Sex Offender Registries: Common Sense or Nonsense?

by Christopher Zoukis

In October 1989, 11-year-old Jacob Wetterling was kidnapped at gunpoint and never seen again.

When the boy’s mother, Patty Wetterling, learned that her home state of Minnesota did not have a database of possible suspects—notably convicted sex offenders—she set out to make a change.

Wetterling’s efforts led to the passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which was signed into federal law by President Bill Clinton in 1994. Jacob’s Law was the first effort to establish a nationwide registry of convicted sex offenders, but it was not the last.

Soon after Jacob’s Law was enacted, 7-year-old Megan Kanka was raped and murdered by a neighbor with a previous conviction for sexual assault of a child. This heinous crime led the state of New Jersey to pass Megan’s Law, which required anyone “convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sex offense” to register with local law enforcement upon release from prison, relocation into the state, or after a conviction that did not include incarceration.

Two years later, Congress enacted a federal Megan’s Law. The bill, which passed in the House by a 418-0 vote and in the Senate by unanimous consent, required that states provide community notification of sex offender registry information “that is necessary to protect the public.” By the end of 1996, every state in the nation had some form of public notification law for sex offenders in place.

In 2006, Congress adopted the Adam Walsh Child Protection and Safety Act, named in honor of 6-year-old Adam Walsh, who was abducted and murdered in Florida. The Adam Walsh Act repealed and replaced both Jacob’s Law and Megan’s Law. The comprehensive Adam Walsh Act created a national sex offender registry and mandated that every state comply with Title I of the Act, the Sex Offender Registration and Notification Act (“SORNA”) or risk losing 10 percent of federal law enforcement funding. SORNA requires, among other things, that states establish a three-tiered sex offender registry system, with “Tier 3” offenders required to update their registry information every three months, for life. SORNA also created the National Sex Offender public website, which had nearly 5 million visits and 772 million hits by 2008.

Full compliance with SORNA has proven costly, and many states have opted out. As of 2014, only 17 states were in full compliance; the remaining 33 states have foregone their full federal law enforcement funding while remaining partially compliant.

False Premises, Faulty Numbers, and Unintended Consequences

There is a laudable and virtually unassailable goal associated with sex-offender registration and restriction laws: protection of the public, especially children. Congress passed SORNA, for example, “[i]n order to protect the public from sex offenders and offenses against children....” 34 U.S.C. § 20901.

But the “protections” provided by sex offender registration and restriction laws are based on faulty information and more than one false premise. In passing registry laws, legislators frequently cite the high rates of recidivism among sex offenders. Judges do the same. In the 2002 opinion McKune v. Lile, U.S. Supreme Court Justice Anthony Kennedy cited a “frightening and high” sex-offender recidivism rate of up to 80 percent.

If it were true, that would, indeed, be “frightening and high.” However, that figure is flat-out wrong. Justice Kennedy based that
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.

John Boston & Dan Manville
ISBN: 978-0-1953744-0-7 • Paperback, 928 pages

The Prisoners’ Self-Help Litigation Manual, in its much-anticipated fourth edition, is an indispensable guide for prisoner litigants and prisoner advocates seeking to understand the rights guaranteed to prisoners by law and how to protect those rights. Clear, comprehensive, practical advice provides prisoners with everything they need to know about conditions of confinement, civil liberties in prison, procedural due process, the legal system, how to actually litigate, conducting effective legal research and writing legal documents. It is a roadmap on how to win lawsuits.
Sex Offender Registries (cont.)

assertion on an unverified claim in a 1986 Psychology Today article written by a therapist who has since repudiated it. In fact, the therapist has stated that the 80 percent figure is "absolutely incorrect" and that he is appalled that it is still being used to influence public policy and judges.

Similarly, a core belief underlying the value of sex offender registries is flat-out wrong—that crimes against children are most often committed by strangers with lengthy criminal histories. Actual recidivism rates are just about the lowest of any offender category—somewhere between 5 percent and 25 percent; sex offenses are, by a very large margin, committed by people known to the victim who have no criminal history, data show.

As crime prevention tools, sex offender registries are a near universal failure. What's more, they work to create a kind of second-class citizen for whom living a normal life is impossible. Residency, "presence," and employment restrictions regularly render registrants homeless, jobless, and cast out of public spaces. Public notification sometimes leads to vigilante action; Human Rights Watch has documented the assault and murder of sex offenders who were located on public registries.

But there is no legislation easier to pass than a restriction on a sex offender. As a group, sex offenders are greatly despised and are thus easy targets for "tough on crime" politicians needing to score points. If the goal of sex offender registration and restriction laws is to actually prevent crime in a constitutional and humane manner, however, it is well past time to take a hard look at the mounting evidence indicating that these laws have gone horribly wrong.

Overview of Registries Nationwide

Laws regulating registered sex offenders vary by state. While every state now requires that sex offenders register, the length of time that a particular sex offender must remain registered ranges from five years to life. Which individual sex offenders are listed on publicly available websites also depends on state law. Most states restrict where registered sex offenders may live, and some states restrict where registrants may work, or be present.

According to a chart created by the Alliance for Constitutional Sex Offender Laws, at least eight states require sex offenders to register for life. Most other states require registration for 10 to 15 years to life, depending on the registrant's crime. Periodic updates are required in most cases, either quarterly or yearly—unless the registrant is homeless.

Homeless sex offenders face additional registration hurdles. For example, in North Dakota, a homeless or transient resident must re-register every three days. Most other states require homeless sex offenders to re-register every seven to 30 days. Massachusetts requires every homeless registered sex offender to wear a GPS device at all times.

Sex offender registration and restriction laws are frequently what lead a registrant to homelessness. In Florida, state law prohibits registered sex offenders from living within 1,000 feet of a school, child-care facility, park, or playground. In addition, as of 2011, the Florida Department of Corrections reported a total of 140 sex offender-related local ordinances, enacted in 44 of Florida’s 67 counties. Typically, these ordinances prohibit registrants from residing within 2,500 feet of various venues, including schools, parks, playgrounds, libraries, churches, public pools, sports fields, and school bus stops.

As a result of these onerous residency restrictions, a 2013 study found that more than 3 percent of Florida’s registered sex offenders are homeless. In Miami, the situation reached crisis levels in 2010, when residency restrictions forced many registered sex offenders to live under a bridge. Ron Book, chairman of the Miami-Dade Homeless Trust, referred to sex offenders as “monsters,” and seems not to have lost any sleep over the rising population of homeless registrants.

“I don’t care if they have to live under a bridge or if they have to live somewhere outside Florida,” Book said.

In other states, laws prohibit registrants from residing between 300 and 2,500 feet from a litany of locations, including schools, child-care facilities, playgrounds, parks, bus stops, youth centers, resident camp facilities, churches, ballparks, pools, athletic fields, “facilities where minors gather,” and the on-campus housing of any institution of higher learning. Some communities leverage these laws to banish sex offenders entirely. Strategically placed “pocket parks” can render entire cities off limits to registrants.

Many states also restrict where a registered sex offender may be present at any given time. In Arkansas, “Level Three” and “Level Four” registrants may not step foot into any swimming area, water park, or state park playground. Florida prohibits registrants...
with a conviction involving a minor from being within 300 feet of “a place where children are congregating.” In Iowa, a similar registrant may not loiter or be present within 300 feet of a public library.

State and federal law further restricts registered sex offenders from receiving certain government benefits and, in some cases, from taking shelter in state-run facilities during an emergency. The Agricultural Act of 2014 prohibits select registrants from receiving food stamps. Some jurisdictions in Florida prohibit sex offenders from seeking safety at public shelters during hurricanes. Homeless shelters and soup kitchens nationwide routinely refuse entry to registered sex offenders.

Sex offenders are subject to most state registry laws even when they are on vacation. In Ohio, South Dakota, and Wyoming, sex offenders must register if they are in the state for more than three days. California and Colorado require a visiting sex offender to register within five days. The registration process itself generally involves spending several hours at the local sheriff’s office, or the state DMV.

Registries in every state are available for public viewing. Some states also give affirmative notification to the public when a sex offender registers. In Alabama, Arizona, Alaska, Louisiana, Texas, and West Virginia, law enforcement or sex offenders themselves must notify the public of their status. Several other states, including Colorado, Connecticut, Maine, New Hampshire, and Washington, provide for discretionary public notification.

Some states also require that registered sex offenders obtain and carry with them special cards or endorsed driver's licenses. Both Louisiana and Mississippi mandate that registered sex offenders obtain a “sex offender card” from the DMV. In Florida, all sex offenders must appear at the DMV within 48 hours of registration in order to pick up an ID card labeled either “SEXUAL PREDATOR” or “943.0435, F.S.” No states require registered sex offenders to wear identifying marks on the outside of their clothing—yet.

In addition to requiring that registered sex offenders have their papers in order, Louisiana prohibits registrants from wearing “masks or hoods” in public. Missouri requires registrants to post signs advising of their status on Halloween. And Minnesota calls its registry the “Predatory Offender Registry” database in order to, according to the state legislature, “more accurately reflect the offenses that trigger registration.” This is despite the fact that there are still people required to register who were convicted of sodomy prior to the Supreme Court declaring such laws unconstitutional.

In sum, sex offenders subject to registration are not welcome to reside or be present in huge swaths of the United States. Sometimes, legislators state their intentions explicitly. A 2008 report in the Hastings Constitutional Law Quarterly cited the speaker of the Georgia House of Representatives as plainly admitting that the state’s registry laws were aimed at driving sex offenders into neighboring states.

**Public safety**

Sex offender registration and restrictions laws are routinely imposed and defended in the name of public safety. Controlling where an individual who has been previously convicted of a sex offense lives, works, or is present is ostensibly meant to limit the likelihood of re-offense, which at first blush seems reasonable. Jason Chambers, a prosecutor and member of the Illinois Sex Offenses and Sex Offender

---

**All Work done under supervision of licensed counsel.**

**Timberwolf Litigation & Research Services, LLC**

Tired of living in a cage? We fight for incarcerated citizens, State and Federal who want their freedom and a second chance at life

**Need Post Conviction Relief? Call Us, We Can Help.**

Timberwolf Provides Template Research and Inmate Referral Services for Law Firms and Convicted Citizens.

112 East High Street, Eaton Ohio 45320
260.243.5649 · 855.712.5276—719.419.2614
helpmetimberwolf@googlegroups.com
Dennis Hartley – Senior Counsel

Payment Plans Available!
Registration Task Force ("SOSOR"), summed up the common sense behind sex-offender registry and restriction laws.

“I have never seen a study that says that if I hit my hand with a hammer, it will hurt,” said Chambers. “But I still know it will hurt. I do not need a study to know that allowing a child sex offender with multiple convictions to live across the street from a grade school is a bad idea.”

There may be good reasons for casting aside common sense beliefs about sex offenders and the effectiveness of registries, however. Empirical evidence and objective data are beginning to confirm what experts have said for many years: Sex-offender registration and restriction laws do not reduce recidivism, and they do not make communities safer. In fact, these laws may actually increase recidivism and decrease public safety.

**Common Sense vs. Reality: Sex Offenders Rarely Reoffend**

Historically, sex offender registration and restriction laws have come in rapid response to public and legislative outrage over rare, high-profile crimes. The kidnapping and murder of a child evokes primal fears, and legislative responses to such evil tend to be swift and dramatic. Such responses also tend to be absent of careful study and deliberation that are the hallmarks of quality legislation. As such, when drafting sex offender registration and restriction laws, legislators often fail to understand the problems they intend to solve, as well as the tools employed to solve them.

In Illinois, for example, the SOSOR Task Force noted in its 2018 report that the state’s registry system was formed “as part of a national response not only to a particular set of circumstances, but often to specific cases that were legislated at a time when crime control was the dominant political philosophy.” The task force also pointed out that the high-profile incidents that led to calls for tighter control of sex offenders were “in many ways atypical of most sexual offenses.”

‘Little if any debate’

In his 2011 book, *Justice Perverted: Sex Offender Law, Psychology, and Public Policy*, forensic psychologist and SUNY-Buffalo Law School professor Charles Patrick Ewing elaborated on this point, writing that “sex offender registration, notification, and community restriction laws arose out of an understandable visceral response to a small number of outrageous sex crimes, coupled with false beliefs that sex offenses were increasing and that sex offenders have a high rate of recidivism.”

“[T]hese laws have often, if not usually, passed with no concern for either cost or likelihood that they will, in fact, reduce either sex offender recidivism or the number of sex offenses in general,” wrote Ewing. “Indeed, some of these laws have been passed with no public input and little if any debate.”

In crafting legislation in the wake of atypical crimes committed by atypical offenders, states have ensnared over 850,000 individuals in a system meant to prevent the type of crimes that they almost certainly did not commit in the first place and likely will not commit in the future. Common sense may indeed dictate that the registration and micromanagement of sex offenders is a good idea. But as author W. Somerset Maugham once said, “Common sense appears to be only another name for the thoughtlessness of the unthinking. It is made of the prejudices of childhood, the idiosyncrasies of individual character and the opinion of the newspaper.”

In *Justice Perverted*, professor Ewing set out to examine the efficacy of sex offender
Sex Offender Registries (cont.)

registration and restriction laws in a decidedly non-common sense manner. In order to answer what Ewing says "is, of course, an empirical question," he did what legislative bodies and policy makers have historically failed to do when enacting sex offender registration and restriction laws: he considered the evidence.

A significant assumption underpinning sex offender laws is that the recidivism rates for this population are, as Justice Kennedy said, "frightening and high." Ewing points out what researchers and experts have been shouting from the mountaintops for years: Recidivism rates for sex offenders are, in fact, "quite low, especially as compared to that for other offenses.”

This is not news. Michigan Citizens for Justice, a group that advocates for reform of sex offender registration and restriction laws, looked at a recent Department of Justice report on new convictions and found that, filtering the data for new convictions (a commonly used definition of recidivism) and crimes against children, sex offenders have a recidivism rate of around 1½ percent. According to the Bureau of Justice Statistics, the general recidivism rate for released prisoners nationwide is 68 percent. Contrary to common misconception, the inclusion of sex offenders in this general number actually lowers the percentage due to sex offenders recidivating at such a low rate.

Other non-partisan sources have come to similar conclusions. The Illinois SOSOR Task Force, which was established by the Illinois Legislature and was composed of practitioners, law enforcement representatives, and advocates, found that the literature suggests a 5 percent sex offender recidivism rate after three years, and a 24 percent recidivism rate after 15 years. The task force also noted that researchers have consistently found that sex offenders are more likely to be rearrested, reconvicted, or reincarcerated for non-sex offenses than sex offenses.

Melissa Hamilton, a professor of law at the University of Houston Law Center and recognized expert on sex-offender recidivism issues, put the actual number in the "low single digits" in a recent court filing. Professor Hamilton is one of the nationally known experts who has been trying to set the record straight about sex-offender recidivism rates for many years.

"[T]he assumption that sex offenders are at high risk of recidivism has always been false and continues to be false," Hamilton told Slate in 2014. "It's a myth.”

Empirical evidence and objective data undermine the common-sense understanding of sex-offender recidivism rates. However, assuming that recidivism rates are lower than commonly believed, common sense still dictates that sex offender registration and restriction laws further reduce recidivism, which is a good thing regardless of how low the rates actually are.

Except that they don’t.

Sex Offender Registration Laws May Impede Public Safety

Professor Ewing examined several studies and meta-analyses and concluded that sex offender registration and restriction laws "have not reduced the number of sex offenses in the United States or even that among previously convicted sex offenders who have been the direct targets of these laws." Interestingly, Ewing reviewed several studies that did find minimal reductions in recidivism rates for sex offenders subject to registration and restriction laws, but those studies were offset by others that found the opposite—that registration and restriction laws actually worked to increase sex offender recidivism rates. Human Rights Watch (“HRW”) explained in a nutshell how sex-offender registration and restriction laws fail to reduce recidivism, and may actually increase recidivism, in a 2007 report, “No Easy Answers for Sex Offenders.”

"Current registration, community notification, and residency restriction laws may be counterproductive, impeding rather than promoting public safety," wrote the report authors. "For example, the proliferation of people required to register even though their crimes were not serious makes it harder for law enforcement to determine which sex offenders warrant careful monitoring. Unfettered online access to registry information facilitates—if not encourages—neighbors, employers, colleagues, and others to shun and ostracize former offenders—diminishing the likelihood of their successful reintegration into communities. Residency restrictions push former offenders away from supervision, treatment, stability, and supportive networks they may need to build and maintain successful, law abiding lives.”

The first point made in the HRW report has also been emphasized by experts and even state-level sex offender management agencies. For example, the California Sex Offender Management Board, which includes law enforcement officers, prosecutors, and prison officials, said in a 2013 report that "[t]he registry has, in some ways, become counter-productive to improving public safety" because "[w]hen everyone is viewed as posing a significant risk, the ability to differentiate between who is truly high risk and more likely to re-offend becomes impossible.”

The Illinois SOSOR Task Force addressed this issue, in part, by recommending much more limited use of the term "sexual predator" when drafting sex-offender laws and regulations. Sex-offender registration and restriction laws are notoriously over-inclusive, and applying the label "sexual predator" to a person convicted of public urination (which can lead to registration in at least 12 states), a teenager convicted of consensual sex with another teenager (which can lead to registration in at least 29 states), or a 10-year-old convicted of a sex crime (which could lead to registration in Texas as of 2013) leads to understandable confusion about what a "sexual predator" is.

California recently enacted a law intended to address this problem while reining in the state’s unwieldy sex offender registry. Senate Bill 3484, sponsored by State Sen. Scott Weiner and signed into law by Gov. Jerry Brown, created a three-tiered registry meant to differentiate between offenders, while also providing most registrants the opportunity to petition to be removed from the registry between 10 and 20 years after release from prison. Law enforcement agencies supported the effort to reform California’s bloated registry, which includes more than 100,000 individuals. Weiner said the new system will improve public safety.

"With this reform, our law enforcement agencies will be able to better protect people from violent sex offenders rather than wast-
ing resources tracking low-level offenders who pose little or no risk of repeat offense," Weiner said in a statement. “Our sex offender registry is a tool used to prevent and investigate crimes, and these changes will make it a better and more effective tool for keeping our communities safe.”

Notifications Counterproductive

The HRW report also highlighted the counterproductive nature of sex-offender registry notification requirements. Common sense dictates that public awareness of the location of a convicted sex offender must improve public safety. Directly addressing this question, professor Ewing found that “[u]nfortunately, the data indicates otherwise.” Publicly viewable sex offender registries do not lower recidivism, nor do they improve the safety of the community.

Sex offenses are committed, in almost every case, by first-time offenders who know their victim. The Bureau of Justice Statistics established in 2010 that family, friends, and acquaintances are responsible for more than 90 percent of all sexual abuse of children. The Association for Treatment of Sexual Abusers similarly found that 93 percent of sex offenses are committed by first-time offenders. A public registry does not necessarily make the community a safer place when the offenders. A public registry does not necessarily make the community a safer place when the offenders. A public registry does not necessarily make the community a safer place when the offenders. A public registry does not necessarily make the community a safer place when the offenders. A public registry does not necessarily make the community a safer place when the offenders. A public registry does not necessarily make the community a safer place when the offenders.

As a result, sex offender registries “generate misplaced fears about the risks that the vast majority of people convicted of a sex offense pose to their communities.” Ruttenberg agrees, and said that public misperceptions of registered sex offenders lead to trouble for registrants themselves.

“Thafs why the men and women on the registry experience so much harassment and vigilante action against them,” said Ruttenberg.

Registrants Attacked by Vigilantes

Vigilante activity is a significant and underappreciated collateral consequence of sex-offender registration and restriction laws. In at least 14 states, there have been enough attacks on registrants to cause legislators to pass laws making it a crime to use registry information to harass, intimidate, or assault a registrant. The 2007 HRW report highlighted some examples of vigilante justice visited upon registered sex offenders.

“Registrants [spoke] of having glass bottles thrown through their windows; being ‘jumped from behind’ and physically assaulted while the assailants yelled ‘You like little children, right?’; having garbage thrown on their lawn; people repeatedly ringing the doorbell and pounding on the sides of the house late at night; being struck from behind with a crowbar after being yelled at by the assailant that ‘People like you who are under Megan’s Law should be kept in jail. They should never let you out. People like you should die. When you leave tonight, I am gonna kill you’. . . .”

Perhaps the most egregious example of common sense gone wrong, however, is the significant push across the nation to restrict where registered sex offenders may live, work, or be present. The presumption underlying all of these restrictions is that the physical location of a given sex offender has some relation to the likelihood that he or she will commit a crime. Similar to other aspects of the registry, however, the evidence suggests that residence, employment, and presence restrictions do not reduce recidivism or enhance public safety at all.

Consider residency restrictions, which prohibit registered sex offenders from living in some arbitrary number of feet from specified locations, such as schools, parks, daycares, and other public places. Professor Ewing suggests that such restrictions are “inherently unlikely to do much if anything to reduce the number of sex crimes in any given geographical location.” Ewing points out a major flaw in the logic of residency restrictions: “[T]hese laws do not restrict convicted sex offenders from living near children, only from living near schools, day care centers, parks, playgrounds, and other places where children congregate.”

“Thafs, for example, a child sex offender might be barred from living within 2,500 feet of one of these ‘protected’ areas but still be

EXPERT WITNESS

Brian Leslie

Coercive Interrogation & Interview Techniques

- False Confessions Resulting From Coercive Questioning
- Improper Witness Interviews Conducted By Law Enforcement
- Inductive & Deductive Investigative Techniques Used
- Complete Forensic Reports
- Expert Witness Testimony

Brian Leslie is a court qualified expert in coercive interrogation & interview techniques and former Chief of Police. He has testified in and worked on many high profile criminal cases including as a contracting expert on several criminal cases for the United States Army JAG core and State Public Defenders.

Find out how our expert services may provide assistance in your upcoming motion, hearing or trial. Have your attorney or family member contact us at:

1-888-400-1309

www.criminalcaseconsultants.com
Sex Offender Registries (cont.)

allowed to live in a large apartment complex brimming with children,” wrote Ewing.

The best available evidence suggests that restricting where registered sex offenders may reside has no impact on recidivism or public safety. The Illinois SOSOR Task Force notes that while “no research was available on whether [residency restrictions] would prevent sexual offending prior to implementation” of such laws, the research is available now. And it does not support the common-sense belief that residency restrictions work.

“[R]esearch has shown residency restrictions neither lead to reductions in sexual crime or recidivism, nor do they act as a deterrent,” wrote the task force.

