S
tudies have shown that racial mi-
norities are overrepresented among the
known wrongful convictions. But even this
simple and easily provable statement runs
afoul of several difficulties, including a lack
of clear definitions for key terms.

The meaning of “race” is not clearly de-
cined. Further, perhaps due to a lack of a clear
definition of race, the breakdown of statistics
by racial groups is not standardized. Most
criminal justice statistics list racial group sub-
divisions of White, Black, and Hispanic. Yet
there is no clear definition of what constitutes
White or Black, and Hispanic is not a racial
group at all, but rather an ethnic group made
up of multiple races. Further, this type of
designation lumps people of Asian ancestry
in with Whites and lists Native Americans
as White or Hispanic while ignoring those of
mixed racial heritage altogether.

One way to mitigate this problem is to al-
low people to self-identify their racial identity,
but this inevitably leads to totals in excess of
110% as some people identify with more than
one racial and/or ethnic group. Given these
problems, any statistical study involving race
and the criminal justice system must be care-
fully scrutinized.

“Wrongful conviction” is also subject to
differing interpretations. Some would include
any conviction that is reversed for reasons oth-
er than improperly admitted non-confessional
evidence of guilt and for which there was no
subsequent conviction. Others insist that the
wrongfully convicted consists only of people
who were convicted but are “provably innocent
of any crime.”

The advent of DNA forensics also has
opened up another definition of wrongfully
convicted — “those who were subsequently
exonerated by DNA evidence.” When com-
paring information from studies of wrongful
convictions, one must be careful to first de-
termine what the authors mean by wrongful
conviction.

Another consideration is that the vast
majority of wrongful convictions are never
proven. Most estimates put the percentage of
wrongful convictions at 4%. With about a mil-
lion felony convictions in the U.S. each year,
one would expect there to be around 40,000
exonerations. Yet 2016 saw a record number
of exonerations—166. This implies that many
thousands of wrongful convictions go undis-
covered each year. The reasons for this might
be a short sentence, a lack of evidence proving
innocence, unproven (or undiscovered) police
perjury, or even a mistaken eyewitness, but the
fact that so many wrongful convictions are
undiscovered leaves open the possibility that
those which are proven are not a representa-
tive sample of all wrongful convictions. For
instance, it is known that DNA exonerations
are most common in cases of murder and
sexual assault because those are the type of
crimes that often generate DNA evidence.
Yet, in the vast majority of crimes, no DNA
evidence is present, so no DNA exoneration
is possible.

Minority Overrepresentation
in Wrongful Convictions

Blacks are overrepresented at every
level of the criminal justice system but no-
where more so than in the percentage of
known wrongful convictions. As of 2016,
Blacks, who comprise less than 13% of the
population of the U.S., account for 47% of the
exonerations listed in the National Registry
of Exonerations. They make up 67% of the
exonerations proven by DNA evidence. The
percentages would be even higher if group
exonerations were not excluded from most
exoneration databases. Group exonerations
involve nearly 100% minorities because the
crooked cops who set up the bogus charges
that result in group exonerations almost
always target minority communities. That is
where you find people lacking the political
and financial wherewithal to combat corrupt
cops and other actors within the criminal
justice system.

Of the at least 1,840 people exonerated
between 1995 and 2017 in group exonera-
tions, the races of 1,657 are known. Of those,
1,486 (90%) were in group exonerations that
overwhelmingly involve Black defendants.
The remaining 10% were in group exonera-
tions that overwhelmingly involved Hispanic
Prison Education Guide
Christopher Zoukis
ISBN: 978-0-9819385-3-0 • Paperback, 269 pages

Prison Education Guide is the most comprehensive guide to correspondence programs for prisoners available today. This exceptional book provides the reader with step-by-step instructions to find the right educational program, enroll in courses, and complete classes to meet their academic goals. This book is an invaluable reentry tool for prisoners who seek to further their education while incarcerated and to help them prepare for life and work following their release.

The Habeas Citebook: Ineffective Assistance of Counsel, Second Edition
Brandon Sample & Alissa Hull
ISBN: 978-0-9819385-4-7 • Paperback, 275 pages

The Habeas Citebook: Ineffective Assistance of Counsel is the first in a series of books by Prison Legal News Publishing designed to help pro-se prisoner litigants identify and raise viable claims for potential habeas corpus relief. This book is an invaluable resource that identifies hundreds of cases where the federal courts have granted habeas relief to prisoners whose attorneys provided ineffective assistance of counsel.

