, 387 pages.</td>
<td>$49.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$49.95. Provides an overview of criminal law, including punishment, specific crimes, defenses &amp; burden of proof.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1086</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Protecting Your Health and Safety</strong>, by Robert E. Toone, Southern Poverty Law Center, 325 pages.</td>
<td>$10.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$10.00. This book explains basic rights that prisoners have in a jail or prison. It deals mainly with rights related to health and safety, such as communicable diseases and abuse by prison officials; it also explains how you can enforce your rights within the facility and in court if necessary.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1060</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>SUBSCRIBE TO CLN FOR 3 YEARS AND CHOOSE ONE BONUS!</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. FOUR (4) FREE issues for 40 issues total!</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. <strong>ARRESTED: WHAT TO DO WHEN YOUR LOVED ONE'S IN JAIL</strong> (A $16.95 VALUE!)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Spanish-English/English-Spanish Dictionary</strong>, 2nd ed., Random House. 694 pages.</td>
<td>$15.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$15.95. Has 145,000+ entries from A to Z; includes Western Hemisphere usage.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1034a</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Writing to Win: The Legal Writer</strong>, by Steven D. Stark, Broadway Books/Random House, 303 pages.</td>
<td>$19.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$19.95. Explains the writing of effective complaints, responses, briefs, motions and other legal papers.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1035</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Roger's Thesaurus</strong>, 709 pages.</td>
<td>$9.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$9.95. Helps you find the right word for what you want to say. 11,000 words listed alphabetically with over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and informal slang words.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1045</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Beyond Bars, Rejoining Society After Prison</strong>, by Jeffrey Ian Ross, Ph.D. and Stephen C. Richards, Ph.D., Alpha, 224 pages.</td>
<td>$14.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$14.95. Beyond Bars is a practical and comprehensive guide for ex-convicts and their families for managing successful re-entry into the community, and includes information about budgets, job searches, family issues, preparing for release while still incarcerated, and more.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1080</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$54.95. This concise compilation of the Federal Rules of Civil Procedure and portions of Title 28 of the U.S. Code most pertinent to federal civil litigation provides attorneys and pro se litigants with a handy resource that facilitates quick reference to the Rules.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1095</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Merriam-Webster's Dictionary of Law</strong>, 634 pages.</td>
<td>$19.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$19.95. Includes definitions for more than 10,000 legal words and phrases, plus pronunciations, supplementary notes and special sections on the judicial system, historic laws and selected important cases. Great reference for jailhouse lawyers who need to learn legal terminology.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2018</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$19.99. The only comprehensive, up-to-date book of non-profit organizations specifically for prisoners and their families. Cross referenced by state, organization name and subject area. Find what you want fast!</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2020</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>NEW! The Habeas Citebook: Prosecutorial Misconduct</strong>, by Alissa Hull, 300 pages.</td>
<td>$59.95</td>
<td></td>
<td></td>
</tr>
<tr>
<td>$59.95. This book is designed to help pro se litigants identify and raise viable claims for habeas corpus relief based on prosecutorial misconduct. Contains hundreds of useful case citations from all 50 states and on the federal level.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2023</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

**Please Note:** Book orders are mailed via U.S. Postal Service with delivery confirmation. CLN does not assume responsibility to replace book orders once their delivery to the destination address (facility) is confirmed by the postal service. If you are incarcerated and placed a book order but did not receive it, please check with the facility's mailroom first. If books ordered from CLN are censored by corrections staff, please file a grievance or appeal the mail rejection, then send us a copy of the grievance and any response you received.