A significant (false) premise underlying residency restrictions may explain why they don’t work. The task force notes that “residency restrictions were premised on preventing sexual abuse by strangers, [but] research has shown most offenders are not strangers to their victim and abuse tends to happen in a private residence rather than identified public locations.”

The nightmare scenario of stranger abduction of a child has a strong hold on the American psyche. Professor Hamilton said that “[i]t’s become a part of our culture that there are predators waiting around corners.” But the empirical evidence—the Bureau of Justice Statistics finding that over 90 percent of victims of sexual abuse know their abuser—puts an end to the myth that sex offenders frequent schools, parks, and daycares trolling for victims. Outside of the rare, high profile incident, stranger abduction from public places wasn’t happening 20 years ago, and it isn’t happening now.

Employment restrictions

What is happening, however, is a continued push to further isolate registered sex offenders by way of additional restrictions, such as those on where a registrant may work or be present. Registered offenders are barred from holding certain licenses and engaging in select occupations across the country. These restrictions generally focus on jobs that might involve contact with children. In Massachusetts, for example, a registered sex offender may not operate an ice cream truck.

Some states take employment restrictions to the extreme. In Alabama, for example, registrants may not be employed anywhere within 2,000 feet of a school or childcare facility or within 500 feet of a playground, park, athletic field or facility, or child-focused business or facility. In Delaware, a registered sex offender cannot be a plumber; Alaska prohibits sex offenders from dealing in hearing aids. New Hampshire prohibits registrants from working in an “end stage renal disease dialysis center,” and Kentucky does not allow a sex offender to be a land surveyor during the first 10 years of registration.

Presence restrictions are becoming commonplace in sex offender registry regimes as well. At least 26 states now restrict where a registered sex offender may be present. In some states, registered sex offenders may not go to a public pool. In others, they are prohibited from patronizing a mall or library.

Employment and presence restrictions are as beneficial to public safety as residency restrictions. That is, they are not beneficial; they neither lower recidivism nor improve community safety. In fact, these restrictions may actually inhibit public safety and increase recidivism.

Across the board, experts agree that a key to limiting the likelihood of recidivism in any releasing population is successful reintegration into the community. The onerous restrictions placed on registered sex offenders do not engender a sense of community, and they severely limit the ability of an offender to reintegrate. Professor Ewing said sex-offender restrictions might actually increase recidivism and decrease public safety.

“[L]aws that restrict the residences, workplaces, and movements of sex offenders also appear to do little if anything to reduce recidivism and may have the unintended negative consequence of making sex offender recidivism more likely because they engender hopelessness and homelessness in some offenders, impede their contact with social support networks in the community, and create disincentives for pro-social behavior,” wrote Ewing.

With all of the available evidence pointing to the decidedly non-common sense conclusion that sex offender registries and restrictions do not reduce recidivism or improve public safety, one would be forgiven for wondering why legislatures nationwide continue to pile on the requirements and restrictions. The Council for State Governments, a nonpartisan group funded in part by the states, posits that “common myths about sex offenders continue to influence laws” despite the fact that “there is little empirical proof that sex offender registries and notification make communities safer.”

“High-profile cases involving sex offenders continue to dominate the news,” said the Council. “[These cases] understandably shape the public perception of sex offenders.”

Whatever the myths or perceptions, Professor Ewing notes that “it appears that the emperor has no (or very few) clothes.”

“The consensus of empirical research is that these sex offender registration and notification laws have no statistically significant effect on sex offender recidivism and thus fail to provide the protection upon which they are premised and which they promise the public,” wrote Ewing.

Sex Offender Registries and Restrictions: A Costly Failure

States spend hundreds of millions of dollars implementing and operating sex-offender registries that don’t work. The restrictions that accompany registries also come at a great social cost. And registries cost the community significantly, because they provide a false sense of safety.

The economic cost of sex-offender registration nationwide is, according to professor Ewing, “immense.” SORNA, which is intended to force states into compliance with federal registry law, was estimated by the Justice Policy Institute to cost states $488 million to implement in its first year. This cost dwarfed the federal crime fighting dollars lost for non-compliance, and most states have chosen not to comply with the federal law. Compliance or not, however, states spend enormous sums operating sex offender registries.

New Jersey, for example, spent an estimated $5.1 million maintaining Megan’s Law in one year alone. California spent $88 million in 2011 solely to electronically monitor about 7,000 paroled sex offenders. Given that California has more than 100,000 registered sex offenders on its rolls, the total cost to operate the state’s registry is in the hundreds of millions.

Sex-offender registries also come with indirect economic costs. Real estate markets, for example, are impacted by the presence of a registered sex offender. One study found that houses within one-tenth of a mile from a registrant’s residence sold for 17.4 percent less than similar homes located farther away. According to the study’s author, “If you have a person who committed a sex offense next door to you, or even a block away, or two-tenths of a mile away, you pay a price.”

The social costs of sex offender registries...
are wide ranging and significant. Professor Ewing points out that the public may be taking false comfort in the “safety” provided by the registration and restriction of sex offenders.

“(T)he sense of added safety and security that [registration, notification, and restriction laws] convey to the public, while often misleading if not altogether false, may lead some citizens, especially parents and other caretakers of children, to become less mindful of the dangers of sexual victimization,” wrote Ewing. Moreover, “armed with the knowledge that convicted sex offenders are not allowed to live within 2,500, 1,000, or even 500 feet of a school, day care center, playground, park, or other place where children regularly congregate, parents and other caretakers may conclude that their children are thus safer and less in need of care and supervision when they are in these ‘protected’ places. Sadly, the facts do not bear out any such conclusions.”

In addition to social and economic costs to the community, sex-offender registries come at great personal and social costs to the families of sex offenders. Women Against the Registry (“WAR”), an organization dedicated to the abolition of sex offender registries, was founded primarily due to the “punishing effect of the registry on innocent family members.”

According to WAR, one study showed that family members of registered offenders are regularly subjected to threats and harassment by neighbors, physical assault, and property damage. The same study found that innocent family members have been evicted or forced to move out of their own home due to a registrant’s status.

“The effect of the public registry on the family of registered offenders cannot be overlooked,” states a WAR pamphlet. “From shaming to banishment to outright violence, these family members are facing harsh treatment daily simply because they are the family member of registered offenders.”

The Human Rights Watch profile of Gavin D. illustrates this point. Gavin was a softball coach who was convicted of misdemeanor indecent contact with a child after he grabbed and twisted the buttocks of a 12-year-old girl in a fit of anger over the outcome of a softball game. He served two years on probation and completed anger management courses but was also required to register as a sex offender in Iowa. As a result of his registration status, Gavin was forced to move out of the home he shared with his wife and two children.

Because he couldn’t find compliant housing in Dubuque, where his family resided, he crossed the border to Wisconsin, where he moved into a friend’s basement. Gavin can’t sleep in the same home as his family, but he can “visit” as often as he likes.

“I can be there 23 hours if I stay awake,” Gavin said. “On the weekends, I stay there as long as I can keep my eyes open. I just want to be with my kids as long as possible. I at least always wait to leave until they have gone to bed, and I try to leave Wisconsin to get back home to them before the kids wake up. I don’t get much sleep, but I need to be a father to my children.”

Registries and restrictions also come at a great cost to sex offenders themselves, of course. Many registrants find themselves homeless due to a lack of affordable and compliant housing. Unemployment among registrants is rampant. Registrants are cast out of most social situations and suffer shame without end. In a 2003 concurring opinion, U.S. Supreme Court Justice David Souter wrote of the consequences of registration suffered by sex offenders.

“Widespread dissemination of offenders’ names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts,” wrote Justice Souter. “It thus bears some resemblance to shaming punishments that were used early in our history to disable offenders from living normally in the community. While the [majority] accepts the state’s explanation that [Alaska’s registration law] simply makes public information available in a new way, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it without warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.”

The registration and restriction of sex offenders also portends other heavy-handed...
moves by government, according to some experts. Noted criminologist Marie Gottschalk wrote that the required registration of one particular group (i.e., sex offenders) could easily be extended to other groups.

“[T]he war on sex offenders is setting important punitive precedents for expanding the prison beyond the prison not just for released sex offenders but also for a whole range of other groups and individuals deemed undesirable by law enforcement officers, government officials, and the broader public,” wrote Gottschalk in her 2015 book Caught.

Sex-offender registries and restrictions are not effective in reducing recidivism or improving public safety. Instead, professor Ewing argues that the actual effects of these laws are: (1) creating the impression that government is doing something to reduce the number of sex offenses; (2) giving the public a greater sense of safety and security in the face of what is erroneously perceived as a growing threat of sexual victimization; and (3) adding another layer of punishment to the criminal justice system’s response to sex offenders.”

Ewing allows for the possibility that there is some value in the true effects of sex-offender registry and restriction laws, however dubious it may be. But the costs, in both dollars and lives, far outweigh the limited and highly suspect “value” of a system that does not accomplish its one and only task: improvement of public safety.

Registry Reform: Casting Aside (Erroneous) Common Sense

Sex-offender registration and restriction laws are products of irrational (but understandable) fear and political calculation. They do not improve public safety or decrease the likelihood that a sex offender will reoffend, but states continue to add requirements and restrictions with great abandon. In the current social and political climate, it is fair to question whether registry reform is possible, regardless of whether the system is broken.

In Missouri, for example, a registration reform bill made it out of the legislature, but was vetoed by the governor. The bill would have removed juvenile offenders—those who committed sex crimes before they were 18—from the state’s public registry, and would have allowed them to petition to be removed from the law enforcement-only version. Gov. Jay Nixon took the opportunity to engage in political grandstanding and vetoed the bill.

“The leadership of the House may be ready to help violent sex offenders hide from the public and law enforcement, but their victims, and the millions of Missourians who use these websites to keep their families safe, are not,” said Nixon.

But fear mongering and public hysteria will only go so far in the face of empirical evidence and a hefty financial burden. Professor Ewing argues that states may eventually “be forced to conduct honest and realistic cost-benefit analysis in deciding whether sex offender registration, notification, and restriction laws are worth the hundreds of millions if not billions of dollars they cost taxpayers each year.”

The Illinois SOSOR Task Force report is a good example of the kind of legislative reform efforts that are needed. The task force spent one year examining research, conducting public hearings, and formulating sensible reform recommendations. Like the California Sex Offender Management Board, the Illinois Task Force strongly recommended committing resources to effectively differentiating between sex offenders, both for treatment purposes and for registration purposes. As the registry currently stands in Illinois, and in most states, sex offenders are treated generically, which does not “reflect their actual risk-to-reoffend.”

The Association for Treatment of Sexual Abusers (“ATSA”) underscored the importance of treating sex offenders heterogeneously for purposes of registration and restriction in a recent Supreme Court filing.

“There is universal agreement among professionals that restrictions on registrants must have some basis in empirical reality to be effective,” wrote the ATSA brief’s authors. “One such reality is the fact that registrants are not a homogenous group of ‘sex offenders’ that should be monolithically managed. Rather registrants comprise a diverse group of individuals, each different from the next in terms of past criminal history, behavioral patterns, and risk of recidivism. On top of the fact that the observed recidivism rates for ‘sex offenders’ in aggregate are far lower than what conventional folk wisdom suggests, differences in recidivism risks among the diverse registrant population requires a tailored rather than a uniform approach to crime prevention.”

United States District Court Judge Richard Matsch made a similar observation in a recent ruling in which he found Colorado’s sex-offender registry unconstitutionally cruel and unusual.

“The fear that pervades the public reaction to sex offenses—particularly as to children—generates reactions that are cruel and in disregard of any objective assessment of the individual’s proclivity to commit new sex offenses,” wrote Judge Matsch. “The failure to make any individual assessment is a fundamental flaw in the system.”

Professor Ewing concludes that a public registry will never promote public safety, regardless of any reforms. This is because a public registry has no impact on whether a given sex offender will recidivate. If registered sex offenders choose to recidivate, they can simply “seek victims in areas where they are unknown and not likely to be recognized.” As such, Ewing proposes limiting registration to a small number of cases on a law enforcement-only database.

Patty Wetterling laments what has happened to sex-offender registries in the years since she championed Jacob’s Law and now advocates for sex-offender registry reform. “These registries were a well-intentioned tool to help law enforcement find children more quickly,” Wetterling told Slate in 2014. “But the world has changed since then.”

Wetterling believes that better understanding and acceptance of sex offenders is crucial to actually improving public safety.

“These are human beings who made a mistake,” said Wetterling. “If we want them to succeed, we’re going to need to build a place for integrating them into our culture. Right now, you couldn’t walk into a church or community meeting and say ‘I was a sex offender, but I’ve gone through treatment. I now have this lovely family, and I am so grateful to be part of this community.’ There is no place for success stories. Nobody believes them.”


Additional sources: Justice Perverted: Sex Offense Law, Psychology, & Public Policy by Charles Patrick Ewing (Oxford University Press, 2011); “Sex Offenses and Sex Offender Registration Task Force Final Report” (http://www.icjia.state.il.us, January 2018); “Improving Illinois’ Response to Sexual Offenses Committed by Youth: Recommendations for Law, Policy, and Practice” by Illinois Juvenile Justice Commission
A New York Times investigation of the New York Police Department has uncovered that “at least 25 instances were found where judges or prosecutors reportedly determined that a cop’s testimony was likely untrue or embellished” since January 2015. It’s what observers commonly refer to as “testilying.” According to NYPD Officer Pedro Serrano: “You take the truth and stretch it out a little bit.”

Officers take advantage of the fact that such a high percentage of criminal cases, especially with indigent defendants, generally end with a negotiated plea rather than a trial. As a result, many of the exaggerations and false statements are never subject to cross-examination and exposure, and the conduct carries over into the next case. However, the practice consists of more than just stretching the truth—it often crosses over into the more insidious practice of planting evidence, manufacturing testimony, and falsifying lineups.

The deceptive practices are taking place in an era when a majority of people have cellphone cameras, and few arrests or police encounters are not subject to some form of video recording. The widespread use of surveillance video on private and public premises, not to mention dashcam video and bodycams, also complicates the concealment of police misconduct.

Nonetheless, one Brooklyn officer told the Times, “There’s no fear of being caught. You’re not going to go to trial and nobody is going to be cross-examined.”

Lawrence Byrne, a legal spokesman for the NYPD, maintains that, “it’s harder for a cop to lie today. There is virtually no enforcement encounter where there isn’t immediate video of what the officers are doing,” he said, saying that it’s a product of a “bygone era.” Or is it?

Despite the assertions of Byrne that, “Our goal is always, always zero,” of the “testilying” instances, it appears to still happen on an all-too-regular basis. The Times uncovered numerous instances where police officers embellished testimony or planted drugs or weapons on innocent individuals, and then lied about it.

In most instances where police are caught engaging in misconduct, prosecutors dismiss the charges and seek to seal the case. The Times reports that these summary dispositions of tainted cases make the tracking of police misconduct almost impossible, but the result of this misconduct is substantial. Ethics-challenged cops leave in their wake dozens of innocent individuals whose lives have been turned upside-down by the expense and life disruptions caused by defending themselves in court.

These instances of misconduct have other unfortunate effects on the criminal justice system. According to the Times, “Police lying raises the likelihood that the innocent end up in jail—and that as juries and judges come to regard the police as less credible, or as cases are dismissed when the lies are discovered, the guilty will go free. Police falsehoods also impede judges’ efforts to enforce constitutional limits on police searches and seizures.”

The Times found that officers lied not only to attempt to “tip the scales of justice” toward guilt, but also to defeat the “exclusionary rule” that mandates that illegally seized evidence be excluded from consideration in a criminal case. Recently, however, there have been cases in which NYPD officers have paid a price for their falsehoods.

According to the Times, “Earlier this month, two veteran NYPD detectives were indicted on charges of official misconduct and filing false paperwork for lying about a drug deal that went down in Queens.” A Brooklyn detective also was indicted on federal perjury charges, accused of attempting to “conceal the fact that he had falsified documentation” related to the photo lineups.

Another Brooklyn officer, speaking anonymously, said: “You’re either a ‘lie guy’ or you’re not” and that he had been pressed to embellish the facts of drug arrests and manufacturing “probable cause” to avoid the arrests being dismissed in a suppression hearing.

The question we should all ask ourselves is whether the misconduct of NYPD officers is unique to that city, or whether it is, in fact, engrained in the DNA of police departments in other cities and jurisdictions as well. It is certainly a question that deserves to be answered.

Sources: nypost.com, nytimes.com
Today [April 17, 2018] the Supreme Court decided Sessions v. Dimaya and struck down the federal definition of “crime of violence” as unconstitutionally vague. The statute, section 16(b) (along with its very analogous cousin, section 924(c)), has meaningfully contributed to mass incarceration, racial disparities in sentencing, and excessive sentencing at the federal level. Dimaya recognized that section 16(b) did so in part through sprawling, amorphous phrasing that could be interpreted and applied in capricious and largely unwieldy ways to expand the category of “crime of violence.” The impact of the Dimaya decision is potentially enormous, both for deportations (the case before the Court) and for criminal sentences.

The Court had done something similar in Johnson v. United States, holding the Armed Career Criminal Act’s residual clause unconstitutionally void for vagueness. Now Justice Kagan, writing for the majority in Dimaya, emphatically rejected the government’s plea to keep on keeping on in a futile attempt to try and give section 16(b) meaning:

“The Government would condemn us to repeat the past—to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned?”

“Insanity,” Justice Scalia wrote in the last ACCA residual clause case before Johnson, “is doing the same thing over and over again, but expecting different results.” Sykes, 564 U. S., at 28 (dissenting opinion). We abandoned that lunatic practice in Johnson and see no reason to start it again.”

Dimaya was right to correct a wrong of the past. But while Dimaya may prevent another rerun of the ACCA insanity, it’s not yet clear how many wrongs of the past Dimaya will ultimately right. Whether Dimaya rights wrongful convictions will depend on how courts interpret a slew of procedural restrictions on federal resentencing and federal post-conviction review.

Group 1: Federal Prisoners Whose Convictions Have Not Yet Become Final

Start with federal prisoners whose convictions have not yet become final (that is, their direct appeals to the court of appeals and Supreme Court have not finished). Will the Court’s ruling in Dimaya help them out?

Assuming these prisoners have not previously made the argument that section 16(b) is unconstitutionally vague, they will have to show that their convictions and sentences involve a “plain error.”

In some respects, this showing will be easy to make: Where section 16(b) is incorporated into federal statutes, it often defines a criminal offense, or alters prisoners’ statutory maximum and minimum sentences. That is, section 16(b) can automatically result in a prisoner receiving more time in prison, which means a mistaken (or invalid) application of section 16(b) affects prisoners’ substantial rights. In this piece, I flagged the many courts of appeals cases recognizing that additional prison time affects defendants’ substantial rights.

But in other respects, and in other cases, prisoners may have some difficulty in convincing courts that there has been a plain error. Section 16(b) provides one definition of a crime of violence, but statutes often include several definitions of that phrase. Imagine (hypothetically) that a statute provides one penalty (ten years) for prisoners with no prior criminal history, and another penalty (fifteen years) for prisoners with prior convictions for crimes of violence. After Dimaya, prisoners could still receive the higher, enhanced penalty provided that their prior convictions qualify as crimes of violence under a definition other than the one supplied by section 16(b). Sometimes, it won’t be clear which “crime of violence” definition a district court relied on when sentencing a prisoner. Other times, it won’t be clear if a prisoner’s prior convictions qualify as a crime of violence under other provisions defining that phrase. Where those ambiguities exist, some courts of appeals have held defendants who may have been sentenced under invalid provisions can’t establish “plain error.”

Group 2: Federal Prisoners Whose Convictions Have Become Final

For federal prisoners whose convictions have become final, they will encounter a different set of procedural obstacles to remedying their convictions and sentences. Section 2255 provides the remedy to correct flawed federal convictions and sentences. Here, I’ll just flag three procedural obstacles that prisoners attempting to file section 2255 motions will face.

Statute of Limitations. Section 2255 provides federal prisoners with a one-year period to challenge their convictions or sentences. The one-year period generally runs from the date that a prisoner’s conviction becomes final. But the period restarts on “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” For prisoners who were convicted or sentenced under provisions that explicitly incorporate section 16(b), Dimaya gives them a one-year window (starting from April 17, 2018) to challenge their convictions and sentences.

But what about prisoners who were convicted or sentenced under provisions that closely resemble section 16(b)? It’s not clear whether the statute of limitations has restarted for them. Here’s an example. Section 16(b) defines a crime of violence as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Section 924(c)(3)(B), on the other hand, defines crime of violence to mean “an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

If those things sound similar, it’s because they are. Assuming a court of appeals thinks that the best reading of Dimaya is that section 924(c)(3)(B) is also unconstitutionally void for vagueness, did Dimaya restart the statute of limitations clock for persons convicted of section 924(c)(3)(B)? On the one hand, we want errors of that kind to be corrected, and corrected quickly, given that prisoners whose convictions may be affected could be serving more time in prison than they should be.

On the other hand, Dimaya didn’t involve section 924(c); it just involved the materially identical section 16(b). In light of that, did the “Supreme Court” itself recognize that section 924(c) is void for vagueness, as the statute of limitations provision requires? Perhaps not. Moreover, if Dimaya restarted the statute of limitations period, it’s possible the one-year window would close before the Supreme
Court itself ever frontally addresses a case involving the constitutionality of section 924(c). That would be a strange result: The statute of limitations to challenge the constitutionality of section 924(c) would expire before the Supreme Court ever addressed the question. In part for this reason, some courts of appeals held that Dimaya’s predecessor decision, Johnson, did not start the statute of limitations period to challenge the constitutionality of the Guideline provision that was worded the exact same way as the provision that Johnson invalidated. If Johnson had started the statute of limitations, these courts reasoned, the statute of limitations would likely expire before the Supreme Court could weigh in.

Retroactivity. Prisoners cannot raise “new” rules of constitutional procedure after their convictions have become final. That rule (the retroactivity bar) would preclude Dimaya claims but for the fact that prisoners can raise “new” rules that are “substantive.” In Welch v. United States, the Supreme Court held that the rule announced in Johnson was substantive and therefore retrospective. The rule was substantive, the Court explained, because it invalidated a provision under which criminal defendants were sentenced. That provision, the Court continued, altered defendants’ statutory minimum sentences and maximum sentences, and exposed them to additional terms in prison. A rule invalidating section 924(c)(3)(B) shares those same features, and therefore would be substantive and retrospective. Most criminal statutes that incorporate section 16(b) either define new crimes, or alter defendants’ statutory minimum and maximum sentences, and therefore affect the term in prison the statutes provide for their offenses. In those cases, a rule invalidating section 16(b) would also be substantive and retrospective.