Dan Manville

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

The Habeas Citebook: Prosecutorial Misconduct
Alissa Hull

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

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

By: ☐ check ☐ credit card ☐ money order

Name _______________________________________________________________

DOC/BOP Number ___________________________________________________

Institution/Agency ___________________________________________________

Address _____________________________________________________________

City ____________________________ State _____ Zip _______________

Shipping included in all prices.
defendants. The vast majority of the group exonerations were for bogus drug charges.

Group exonerations are excluded from many exoneration databases due to the decision by the keepers of those databases that they should include not the wrongly convicted, but the provably factually innocent. Those same gatekeepers of exoneration statistics believe that group exonerations provide insufficient information to prove innocence. Thus, they skew the information available on wrongful convictions in many ways — including racial composition of exonerees, types of crimes they were convicted of, percentage who pleaded guilty, and reason for wrongful conviction. For instance, most of the people exonerated by DNA evidence were convicted of a sex crime or murder. Most exonerated in group exonerations were convicted of drug offenses. Likewise, most people exonerated by DNA evidence had eyewitness misidentification as the leading cause of their wrongful conviction, but all group exonerees had police perjury as their leading cause. Further, only 6% of DNA exonerees pleaded guilty; whereas, about 80% of the provably factually innocent group exonerees pleaded guilty. [CLN, Sept. 2019, P.1].

Even worse than the exclusion of group exonerations from the databases is the total exclusion of wrongful convictions for misdemeanors. Perhaps this is because misdemeanors are considered too minor to bother with, since they do not result in years or decades of imprisonment. But the effect misdemeanors have on poor people can be devastating. Even brief periods of incarceration in a jail can cause the loss of a job, housing, and child custody. Likewise, a criminal record with a misdemeanor conviction can close future opportunities for housing, education, and employment. What to the moderately affluent is a matter of “paying the fine and getting on with your life” becomes a life-altering experience for those too poor to pay a fine, make bail, or hire an attorney. It can also be the start of a journey that ends in prison.

Misdemeanor-to-Prison Pipeline

As in every other level of the criminal justice system, minorities are overrepresented in misdemeanor courts. The petty-offense machinery often criminalizes completely harmless conduct that disproportionately brands people of color as criminals – reinforcing racial stereotypes already present in the criminal justice system. The consequences of misdemeanor convictions are serious and long-term, including arrests, fines, fees, incarceration, humiliation, and onerous conditions of probation, stigmatization, and a criminal history that may diminish future opportunities for employment, education, housing, and credit. Of course, incarceration can also carry with it the immediate loss of employment, housing, and/or custody of children as well as stress on family relationships that can lead to estrangement or divorce.

Misdemeanors have greater consequences for poor people, and minorities make up a greater percentage of the poor. In most instances, the government does not provide a defense attorney for misdemeanor prosecutions, and the less affluent cannot afford one. They often cannot afford bail. Therefore, when faced with a decision of whether to languish in jail for months or even years awaiting what the criminal justice system considers to be a low-priority trial, poor people charged with misdemeanors often plead guilty just to gain immediate release from jail – even if they know they are not guilty of a crime.

This aspect of the innocent poor pleading guilty was recently highlighted when a newly elected district attorney in Houston, Texas, insisted on having the crime lab test substances the police alleged were drugs even when the person charged with the crime had already pleaded guilty. The crime lab had been so backlogged that people who maintained their innocence but could not afford bail were kept in the county jail for months while those willing to plead guilty were often released the same day they entered their pleas. The testing found 134 people who had pleaded guilty to low-level drug crimes when the items they possessed were not controlled substances. Thus, having committed no crime, they pleaded guilty solely to gain release from jail. Only a third of the offenses were misdemeanors, showing that the pressure to plead guilty to get out of jail even influences innocent felony defendants. This proof of the coercive effect of jailing people arrested for minor, non-violent crimes led the courts and district attorney to re-evaluate whether bail should be charged in such cases and whether possession of small amounts of marijuana should even be prosecuted.