---

### Criminal Legal News Book Store

- *ALL BOOKS SOLD BY CLN ARE SOFTCOVER / PAPERBACK*

---

Criminal Legal News

---

May 2020
**Hepatitis and Liver Disease: What You Need to Know**, by Melissa Palmer, MD, 471 pages. $19.99. Describes symptoms & treatments of Hepatitis B & C and other liver diseases. Discusses medications to avoid, diets to follow and exercises to perform, plus includes a bibliography. 1031

**Criminal Procedure: Constitutional Limitations**, 8th ed., by Jerold H. Israel and Wayne R. LaFave, 557 pages. $49.95. This book is intended for use by law students of constitutional criminal procedure, and examines constitutional standards in criminal cases. 1085

**Prisoners’ Self-Help Litigation Manual**, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 928 pages. $54.95. The premiere, must-have “Bible” of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Includes detailed instructions and thousands of case citations. Highly recommended! 1077


**Sue the Doctor and Win! Victim's Guide to Secrets of Malpractice Lawsuits**, by Lewis Laska, 336 pages. $39.95. Written for victims of medical malpractice/neglect, to prepare for litigation. Note that this book addresses medical malpractice claims and issues in general, not specifically related to prisoners. 1079

**Advanced Criminal Procedure in a Nutshell**, by Mark E. Cammack and Norman M. Garland, 3rd edition, 534 pages. $49.95. This text is designed for supplemental reading in an advanced criminal procedure course on the post-investigation processing of a criminal case, including prosecution and adjudication. 1090a

**Federal Prison Handbook**, by Christopher Zoukis, 493 pages. $29.95. This leading survival guide to the Federal Bureau of Prisons teaches current and soon-to-be federal prisoners everything they need to know about BOP life, policies and operations. 2022

**Federal Rules of Evidence in a Nutshell**, 9th ed., by Paul F. Rothstein, Myrna S. Raeder and David Crump, 816 pages. $49.95. This succinct overview presents accurate law, policy, analysis and insights into the evidentiary process in federal courts. 1093

**Civil Procedure in a Nutshell**, 8th edition, by Mary Kay Kane, 334 pages. $49.95. This comprehensive guide provides a succinct overview of procedural rules in civil cases. 1094

**Nolo’s Plain-English Law Dictionary**, by Gerald N. Hill and Kathleen T. Hill, 477 pages. $29.99. Find terms you can use to understand and access the law. Contains 3,800 easy-to-read definitions for common (and not so common) legal terms. 3001

**Win Your Case**, by Gerry Spence, 287 pages. $21.95. Relying on the successful methods he has developed over more than 50 years, Spence, an attorney who has never lost a criminal case, describes how to win through a step-by-step process 1092


**Prison Education Guide**, by Christopher Zoukis, PLN Publishing (2016), 269 pages. $49.95. This book includes up-to-date information on pursuing educational coursework by correspondence, including high school, college, paralegal and religious studies. 2019

---

### Subscription Rates

<table>
<thead>
<tr>
<th></th>
<th>1 year</th>
<th>2 years</th>
<th>3 years</th>
<th>4 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prisoners/Individuals</td>
<td>$48</td>
<td>$96</td>
<td>$144</td>
<td>$192</td>
</tr>
<tr>
<td>Professionals/Entities (Attorneys, agencies, libraries)</td>
<td>$96</td>
<td>$192</td>
<td>$288</td>
<td>$384</td>
</tr>
</tbody>
</table>

### Subscription Bonuses

- 2 years - 2 bonus issues for 26 total issues
- 3 years - 4 bonus issues (40 total) or a free book (see other page)
- 4 years - 6 bonus issues (54 total) or a free book (see other page)

(All subscription rates and bonus offers are valid as of 1-1-2019)