Procedural Default. Prisoners cannot generally raise claims in section 2255 proceedings if they could have, but did not, previously raise those claims, including in their direct appeals. But that rule (known as the procedural default doctrine) also has exceptions. Two of them are potentially relevant here. The first exception is for “novelty”: If a claim was so novel that a defendant’s counsel could not have anticipated it, then a defendant won’t be barred from raising the claim later on. In most cases, the exception for “novel” claims doesn’t do defendants much good, because if a claim is so novel that the defendant’s attorney couldn’t have anticipated it, then the retroactivity bar would preclude the defendant from raising it after the defendant’s conviction has become final. But that shouldn’t be a problem for prisoners affected by Dimaya, since the rule that Dimaya announced falls within one of the exceptions to the retroactivity bar.

The second potentially relevant exception is for “miscarriages of justice”: If a defendant can establish there has been a miscarriage of justice, meaning the defendant is actually innocent (here, of the defendant’s offense), then a court will hear the defendant’s procedurally defaulted claim. Although defendants will often claim they are actually innocent because of new evidence, or new facts, defendants can also be actually innocent because of a change in the law. In both cases, the defendant was convicted of or sentenced for something that wasn’t a crime. (I explain this argument in greater detail in a forthcoming Virginia Law Review article, Legal Innocence and Federal Habeas.)

For example, in Bousley v. United States, the Supreme Court held that a defendant who was convicted under a mistaken interpretation of section 924(c) could establish that there has been a miscarriage of justice. Bousley reasoned that if the statute, properly interpreted, didn’t apply to the defendant, then the defendant was actually innocent of the offense and could have the defaulted claim heard on its merits. Bousley, to be sure, involved an error of statutory interpretation, whereas Dimaya involves an error of statutory invalidation: The criminal statute in Bousley was valid, it was just interpreted incorrectly, whereas the criminal statutes affected by Dimaya may have been interpreted correctly but they aren’t valid criminal statutes. (Though the fact that the Court held them vague suggests it’s not possible to interpret them correctly in a significant number of cases.) But that shouldn’t matter for purposes of the miscarriage of justice exception: In both cases, the defendant was convicted or sentenced for something that isn’t a crime, either because the statute was interpreted incorrectly or because it wasn’t valid. For that reason, the government, in the wake of Johnson, conceded that defendants who were sentenced under ACCA’s residual clause were actually innocent. The current administration may not make the same concession, if past practice is any indication. But they’d be wrong, for reasons I explain in the article I referenced above (and will post soon).

Group 3: Federal Prisoners Whose Convictions Have Become Final And Who Have Already Filed One Section 2255 Motion

There will be greater difficulties for federal prisoners whose convictions have become final and who have already filed one section 2255 motion. Everyone’s (least) favorite statute, the Anti-Terrorism and Effective Death Penalty Act, imposes severe restrictions on prisoners’ ability to file multiple section 2255 motions. The one restriction that’s potentially relevant to, and accessible to prisoners affected by Dimaya is for a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Justice Kagan mentioned the “insanity” and “lunatic practice” that Johnson aban-
**Dimaya**

invalidated a criminal statute on vagueness

has any cases on its docket for next year that

Court's calendar works: The Court doesn't

April 17, 2018. That's unlikely, given how the

case on collateral review) within one year of

Court hasn't made

So, assuming a court thinks that the Supreme

than one year from the date on which the

Dodd v. United States

successive petition for post-conviction review.

Court announced a new rule to file a second or

have just one year from the date the Supreme

2255 motions. As I've mentioned, prisoners

window for the Court to resolve that issue

unconstitutional.

certainly hasn't explicitly held section 924(c)

arguments—that is, they have held defen-

dants cannot waive arguments that would result in a "miscarriage of justice" if a court
didn't hear them. Some of the arguments that
defendants cannot waive (in some circuits) include the argument that the statute under

which the defendant was convicted is unconsti-
tutional, or any argument that results in the

defendant receiving a sentence above the

lawful statutory maximum for their offense of

conviction. Dimaya claims could fall within

those exceptions.

Dimaya spoke of "lesson[s] so hard learned" from Johnson and the ACCA de-

bacle that Johnson corrected. But another lesson that was hard learned from Johnson

is that Johnson, or in this case Dimaya, will just be the beginning. Whether those deci-

sions will ultimately benefit the individuals who are currently wrongly incarcerated

will depend on what comes next, and spe-

cifically on how courts interpret the many
draconian restrictions on post-conviction

review. [1]

This article was originally published on Harvard Law Review Blog on April 17, 2018, and is

reprinted with permission from the author, with

minor edits.

Leah Litman is an assistant professor of law at

University of California, Irvine School of Law,

where she teaches and writes on federalism and

federal post-conviction review.

**U.S. Supreme Court Holds Residual Clause Definition of ‘Crime of Violence’ Unconstitutionally Vague Under Due Process Clause**

by Dale Chappell

The U.S. Supreme Court struck yet another residual clause definition of "crime of violence" as unconstitutionally vague in a major decision that could potentially affect thousands of prisoners serving longer prison sentences for a conviction falling under this type of clause.

When the Government sought to deport James Dimaya after his second California burglary conviction, the Board of Immigration Appeals ("BIA") determined that his first-degree burglary conviction was a "crime of violence" under the "substantial risk of the use of force" clause and therefore an "ag-

gravated felony," requiring his deportation pursuant to the Immigration and Nationality Act ("INA").

The INA requires that any alien convict-
ed of an "aggravated felony" must be deported. This includes a conviction for a "crime of violence," as defined in 18 U.S.C. § 16. The statute's definition of "crime of violence" is divided into two parts that are commonly known as the elements clause in § 16(a) and the residual clause in § 16(b), which was at issue in the present case.

The statute's two parts cover: (a) an of-
fense that has an element the use, attempted
use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

While Dimaya’s appeal was pending in the U.S. Court of Appeals for the Ninth Circuit, the U.S. Supreme Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the “residual clause” of the Armed Career Criminal Act (“ACCA”) contained in 18 U.S.C. § 924(e)(2)(B)(ii) was unconstitutionally vague and ruled that the residual clause in § 16(b) produces, just as ACCA’s residual clause did, more unpredictability and arbitrariness than the Due Process Clause tolerates. Consequently, the statute did not provide fair notice of what conduct is prohibited.

In Dimaya, the Court determined that § 16(b)’s residual clause suffers from the same constitutional deficiencies as the ACCA’s residual clause in Johnson. As with the ACCA’s clause, § 16(b) also requires courts to identify a crime’s “ordinary case” to measure the crime’s risk. Like in Johnson, nothing in the statute assists courts with that task. The Court stated that with respect to both residual clauses the “ordinary case” is an “excessively speculative, essentially inscrutable thing.”

The Court then observed that § 16(b) also shares the second fatal feature of the ACCA’s residual clause — “uncertainty about the level of risk that makes a crime ‘violent.’” As was the case in Johnson, § 16(b) layers the uncertainty about the requisite level of risk upon “a judge-imagined abstraction” of a crime’s “ordinary case.”

With the foregoing deficient features of § 16(b) in mind, the Court concluded that § 16(b) produces, just as ACCA’s residual clause did, more unpredictability and arbitrariness than the Due Process Clause tolerates.

Accordingly, the Supreme Court affirmed the judgment of the Court of Appeals. See: Sessions v. Dimaya, 2018 U.S. LEXIS 2497 (2018).

New Book Distributed by Prison Legal News

Federal Prison Handbook
by Christopher Zoukis

“A true resource for anyone involved with the prison system.”
– Alan Ellis, America’s leading federal criminal defense attorney and author of the Federal Prison Guidebook

“Provides a wealth of useful information and solid advice. … A treasure trove of penal acumen and knowledge.”
– Alex Friedmann, Managing Editor, Prison Legal News

This leading survival guide to the Federal Bureau of Prisons teaches soon-to-be and current federal prisoners everything they need to know about BOP life, policy and operations. Designed to bring prison novices up to speed and provide experienced prisoners with the policy and legal understanding of every facet of federal incarceration, this book is a must-have for anyone who must experience federal prison.

www.ConvictPenPals.com • Write for FREE brochure! Send stamp or SASE for fast reply:

CONPALS
INMATECONNECTIONS
465 NE 181st Ave. #308 Dept. CLN
Portland OR 97230
Federal Corrlinks users:
Info@ConvictPals.com OR CS@ConvictPals.com
Since 2002 • Se Habla Español


Criminal Legal News 15 June 2018
Victory: Virginia Supreme Court Delivers Blow to Police Use of License Plate Reader Technology to Track Drivers, Surveil Citizens

by The Rutherford Institute

RICHMOND, Va. — The Virginia Supreme Court has delivered a blow to the police’s use of Automated License Plate Readers (ALPRs) to surveil citizens and track drivers’ movements. The Rutherford Institute filed an amicus brief in Neal v. Fairfax County Police Department challenging the police practice of collecting and storing ALPR data as a violation of Virginia law that prohibits the government from amassing personal information about individuals, including their driving habits and location.

In reversing a lower court ruling that allowed state law enforcement agencies to extend the government’s web of surveillance on Americans by tracking them as they drive their cars, the Court held that the use of ALPRs involves the collection of personal information prohibited by Virginia’s Government Data Collection and Dissemination Practices Act. Mounted next to traffic lights or on police cars, ALPRs, which photograph up to 3,600 license tag numbers per minute, take a picture of every passing license tag number and store the tag number and the date, time, and location of the picture in a searchable database. The data is then shared with law enforcement, fusion centers and private companies and used to track the movements of persons in their cars.

“We’re on the losing end of a technological revolution that has already taken hostage our computers, our phones, our finances, our entertainment, our shopping, our appliances, and now, it’s focused its sights on our cars,” said constitutional attorney John W. Whitehead, president of The Rutherford Institute and author of Battlefield America: The War on the American People. “By subjecting Americans to surveillance without their knowledge or compliance and then storing the data for later use, the government has erected the ultimate suspect society. In such an environment, there is no such thing as ‘innocent until proven guilty.’”

Since 2010, the Fairfax County Police Department (FCPD) has used ALPRs to record the time, place, and driving direction of thousands of drivers who use Fairfax County roads daily. License plate readers capture up to 3,600 images of license tag numbers per minute and convert the images to a computer format that can be searched by tag number. This information, stored in a police database for a year, allows the police to determine the driving habits of persons as well as where they have been.

In 2014, Fairfax County resident Harrison Neal filed a complaint against FCPD asserting its collection and storage of license plate data violates Virginia’s Government Data Collection and Dissemination Practices Act (Data Act), a law enacted because of the fear that advanced technologies would be used by the government to collect and analyze massive amounts of personal information about citizens, thereby invading their privacy and liberty. The lawsuit cited a 2013 opinion by Virginia Attorney General Ken Cuccinelli that ALPR data is “personal information” that the Data Act forbids the government from collecting and storing except in connection with an active criminal investigation. Despite this opinion, FCPD continued its practice of collecting and storing ALPR data in order to track the movements of vehicles and drivers.

In November 2016, a Fairfax County Circuit Court judge ruled that license plate reader data was not “personal information” under the Data Act because license tag numbers identify a car and not a person. The Virginia Supreme Court reversed that decision, ruling the data was personal information, and remanded the case for a determination of whether the ALPR record-keeping process allows a link to be made between the license plate number and the vehicle owner.

This article was originally published by The Rutherford Institute (rutherford.org) on April 26, 2018. Reprinted with permission.

Book Review: California Habeas Handbook 2.0 by Kent A. Russell

Reviewed by Christopher Zoukis

The writ of habeas corpus is an extraordinary remedy that allows a person held against his or her will by the state to challenge the legality of confinement. It is often referred to as “The Great Writ,” and has its roots in common law going back hundreds of years. The U.S. Constitution forbids the suspension of the writ except in the case of rebellion or invasion.

The writ of habeas corpus has provided protection to citizens against improper restrictions on liberty. Despite its continued existence in American jurisprudence, the writ of habeas corpus has been heavily restrained over the last several decades. While prisoners may still use the writ to challenge confinement, procedural and substantive roadblocks present serious impediments to relief.

The chief curtailment of the writ came in the form of the federal law known as the Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit referred to the AEDPA as “a twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the writ as it would be for a Supreme Court justice to strike out Babe Ruth, Joe DiMaggio and Mickey Mantle in succession.”

Despite the reality of modern habeas corpus litigation, the writ remains an available method to contest confinement. For prisoners pursuing a writ of habeas corpus on their own, the journey is fraught with difficulty and the terrain loaded with traps for the unwary.

But there is help for prisoners. For over 20 years, attorney and habeas corpus expert Kent A. Russell has published the California Habeas Handbook (“CHH”). The accessible, authoritative and (in some cases, literally) lifesaving CHH has provided prisoners in California and beyond everything they need to navigate the minefield of habeas corpus litigation.

A new edition became available in January 2018. The California Habeas Handbook 2.0 includes updates, as well as two new chapters focusing on criminal-justice reform efforts in California and parole for California prisoners.
June 2018

Criminal Legal News

 Attorney Russell makes it clear that winning habeas corpus relief is not easy. CHH 2.0 starts out with a “gut check,” but notes an important point: Habeas litigation may be difficult, but it is available for those who are suffering an injustice. Prisoners with CHH 2.0 at their fingertips can and should pursue their habeas claims.

Russell provides a comprehensive history of The Great Writ in Chapter 3 of CHH 2.0. This is a deceptively crucial part of the book; in order to understand habeas litigation, it is advisable to know how modern habeas law and procedure developed. One important point made here helps to make clear why statutes like the AEDPA exist. State prisoners must, in almost every case, discover and present all habeas evidence in state court first. It is no longer possible to rely on federal courts.

Post-AEDPA habeas corpus litigation at the state level has taken on a new level of importance. In the fourth chapter of CHH 2.0, which is devoted entirely to in-state, post-conviction and habeas practice, Russell underscores why pre-federal filings are so important. All claims, even those that will only find relief in federal court, must be fully brought and “exhausted” in state court first.

The state chapter in CHH 2.0 also includes tips on avoiding the deadly “procedural default.” This occurs when a state high court denies a habeas petition on procedural, as opposed to substantive, grounds. A claim that is denied on procedural grounds was not denied on the merits, and therefore is not exhausted for purposes of the AEDPA. Procedural defaults are significant impediments to federal habeas corpus relief, so they must be avoided by following Russell’s advice: “[F]ile on time, follow the rules, and state your habeas claims clearly and with all documentary support.” With CHH 2.0 by your side, procedural defaults are avoidable.

State habeas corpus petitions are almost always denied, but must be denied in a particular way. Once this is accomplished, it is time to move on to federal habeas litigation—the subject of Chapter Five. In order to obtain relief, a petitioner must show denial of a fundamental right derived from the U.S. Constitution and prejudice resulting from the error.

Russell takes the habeas litigant through the drafting process from start to finish. The petition and supporting documents are crucial; they tell the court how the law was violated and provide supporting facts and law. Sample petitions are supplied in the Appendix section.

Chapter Five also includes a discussion of how the government will respond to a federal habeas petition, and what those responses mean. This response is often in the form of a motion to dismiss, and almost always argues that the petition is untimely, the petitioner failed to exhaust, or the claims were defaulted at the state level. Russell provides the reader with an understanding of these defenses and explains how to draft a Traverse (or Reply) to the government’s arguments.

The central goal of habeas litigation is to be granted an evidentiary hearing. Unfortunately, most claims do not go to hearing. As such, a habeas litigant may then appeal from the magistrate’s report and recommendation to the district court, and then to the U.S. Court of Appeals. A denial at that level is usually a death knell, so Russell provides everything a petitioner needs to properly appeal.

Federal habeas litigation is a difficult and sometimes soul-crushing endeavor. The AEDPA made the likelihood of winning habeas relief very slim. Russell recognizes the difficulties presented by the AEDPA and includes an entire chapter on the “AEDPA Agenda.” Here, the petitioner will learn the power of the AEDPA to smite an otherwise valid claim and how to avoid demise. Chapter Seven walks the reader through the process of form filling. This is quite helpful, because habeas petitions at both the state and federal level are form-driven. The California habeas form as well as a generic form are provided, with guidance on how to fill out each section.

 Anyone who has been driven to the brink by legal research will appreciate what is quite possibly the most valuable and user-friendly part of CHH 2.0—the “Habeas Grounds Table” in Chapter Eight. Organized by categories such as State’s Investigation, Charges, Discovery, Guilty Pleas, and more, the Grounds Table lists over 100 previously successful habeas corpus grounds, as well as the constitutional right that was violated together with the U.S. Supreme Court decision that recognized the ground.

Chapter Nine is all new in this edition of CHH 2.0. With the assistance of attorney and parole expert Susan Jordan, Russell goes through newly enacted post-conviction remedies available to California prisoners. These include reforms to California’s “3 Strikes” laws (Prop 36), the reclassification of certain felonies as misdemeanors, which allows for retroactive application and resentencing in some cases (Prop 47), changes in California’s juvenile sentencing laws in response to the U.S. Supreme Court’s decisions in Miller v. Alabama, 132 S.Ct. 2455 (2012), and Graham v. Florida, 560 U.S. 48 (2010) (the Youth Offender Parole Law), and Senate Bill 9, which also addresses changes to juvenile sentencing practices.

The final chapter is written entirely by Susan Jordan and focuses on parole in California. Here, Jordan takes California prisoners through every milestone in the parole process, starting on day one. This chapter includes a handy timeline of each milestone—prisoners will learn what to do immediately, what to do in 1 to 3 years, what to do in the year prior to a parole hearing, and more. Even for those California prisoners who are pursuing habeas relief, this chapter is useful. If you don’t win relief on your habeas petition, parole may be the next best thing.

CHH 2.0 also includes a discussion about hiring Kent Russell for a habeas claim. There is good advice here about hiring a private lawyer for what is an extraordinarily complex area of the law, but Russell acknowledges that most prisoners won’t be able to afford one. For those who can, he devotes 15 pages to explaining exactly what he will (or won’t) do, what it will cost, and what a client’s expectations should be.

There’s also an optional CD-Rom available that contains over 75 complete, unedited copies of some of the most useful documents that have actually been filed in both state and federal habeas cases by Russell during his decades of practice.

CHH 2.0 is an invaluable resource. Every jailhouse lawyer should have it on hand. And the ultimate testament to CHH 2.0 is this: Every private lawyer who handles habeas corpus petitions in California (and elsewhere) should have Kent Russell’s book on the shelf, as well.

---

COLLEGE DEGREES FROM PRISON

Earn an Associate’s, Bachelor’s, Master’s, or Doctoral Degree in Christian Counseling. Ordination services also available.

Tuition as Low as $12.95 per month

Scholarships available. To see if you qualify, send a self-addressed, stamped envelope to P.O. Box 530212 Dabary, FL 32753.

INTERNATIONAL CHRISTIAN COLLEGE & SEMINARY

ICSCCAMPUS.ORG
Habeas Hints: Understanding and Satisfying the Strickland Test for IAC

by Kent Russell and Tara Hoveland, attorneys

This column provides “Habeas Hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is on state habeas corpus and on “AEDPA,” the federal habeas corpus law that now governs habeas corpus practice in courts throughout the United States.

INEFFECTIVE ASSISTANCE OF COUNSEL

Understanding and Satisfying the Strickland Test for IAC

The landmark case of Strickland v. Washington, 466 U.S. 668 (1984), establishes that ineffective assistance of counsel (“IAC”) claims require two showings: (1) Deficient Performance (What went wrong?); and (2) Prejudice (So what?). In this column, we’ll deconstruct these core requirements and give you guidance on how to satisfy them.

IAC: Deficient Performance

To show deficient performance pursuant to Strickland, your lawyer’s overall conduct of the defense must have fallen below “an objective standard of reasonableness ... under prevailing professional norms.” That is, your lawyer performed, contrary to your best interests, in a way that a reasonable lawyer would not have. To evaluate such a claim, the court will presume that your lawyer “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” To overcome this presumption, you must “identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” Then, the court will determine whether “in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” Id. at 689-90.

Here are some hints for how to investigate and present a case seeking to demonstrate deficient performance:

1. Politely but firmly ask your lawyer for your file. Don’t be shy; it is your file and you have a right to it. If the file is too large and/or you don’t want to risk keeping it in your cell, have the lawyer send it to a family member or trusted friend. Ideally, this person can make a copy of the file so the original stays intact. This is important because you can then use copies of documents as exhibits and still have the entire original file in case it is needed as exhibit in an evidentiary hearing.

2. Make a list of the major items in the file and copy them. By focusing on the most important stuff, your index and cache of documents will be small enough to keep in your cell and you can refer to them when asking for copies of documents to be sent to you.

3. Overview the file. Keep in mind that the duties of a reasonably competent attorney include all of the following:
   - Obtain discovery in a timely fashion. (Does the file contain all the relevant police reports, lab reports, and more in time for their effective use at trial?);
   - Thoroughly investigate the facts. (e.g., locate and interview witnesses and obtain any evidence not included in the discovery. Is there any evidence your lawyer did these things or hired a private investigator to do them?);
   - Research the applicable law. (Are there memos and case law on the key legal issues?);
   - Consult with relevant experts and obtain – or diligently try to obtain sufficient funds to do so. (Was an expert retained or appointed? Do you need more money than the court is initially willing to authorize? If so, why?);
   - Move to suppress unconstitutionally obtained evidence. (Note that you can’t challenge the merits of a denial of a search-and-seizure motion on habeas corpus, although you can argue that your lawyer performed deficiently in failing to make a motion to suppress that had a decent chance of success.);
   - Object to — and/or file motions to exclude — inadmissible evidence. (Are there motions in limine regarding the main issues?);
   - Investigate — and/or object to — the use of invalid or inadmissible priors. (Are there any motions to strike or bifurcate priors that should have been made but weren’t?);
   - Advise the client thoroughly and accurately regarding correct sentencing exposure. (Did the lawyer fail to accurately give you the low-down on what you were facing if convicted and what you could or couldn’t do at sentencing?);
   - Advise of any adverse immigration consequences; and
   - Take timely action to have your direct appeal filed and pursued by competent appellate counsel.

4. Mine the file for the “gold” you can use in proving deficient performance. Make a list of specific acts or omissions that do not fit within the range of reasonable competence. Then flesh out your list with the documents that support your claim, so you can attach those to your petition. In searching for evidence of possible deficient performance, ask yourself these questions: (1) Was there any reasonably obtainable evidence/witnesses that your lawyer did not find? If so, were there any attorney or investigator notes regarding efforts to find them? (2) Were there any laws applicable to your case that your lawyer was unaware of? If so, what were they? (3) Was expert testimony used by the prosecution in your case? If so, what does the correspondence in the file show about trial counsel’s efforts to obtain contradictory expert testimony for the defense?

5. Important: You must prove that each of the acts and/or omissions that you contend amount to deficient performance did not result from an informed tactical choice. Either you have to show that trial counsel had no sensible strategic reason for what he did or failed to do, or that he failed to conduct a sufficient investigation in order to make a reasonable, informed decision as to what strategy to pursue in the first place. (See Wiggins v. Smith, 539 U.S. 510, 525 (2003)) “[A] lawyer who fails adequately to investigate and introduce evidence that demonstrates his client’s factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.” For a good summary of the duty to investigate before making “tactical” decisions, see, e.g., Richter v. Hickman, 578 F.3d 944, 956-57 (9th Cir. 2009):

“Counsel is obligated to conduct a reasonable investigation in order to present the most persuasive case that he can. Counsel must conduct a pretrial investigation into the availability of independent, objective sources to support the part of his client’s testimony that he knows or can reasonable expect will be challenged, and subsequently to present to the jury any evidence he finds
that tends to show his client’s innocence, tends to undermine the prosecution’s case, or raises a reasonable doubt as to his client’s guilt, unless he makes an informed strategic decision that the risks of introducing such evidence outweigh its benefit to the defense.”

6. Send your lawyer something in writing (and keep a copy), asking him/her to address any specific questions you have about your case. (If the response is helpful, ask if she/he will sign a declaration. It can be helpful to draft a suggested declaration yourself and ask your lawyer to either sign it as-is or make appropriate changes.)

7. If your lawyer stops communicating with you, draft your own declaration detailing your attempts to get a declaration from counsel and attach your letter(s) and his/her responses. Although these will be hearsay, they are still supportive of your allegations and may lead to the court ordering an evidentiary hearing at which you can subpoena counsel’s attendance.

8. Provide detailed evidence supporting your allegations. For example: investigation reports and/or declarations from witnesses your attorney never contacted; evidence that was not found or presented; expert witness declarations from experts who should have been called at trial but weren’t, and copies of anything from the file that shows that your attorney was aware of the evidence or witnesses, but failed to pursue them.

IAC: Prejudice

So what? That’s the fundamental question to ask yourself in trying to satisfy the “prejudice” prong of the Strickland test after you’ve hopefully established deficient performance as discussed in the previous section.

There are two essential components to the requirement for showing prejudice in IAC cases: First you should define IAC prejudice for the court in the most favorable way while still coming within the limits imposed by case law. Second, you have to prove IAC prejudice by providing the most persuasive reasons that you can to convince the court that trial counsel’s errors were serious enough to require a new trial.

Defining IAC Prejudice

Strickland holds that, to establish prejudice, the petitioner must demonstrate “a reasonable probability that, but for counsel’s ... errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Note that the second sentence defines “reasonable probability” in a way that is different from how an ordinary person would think of “probability” — namely as something that is more likely to happen than not. That’s important, because this ordinary definition of “probability” suggests that the “reasonable probability” needed to show IAC prejudice requires more than a 50/50 chance of a better result if counsel had performed competently. On the contrary, however, the cases make clear that the minimum showing for Strickland’s prejudice requirement in IAC cases is “even less than a fifty-fifty chance.” (See, e.g., Hernandez v. Chappell, 878 F.3d 843, 846 (9th Cir. 2017).

Granted, it is also clear from Strickland that more is required than a showing of the mere “possibility” of a different result. Nevertheless, putting these limits together, Strickland defines the “reasonable probability” requirement as one that is more demanding than a showing that counsel’s errors had some possible or conceivable effect on the outcome of the trial (for example, the lower “Chapman” standard that would apply where constitutional error is shown on direct appeal) — but less stringent than a 50/50 showing or the 51% preponderance of the evidence needed in civil cases generally.

Now that we are clear on what a “reasonable probability” is not in IAC cases, just what is it? Again, the Strickland definition focuses on “undermining confidence in the outcome.” But whose confidence are we talking about, and what’s enough to undermine it? Although there are no definitive answers to these questions in the existing case law, the Hernandez case I’ve cited above is helpful, because it reminds us that there are 12 jurors sitting in a criminal case, and that a conviction requires the unanimous consent of all 12. Therefore, if there is a strong likelihood that even one juror who voted for conviction would have voted not guilty if counsel hadn’t performed deficiently, IAC prejudice has been established. Thus, in Hernandez, where counsel’s error consisted of a failure to raise a diminished capacity defense to the charges, the court explained: “Our confidence in the outcome of [the] trial is undermined [because] we believe it likely that at least one juror would have concluded that Hernandez suffered from the mental impairment required for a successful defense of diminished mental capacity.”

In sum, and integrating the unanimity requirement with the need for the State to prove guilt beyond a reasonable doubt, we wind up with the following definition of IAC prejudice: A reasonable probability (once again, more than a mere possibility but something less than a 51% probability) that at least one juror, upon hearing the evidence which trial counsel should have introduced but did not, would have concluded that the prosecution had failed in its burden to prove the defendant guilty beyond a reasonable doubt.

Proving IAC Prejudice

Although no two cases are exactly the same, there are several factors which, if they apply in your case, should be emphasized to the court in arguing that you have met the standard for showing IAC prejudice:

Seriousness of the error: If the error was one of omission, show that the error deprived the defendant of a critical defense that had a good chance of succeeding, or of key evidence that would have supported that potentially viable defense.

Frequency of the error: If the error was one of commission (e.g., the introduction of harmful evidence that could have been excluded), show that it came up multiple times rather than just once.

Prosecutor’s emphasis on the evidence affected by the error: Use the prosecutor’s final argument to demonstrate that the prosecutor hammered away at the damage that resulted from counsel’s performance. For example, if counsel failed to establish a viable alibi, cite all the instances in which the prosecutor argued that defendant’s presence at the scene was firmly established.

Strength of the prosecution’s case: The weaker the prosecution’s case for conviction, the stronger the likelihood that counsel’s errors affected the verdict. If possible, go into the teeth of the worst evidence against the defendant, and establish an innocent explanation for most or all of it.

Length of the jury deliberations: The longer the jury deliberated, the more likely it is that they were in doubt about the prosecution’s case, and would have been influenced to change their vote to not guilty if they had heard the favorable evidence that defense counsel failed to elicit.

Juror requests for read-back of testimony: If the jury asked during deliberations for a read-back of testimony that would have been refuted or undermined by more competent representation, bring that squarely to the court’s attention.

Favorable jury findings on alternate issues: Examples: (1) The victim was shot to death and the jury was asked to make a finding that...
the defendant personally used a weapon, but did not make that finding; (2) The jury was asked to find the defendant guilty of a greater crime, but came instead with a verdict on a lesser included offense; (3) Outright acquittal on some of the charges.

Evidence omitted due to counsel’s deficient performance was not covered by other evidence. Where the error is counsel’s failure to elicit favorable evidence, show that the same or similar evidence was not introduced through other evidence that came in via any other sources.

Comparison of the favorable evidence that would have come in through competent representation with the more damning evidence that was introduced at trial. For example, where the prosecutor used uncontradicted expert testimony to convict the defendant, show through expert witness declarations that a defense expert could have successfully challenged the reliability of the forensic evidence.

Evidence omitted due to counsel’s deficient performance was not covered by other evidence. Where the error is counsel’s failure to elicit favorable evidence, show that the same or similar evidence was not introduced through other evidence that came in via any other sources.

Comparison of the favorable evidence that would have come in through competent representation with the more damning evidence that was introduced at trial. For example, where the prosecutor used uncontradicted expert testimony to convict the defendant, show through expert witness declarations that a defense expert could have successfully challenged the reliability of the forensic evidence.

Evidence omitted due to counsel’s deficient performance was not covered by other evidence. Where the error is counsel’s failure to elicit favorable evidence, show that the same or similar evidence was not introduced through other evidence that came in via any other sources.

Comparison of the favorable evidence that would have come in through competent representation with the more damning evidence that was introduced at trial. For example, where the prosecutor used uncontradicted expert testimony to convict the defendant, show through expert witness declarations that a defense expert could have successfully challenged the reliability of the forensic evidence.

Evidence omitted due to counsel’s deficient performance was not covered by other evidence. Where the error is counsel’s failure to elicit favorable evidence, show that the same or similar evidence was not introduced through other evidence that came in via any other sources.

Comparison of the favorable evidence that would have come in through competent representation with the more damning evidence that was introduced at trial. For example, where the prosecutor used uncontradicted expert testimony to convict the defendant, show through expert witness declarations that a defense expert could have successfully challenged the reliability of the forensic evidence.

Evidence omitted due to counsel’s deficient performance was not covered by other evidence. Where the error is counsel’s failure to elicit favorable evidence, show that the same or similar evidence was not introduced through other evidence that came in via any other sources.

Comparison of the favorable evidence that would have come in through competent representation with the more damning evidence that was introduced at trial. For example, where the prosecutor used uncontradicted expert testimony to convict the defendant, show through expert witness declarations that a defense expert could have successfully challenged the reliability of the forensic evidence.

Evidence omitted due to counsel’s deficient performance was not covered by other evidence. Where the error is counsel’s failure to elicit favorable evidence, show that the same or similar evidence was not introduced through other evidence that came in via any other sources.

Comparison of the favorable evidence that would have come in through competent representation with the more damning evidence that was introduced at trial. For example, where the prosecutor used uncontradicted expert testimony to convict the defendant, show through expert witness declarations that a defense expert could have successfully challenged the reliability of the forensic evidence.
Drug-Induced Homicide Laws Hurt Rather Than Help Opioid Overdose Crisis

by Dale Chappell

Lawmakers and prosecutors just don’t get it. Instead of treatment and prevention of opioid overdoses, lawmakers and prosecutors are pushing for more convictions under draconian drug-induced homicide laws in response to America’s deadly crisis. They claim it is to “send a strong message” to drug dealers.

In reality, the only “message” being heard, however, is not to call 911, lest you get charged in the death under the drug-induced homicide laws. Rather than targeting the major drug distributors as the laws were intended, prosecutors often charge friends and lovers of the victim, according to Health in Justice, an organization that opposes “criminalization of health and social problems” and tracks punitive drug policies. “Fewer than half of the cases we analyzed involved a traditional buyer/seller relationship,” noted Leo Beletsky, lead investigator at Health in Justice and associate professor of law and health sciences at Northeastern University.

“Drug-induced homicide is couched as a way to respond to the overdose crisis, but prosecutors are not held accountable for proving whether these laws are effective,” said Lindsay LaSalle, senior staff attorney at the Drug Policy Alliance, a New York-based non-profit. “There is not a shred of evidence that these laws are effective at reducing overdose fatalities.”

On the contrary, research shows that these laws are not only ineffective, but they also exacerbate the very problems they purport to fix. In a 2017 study by LaSalle, more than half of those who witnessed an opioid overdose were reluctant to call 911 for fear of legal consequences. The study found that drug-induced homicide prosecutions undercut Good Samaritan laws, which generally shield those who seek medical help for opioid overdose victims from criminal prosecution.

When Michael Millette sold some heroin to his friend and drug-use partner, he warned him to be careful. “I told him, ‘Listen, this stuff is really good, just do a tiny line, it’s very strong.’” Millette’s friend was found dead of an opioid overdose with a syringe and spoon next to him. Prosecutors pinned the death on Millette for providing his friend with the deadly heroin under a draconian drug-induced homicide law introduced during the crack-cocaine era.

Cases such as Millette’s are exploding nationwide. Drug-induced homicide prosecutions have increased nearly 225 percent in just six years, from 363 in 2011 to 1,178 in 2016, according to the Drug Policy Alliance. These laws have created a chilling effect on the so-called “public health” response to America’s worsening opioid overdose crisis, by deterring drug users and their companions from calling 911 during an overdose. They would rather not seek lifesaving help than be prosecuted under the drug-induced homicide laws.

Compounding this problem is the fact that a small-time drug user selling to support his or her own habit usually has no idea what else is in the heroin. In Millette’s case, the heroin he sold to his friend was laced with illicitly manufactured fentanyl, a synthetic opioid 50 to 100 times stronger than heroin. There was no evidence that Millette even knew this. Rather than take his chances at trial, Millette pleaded guilty and received 10 to 30 years in prison.

Locking Millette and others like him up for decades was not the original goal of drug-induced homicide laws, and it certainly won’t do anything to help solve the opioid crisis gripping the country.

Sources: injusticetoday.com, drugpolicy.org

John F. Mizner, Esq.
311 West Sixth Street
Erie, Pennsylvania 16507
(814) 454-3889
jfm@miznerfirm.com

Representing Pennsylvania Inmates
Medical mistakes
Inadequate care
Delay in treatment

Criminal
Civil
Personal Injury. Civil Rights.

Handling cases throughout Wisconsin & Illinois
1200 East Capitol Drive, Suite 360
Milwaukee, Wisconsin 53211
414-963-6164

Listed by Super Lawyers
Client reviews at avvo.com
Better Business accredited
“Broken windows” policing has not been linked to a reduction in serious crime, but it has been linked to an increase in police lying. “Broken windows” policing is based on the belief that aggressive police enforcement of minor criminal violations—such as trespassing, possession of marijuana, or using public transportation without paying—causes a decrease in serious crimes.

To show an increase in enforcement, the arrest rate has to go up, so police officers are told to arrest more citizens. Some are even given daily quotas of arrests to make. A 2016 report by the NYPD’s Office of Inspector General found “no empirical evidence demonstrating a clear and direct link between an increase in summons and misdemeanor arrest activity and a related drop in felony crime.” Nonetheless, “broken windows” policing remains NYPD policy.

A vigilant officer might simply pay more attention to what is going on and pursue even the most minor of offenders. However, this would not ensure that the officer made the necessary quota of arrests.

The lazy and more common approach used by police under the “broken windows” policy is simply to lie. If you stop someone, frisk that person, and find an illegal knife, you could simply say that part of it was visible out of the top of the person’s pocket. If you pull over a car and find a joint in the ashtray, you could lie and say the driver failed to signal a lane change. That way, the misdemeanor arrests are covered by legal reasons for the stop.

In an opinion piece in the New York Daily News, Managing Director of The Bronx Defenders Justine Olderman said little has changed since the Mollen Commission Report of the 1990s found that lying was one of the most persuasive forms of police officer misconduct in the NYPD. Olderman, whose office handles thousands of “broken windows” policing cases each year, said police lying to justify unlawful stops, searches, and arrests are the hallmark of that style of policing.

There is little incentive for police to stop lying. Less than 1% of the 205,386 misdemeanor cases in New York City’s courts in 2016 received a trial or a hearing of some kind in which a judge could test the credibility of police. The reason is simple: People cannot afford to hire a lawyer and wait months or years for a trial while the pending criminal charge jeopardizes their child custody, employment, housing, and immigration status.

In those rare cases that receive a trial, a judge is much more likely to believe a police officer about the circumstances of an arrest than a criminal defendant, absent irrefutable evidence such as a video recording. Even when there is such evidence, like when a judge dismissed the charges against a Black Lives Matter demonstrator after a video recording showed police subsequently lied about the encounter, the incident is rarely viewed as emblematic of widespread police behavior. Rather, the matter is generally written off as a “misunderstanding” or “isolated incident” with the officer or officers involved receiving little or no discipline.

The unconstitutional “stop-and-frisk” program formerly carried out by the NYPD resulted in the targeting of minorities while turning up firearms in fewer than two out of a thousand stops. Similarly, the “broken windows” policy plays to the prejudice of police officers, who target communities of color and commit thousands of unlawful stops on the off chance that evidence of a crime might be discovered. In the rare cases such evidence is found, police often have to lie about the reason for the stop in the first place. Thus, it would appear that the very practice of “broken windows” policing has the very real potential for corruption and abuse by police.

Source: nydailynews.com

Coast to Coast, Sex Offender Residency Restrictions Waste Money, Create Havoc

by Sandy Rozek

If every shred of evidence showed that traffic lights, while costing large amounts of resources to install, did nothing to decrease auto accidents and actually created a host of undesirable consequences, would cities still install them at every major intersection? This is exactly what happens with the creation of what are euphemistically called “child safety zones.”

The emergence of sex-offender registration and notification laws in the mid-1990s created awareness of convicted sexual offenders living throughout communities and neighborhoods. This led to the notion that restricting these individuals from living (and often from just being) within close proximity to areas where children congregate would help prevent the sexual victimization of children. Today, 35 states have statewide residency restrictions, and many of the others allow individual jurisdictions to establish them.

This ignores the most basic fact about child molestation, a fact that has long been known but largely ignored: Children are not sexually abused by strangers lurking in parks and school playgrounds. Virtually all molestation of children is committed by those in the children’s lives in trusted positions, the majority in private residences.

The clamor for residency restrictions

Every month, new communities demand the creation of these “protected” areas for children. These are prominent headlines from the past few months.

In New York: “Cuomo seeks 1000-foot boundary for sex offenders around schools”;
In Maine: “Lawmakers seek to close loophole on residency restrictions for registered sex offenders”;
In Florida: “Possible ordinance would limit where sex offenders can live”; and
In California: “Vidak authors measure to limit where sex offenders can live”

Research shows these laws to be ineffective

The first research study done (Minnesota Department of Corrections, 2007), showed that residency restrictions would not have prevented any re-offenses.

Since then, numerous studies — academic, private, and governmental — have been done. Not one has shown a different result.
A totally failed system

Compelling logical, factual reasons to totally abolish distance restrictions in residence and presence for those required to be on sex-offender registries include: (1) absolutely no validation from empirical evidence; (2) conditions which contradict every valid opinion and statistic about rehabilitation; (3) a complete failure in solving the problem it is intended to address; and (4) the creation of problems that cause a decrease in public safety and destroy lives.

What are we waiting for?

Sources: thedailystar.com, wabt.tv, wjhg.com, hanfordsentinel.com, mn.gov, casomb.org, journals.sagepub.com, smart.gov, doc.ks.gov, ktul.com, ocregister.com, wpr.org

Sandy Rozek is a board member and communications director for the National Association for Rational Sexual Offense Laws – NARSOL –, an organization that advocates for laws based on facts and evidence and for policies that support the successful rehabilitation, restoration, and reintegration of law abiding, former sex offenders into society as the path to a safer society.

Louisiana: No Charges for Cops Who Shot Alton Sterling, Despite Body-Cam Evidence

by Monte McCoin

Two white police officers who were involved in the 2016 death of an unarmed black man at a Baton Rouge convenience store were disciplined, but not criminally charged, for their roles in the incident, despite body-cam video evidence that appears to show the use of excessive force.

Although Alton Sterling’s death by police shooting was captured by at least six video sources, including footage from Baton Rouge Police Officers Blane Salamoni and Howie Lake II’s body-worn cameras.

On March 27, 2018, Louisiana Attorney General Jeff Landry announced that no state charges would be filed against the pair for their roles in Sterling’s death. “This decision was not taken lightly,” Landry said. “We came to this conclusion after countless hours of reviewing the evidence.” Federal prosecutors previously declined to press charges in May 2017.

The two officers had separate disciplinary hearings on March 30, 2018. Salamoni was fired for violating use-of-force policies, while Lake was suspended for three days without pay for “losing his temper” during the incident.

The same day, video footage was released to the public on what Sterling family attorney L. Chris Stewart called “a day for truth.” Stewart clarified, “And what that truth is, is the silent complaint – or the loud one – of every black person in the inner city who has to deal with an officer like Blane Salamoni.”

Attorneys filed a wrongful death lawsuit in June 2017 on behalf of Sterling’s five minor children, which claims Salamoni and Lake violated their father’s civil rights and continued a pattern of excessive force and racism within the police department’s ranks.

The suit, which is ongoing, names Salamoni and Lake, as well as the Parish of East Baton Rouge, the City of Baton Rouge and its police department, then-Chief of Police Carl Dabadie Jr., and XYZ Insurance Co. as defendants. It seeks punitive damages, attorney fees, and court costs and calls for the formation of a national, elected independent body to investigate officer-involved shootings.

Sources: alternet.org, time.com, cnn.com, nydailynews.com, nola.com
Captured: ‘Golden State Killer’ Wanted for 12 Murders and 50 Rapes Turns Out To Be Former Sacramento-Area Cop

by Derek Gilna

DNA testing and some apparent good breaks in a decades-long investigation paid off when police officers executed an arrest warrant on former Auburn, California, police officer Joseph James DeAngelo on April 24, 2018.

DeAngelo, now 72, is accused of being the notorious “Golden State Killer,” who is believed to be responsible for at least 12 murders, 50 rapes, and 100 burglaries between 1974 and 1986, some of which might have been committed while he was an officer sworn to protect the public.

The accused former cop was fired from the police department of the small Sacramento suburb for stealing dog repellent and a hammer from a drugstore, but appeared to be on investigator’s radar for apparent erratic behavior. The armed attacks, which terrorized parts of central and southern California, were marked by extreme and often sadistic violence and sexual assaults that preceded armed robberies. The attacks produced thousands of leads but no results for decades.

Investigators apparently reactivated the case in 2016. According to District Attorney Anne Marie Schubert, “We knew we were looking for a needle in a haystack, but we also knew that needle was there. We found the needle in the haystack, and it was right here in Sacramento. The answer was always going to be in the DNA,” she said.

The former officer apparently surfaced as a suspect based upon his current, erratic behavior, which erupted into expletive-laced outbursts when he became frustrated. “He liked the F word a lot,” neighbor Natalia Bedes-Correnti said. “He’d be out on his driveway yelling and screaming, looking for his keys. I could hear him from inside my house yelling and screaming. He was very loud.”

Another neighbor, Kevin Tapia, said DeAngelo got into an argument with his father. “No one thinks they live next door to a serial killer,” he said. “But at the same time I’m just like, he was a weird guy. He kept to himself. When you start to think about it you’re like, I could see him doing something like that, but I would never suspect it.”

Authorities uploaded some of the suspect’s ‘discarded DNA’ from a crime scene to the GEDmatch.com genealogy database, creating a fake profile and eventually a match with great-great-great-grandparents, from which investigators created family trees that eventually led to his suspect. The website’s data is stored in public view.

Sacramento County Sheriff Scott Jones said: “This was truly a convergence of emerging technology and dogged determination by detectives.”

According to the sheriff, DeAngelo was arrested on suspicion of involvement in four slayings in the Sacramento and Ventura county areas. “Very possibly he was committing the crimes when he was employed as a peace officer,” Jones said.