---

**Mail Order To:**

Criminal Legal News
P.O. Box 1151
Lake Worth Beach, FL 33460

**Mail Payment and Order to:**

Criminal Legal News
P.O. Box 1151
Lake Worth Beach, FL 33460

**Note: All purchases must be pre-paid.**

Please Change my Address to what is entered below

**Mail Order To:**

Name: ____________________________________________

DOC #: _______________________________________

Suite/Cell: _______________________________________

Agency/Inst: _______________________________________

Address: _______________________________________

City/State/Zip: _______________________________________

---

**Subscription to Criminal Legal News**

<table>
<thead>
<tr>
<th>Qty.</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 month subscription (prisoners only) - $28</td>
<td></td>
</tr>
<tr>
<td>1 yr subscription (12 issues)</td>
<td></td>
</tr>
<tr>
<td>2 yr subscription (2 bonus issues for 26 total!)</td>
<td></td>
</tr>
<tr>
<td>3 yr sub (write below: &quot;FREE&quot; book, Arrested: What to Do… or 4 bonus issues for 40 total!)</td>
<td></td>
</tr>
<tr>
<td>4 yr sub (write below: &quot;FREE&quot; book, The Habeas Citebook 2nd Ed. or 6 bonus issues for 54 total!)</td>
<td></td>
</tr>
</tbody>
</table>

Single back issue or sample copy of CLN - $5.00 each

**Books Orders** (No S/H charge on 3 & 4-year subscription free books OR book orders OVER $50)

<table>
<thead>
<tr>
<th>Qty.</th>
<th>Amount</th>
</tr>
</thead>
</table>

Add $6.00 S/H to BOOK ORDERS under $50

(CLN subs do not count towards $50 for free S/H for book orders)

FL residents ONLY add 6% to Total Book Cost

**TOTAL Amount Enclosed:**

---

* NO REFUNDS on CLN subscription or book orders after orders have been placed. *
* We are not responsible for incorrect addresses or address changes after orders have been placed. *
* Please send any address changes as soon as possible; we do not replace missing issues of CLN due to address changes.*
The Habeas Citebook: Prosecutorial Misconduct

By Alissa Hull
Edited by Richard Resch

The Habeas Citebook: Prosecutorial Misconduct is part of the series of books by Prison Legal News Publishing designed to help pro se prisoner litigants and their attorneys identify, raise and litigate viable claims for potential habeas corpus relief. This easy-to-use book is an essential resource for anyone with a potential claim based upon prosecutorial misconduct. It provides citations to over 1,700 helpful and instructive cases on the topic from the federal courts, all 50 states, and Washington, D.C. It’ll save litigants hundreds of hours of research in identifying relevant issues, targeting potentially successful strategies to challenge their conviction, and locating supporting case law.

The Habeas Citebook: Prosecutorial Misconduct is an excellent resource for anyone seriously interested in making a claim of prosecutorial misconduct to their conviction. The book explains complex procedural and substantive issues concerning prosecutorial misconduct in a way that will enable you to identify and argue potentially meritorious claims. The deck is already stacked against prisoners who represent themselves in habeas. This book will help you level the playing field in your quest for justice.

—Brandon Sample, Esq., Federal criminal defense lawyer, author, and criminal justice reform activist

Order by mail, phone, or online. Amount enclosed _________
By: ☐ check ☐ credit card ☐ money order
Name ________________________________________________________________

DOC/BOP Number ______________________________________________________
Institution/Agency ______________________________________________________
Address _______________________________________________________________
City ____________________________ State ____ Zip _________________
Subscription Renewal — 05/20
The above mailing address for CLN subscribers indicates how many issues remain on the subscription. For example, if it says “10 LEFT” just above the mailing address, there are 10 issues of CLN remaining on the subscription before it expires. IF IT SAYS “0 LEFT,” THIS IS YOUR LAST ISSUE. Please renew at least 2 months before the subscription ends to avoid missing any issues.

Change of Address
If you move or are transferred, please notify CLN as soon as possible so your issues can be mailed to your new address! CLN only accepts responsibility for sending an issue to the address provided at the time an issue is mailed!

Criminal Legal News is online!

Full issues of CLN are available on our website at www.criminallegalnews.org.

In addition to the content available in CLN’s print issues, our website contains updated criminal justice related news stories, subscribing and book ordering information, ability to search all past articles, HRDC Litigation Project information, and much more!

Visit us online today for all your criminal justice related news and information!