Agents from the FBI had also been called in to gather evidence at a Sacramento-area home linked to DeAngelo. “There is a lot of material in his house, a lot of stuff to go through,” Jones said.

One victim, Jane Carson-Sander, who was sexually assaulted in 1976 in her home in Citrus Heights, received an email from a retired detective who advised her of the arrest. “I have just been overjoyed, ecstatic. It’s an emotional roller-coaster right now,” Carson-Sander, said. “I feel like I’m in the middle of a dream and I’m going to wake up and it’s not going to be true. It’s just so nice to have closure and to know he’s in jail.”

According to Exeter Police Chief John Hall said, “It is absolutely shocking that someone can commit such heinous crimes, and finding out someone in a position of trust could betray that is absolutely unbelievable.”

The Auburn Police Department added that it will “do everything within its power to support this investigation and any prosecution that follows.”

DeAngelo is being held without bail in the Sacramento County jail.

Sources: sacbee.com, sun-sentinel.com, foxnews.com, cnn.com, washingtonpost.com

‘Shaken Baby Syndrome’ Diagnoses Discredited, Convictions Questioned

by Matthew Clarke

The term “junk science” does not quite cover the revolution in our understanding of the diagnosis of shaken baby syndrome. Medical experts now know that their belief in how to diagnose a clear sign of child abuse based upon a determination of shaken baby syndrome was mistaken. This new understanding may cast doubt on hundreds of murder, assault, and child abuse convictions.

In the 1970s, pediatric neurosurgeon Dr. Norman Guthkelch advanced the hypothesis that babies showing a certain pattern of injuries had been violently shaken. He thought he was on solid scientific footing. He adamantly believed that such babies—especially those with the so-called “triad” of brain swelling, together with bleeding on the brain’s surface and behind the retinas—were victims of abuse even if there were no outward signs of injury. “Shaken baby syndrome” soon became a medical consensus.

In court, it was accepted as a scientific fact and used to convict hundreds of defendants.

However, over the past two decades, newer scientific research has proven that accidents, diseases, and genetic conditions can cause the damning triad and other symptoms associated with shaken baby syndrome. This has undermined faith in the credibility of a shaken baby syndrome diagnosis to the point that, in 2009, the American Academy of Pediatrics (“AAP”) recommended that doctors cease using the term, especially in light of the potential legal, both criminal and civil, ramifications of such a diagnosis. The AAP explained that “advances in the understanding of the mechanisms and clinical spectrum of injury associated with abusive head trauma compel us to modify our terminology to keep pace with our understanding of pathologic mechanisms.”

But what does that mean for the people who have been convicted of assault or murder based on the triad? In 2015, the Medill Justice Project in the Journalism Department at Northwestern University compiled data covering the previous 20 years. The data showed that over 3,000 criminal cases in
the U.S. involved shaken baby syndrome. A Washington Post investigation turned up 1,600 shaken baby syndrome convictions of parents and caregivers since 2001, 16 of which were subsequently overturned. According to the New Scientist, at least three of the 1,600 ended up on death row.

Zavion Johnson was one of the 1,600. The then-18-year-old Sacramento, California, father called an ambulance on the afternoon of November 21, 2001, and reported that his daughter had stopped breathing. At the hospital, doctors found internal head injuries and a fractured skull. Suspecting abuse, they called police.

Johnson would later tell his family that he accidentally dropped Nadia while they were taking a shower that morning. The baby’s head hit the back of the cast-iron tub, but she seemed okay thereafter. The frightened teenager didn’t tell this to police when they initially questioned him. That decision would cost him dearly.

Johnson was charged with murder. At the trial, multiple witnesses testified that he was a gentle and loving father who never mistreated the baby. None of the prosecution witnesses contradicted this. They didn’t need to. Instead, the prosecution had three medical experts who testified that the injuries Nadia received could only have been caused by violent shaking, not a short fall. The prosecutor used that testimony to 25 to life in prison.

In 2017, two of the prosecution’s experts disavowed their trial testimony, and even the district attorney now supports Johnson’s attempt to have his conviction overturned. Dr. Gregory Reiber, the forensic pathologist who performed the autopsy on Johnson’s daughter, said based on significant changes in the understanding of childhood head injury, his opinion has changed, and he now believes her injuries “are consistent with the accidental fall in the bathtub described by Zavion Johnson.”

Dr. Claudia Greco, a University of California-Davis neuropathologist who testified at the trial, now says the injuries do not prove that they were intentionally inflicted or that Johnson shook his daughter.

None of these revelations would have come out had Johnson not contacted the Northern California Innocence Project, after years of trying to get his case reversed on his own.

That’s when attorney Paige Kaneb got involved. “I’d been on another shaken baby case, so I’m a bit obsessed with the issue,” said Kaneb, who gathered evidence, got in touch with the prosecution’s experts, and eventually secured declarations disavowing their trial testimony.

On October 31, 2017, Kaneb filed a petition to have Johnson’s conviction overturned. The district attorney did not oppose it. “Our decision … was not a difficult one,” wrote Chief Deputy District Attorney Steve Grippi in an email. “Had the information been discredited by the medical community. Anyway the presence of the so-call triad has been discredited for years of his life and so much more, he was eventually vindicated and set free. That’s the good news. The bad news is there are certainly more factually innocent men and women just like Johnson who are still in prison.

That is all good for Johnson, but what about the thousands of other shaken baby convictions? Dr. Norman Guthkelch had said that it’s “high time every case of a parent in [prison] for this had his or her case reviewed” because “we went badly off the rails … on this matter.”

We at CLN couldn’t agree more. An automatic determination of abuse based on the presence of the so-call triad has been discredited by the medical community. Anyone convicted based upon the triad in prison today should reach out to an innocence project, conviction integrity unit, or similar resource. In light of the medical and legal communities’ current understanding of shaken baby syndrome/abusive head trauma, people are listening and working to right the wrongs of the past.

Sources: aap.org, medill.northwestern.edu, slate.com, washingtonpost.com

Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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

Please contact Kathy Moses at kmoses@humanrightsdefensecenter.org, or call (561) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth, FL 33460.
Washington High Court Issues New Rule Making Immigration Status Inadmissible

by Derek Gilna

The Washington Supreme Court on November 8, 2017, issued a new rule of evidence, making it “generally inadmissible” in both criminal and civil cases to question a party’s immigration status. According to the Court, “evidence of a party’s or a witness’s immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness.”

The Court’s newest order follows in the footsteps of a precedent established in 2010, in which the Court set aside a trial verdict adverse to an individual who had suffered a serious personal injury, but had overstayed his visa. When the case was retried with the immigration information excluded, he was awarded $2.6 million.

As noted by the Court, “Whenever a party seeks to use or introduce immigration status evidence, the court shall conduct an in camera review of such evidence. The motion, related papers, and record of such review may be sealed pursuant to GR 15 and shall remain under seal unless the court orders otherwise. If the court determines that the evidence may be used, the court shall make findings of fact and conclusions of law regarding the permitted use of that evidence.”

Normally, witness’ testimony can be impeached or discredited at trial by following a standardized procedure not requiring prior court approval. Thus, many defense attorneys were unhappy with the provision that required court approval before they could ask those questions. “The court may admit evidence of immigration status to show bias or prejudice,” the rule states, “if it finds the evidence is reliable, relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status.”

Defense attorney Angus Lee said, “If somebody is being granted a benefit in exchange for their testimony Supreme Court case law for due process makes very clear that’s relevant and admissible for impeachment.” However, before defense counsel can raise this issue in an adversary setting, it must file a pretrial motion and obtain an order from the trial judge permitting the admission of such evidence.

Prosecutors were more favorably disposed toward the new rule because it permits them to obtain the testimony of undocumented individuals, who can be rewarded for their cooperating testimony in pending cases by the promise of U-visas (set aside for crime victims and their immediate family members) and eventual legal status.

King County deputy prosecuting attorney David Martin said the new rule is necessary, “People are scared,” he said. “They’re scared because of what they hear coming out of the federal government. Immigration does come up in criminal cases, and sometimes it’s entirely appropriate that the status is examined, but what this rule says is you have to have really good reasons.”

The new rule will go into effect September 1, 2018.

Source: blog.findlaw.com

New Report: 60 Percent of Exonerations Stem from Official Misconduct

by Steve Horn

The newly released 2017 edition of the National Registry of Exonerations report delivers big findings about the work done by conviction integrity units (“CIUs”), innocence projects, and what some legal experts refer to as the “two-tiered” criminal justice system.

Put together by the University of California-Irvine, the report has concluded that the work done by CIUs and innocence projects across the country has helped move the meter in the area of wrongful convictions.

But the report also points to a number which, to some, is troubling. That is, a record-high 84 official misconduct exonerations – or exonerations given because of official misconduct committed by those vested with the power of the law, such as police officers, prosecutors, and governmental officials – were given in 2017 nationwide. That’s 84 out of the 139 total exoneration, or about 60 percent, recorded by the Registry of Exonerations in 2017.

“Official misconduct encompasses a wide range of behavior — from police officers threatening witnesses, to forensic analysts falsifying test results, to child welfare workers pressuring children to claim sexual abuse where none occurred,” details the report. “But the most common misconduct documented in the cases in the Registry involves police or prosecutors (or both) concealing exculpatory evidence.”

However, almost none of those officials have been held accountable for their deeds, largely a byproduct of prosecutorial immunity.

“It’s remarkable how much official misconduct plays a role in these exonerations, and it’s remarkable when it comes to light, because it tends to stay concealed,” Brandon Garrett, a law professor at the University of Virginia, told NBC News.

Conviction Integrity Units, Innocence Projects

Of the exonerations achieved by those eventually deemed innocent in various jurisdictions nationwide, 42 came as a result of the work done by CIUs. A CIU is somewhat akin to a government agency inspector general’s office, a body that oversees the integrity of convictions carried out by prosecutors’ offices, which has full investigative oversight power. As a relatively new phenomenon in the U.S. criminal justice system, there are 33 CIU offices nationwide, which vary in staff size, degrees of political independence from prosecutors’ offices, and the amount of activity that they have carried out to date.

While CIUs have played a statistically significant role in exonerations, the Registry is careful to give credit where it thinks credit is due in terms of who initially spawned a second look at many of these convictions.

“Most CIU exonerations, however, were initially investigated by defense attorneys, innocence organizations, journalists, or others,” the report details. “In some cases, the exonerated defendants even faced concerted resistance by the prosecutors’ offices before
The CIUs came around to supporting the exonerations.

Unlike CIUs, which are embedded as part of the official state apparatus, innocence organizations are nonprofit external law firms and legal clinics that have a central mission of reversing wrongful convictions. They exist in the vast majority of states throughout the U.S. under the umbrella of the Innocence Network. And they played a major role in exonerations in 2017, according to the Registry, helping to secure a record 54 exonerations in 2017. Combined, CIUs and innocence projects secured 69 percent of exonerations for 2017.

“Fifty or a hundred years ago, an innocent defendant in prison had no one to turn to,” Michigan State University law professor Barbara O’Brien, editor of the Registry, said in a press release about the findings. “The main reason we’re seeing more exonerations now is that they can seek help from innocence organizations and prosecutors’ offices who are committed to fixing wrongful convictions and are increasingly working together.”

While CIUs and innocence projects played a vital role in securing exonerations for the wrongfully accused, the bad news is that all of the innocence projects are greatly overbooked and don’t have the staffing to take all of the possible cases. So, they have to be greatly selective in the cases they take on.

“Exonerations typically take years, if not decades, to complete, and thousands of hours. Any [innocence project] — even a relatively well-funded one — must be highly selective in choosing cases,” explains the report. “Some receive thousands of requests for assistance a year but can only take on a handful of new cases. Moreover, [innocence projects] based in law schools — innocence clinics — exist in large part to educate law students who work on cases for course credit, which limits the resources they can devote to freeing innocent defendants.”

Since 1989, innocence projects have obtained 434 exonerations.

**Numbers, Figures**

Of the exonerations achieved, 37 of them centered on false eye-witness accounts, while 29 centered on the coaxing of false confessions. Texas was the state with the most exonerations at 23, followed by Illinois at 21, while California — a state with 39 million residents — only had nine exonerations in 2017.

Those eventually exonerated in 2017, according to the Registry report, spent an average of 10.6 years incarcerated for their convictions. That’s a total of 1,478 total years of life lost behind bars. In 2017, the person who spent the most time previously incarcerated while eventually being proven innocent, Ledura Watkins, spent over 41 years in prison for a murder of a school teacher that he did not commit.

The National Registry of Exonerations report makes all of its data easily trackable, with each exoneration having an individual case study, which can be read on its website. The Registry, which meticulously tracks every criminal justice system exoneration and tells the stories behind those wrongfully accused and incarcerated, has published these reports annually since 1989. Since the Registry began doing these reports, 2,261 exonerations have ensued.


---

**Colorado Supreme Court Limits Bottom End of Aggravated Sentencing Statute for Habitual Sex Offenders**

By Christopher Zoukis

The Supreme Court of Colorado ordered that a habitual sex offender be sentenced because the trial court miscalculated the bottom end of the defendant’s sentence. The December 18, 2017, opinion clarified that there is an upper limit on the minimum end of a habitual sex offender’s sentence.

Ervin Isom was convicted of sexual assault on a child and adjudicated a habitual sex offender against children. The trial court sentenced him to an indeterminate prison term of 40 years to life. Isom appealed the sentence, arguing that it was illegal because the trial judge had concluded that there was no upper limit on the minimum portion of his sentence.

The court of appeals agreed, concluding that 36 years to life was the maximum permissible sentence.

The court of appeals noted that the statute governing aggravated sentences for habitual sex offenders, C.R.S. 18-1.3-1004(1) (c) (“Statute”), does not appear to prescribe a maximum at the bottom end of an enhanced, indeterminate sentence. The Colorado Supreme Court granted certiorari and affirmed.

Colorado uses an indeterminate sentencing scheme for felonies, including sex offenses. This requires a court, pursuant to statutory sentencing provisions, to set a minimum and maximum sentence. For a habitual sex offender, the Statute provides for a sentence at the bottom end of “at least three times the presumptive maximum sentence of sexual assault of a child (six years)” and, at the top end, life.

The trial court took the phrase “at least” at face value and concluded that there was no limitation on the minimum sentence. But the Colorado Supreme Court had previously determined that similar language in another sentencing statute was ambiguous. In Vensor v. People, 151 P.3d 1274 (Colo. 2007), the Supreme Court determined that there was an upper limit to the minimum end of an enhanced sentence for a general sex offense.

According to the Court in the present case, the analysis that applied in Vensor also applies to the Statute. Taking the trial court’s reading of the top end of a minimum sentence to its logical extreme would destroy the indeterminate nature of Colorado’s criminal sentencing scheme, reasoned the Court. Misreading the Statute in this way could lead to an “indeterminate” sentence of life-life, which could not be what the Legislature intended.

Turning to the specifics of the Statute, the Court concluded that the minimum sentence for a habitual sex offender could be no higher than triple the presumptive maximum, unless the trial court finds extraordinary aggravating circumstances, in which case the top end of the minimum would be six times the presumptive maximum.

Because the presumptive maximum for sexual assault of a child is six years in Colorado, Isom’s minimum sentence could be no more than 18 years, unless the trial court found extraordinary aggravating circumstances, in which case his minimum would be 36 years.

Accordingly, the Court affirmed the judgment of the court of appeals and remanded the case back to that court with instructions for the trial court to resentence consistent with this opinion. See: Isom v. People, 407 P.3d 559 (Colo. 2017).
The government’s use of incriminating statements made by a defendant at a confidential debriefing breached the plea agreement and constituted “plain error” when the government disclosed that information to the sentencing court to push for a longer sentence, the U.S. Court of Appeals for the D.C. Circuit held.

Kamal King-Gore was arrested on June 10, 2010, for selling 60.6 grams of cocaine base to a confidential informant. After being indicted, he met with prosecutors in a voluntary, off-the-record debriefing. In a written agreement, prosecutors promised that “no statements made by or other information provided by” him would “be used directly against [him] in any criminal proceeding.”

He subsequently pleaded guilty. At sentencing, despite its promise not use any statements or information obtained during the debriefing, the government told the sentencing court that King-Gore was a major drug “wholesaler” responsible for more drugs than the court knew. The term “wholesaler” was used by King-Gore during the debriefing to describe himself. The court sentenced King-Gore to well above the mandatory minimum sentence.

He appealed the government’s breach of the agreement. On appeal, the government admitted it breached the agreement, but argued that it did not prejudice King-Gore because the court still would have imposed the same sentence without the confidential information.

The Court of Appeals disagreed.

Because King-Gore raised the issue for the first time on appeal, he had to show that the error was “plain,” meaning that it affected the outcome of the case and the fairness and integrity of the proceedings, the Court said. It determined that King-Gore had met that standard.

At sentencing, the court did, in fact, rely on the government’s information about King-Gore being a wholesale drug dealer. The sentencing court stated: “As the Government argues legitimately, Mr. King-Gore was a wholesale trafficker, not just a retail trafficker in drugs. That means it’s a serious offense and suggests a higher sentence.” As such, the Court of Appeals concluded that King-Gore’s confidential statement influenced the sentencing court’s decision, and thus he was prejudiced by the government’s breach.

“The question isn’t whether defendant’s prison term would have been as long as the district court considered only permissible factors,” the Court said. “We believe that there is at least a reasonable likelihood that King-Gore received a higher sentence than he would have absent the government’s breach,” the Court concluded.

The Court said it cannot justify keeping King-Gore “in prison longer for improper reasons,” which would undermine the integrity of court proceedings. Accordingly, it vacated King-Gore’s sentence and remanded for resentencing before a different judge, stressing that “the fault here rests on the prosecutors, not on the sentencing judge.” See: United States v. King-Gore, 875 F.3d 1141 (D.C. Cir. 2017).

Cautionary Tale: Visible Fingertips in Cellphone Pictures Can Get You Arrested

For those in the U.S. who enjoy taking photos on their cellphones, particularly of illicit activities or potentially illegal ones, the South Wales Police force has sent a warning shot across the Atlantic to beware. Or else.

In March in South Wales, U.K., a kingpin of a cannabis and ecstasy trafficking ring was arrested after photos of ecstasy that he took on his cellphone and sent in a text message on WhatsApp were traced back to him via his fingerprint marks that could be seen on enlarged images of that photo. In total, 11 people were arrested as members of the ring.

In South Wales, law enforcement officials there said it was the first time this particular technique had been used to support an arrest. It is an investigation that began with neighbors calling to say it appeared that suspicious activity was occurring at a house with more-than-normal foot traffic coming into and out of it. And the arrest phase of it has ended with the tracking down of the 28-year-old leader of the pack, Elliot Morris.

Dave Thomas, forensic operations manager at the Scientific Support Unit, said in a press release put out by the South Wales Police force that, “Specialist staff within the JSIU fully utilised their expert image-enhancing skills which enabled them to provide something that the unit’s fingerprint identification experts could work,” adding that “Despite being provided with only a very small section of the fingerprint which was visible in the photograph, the team were able to successfully identify the individual.”

Cellphone Fingerprints Cross Atlantic

The publication Vice Motherboard further reported that, though this is a story about an arrest in the U.K., fingerprint traces found via photos taken on a cellphone have also been used for an arrest in the U.S., as well. In the U.S., this has ensued in the domain of possession of child pornography arrests.

Vice pointed to the 2015 arrest and subsequent charges brought against a man based on photos he took of himself performing sexual acts on a one-year-old child. Though his face was obscured, law enforcement officers were able to see sufficient details of the ridges of his fingerprints in the photos he snapped to identify him.

“It’s kind of groundbreaking—but it’s actually really simple,” said Lt. Joe Giasone, of the Sheriff’s Criminal Investigation Section in Sarasota County, Florida, in a story published by Forensic Magazine. “In one of the pictures, you could zoom in and get really good detail on his finger.”

The Sarasota County Sheriff’s Department is not alone in utilizing this
groundbreaking technique to identify a suspect. Just months earlier in 2015, federal charges were brought against 24-year-old Tyler Seevers (USA v. Seevers, 2:15-cr-00043-DWA) in February 2015 for sexually lurid photographs he took of a three-year-old girl and her older sister in May and July 2014. In August, the plea agreement reached between the U.S. Department of Justice and Seevers showed that he was originally busted via his fingerprints which were seen within the photos he took of the young children.

“Seevers produced sexually explicit photographs of a female child, three years of age, using an iPod Touch. The iPod Touch was turned over to law enforcement by the victim’s mother who had discovered the photographs of her daughter,” detailed the DOJ press release. “Forensic analysis of the contents of the iPod Touch revealed images of both the 3-year-old and her older sister. One such sexually exploitative photograph depicted the ridges of the photographer’s fingertips. A fingerprint analyst with the Pennsylvania State Police was able to identify Seevers’ hand as that depicted in the photograph.”

In 2017, in another child pornography case, the Texas Department of Public Safety Crime Lab in Austin utilized fingerprints seen in a photo of a man molesting a nine-year-old child.

“In July 2015, the Texas Office of Attorney General submitted a digital photograph of an unknown suspect exploiting a child to the DPS Crime Lab in Austin. The only evidence of the suspect in the photo were fingers on one hand,” the Texas Department of Public Safety explained the details of the case in a July 2017 press release. “Hall, the Latent Automated Fingerprint Identification System Supervisor, and Blackburn, the Latent Prints Supervisor, combined efforts to use the photograph to match the fingerprints to a suspect, which ultimately led to an arrest by the Georgia Bureau of Investigation in August of 2015.”

For their work, the Texas Department of Public Safety Crime Lab received the U.S. Federal Bureau of Investigation’s (“FBI”) Biometric Identification Award in 2017 for the best biometric work of the year done by a law enforcement unit. Robert Bossick, Jr., the man who took the photos, was sentenced to 50 years in prison by a judge in the U.S. District Court for the Southern District of Georgia (USA v. Bossick Jr., 1:16-cr-00001-JRH-BKE) for production and possession of child pornography. In the process of searching his phone, law enforcement officials also found text messages exchanged via the app Kik, which resulted in more leads for their ongoing criminal probe.

Bossick’s case was the first of its type in which the fingerprint seen in a cellphone picture was matched with a fingerprint stored in the FBI’s Next Generation Identification database. That database serves as a centralized storage hub of biometric information collected from U.S. citizens.

So, while to date this new technique of finding fingerprint traces through smartphone photos has been used to bust drug traffickers and child pornographers, it doesn’t take a huge stretch of the imagination to envision it being used as a means of establishing probable cause for arrests of all sorts of potential criminal charges. Put another way, think twice or maybe even thrice before taking photographs on your smartphone which can and will used against you in a court of law.

Sources: south-wales.police.uk, motherboard.vice.com, forensicmag.com, fbi.gov, justice.gov, dps.texas.gov
Innocence be Damned: Prosecutors Who Disregard Justice in Push to Win at Any Cost  
by Dale Chappell

The prosecutor’s goal “is not that it shall win a case, but that justice shall be done,” the U.S. Supreme Court declared in Berger v. United States, 295 U.S. 78 (1935). Some prosecutors, however, are clearly not guided by the high court’s admonition; on the contrary, they believe that their job is to win—at any cost.

Over the last 25 years, more than 2,150 prisoners have been proven innocent. Barry Scheck and Peter Neufeld’s Innocence Project has freed more than 200 of them since its creation in 1992, while other organizations spawned from their project have freed many others wrongfully imprisoned.

Inexplicably, some prosecutors fight to keep even those proven factually innocent behind bars. These prosecutors do not merely delay justice; they actively work against it. When a prisoner is exonerated by a court, these prosecutors file appeal after appeal, or indictment the exoneree all over again, instead of trying to find the actual perpetrator.

When Davontae Sanford was 14 years old, he confessed after a late-night interrogation to murdering four people in a Detroit drug house. Sanford said he was told by cops that he could go home if he gave them “something.” He did, and on the advice of counsel, who was later suspended for misconduct, he pleaded guilty and got 29 to 92 years in prison.

Just days after Sanford was sentenced to prison, a hit man named Vincent Smothers admitted to killing the four people that Sanford had pleaded guilty to killing. Smothers’ confession was corroborated when the gun was recovered, and ballistics matched it to the murders. Smothers even gave a sworn affidavit in 2015 that Sanford was not involved in the murders “in any way.”

Smothers admitted to 12 contract killings in total. However, he was never convicted or even charged with the four murders pinned on Sanford. Smother pleaded guilty to the other eight murders that he also admitted were his work. Sanford remained in prison when he was clearly innocent. In 2009, it was leaked that police had failed to turn over Smothers’ confession to Sanford’s lawyers, and Sanford petitioned to withdraw his guilty plea based on the new evidence. Wayne County Prosecutor Kym Worthy opposed Sanford’s petition all the way to the Michigan Supreme Court, which agreed with Worthy that actual innocence is not a valid reason to withdraw a guilty plea (which would lead one to conclude that the term ‘criminal justice system’ is a misnomer).

In 2015, lawyers for Sanford filed a post-conviction motion challenging his wrongful conviction. After Michigan State Police reinvestigated the case, they issued a 117-page report that concluded (1) Sanford was innocent, (2) Smothers and an accomplice were guilty of the murders, and (3) Detroit’s then-deputy police chief, James Tolbert, had lied in order to convict Sanford. Worthy finally agreed to Sanford’s release—but only because of Tolbert’s lies, she clarified, and not because Sanford was innocent.

In July 2017, Sanford filed a civil lawsuit under Michigan’s Wrongful Imprisonment Compensation Act, and the Michigan Attorney General conceded in just four months that Sanford was innocent and wrongfully imprisoned. He was awarded $408,356.16 on December 21, 2017, for the nine years he spent in prison.

In another case prosecuted by Worthy, Lamarr Monson was convicted in 1996 of the murder of a 12-year-old girl and received a sentence of 30 to 50 years in prison. Nearly 20 years later, David Moran, director of the Michigan Innocence Clinic, examined the ceramic toilet lid Monson supposedly used to “stab” his victim to death. The toilet lid was covered in bloody fingerprints, but they were never tested. When Moran had them tested, they matched a man named Robert Lewis, not Monson.

During a four-month-long evidentiary hearing in 2016, Lewis then live-in girlfriend testified that he came home the night of the murder with “blood on him; it was dripping off his fingernails.” The assistant prosecutor, David McCready, blew it off, saying that Lewis might have wandered by the apartment while the building manager was on the phone with 911 and moved the toilet lid out of the way to help. Moran responded by observing, “There might be 12 gullible citizens that would buy that, but that’s why we need a new trial: to see if the state can find them.”

The court granted Monson a new trial, and Worthy dismissed the case in August 2017 due to “destruction of the evidence and the possible coercive conduct” of Monson’s investigators. Worthy maintained that Monson was guilty and refused to charge Lewis with the murder.

After Monson’s exoneration, Worthy made a public statement that Monson had sex with the 12-year-old victim. Moran, in Monson’s defense, said the accusation was “false and disturbing” and pointed out that “it is unethical for a prosecutor, upon dismissing charges against a defendant, to then publicly defame the defendant.”

When pressed as to what evidence she had to support her accusation that Monson had sex with the victim, Worthy cited his alleged statements in connection with his so-called confession—the same statements that she admitted were likely coerced and “support[ ] Monson’s defense of a false confession.” That is the type of tortured reasoning and dissembling often present in cases where prosecutors are loath to admit they convicted an innocent person even in the face of overwhelming evidence pointing to that conclusion.

Denying innocence means the actual perpetrators remain free, which poses a clear and present danger to public safety. According to data collected by the Innocence Project, 356 people have been exonerated by DNA evidence since 1989. Of those cases, 152 actual perpetrators were identified, and they were free to commit “150 additional violent crimes,” which included rapes and murders. Convicting innocent people takes a high toll on the wrongfully convicted as well as society at large.

After Michael Morton was wrongfully convicted in a Texas court of murdering his wife in 1997, DNA evidence later showed Mark Alan Norwood, not Morton, was the true killer. Prosecutors in the case had illegally withheld exculpatory evidence, and Norwood went on to rape and kill another woman in the same fashion.

Ken Anderson, the lead prosecutor who withheld the crucial evidence, later became a district court judge after Morton’s conviction. Judge Anderson was then criminally charged and pleaded guilty to felony criminal contempt. He was disbarred and no longer able to serve as a lawyer or judge.
The Supreme Court of Iowa held that a motion for postconviction relief is the proper vehicle to challenge a substantial deprivation of liberty or property interest in certain Iowa Department of Corrections (“IDOC”) administrative actions.

In 1990, Kevin Franklin pleaded guilty to second-degree murder and second-degree sexual abuse for which he received 50 and 25 years, respectively. He has been eligible for parole since 2012.

Franklin filed a postconviction relief motion alleging he was unlawfully held in custody or other restraint — language consistent with Iowa Code § 822.2 (1)(e). He also filed a motion to correct an illegal sentence. In both motions, Franklin alleged that the IDOC required him to complete Sex Offender Treatment Program (“SOTP”) yet continually denied his request to participate. The IDOC practice of withholding SOTP until an offender is within three years of discharge artificially lengthened his sentence and effectively removed any meaningful chance of parole or work release. The parole board would not consider any relief until the completion of SOTP.

The district court combined both of these motions into one postconviction motion, and the State moved for summary judgment, arguing that this was better characterized as a parole or administrative issue.

The district court granted the motion for summary judgment, holding it lacked subject matter jurisdiction. The court noted that there were no disputed facts, so the only issue to decide was whether the district court had authority to adjudicate Franklin’s claim under § 822.2.

In accordance with the Pettit v. Iowa Department of Corrections, 891 N.W.2d (Iowa 2017), Maghee v. State, 773 N.W.2d 228 (Iowa 2009), Davis v. State, 345 N.W.2d 97 (Iowa 1984), line of cases, review of postconviction relief has been expanded to SOTP classifications, work-release revocations, and disciplinary actions involving a substantial deprivation of liberty or property interest. Franklin’s claim was that the IDOC’s policy of withholding SOTP until three years of one’s discharge date is effectively imposing a silent mandatory minimum, constituting a substantial deprivation of liberty interest.

The Supreme Court of Iowa ruled that Franklin has the right to pursue his claim under § 822.2(1)(e). As such, the Court reversed the district court order finding that it lacked subject matter jurisdiction to hear his case. The Court explained that this “is not a case concerning subject matter jurisdiction. Rather, it involves authority to hear the case.” Finally, the Court ruled that the district court had authority to hear this case.

Accordingly, the Court remanded the case for further proceedings consistent with this opinion. See: Franklin v. State, 905 N.W.2d 170 (Iowa 2017).
Arizona Supreme Court: Trial Court Must Tell Jury Defendant Ineligible for Parole in Death Penalty Phase

by Dale Chappell

The trial court erred by failing to tell the jury that a defendant was ineligible for parole before its decision to impose the death penalty, the Supreme Court of Arizona held November 6, 2017.

A jury found Jasper Rushing guilty of killing his cellmate at the Lewis Prison Complex in September 2010. The evidence showed Rushing “smashed in” his cellmate’s face, cut his throat, and severed his penis before he told guards, “I think I just killed my cellie.” He was charged with premeditated first-degree murder, and the State sought the death penalty. The jury found Rushing guilty of murdering his cellmate in an “especially heinous or depraved manner,” an aggravating factor under Arizona law to allow the death penalty.

On appeal, one of Rushing’s arguments was that the trial court violated his constitutional rights by refusing to instruct the jury during the penalty phase that he was ineligible for parole because his crime was committed after January 1, 1994, making him ineligible for parole under Arizona law.

The U.S. Supreme Court held in Simmons v. South Carolina, 512 U.S. 154 (1994), that when a jury is determining whether to impose the death penalty, “due process requires that the sentencing jury be informed that the defendant is parole ineligible,” the Arizona Supreme Court noted. The possibilities of clemency or a future role or to be released from prison, the trial court was required to instruct the jury that Rushing would be “parole ineligible,” or to allow Rushing to introduce evidence to that effect, the Court ruled.

Since the trial court failed to do so, Rushing’s death sentence was vacated by the Arizona Supreme Court. The Court remanded the case for a new penalty phase proceeding. See: State v. Rushing, 404 P3d 240 (Ariz. 2017).

Ninth Circuit Reverses Drug Smuggling Conviction for Improper Exclusion of Evidence of Third-Party Culpability

by Christopher Zoukis

The United States Court of Appeals for the Ninth Circuit reversed a defendant’s conviction for importation of methamphetamine because the district court improperly excluded relevant evidence that someone else committed the crime.

Angelica Urias Espinoza, a citizen of Mexico, ran a business in which she imported clothing from the United States for sale in Mexico. Because the business required regular border crossings, Urias Espinoza obtained a border crossing card that allowed her to legally enter the United States. She made 14 such border crossings between February 27, 2015 and late April, 2015.

On April 22, 2015, U.S. Customs and Border Patrol agents detained Urias Espinoza as she attempted to legally enter the United States. Agents Tan and Wallis suspected that the car contained hidden drugs. A brief search revealed a suspicious bulge in the back seat of the car. When the back seat was opened, the agents discovered 12 kilograms of methamphetamine.

Urias Espinoza was arrested and charged with importing methamphetamine in violation of 21 U.S.C. §§ 952 and 960. At trial, she determined that Urias Espinoza’s theory was too speculative. As a result, she was convicted and sentenced to 90 months in prison.

On appeal, the Court of Appeals reviewed the district court’s exclusion of evidence for abuse of discretion. Because the district court identified and applied an incorrect legal standard, the Court found an abuse of discretion that required reversal.

The lower court erred when it applied the wrong rule for admissibility of third-party culpability evidence. In the Ninth Circuit, United States v. Armstrong, 621 F.2d 951 (9th Cir. 1980) set forth the proper standard: “[U]nder the Federal Rules of Evidence, ‘[f]undamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.’”

The district court erroneously relied on
Ohio Supreme Court Holds State Cannot Prove ‘Bulk Amount’ of Fentanyl Under Statute

by Dale Chappell

Because no standard pharmaceutical reference manual specifies a maximum daily dose in the usual dose range for fentanyl, a defendant’s conviction for aggravated possession of a “bulk amount” of the drug could not stand, the Supreme Court of Ohio held January 4, 2018.

Mark Pountney was charged with multiple offenses, including possession of 10 three-day transversal fentanyl patches, and the State sought an enhanced felony level of aggravated possession based on the amount of the drug involved. That is, the State argued that he possessed a “bulk amount” of fentanyl, a second-degree felony given the amount of the drug in his possession.

After a bench trial on the fentanyl charge, Pountney was convicted and sentenced to three years in prison after pleading guilty to the other counts. He appealed.

On appeal, Pountney argued that the State failed to present sufficient evidence that he had possessed at least five times the “bulk amount” of fentanyl under R.C. 2925.01(D)(1)(d), which is a second-degree felony under R.C. 2925.11(C)(1)(c). The court of appeals agreed and reduced his conviction to a fifth-degree felony. The State appealed to the Ohio Supreme Court, which agreed to hear the case.

On appeal to the Supreme Court, the State argued that “because there is no usual dosage range” of fentanyl, the State may rely upon the usual dose range of morphine, the prototype drug for fentanyl, to establish the bulk amount of fentanyl.” The Court disagreed.

Ohio Revised Code 2925.11(A) prohibits knowingly obtaining, possessing, or using a controlled substance. If the amount in question equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, it constitutes a second-degree felony. R.C. 2925.11(C)(1)(c). The Court noted that the General Assembly has defined the “bulk amount” of a Schedule II opiate or opium derivative, like fentanyl, as an “amount equal to or exceeding twenty grams or five times the maximum daily does in the usual dose range specified in a standard pharmaceutical reference manual.” R.C. 2925.01(D)(1)(d).

The State acknowledged that the usual dose range for fentanyl does not appear in any standard pharmaceutical reference manual because “transdermal fentanyl should be individualized” based on multiple factors for each patient.

The Court rejected the State’s argument that it can rely on the usual dose range of morphine, the prototype opiate, to establish the bulk amount of fentanyl under R.C. 2925(D)(1)(d) since the usual dose range is not specified in any standard pharmaceutical reference manual.

According to the Court, the State cannot prove a “bulk amount” of fentanyl patches because standard reference manuals do not specify a maximum daily dose in the usual dose range for fentanyl. The Court conceded that this situation creates a “problem of proof” for the State, which can only be fixed by the General Assembly amending the statute. Since a “bulk amount” cannot be established, Pountney cannot be convicted of a second-degree felony under R.C. 2925.11(C)(1)(c). He can be convicted of only a fifth-degree felony under the statute.

Accordingly, the Ohio Supreme Court affirmed the lower court’s decision to reduce Pountney’s conviction to a fifth-degree felony. See: State v. Pountney, 2018-Ohio-22 (2018).
In a brief per curiam opinion, the United States Supreme Court vacated an Eleventh Circuit Court of Appeals decision that foreclosed potential relief for a prisoner on death row whose conviction may have been influenced by a racist juror.

The January 8, 2018, opinion allowed Keith Tharpe’s habeas corpus petition to proceed. Tharpe, who has been on Georgia’s death row for over two decades, was convicted of the 1991 murder of his estranged wife’s sister, Jaquelin Freeman.

Tharpe’s claim rested on an affidavit signed by juror Barney Gattie, in which he explained the reasoning underlying his decisions in the jury room. According to the affidavit, Gattie (who is white) drew a distinction between Tharpe and Freeman, both of whom are black.

“The Freemans are what I would call a nice Black family,” wrote Gattie. “In my experience I have observed that there are two types of black people. 1. Black folks and 2. N****s.”

Gattie went on to say that Tharpe “who wasn’t in the ‘good’ black folks category in my book should get the electric chair for what he did,” and that “[a]fter studying the Bible, I have wondered if black people even have souls.”

Both the U.S. District Court and the Eleventh Circuit found that because a Georgia state court had already determined that Gattie’s presence on the jury did not prejudice Tharpe, he could not proceed with a federal habeas corpus claim. The Supreme Court noted, however, that if there is clear and convincing evidence to the contrary to the state court’s ruling, it is not binding on federal courts. 28 U.S.C. § 2254(e)(1). Without making that determination, the Court ruled that the lower courts should look again.

The Court noted that the Eleventh Circuit denied Tharpe’s certificate of appealability (“COA”) “based solely on its conclusion, rooted in the state court’s fact-finding, that Tharpe had failed to show prejudice” by Barney Gattie’s behavior and influence on the jury’s verdict.

The Supreme Court disagreed with that assessment. “Gattie’s remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe’s race affected Gattie’s vote for a death verdict,” wrote the Court. It further explained that at “the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court’s factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise.”

Accordingly, the U.S. Supreme Court granted Tharpe’s motion to proceed in forma pauperis, granted the petition for certiorari, vacated the Eleventh Circuit’s judgment, and remanded the case for further consideration as to whether Tharpe is entitled to a COA. See: Tharpe v. Sellers, 138 S. Ct. 545 (2018).

The Supreme Court of the United States reversed a defendant’s conviction for violating the second clause of 26 U.S.C.S. § 7212(a) (“Omnibus Clause”). In doing so, the Court announced the requirements for a conviction under the criminal tax statute, resolving a split among the United States Courts of Appeals.

Between 2004 and 2009, the IRS opened and closed multiple investigations into the tax activities of Carlo Marinello. In 2012, the Government indicted him for several violations of various criminal tax statutes, including the Omnibus Clause. It forbid[s] corrup[tly] or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeav[or] to obstruct or impede, the due administration of the Internal Revenue Code.

To be convicted of violating the Omnibus Clause, the defendant must have engaged in at least one of eight enumerated activities. The Government accused Marinello of engaging in five of the eight activities: (1) failing to maintain corporate books and records, (2) failing to provide complete and accurate tax information to tax accountant, (3) destroying business records, (4) hiding income, and (5) paying employees with cash.

At trial, the judge instructed the jury that it must find Marinello engaged in at least one of the five activities alleged by the Government in order to convict him. Additionally, it must conclude that he did so “corruptly,” meaning “with the intent to secure an unlawful advantage or benefit” for himself or someone else.

However, the judge did not instruct the jury that it must conclude that he knew he was under investigation and intended corruptly to interfere with that specific investigation. The jury convicted him on all counts.

On appeal to the Court of Appeals for the Second Circuit, Marinello argued that a violation of the Omnibus Clause requires the Government to prove the defendant attempted to interfere with a “pending IRS proceeding,” such as a specific investigation. The Second Circuit rejected his argument and held that a defendant need not possess “an awareness of a particular [IRS] action or investigation.”

Marinello petitioned the U.S. Supreme Court for certiorari, asking it to decide whether the Omnibus Clause requires the Government to prove the defendant was aware of “a pending IRS action or proceeding, such as an investigation or audit,” when he or she engaged in at least one of the enumerated activities. Since the Circuit Courts of Appeals were split on this question, the Supreme Court granted the petition to answer it and resolve the circuit split.

The Court began its analysis by discussing United States v. Aguilar, 515 U.S. 593 (1995), in which the Supreme Court interpreted a criminal statute worded much like the Omnibus Clause. The statute at issue in Aguilar made it a felony “corruptly or by threats of force, or by any threatening letter or communication, [to] influence[e]s, obstruct[t], or impede[s], or endeav[o]r to influence, obstruct, or impede, the due administration of...”
The G-Men are Coming: Local Cops Partner with Federal Authorities to Deport Undocumented Immigrants

by Christopher Zoukis

Donald Trump spoke ill of the undocumented immigrant population during his run for president and promised to ramp up deportation efforts if elected. As president, he is making good on his campaign promise.

According to Reuters, the U.S. Department of Homeland Security (“DHS”) has greatly increased its use of so-called 287(g) agreements with state and local authorities. These agreements, authorized by the Immigration and Nationality Act, essentially deputize local law enforcement officers to perform some federal immigration duties, such as checking immigration status and issuing federal immigration detainers.

A Mother Jones report indicates that while this activity has been limited since 2012 to a “jail enforcement” model, which allows deputized officers to “interrogate arrested individuals about their immigration status and issue immigration detainers on inmates,” the new DHS directive expanding the program also contemplates greater use of the “task force officer” model. This controversial method, used heavily by former Sheriff Joe Arpaio of Maricopa County, Arizona, allows police to question and arrest anyone they suspect to be undocumented.

The Reuters investigation uncovered documents revealing that DHS has reached out to “scores” of state and local agencies about entering into 287(g) agreements.

“It fits right into what Trump wants to do,” said Bill Ong Hing, an immigration law professor at the University of San Francisco. “He promised to establish an army charged with rounding up and deporting undocumented immigrants. [287(g) agreements] are a convenient way for him to expand that deportation force.”

The efforts, spearheaded by former DHS Secretary John Kelly, who referred to the program as “a highly successful force multiplier” and “critical to an effective enforcement strategy,” have been successful. According to the Reuters report, the number of 287(g) agreements has doubled in the 10-month period between February and December 2017. Thirty-eight other jurisdictions have expressed interest in the program, eight of which are looking into the task force officer model.

According to U.S. Immigration and Customs Enforcement, 287(g) agreements “led to the identification of more than 402,000 removable aliens” from January 2006 to September 2015. Those numbers are sure to spike as federal immigration authority and methods infiltrate local law enforcement.

But not everyone in law enforcement thinks that these agreements are a good idea. Mother Jones reports that the Major Cities Chiefs Association (“MCCA”), a group of police chiefs and sheriffs from the largest cities in the United States and Canada, has expressed concern over cooperation between local police and federal immigration agents. In 2013, the MCCA noted that this type of relationship “undermines the trust and cooperation with immigrant communities which are essential elements of community oriented policing.”

Additionally, civil rights advocates worry about the impact of 287(g) agreements on local communities. The American Civil Liberties Union has called it “one of the worst federal immigration enforcement programs.”

And Shiu-Ming Cheer, senior staff attorney at the National Immigration Law Center, worries about the potential “chilling effect” of 287(g) agreements.

“Immigrants will start seeing law enforcement as deportation agents,” said Cheer. “It’s going to create a wider sense of fear.” As a result, members within immigrant communities will fear calling and cooperating with police when they are witnesses to or even victims of crimes.

Source: motherjones.com
‘Black Identity Extremists’ Added to FBI List of Domestic Terrorists

by Christopher Zoukis

A new FBI report published in August 2017, and leaked two months later, identified a movement it refers to as “black identity extremists” as a new addition to the growing number of groups the agency considers possible domestic terrorists.

According to McClatchyDC.com, the report defines black identity extremists as individuals who, in response to “perceived racism and injustice in American society,” seek to use force or violence, sometimes in furtherance of “establishing a separate black homeland or autonomous black social institutions, communities or governing organizations within the United States.” In addition, the report claims that black identity extremists engage in “premeditated, retaliatory lethal violence against law enforcement.”

This label, combined with the overly broad definition of domestic terrorism in the USA PATRIOT Act, could lead to “abusive and unjustified investigations,” said American Civil Liberties Union National Security Project Director Hina Shamsi.

“We are worried that protestors are increasingly being labeled as terrorism threats,” said Shamsi.

Shamsi’s concerns may be well-founded. A letter from 84 members of Congress to the U.S. Department of Justice requests that Dakota Access Pipeline protestors be labeled as domestic terrorists. While the designation is not necessarily a criminal charge, Shamsi told McClatchyDC.com that the label makes it easier for police agencies to surveil affected groups.

“This has absolutely been a pattern by federal, state and local law enforcement, “ said Shamsi. “And it is absolutely subject to rhetorical and political manipulation, and there is real danger that arises from that.”

According to former FBI agent Michael German, being labeled a domestic terrorist allows the FBI to surveil “basically anyone who’s black and politically active.” German, who worked in domestic terrorism at the FBI and is now a fellow at the Brennan Center, doesn’t believe that there is enough ideological coherence to connect the very few attacks on police by black individuals together into a terrorist movement.

“They’re talking isolated incidents and turning it into a movement to justify increased surveillance,” said German. “It’s throwing fuel on this argument of a war on police by black people, even though if you look at the numbers that’s not the case.”

The FBI refused to comment on the leaked report specifically, but said in a statement that it is prohibited from “initiat[ing] an investigation based solely on an individual’s race, ethnicity, national origin, religion, or the exercise of First Amendment rights.” The statement went on to declare that the FBI’s focus “is not on membership in particular groups but on individuals who commit violence and other criminal acts.”

Shamsi told McClatchyDC.com that the classification of “black identity extremists” as domestic terrorists may be unique to the Trump administration, but the labeling of minority groups in this way is not. “There is no question that people who have been singled out include Muslims, black activists and environmental and animal rights activists, regardless of the administration,” said Shamsi.

Erroll Southers, director of the University of Southern California’s Homegrown Violent Extremism Studies at the Sol Price School of Public Policy, warned: “This document has been distributed to 18,000 law enforcement agencies in the United States, some of whom have intelligence capacity. So when they get a document that speaks to the topic of domestic terrorism, and they’re given these guidelines on what to look for, this ups the ante in regards to people they come in contact with.”

Sources: mcclatchydc.com, thinkprogress.org

Colorado Supreme Court: Conviction of Drunk Motorist for Attempted Reckless Manslaughter and Attempted Second Degree Assault Requires Risk to Discernable Person, Not Merely Public At-Large

by Christopher Zoukis

The Colorado Supreme Court struck down the convictions of a habitual drunk driver because the convictions — one for attempted reckless manslaughter and one for attempted second-degree assault — required that an actual, discernable person be placed at risk, and the evidence did not establish that fact. The January 22, 2018, opinion upheld an appellate court ruling that the convictions must be dismissed.

Isidore Griego had a long history of DUI arrests. On December 26, 2005, he was followed for several miles by Arapahoe County Officer Dan Hyde. While following Griego, Hyde observed him swerve across the center line, onto the shoulder, and into a ditch.

After Griego ran over a street sign, went through a red light, and hit a curb in an apartment complex, Hyde pulled him over. He smelled a strong odor of alcohol, and noted that Griego’s speech was slurred to the point of being incomprehensible. The only other vehicle on the road during the episode was a car traveling in the opposite direction, but Griego’s car never got closer than about 100 to 150 feet. Hyde determined that Griego’s vehicle “was never an imminent danger to [the other car]” and that “Griego’s weave into the center lane area did not jeopardize or threaten any oncoming traffic,” so he arrested him for DUI.

Griego was again arrested for DUI on October 7, 2006. He was discovered parked at an intersection, asleep at the wheel. Officer John Jones pounded on Griego’s window and yelled at him to wake up. After five minutes of banging on the window, Griego woke up and was arrested for DUI.

Soon thereafter, the district attorney’s office launched an investigation into Griego’s DUI history, with the intent of filing more serious charges. After a lengthy investigation, Senior Investigator Thomas Malone determined that he “personally did not believe it to be appropriate” to file any charges other than DUI.

Despite Malone’s conclusion, the district attorney’s office charged Griego with attempted reckless manslaughter and attempted second-degree assault — both Class 5 felonies — but not DUI. Griego moved to dismiss the charges, but his motion was denied. He was
The appellate court found, and the Colorado Supreme Court agreed, that the statutes at issue require evidence that another, discernible person was put at risk—a threat to the general public at large was not sufficient. The Colorado Supreme Court reached this conclusion for several reasons.

First, the Court found that “the plain language of the reckless manslaughter and second degree assault statutes expressly contemplates death or injury to another person.” To hold that intent to harm a member of the general public was enough “would effectively read the phrase ‘another person’ out of the pertinent statutes, which we may not do.”

Second, the Court found no case in which a court upheld a conviction for either crime when the case involved “a risk to the public at large,” rather than to a discernible victim. The Court differentiated between crimes against the person, like what Griego was charged with, and traffic offenses. “Reckless manslaughter and second degree assaults are crimes against the person that require that a discernible victim be put at risk,” wrote the Court. “Crimes against the public peace and traffic offenses, in contrast, generally do not.”

Third, the Court reasoned that taking the People’s arguments to their logical end would result in an absurdity. Under the People’s theory, “every DUI and innumerable other driving offenses, which are ordinarily misdemeanors, could be charged as attempted reckless manslaughter or attempted second degree assaults.” Such an outcome, warned the Court, “could also implicate equal protection concerns.”

Finally, the Court ruled that the People’s interpretation of the statutes provided no “discernible limiting principle.” Without the requirement that an actual person be placed in danger, “prosecutors would be permitted to charge attempted reckless manslaughter or attempted second degree assault for a broad array of arguably risky conduct, including … speeding, running a red light, or distracted driving.”

Ultimately, the Court determined that no evidence was presented from which a jury could conclude that an actual, discernible person was put at risk by Griego’s charged conduct. In the first incident, the People’s own witness testified, without contradiction, that Griego’s actions did not put any actual, discernible person at risk. In the second incident, the evidence clearly established that no cars or pedestrians were present. As such, the convictions could not stand since the evidence did not support them, though DUI convictions most certainly would have.

Accordingly, the Colorado Supreme Court affirmed the judgment of the court of appeals and remanded the case to that court with instructions to remand to the district court for entry of judgment of acquittal on all counts. See: People v. Griego, 409 P3d 338 (Colo. 2018).

---

Federal Judge Excludes Evidence After FBI Lies on Search Warrant Affidavit, Geek Squad on FBI payroll

by Matt Clarke

The federal child pornography case against a California doctor was dismissed after the judge excluded all the evidence seized from his home because an FBI agent lied on the affidavit supporting the search warrant for his home, falsely claiming technicians working on the doctor’s computer had discovered child pornography.

Oncologist Dr. Mark Rettenmaier brought a computer to the Geek Squad at Best Buy for repair. It was sent to the company’s central repair facility in Kentucky. There, technicians discovered a photo of a naked girl in the unallocated space of the computer’s hard drive. The photo did not depict a sex act or show the approximately 9-year-old girl’s genitalia. The technicians had an agreement with the FBI office in Louisville in which they were paid each time they tipped the FBI to child pornography on computers they repaired, so they reported the photo.

FBI Special Agent Cynthia Kayle prepared an affidavit for a search warrant of Rettenmaier’s home falsely stating that the image found was child pornography, and not mentioning that it was found in the unallocated space or that the FBI paid the Geek Squad technicians who reported it. Unallocated space is where portions of deleted files remain until the computer overwrites them, and images within the area are often missing information such as when it was created, accessed, or deleted. Courts have ruled that such images alone are not proof of possession by the computer’s owner. Further, the image was “child erotica,” not child pornography. Possessing child erotica is not illegal.

The search warrant was issued and hundreds of child pornography images were discovered on Rettenmaier’s iPhone.

Rettenmaier’s attorney, James D. Ridder, discovered payments of about $500 to some technicians described as “confidential human sources” in FBI internal records. He raised the issue of whether the technicians were de facto employees of the FBI requiring a search warrant.

U.S. District Judge Cormac J. Carney rejected the idea that Rettenmaier had any expectation of privacy in a computer turned over to technicians to recover data. However, he ruled that the search was illegal because he would not have authorized the search warrant had the FBI told the truth—that there was a single image of child erotica found in the computer’s unallocated space.

“One image of child erotica is simply not sufficient to search Dr. Rettenmaier’s entire home, the place where the protective force of the Fourth Amendment is the most powerful,” said Judge Carney in ruling the seized evidence inadmissible.

Federal prosecutors filed a notice of appeal, but missed the filing deadline for their brief. With insufficient remaining evidence, they filed a motion to dismiss the case, which was granted.

The broader unresolved issue is whether Geek Squad technicians, against the wishes of Best Buy, are acting as de facto agents of the FBI in light of the bounty paid to them when they alert the bureau to questionable material discovered on a client’s computer. Privacy advocates warn that such an arrangement has the potential of encouraging Geek Squad technicians to snoop around in computers beyond what is necessary to repair them. If that’s in fact what some technicians are doing with the intent to find evidence of criminal activity, then the arrangement is inappropriately bypassing the Fourth Amendment.

Source: watertowndailytimes.com, washingtonpost.com
A prisoner may sign and deliver a habeas-related motion to prison officials for timely mailing under the “prisoner mailbox rule” on behalf of another prisoner, the U.S. Court of Appeals for the Fifth Circuit held on January 12, 2018.

After the U.S. District Court for the Northern District of Texas denied John Uranga’s habeas corpus petition under 28 U.S.C. § 2254, challenging his life sentence in state prison for possessing less than 4 grams of methamphetamine as a habitual felony offender—a fellow prisoner helping him with his petition signed Uranga’s name on his behalf and mailed a motion to “reconsider” the court’s judgment under Federal Rule of Civil Procedure 59(e). This was to ensure Uranga would meet the deadline for filing since the prison was on lockdown. The district court denied Uranga’s motion as untimely filed, and he appealed.

On appeal, there were several issues. The first issue was whether Uranga’s Rule 59(e) motion was timely filed to toll the time to appeal. The next issue was whether the motion was actually an improper “successive” habeas petition. The final issue was whether Uranga was entitled to relief on the actual claim in his habeas petition.

Under 28 U.S.C. § 2253, a court of appeals does not have jurisdiction to hear an appeal from the denial of a § 2254 petition unless a certificate of appealability (“COA”) has been granted, finding that the petitioner’s issues are debatable or should proceed further. While the district court had refused to grant Uranga a COA, a judge on the Fifth Circuit did, effectively giving the Court jurisdiction to hear the appeal.

The next jurisdictional hurdle was whether Uranga’s Rule 59(e) motion was timely filed. A Rule 59(e) motion is timely if filed within 28 days of the judgment it is attacking, which in this case was § 2254 judgment. If Uranga’s Rule 59(e) motion was filed after the 28-day filing period, it would not have tolled the time to appeal.

In Houston v. Lack, 487 U.S. 266 (1988), the U.S. Supreme Court “held that a pro se prisoner’s notice of appeal under Federal Rule of Appellate Procedure 4(a)(1) is deemed filed as of the date the notice is delivered to prison officials for mailing.” This is commonly referred to as the “prisoner mailbox rule.” The Fifth Circuit subsequently extended the prisoner mailbox rule to other filings by pro se prisoners, specifically including Rule 59(e) motions. Brown v. Taylor, 829 F.3d 365 (5th Cir. 2016).

In the present case, Uranga arranged for a fellow prisoner who was helping him with his habeas petition, Gordon Ray Simmonds, to file a declaration that it was necessary for him to sign Uranga’s motion on his behalf and deliver it to prisoner officials for mailing in order to meet the filing deadline. Simmonds explained that he had to sign Uranga’s petition and deliver it to prison officials because the facility was on lockdown at the time, and that was the only way for Uranga to meet the filing deadline.

The State argued that because Uranga himself did not sign and deliver his Rule 59(e) motion to prison officials, the prisoner mailbox rule did not apply, and thus Uranga’s motion was filed after the 28-day deadline. The district court agreed. It concluded that since Simmonds was a non-party and not a licensed attorney he lacked authority to sign Uranga’s motion on his behalf. In addition, the court concluded that the prison mailbox rule does not apply when a motion is given to a fellow prisoner to deliver to prison officials for mailing. The Fifth Circuit disagreed.

The Court pointed out that the district court failed to apply specific rules applicable to § 2254 proceedings that permit someone other than the prisoner or licensed attorney to sign a habeas petition under specific circumstances. Under § 2242, “an application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.” The Court explained this “next friend” rule applies when the filing explains (1) why the petitioner himself cannot sign the filing, and (2) the relationship and interest of the person signing for the petitioner as a “next friend.” While § 2242 mentions only habeas petitions, the Court expanded the statute to apply to habeas-related filings, such as those under Rule 59(e).

The Court concluded that there is no requirement under the prisoner mailbox rule for the prisoner himself to personally deliver the documents to be filed to prison officials. That is, a fellow prisoner serving as a “next friend” may deliver the documents under the prison mailbox rule.

The Court noted that the Ninth Circuit similarly held in Hernandez v. Spearman, 764 F.3d 1071 (9th Cir. 2014), that it does not matter who hands the filing to prison officials in order to invoke the prisoner mailbox rule, and in Warren v. Cardwell, 621 F.2d 319 (9th Cir. 1980), that a “next friend” could sign and file a petition where the prison was on lockdown.

Finding that Simmonds had the legal authority to sign Uranga’s petition as a “next friend” and to deliver it to prison officials for mailing, the Court held that Uranga’s Rule 59(e) motion was timely filed under the prison mailbox rule.

The last jurisdictional hurdle was whether Uranga’s Rule 59(e) motion was actually an improper “successive” motion, which the district court ruled it was. A motion under Rule 59(e) or Rule 60(b) challenging a judgment in a habeas action is considered another habeas petition if it raises new grounds for relief or attacks the district court’s reasoning for denying a claim on the merits, the U.S. Supreme Court held in Gonzalez v. Crosby, 545 U.S. 524 (2005). Because 28 U.S.C. § 2244 creates a jurisdictional bar on district courts from hearing successive habeas petitions without authorization from a court of appeals, the district court could not have heard Uranga’s Rule 59(e) motion, if it was truly a successive habeas petition.

However, the Supreme Court also held in Gonzalez that if the motion attacks “some defect in the integrity of the federal habeas proceedings,” it is not a successive habeas petition. The Fifth Circuit concluded that Uranga’s Rule 59(e) motion attacking the district court’s denial of his motion to amend his habeas petition was not an attack on the merits of his claim, but was a proper Rule 59(e) motion attacking the proceedings.
Because Uranga’s Rule 59(c) motion was timely filed and was not a successive habeas petition, the Fifth Circuit concluded that Uranga’s appeal was timely filed and the Court therefore had jurisdiction.

Moving to the merits of Uranga’s claim that he was denied an impartial jury, the Fifth Circuit agreed that one of the jurors was biased against Uranga and that his petition should have been granted.

During a police chase, Uranga had driven onto someone’s lawn and caused property damage. When the video of the chase was played to the jury, one of the jurors realized it was his own lawn Uranga had damaged. When the judge questioned the juror away from the other jurors on whether he could still be impartial, the juror said he could, so the court allowed him to participate in the penalty phase.

The trial court erred, the Fifth Circuit said. The Sixth Amendment of the U.S. Constitution guarantees that an accused has the right to a trial by an impartial jury. Nevertheless, the trial court determined that neither the state constitution nor U.S. Constitution provided for such a claim and dismissed Uranga’s petition.

Although juror bias is found in only “extreme situations,” the Fifth Circuit said, bias may be found when the facts “are such that they would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality.” The video offered by the State during the penalty phase clearly showed that Uranga had damaged the juror’s own lawn. “Damage nonetheless was personal to the juror,” the Court concluded, and found that Uranga’s habeas petition should have been granted.

Accordingly, the Court reversed the judgment of the district court denying Uranga’s § 2254 application and remanded the case to the district court.

Additionally, the Court directed that a writ of habeas corpus be issued, unless he is resentenced within 90 days. See: Uranga v. Davis, 879 F.3d 646 (5th Cir. 2018).

Fifth Circuit: 96-Day Pretrial Detention Without Appearance Before Judge or Chance to Post Bail Violates Fourteenth Amendment Due Process Rights

by Matt Clarke

On October 24, 2017, the U.S. Court of Appeals for the Fifth Circuit held that an indicted Mississippi pre-trial detainee’s Fourteenth Amendment due process rights were violated when she was held for 96 days without appearing before a judge or having an opportunity to post bail.

Jessica Jauch was indicted for sale of a Schedule IV controlled substance based upon the word of a confidential informant. The Circuit Clerk of Choctaw County, Mississippi, issued a capias that was served on her after she was arrested for misdemeanor traffic tickets. She quickly cleared the traffic tickets. She was still held in jail, and her requests to be brought before a judge and allowed to post bail denied because Sheriff Cloyd Halford had a policy that felony arrestees be detained until the next term of the Circuit Court.

Finally, 96 days after her arrest, Jauch was appointed counsel and had bail and a trial date set. Six days later, she posted bail. Within four weeks, the prosecutor reviewed the evidence and promptly moved to dismiss the charges. It was uncontested that Jauch was innocent of the drug charges.

Jauch filed a federal civil-rights action against Sheriff Halford and Choctaw County alleging, among other claims, a Fourteenth Amendment due-process violation. On cross-motions for summary judgment, the district court held that the due-process issue was better analyzed under the Fourth Amendment and then dismissed the case after finding no violation of due-process rights because an indictment is a finding of probable cause for arrest. Jauch appealed.

The Fifth Circuit held that the “excessive detention, depriving Jauch of liberty without legal or due process violated [the Fourteenth] Amendment; for that reason, her motion for summary judgment should have been granted as to the Fourteenth Amendment Due Process claim.” The Court noted that, despite the district court’s analysis, Jauch had not raised a due-process claim under the Fourth Amendment, and such a claim would have been futile. However, the Fourth Amendment is not the only source of a pretrial detainee’s due-process rights. When a person who is legally arrested spends an inordinate amount of time in pretrial detention, the due-process clause of the Fourteenth Amendment is implicated. Jones v. City of Jackson, 203 F.3d 875 (5th Cir. 2000).

Without deciding whether substantive due-process rights were implicated, the Court held that lengthy pretrial detention without access to a magistrate or bail can violate a detainee’s procedural due-process rights. Such a lengthy delay does not have legislative backing. Rather, it conflicts with Mississippi’s legislative decree that all defendants be arraigned within 30 days of arrest. Further, the Court analyzed precedent dating as far back as 1166 in English law, noting that lengthy detention prior to being brought before a judge is historically prohibited, and, when a judge is unavailable, one simply finds another judge so justice is not delayed.

The Court stated that Sheriff Halford, the relevant policymaker, exposed the county to liability under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), by promulgating and enforcing this unconstitutional policy. Under Monell and its progeny, municipal liability requires: (1) an official (or custom), of which (2) a policy maker can be charged with actual or construction knowledge, and (3) a constitutional violation whose “moving force” is that policy (or custom).

Sheriff Halford, the county’s relevant policy maker, “instituted a policy whereby certain arrestees were indefinitely detained without access to courts or the benefit of basic constitutional rights. This unconstitutional policy was the moving force behind Jauch’s constitutional injury,” the Court explained. Thus, the Court concluded that under the Monell line of cases Choctaw County is liable. Accordingly, the Fifth Circuit reversed the judgment and remanded the case for further proceedings consistent with this opinion. See: Jauch v. Choctaw County, 874 F.3d 425 (5th Cir. 2017).
The North Dakota Supreme Court reversed a criminal restitution order because the trial judge misapplied statutory and constitutional law in determining the amount ordered.

On February 27, 2017, Lukas Kostelecky was arrested for criminal mischief, a Class C felony, after damaging a copy machine at New Town High School. He pleaded guilty to criminal mischief, a Class A misdemeanor, and was ordered to pay $3,790 in restitution to the New Town school district.

At the restitution hearing, the state presented a quote of $3,790 to replace the copier. The quote also noted that the depreciated value of the machine was $400. Kostelecky presented evidence that a refurbished copier would cost between $1,111 and $1,795. When ordering the $3,790 in restitution, the trial court judge said, “Now, if, in fact, that makes the school district beyond whole, I can’t make that determination... but that was the amount that was expended to replace the item that was damaged and ultimately destroyed by Mr. Kostelecky.”

Kostelecky appealed, arguing that “restitution does not mean the victim is entitled to buy newer, more expensive items.” After reviewing state law, as well as a 2016 addition to the North Dakota Constitution called “Marcy’s Law,” the North Dakota Supreme Court determined that the trial court abused its discretion in crafting the restitution order.

Marcy’s Law provides victims “[t]he right to full and timely restitution in every case from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct.” Two other North Dakota statutes address restitution: N.D.C.C. § 12.1-32-08(1), which provides that a victim is entitled to “reasonable damages... actually incurred,” and N.D.C.C. § 32-03-09.2, which provides that a victim is entitled to “actual damages.”

Reading the three laws together, the Court found that the purpose of restitution in North Dakota is “to ensure the victim of a crime is made whole.” Specifically, the Court said that “harmonizing these constitutional and statutory provisions together, we conclude a victim is entitled to be made whole through a reasonable restitution amount based on the entirety of his or her actual losses.”

Here, the trial court misapplied the law. While situations may exist where replacement costs are necessary, if an item can be repaired or replaced on a secondary market, “replacement costs may be excessive.” The trial court failed to consider this, as well as the evidence presented by Kostelecky. Indeed, despite what the trial judge said, he could, and in fact is required to, determine whether a restitution order makes a victim “beyond whole.” Accordingly, the Court vacated the restitution order and remanded the case for reconsideration in light of this opinion. See: State v. Kostelecky, 906 N.W.2d 77 (N.D. 2018).

The Rhode Island Supreme Court held that, “from this point forward, Shatney v. State, 755 A.2d 130 (R.I. 2000), shall be deemed abrogated and inapplicable in any case involving both an initial application for postconviction relief and an applicant who has been sentenced to life without the possibility of parole.” It further held that the Shatney hearing given to a prisoner sentenced to life without the possibility of parole (“LWOP”) had not been sufficient to qualify as the evidentiary hearing the court had previously required for prisoners serving LWOP on first application for postconviction relief pursuant to Tassone v. State, 42 A.3d 1277 (R.I. 2012). That is, Tassone mandates that prisoners serving LWOP receive an evidentiary hearing on the merits with respect to the first application for postconviction relief.

Jeremy Motyka, a Rhode Island prisoner serving LWOP, filed his first application for postconviction relief, which was denied. He appealed, and the Rhode Island Supreme Court conducted a comprehensive review of the transcript of the case and found that the hearing on the motion to withdraw “was not the hearing that we required in Tassone.” Shatney had set forth a procedure for withdrawal of court-appointed counsel. It mandated that court-appointed counsel seeking to withdraw file a “no-merit” memorandum detailing the nature and extent of counsel’s review of the case, listing each issue the applicant wishes raised, and explaining why each issue lacks merit. The court must then conduct a hearing with applicant present and, should it agree that the issues lack arguable merit, permit counsel to withdraw and advise the applicant.

Rhode Island High Court Abolishes Shatney in Initial Application for Postconviction Relief by Prisoners Serving Life Without Parole

by Matt Clarke

On December 5, 2017, the Supreme Court of Rhode Island held that, “from this point forward, Shatney v. State, 755 A.2d 130 (R.I. 2000), shall be deemed abrogated and inapplicable in any case involving both an initial application for postconviction relief and an applicant who has been sentenced to life without the possibility of parole.” It further held that the Shatney hearing given to a prisoner sentenced to life without the possibility of parole (“LWOP”) had not been sufficient to qualify as the evidentiary hearing the court had previously required for prisoners serving LWOP on first application for postconviction relief pursuant to Tassone v. State, 42 A.3d 1277 (R.I. 2012). That is, Tassone mandates that prisoners serving LWOP receive an evidentiary hearing on the merits with respect to the first application for postconviction relief.

Jeremy Motyka, a Rhode Island prisoner serving LWOP, filed his first application for postconviction relief, which was denied. He appealed, and the Rhode Island Supreme Court conducted a comprehensive review of the transcript of the case and found that the hearing on the motion to withdraw “was not the hearing that we required in Tassone.” Shatney had set forth a procedure for withdrawal of court-appointed counsel. It mandated that court-appointed counsel seeking to withdraw file a “no-merit” memorandum detailing the nature and extent of counsel’s review of the case, listing each issue the applicant wishes raised, and explaining why each issue lacks merit. The court must then conduct a hearing with applicant present and, should it agree that the issues lack arguable merit, permit counsel to withdraw and advise the applicant.
that further proceedings must be pro se.

The Supreme Court found particularly disquieting that Motyka’s court-appointed counsel, who was arguing against the merits of Motyka’s claims while seeking to withdraw, was advising him on how to answer the hearing justice’s questions and how to submit evidence. The linkage of the ruling on the “no-merit” memorandum and the dismissal of the postconviction application also made the Court uneasy since one is not determinative of the other. Therefore, the Court concluded “that Shatney and Tassone are inconsistent with each other and may not properly be permitted to coexist as it relates to life without parole cases.” Accordingly, the Court vacated the judgment of the superior court and remanded the case for further proceedings. It instructed “that on remand counsel be appointed for Mr. Motyka and that the Superior Court conduct further proceedings in accordance with this opinion and our opinion in Tassone.” See: Motyka v. State, 172 A.3d 1203 (R.I. 2017).

Georgia Supreme Court Vacates Convictions and Sentences Due to Merger Errors

by Matt Clarke

On December 11, 2017, the Supreme Court of Georgia vacated convictions and sentences for aggravated assault and firearms possession due to a merger error.

Thyrrell Depree Donaldson, a Georgia state prisoner, appealed his convictions for felony murder, aggravated assault, and two counts of firearms possession, all in connection with the shooting death of Robert White Jr. The Supreme Court overruled the grounds Donaldson raised, but found two merger errors in his sentencing that he had not raised on appeal.

Donaldson was convicted of firing two shots at White, who was sitting atop the stairs outside Donaldson’s apartment. One bullet missed, but the other one struck White in the back, severing his spinal cord and perforating his aorta. As a result, he could not move his legs and died shortly thereafter due to blood loss.

Donaldson was indicted on six counts: malice murder (Count 1), felony murder predicated on aggravated assault (Count 2), aggravated assault for shooting White in the back (Count 3), aggravated assault for shooting at White and missing (Count 4), possession of a firearm during the commission of a felony (murder) (Count 5), and possession of a firearm during the commission of a felony (aggravated assault) (Count 6).

After he was acquitted of malice murder but found guilty on all other counts, the trial court merged Count 3 with Count 2 and then sentenced him to life for felony murder, a consecutive 20-year term for the Count 4 aggravated assault, a consecutive five-year term for possession of a firearm during the felony murder, and a concurrent five-year term for possession of a firearm during the Count 4 aggravated assault.

The evidence showed that the two shots were fired “back-to-back,” as a part of a single incident. Thus, the shootings did not constitute separate aggravated assaults and the counts should have been merged pursuant to Gomez v. State, 801 S.E.2d 847 (Ga. 2017). Therefore, both aggravated assault counts should have been merged into the felony murder count for sentencing purposes, the Court instructed.

Similarly, because the crimes involved a single victim and a single criminal episode, Donaldson could only be convicted for possession of a firearm during the commission of a crime one time pursuant to Stovall v. State, 696 S.E.2d 633 (Ga. 2008). The Count 6 possession of a firearm during the commission of aggravated assault should have been merged into the Count 5 possession of a firearm during the commission of felony murder. Therefore, the Court vacated the convictions and sentences for Counts 4 and 6 but affirmed the remaining convictions and sentences. See: Donaldson v. State, 808 S.E.2d 720 (Ga. 2017).

‘Serious Bodily Harm’ Does Not Include Animals, Massachusetts Supreme Court Holds

by Dale Chappell

The term “serious bodily harm” does not include harm to animals, unless the statute expressly says so, the Supreme Judicial Court of Massachusetts held, tossing out a youthful offender indictment.

After a 14-year-old juvenile tortured a dog, the Commonwealth indicted him as a youthful offender for cruelty to animals and bestiality under G.L.c. 272, §§ 34, 77. The juvenile court granted the juvenile’s motion to dismiss the indictment because the term serious bodily harm in the youthful offender statute does not include animals. The Commonwealth appealed, and the Massachusetts Supreme Court took the case sua sponte from the Court of Appeals.

A juvenile may be tried as a youthful offender, which includes adult prison time, if the crime would have included prison if he were an adult and he was previously committed under youth services, or if the crime involved serious bodily harm, the Court explained. The question here was whether the term “serious bodily harm” applies only to humans.

Canvassing the Commonwealth’s statutes, the Court concluded that the Legislature expressly included the term “animals” when it wanted the statute to cover or apply to animals. In fact, the Legislature has done so “directly and unambiguously,” the Court noted, listing several statutes criminalizing animal abuse. “Had the Legislature intended the general criminal statutes to protect animals, it need not have enacted animal cruelty laws at all,” the Court said.

The term “serious bodily harm” was put in the youthful offender statute “to limit the number of juveniles being treated as adults,” the Court noted. Until then, it was up to the judge whether a juvenile could be tried as an adult. Based on legislative intent, the youthful offender statute’s ‘serious bodily harm’ applies only to humans, the Court held, affirming dismissal of the indictment.

Accordingly, the Supreme Judicial Court of Massachusetts affirmed the order granting the juvenile’s motion to dismiss. See: Commonwealth v. J.A., a juvenile, 85 N.E.3d 684 (Mass. 2017).
Study: Unionized Police? Increased Misconduct

by Derek Gilna

According to a December 2017 study by University of Chicago Law School researchers, data from Florida indicates that “shielding officers from the consequences of their actions ... result[s] in increased misconduct.” After Florida sheriffs’ deputies were allowed to unionize in 2003, such incidents of misconduct increased.

The researchers wrote, “Our primary result is that collective bargaining rights lead to about a 27% increase in complaints of officer misconduct for the typical sheriff’s office.”

The study found that collective bargaining results in “a lengthy list of extra rights for deputies. While due process should be afforded to everyone, the version of due process citizens make do with contains none of these perks and protections.”

These extra protections include (1) the right to “be informed of the nature of the investigation before any interrogation begins;” (2) the right to receive “all witness statements ... and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recordings relating to the incident under investigation ... before the beginning of any investigative interview of that officer;” and (3) the requirement that all “identifiable witnesses shall be interviewed, whenever possible, prior to the beginning of the investigative interview of the accused officer.”

The clear implication is that deficient or absent officer discipline for clear cases of misconduct appears to foster increased police misconduct. Study authors analyzed this issue in Florida by constructing a “comprehensive panel dataset of Florida law enforcement agencies starting in 1997, and employ a difference-in-difference approach that compares sheriffs’ offices and police departments before and after” the 2003 Florida Supreme Court decision in Coastal Fla. Police Benevolent Association v. Williams, 838 S.2d 543 (Fla. 2003).

As a result of that decision, Florida sheriffs’ deputies are shielded from discipline by the Law Enforcement Officer Bill of Rights, which comprises a wide variety of generous procedural protections for officers facing disciplinary investigations.

The clear result of all of these protections is an increase in both cost and time required to discipline or remove officers with clear records of misconduct from police rolls. These protections limit the deterrent effect of disciplinary mechanisms. Nevertheless, the study indicates that union agreements result in an increase in police misconduct. It is not at all surprising to discover that when people with power are subject to lower accountability, the number of complaints alleging abuse goes up.

Source: techdirt.com

News in Brief

Arkansas: The taxpayers of Walnut Ridge, Arkansas, face a lawsuit that was filed in response to a video-taped incident of unlawful detention, assault, deprivation of rights and, eventually, conspiracy carried out by police officer Matthew Mercado in December 2016. Railroad worker Adam Finley was stopped by Mercado while working at a railroad crossing for Burlington Northern Santa Fe Railroad and asked why he was there. After ordering Finley out of the vehicle, Mercado pushed him, cursed at him, and handcuffed him, detaining Finley briefly before telling him he would “ride the lightning,” next time. When Finley filed a complaint with the Walnut Ridge Police Department, he was cited for refusal to submit and obstructing governmental operations, which the suit described as a ploy to cover up the incident. On April 3, 2018, Finley was acquitted of all charges in Lawrence County District Court. The lawsuit remains pending.

Alabama: William Jeffrey West, 44, entered a not-guilty plea on April 10, 2018, to charges that he killed his wife, 42-year-old Kathleen Dawn West, with a blow to the head from an absinthe bottle. Prosecutors say her blood and her husband’s fingerprints were found on the bottle. “We have a very strong case,” said Roger Hepburn, an assistant district attorney. Her mother, Nancy Martin, believes that William was not involved in her daughter’s death and that an intoxicated fall is to blame. William West had been a corporal with the Birmingham-Southern College police department before Kathleen’s death.

California: Pleasonton City Attorney Dan Sodergren told the Pleasanton Weekly on April 20, 2018, that the municipality had settled for $285,000 a federal lawsuit brought by the family of 19-year-old John Deming Jr., who was shot and killed by then-Pleasanton police officer Daniel Kunkel in 2015. “While the city had strong legal defenses in this case, ultimately, the matter was settled for financial reasons taking into account the expense of litigation and the inherent uncertainty of a jury trial,” Sodergren said. Kunkel no longer works for the Pleasanton Police Department, though Sodergren declined to detail when or why the officer left the department. Criminal charges were not brought in the case.

California: An appeals court decided in April 2018 that the Los Angeles County Sheriff’s Department is not allowed to fire narcotics detective Carlos Arellano, despite evidence that revealed he was involved with a drug-trafficking organization, cultivated marijuana plants, and discussed drug payments in phone conversations. The court did not declare Arellano innocent of the allegations – its ruling only established that conversations caught on a wiretap cannot be used in a disciplinary proceeding. Sheriff’s department spokeswoman Nicole Nishida said the agency is considering whether to appeal to the California Supreme Court. Arellano’s paid administrative leave netted him $130,000 in salary and compensation last year, according to records obtained by the Los Angeles Times.

Florida: The family of a man who was...
shot and killed by police was outraged when detectives showed up at the funeral home where his body was located and attempted to use the dead man’s fingertips to unlock his cell phone. “I just felt so disrespected and violated,” said Victoria Armstrong, whose fiancé, Linus F. Phillip, was shot and killed by a large police officer on March 23, 2018. Lt. Randall Chaney said detectives were trying to access and preserve data on the phone to aid the ongoing investigation into Phillip’s death and a separate case involving drugs. Greg Nojeim, director of the Freedom, Security and Technology Project at the Washington-based Center for Democracy and Technology, said, “If I was writing the rules on this, it would be that the police would need a warrant in order to use a dead person’s finger to open up a phone, and I’d require notice to the family.”

**Florida:** Former Broward Regional Juvenile Detention Center guard Darel Bryant will not face criminal charges from Broward County prosecutors for being caught on video punching a small, slight 14-year-old detainee in the face, including breaking his nose in two places. However, the Department of Juvenile Justice found Bryant’s actions to be a case of “excessive force” and the guard subsequently resigned. An April 23, 2018, report from the *Miami Herald* alleged that Bryant was also one of several guards who encouraged a “Fight Club” among juvenile detainees by offering the teens honey buns, hamburgers or other treats as a reward for attacking another child. Jeffrey Butts, director of the Research and Evaluation Center at the John Jay College of Criminal Justice in New York, said, “The behavior of staff toward youth suggests an atmosphere of pervasive violence in the facility, which the state is choosing to ignore. The question is why?”

**Georgia:** A group of roughly 400 heavily militarized police officers aggressively patrolled a small neo-Nazi rally in the city of Newnan on April 21, 2018, and arrested 10 counter-protesters for refusing to remove the masks they wore to avoid being identified by both law enforcement and neo-Nazis. The lead officer in the arrests said the counter-protesters were breaking a state law regarding masks, likely in the arrests said the counter-protesters were breaking a state law regarding masks, likely referring to a law enacted in 1951 to combat the Ku Klux Klan. “The irony of enforcing masking laws to prosecute leftists is just incredible,” said Molly, a counter-protester from Charlottesville, Virginia, who traveled to Georgia to protest neo-Nazis. “And to be roughing up anti-Nazi protesters while handling literal Nazis with kid gloves... it’s absurd,” she added.

**Georgia: An Alpharetta police officer spoke out after being fired for defying his supervisor’s directive to criminally cite any driver who was involved in a minor fender-bender automobile accident, regardless of the severity of damage or injury. When asked what the primary motivation was for being ordered to write so many needless tickets, former Officer Daniel Capps said his supervisor was “just one of those guys who likes writing tickets,” and “gets off on, in their words, causing other people pain.” Alpharetta City Manager James Drinkard said in an April 16, 2018, statement to CBS46, “While the decision to terminate employment was based, in part, on the former employee’s decision to ignore lawful departmental policy and refuse to properly cite at-fault drivers who caused traffic crashes that resulted in property damage, that behavior was part of a pattern of performance and poor decision making that was simply not acceptable.”

**Illinois:** The City of Chicago paid out $20.3 million in settlements to resolve police-involved lawsuits in the first eight weeks of 2018 alone. For some perspective, an analysis of Chicago’s records shows police misconduct cost the city $2.2 million for the first eight weeks of 2016 and $6.1 million for 2017. According to an April 17, 2018, CBS report, about half of those taxpayer dollars were forfeited to plaintiffs who alleged excessive force, false arrest and illegal search and seizure. Attorney Jon Loewy, who has several cases pending against the city, said, “From an economic standpoint, dollars and cents, it would be cheaper to solve the problem than to keep paying out on lawsuits.”

**Illinois:** Members of an activist campaign called No Cop Academy organized a sit-in at Chicago’s City Hall on March 28, 2018, to protest Mayor Rahm Emanuel and the city’s plans for a $95 million police training center scheduled to be built on Chicago’s west side. Students and community members held space in the lobby for nearly six hours despite attempts by police to restrict the demonstrator’s access to public bathrooms and to confiscate food and drink items delivered to the activists. Organizers collected 877 community recommendations for how the money could better be spent. Fifty-one percent suggested the money be spent on schools and youth resources. Twenty percent suggested the city invest in community spaces, mental health clinics, or substance abuse clinics. Twenty percent suggested the money go toward addressing homelessness and reclaiming abandoned properties that are in disrepair.

**Louisiana:** State Senator J.P. Morrell is trying to revise Oklahoma’s bestiality law to make the language of the bill constitutional, and to clarify what entails bestiality under the law. In an April 9, 2018, vote, the state Senate passed SB236 by a vote of 25-10 and it moved forward for consideration by the House. Sen. Bret Allain said in an email that the bill needs work. He wrote that he and other senators declined to support the bill “from positions related to redundancy with current law and a lack of a mental health / behavioral treatment component to punishment that deals with the root causes of such actions to name a few.” The state technically has an anti-bestiality statute on the books, but the problem is that lawmakers tied it to a homophobic sodomy law, which, like all others nationwide, was rendered unconstitutional after the 2003 U.S. Supreme Court case *Lawrence v. Texas.*

**Michigan:** Longtime Detroit police officer Jerold Blanding has been the subject of multiple controversies ranging from shooting unarmed citizens to shooting a (presumably) innocent pigeon. Blanding once again made news on April 11, 2018 when he was charged with three counts of possession of firearm while under the influence, eight counts of resisting and obstructing the police, and six counts of felony firearm. The criminal counts stem from a January incident in which Blanding was on restricted duty due to the fatal shooting of a teen in 2017. Detroit police found him at the scene of a car crash smelling like booze, slurring his words, and illegally carrying three guns. He apparently knew the crash victim and attempted to obstruct first responders from rendering aid, according to prosecutors.

**Montana:** On April 18, 2018, three unidentified Billings police officers were disciplined, but not criminally charged, after video footage was discovered of them having sex with former Billings employee Rawlyn Strizich on city property. All the men admitted to the inappropriate conduct. Two of the officers were suspended for two weeks because they were on duty at the time of the encounters, which occurred in the department’s storage facility. The third, who was off-duty when the sexual encounter occurred in his patrol car, received a one-week suspension. Police Chief Rich St. John said sexual misconduct was not the initial focus of the investigation. The video was discovered while Strizich was suspected of stealing oxycodone and other opioids from evidence. She was fired from her job as a city hall clerk in February 2018.

**New Jersey:** Ruben McAusland, 26, an officer with the Paterson Police Department,
was arrested on April 20, 2018, for selling drugs to an undercover FBI agent between October 2017 and April, 2018. According to a statement from the U.S. Attorney’s Office, McAusland is accused of selling at least 35 grams of marijuana, 48 grams of heroin, 31 grams of cocaine and 31 grams of crack from his patrol car while parked near police headquarters. “It’s a surprising case – that an officer, who is suspected to be preventing the sale of drugs, did just the opposite,” FBI spokesman Will Skaggs said. If convicted of all charges, McAusland could face up to 40 years in prison.

New York: A new website operated by the Legal Aid Society will allow New Yorkers to automatically generate a Freedom of Information Law request to determine if they have been labeled as a gang member in the NYPD’s Electronic Case Management System. “The NYPD’s gang database is black-box of secrecy in desperate need of sunlight,” Anthony Posada, supervising attorney of the Community Justice Unit at the Legal Aid Society, told Pix11.com on April 18, 2018. “This website will complement our current efforts to help New Yorkers – especially those from communities of color – determine if they have been caught in the NYPD’s gang labeling dragnet,” he added. The site is free and can be accessed at legalaidfoil.backspace.com.

North Carolina: In an effort to prevent the “militarization” of law enforcement in the City of Durham, the City Council voted on April 16, 2018, to ban Durham’s police department from participating in military-style training exchanges with Israel. Cops across the country routinely travel to Israel to receive training exchanges with Israel. Cops across the country routinely travel to Israel to receive training exchanges with Israel. Cops across the country routinely travel to Israel to receive training exchanges with Israel. Cops across the country routinely travel to Israel to receive training exchanges with Israel. Cops across the country routinely travel to Israel to receive training exchanges with Israel.

Tennessee: On April 17, 2018, Memphis police officers Kevin Coleman and Terrion Bryson were charged with possession of a controlled substance with intent to manufacture, deliver, and sell — along with criminal attempt felony and possession of a firearm during the commission of a felony. The pair was busted following a sting by the Memphis Police Department’s Organized Crime Unit. The investigation began after authorities received a tip that Coleman and Bryson were stealing money and drugs during traffic stops. The investigation expanded when the pair told the undercover officer they wanted $10,000 to “offer security for the shipment of narcotics.” The dirty cops then agreed to protect 2.5 kilograms of heroin, according to the arrest affidavit. Coleman and Bryson were arrested after they escorted the “shipment” to a storage unit and were given an additional $5,000 by undercover officers.

United Kingdom: On April 10, 2018, Detective Constable Richard “Dick” Holder was fired after being caught advertising himself as a sex worker on an adult site. Chief Constable Giles York said the man was on sick leave while he solicited prostitution clients on the AdultWork site, adding that Holder had struggled with “underperformance,” as well as a “pattern of disruptive behavior that has been on the verge of criminal at times” during his police career. Holder was the second police officer in the Sussex area to lose his job after being caught working as a prostitute in the last two years. In 2016, police constable Daniel Moss was suspended from duty after a similar incident.
**Hepatitis and Liver Disease: What You Need to Know**, by Melissa Palmer, MD, 471 pages. $129.99. 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. 2013

**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. 2018

**Prisoners’ Self-Help Litigation Manual**, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 928 pages. $39.95. 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! 2010


**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. 2017

**Advanced Criminal Procedure in a Nutshell**, by Mark E. Cammack and Norman M. Garland, 3rd edition, 505 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. 2017

---

**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</td>
<td>$96</td>
<td>$192</td>
<td>$288</td>
<td>$384</td>
</tr>
</tbody>
</table>

(Attorneys, agencies, libraries)

**Subscription Bonuses**

- 2 bonus issues for 26 total issues 2019
- 3 years - 4 bonus issues (40 total) or a free book (see other page) 2019
- 4 years - 6 bonus issues (54 total) or a free book (see other page) 2019

(All subscription rates and bonus offers are valid as of 2-1-2018)

---

**Purchase with Visa, MasterCard, AmEx or Discover by phone:** 561-360-2523

Or buy books and subscriptions online: www.criminallegalnews.org

---

**Mail Payment and Order to:**

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

**All purchases must be pre-paid. Prisoners can pay with new first-class stamps (strips or books only, no single stamps), or pre-stamped envelopes, if allowed by institutional policies.**

**Please Change my Address to what is entered below**

**Mail Order To:**

Name:

DOC #: 

Suite/Cell: 

Agency/Inst: 

Address: 

City/State/Zip: 

---

**Books Orders**  

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

- 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: 

---

**Subscribe to Criminal Legal News**

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

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

---

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

---

**No refunds on CLN subscription or book orders 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.**
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.
Subscription Renewal — 05/18
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!