Unfortunately, other populous counties in Texas have not learned from Harris County’s experience. Travis and Galveston Counties jail 69% of people charged with...
Racism & Wrongful Convictions (cont.)

misdemeanors; Dallas County jails 42% – the least of the 10 most populated Texas counties.

The over-jailing of misdemeanants is racially disproportionate. For instance, in Travis County, 35% of the people booked into jail for misdemeanors are Black, but Blacks make up only around 9% of the county’s population. Many of the people booked into jail were charged with fine-only misdemeanors that do not carry jail time as a possible penalty.

Jailing misdemeanor defendants is costly. In addition to potentially costing the defendants their jobs, housing, or children, it is estimated to have cost the taxpayers in the ten most populated Texas counties $51 million to jail people charged with misdemeanors in 2016.

Even when an innocent misdemeanor criminal defendant is willing to wait in jail for a day in court, there is no assurance of success. Misdemeanor prosecutions are “quick and dirty.” It adjudicates defendants in “speedy, sloppy, disrespectful ways without careful attention to evidence or rules.” The misdemeanor system presumes poor minorities should be treated as criminals and process them in a way that turns this into a self-fulfilling presumption by incarcerating them, providing no counsel or, at most, a harried public defender swamped by an untenable caseload, pressuring them to plead guilty, and accepting flimsy evidence as absolute proof of guilt. In many misdemeanor prosecutions, the only evidence of guilt offered to support jailing and prosecution is the statement of the police officer who made the arrest that the defendant was loitering, jaywalking, vagrant, trespassing, or resisting arrest. Thus, many misdemeanor defendants are convicted solely by “word of cop.”

The racial disparity in misdemeanor arrests is not limited to Texas. According to FBI statistics, in 2015, Blacks comprised 12.6% of the U.S. population but accounted for 26.6% of its misdemeanor arrests. This included 44.7% of the arrests for curfew violations and loitering and 56.4% of the gambling arrests.

In Urbana, Illinois, 91% of the people ticketed for jaywalking between 2007 and 2011 were Black. Only 16% of the city’s residents were Black.

In Jacksonville, Florida, which is 29% Black, Blacks received 55% of the tickets issued to pedestrians. Almost all were issued in the city’s poorest neighborhoods.

In Baltimore, Maryland, the police department was criticized in 2016 for forms for a trespassing arrest containing blank spaces for the arrestee’s name and address but not for gender or race. Those were preprinted on the form as “BLACK MALE.”

Underpolicing While Overpolicing

Studies have shown that police stereotype minority communities as criminal. Therefore, they focus resources on these “criminal communities” and police them more stringently. Thus, three urban Black men standing on a corner discussing a basketball game are subject to being detained and searched by police and possibly charged with an order-maintenance offense such as vagrancy, loitering, disorderly conduct, public intoxication, or resisting arrest, while three suburban White men having a similar discussion at a street corner need not fear police intervention at all. The effect of this overpolicing is that Black communities suffer a higher arrest rate than White communities.

The higher arrest rates in Black communities reinforce the stereotype of Blacks committing crimes at higher rates than Whites. Studies have shown that Blacks do commit some of the less common felony offenses, specifically robbery and murder, at higher rates than Whites. The studies also show that the higher Black rates of arrest for “contempt of cop” offenses such as disorderly conduct or resisting arrest reflect police discretion, not higher rates of offending. Thus, the skewed misdemeanor arrest rates for Blacks appear to be the product of discriminatory overpolicing, not greater criminality.

Ironically, the very minority neighborhoods that suffer from overpolicing of misdemeanors also suffer from underpolicing of more serious crimes. Perhaps because so many resources are expended overpolicing minor offenses or perhaps because police are too busy arresting and booking misdemeanants, studies have shown that, for Black communities, 911 response times are longer, and homicide clearance rates are lower. Thus, community activists find themselves simultaneously protesting overzealous and intrusive misdemeanor policing while supporting an increased police presence and greater resources for the policing of serious offenses.

Another factor driving the overpolicing of Black communities is the police arrest quota system. Some police departments require officers to make a certain number of arrests per shift. Others exalt officers with the highest number of arrests and assign those with lower arrest rates to less desirable duties. Either approach gives police an incentive to make

---

If You Write to Criminal Legal News

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

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

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

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

While we wish we could respond to everyone who contacts us, we are unable to do so; please do not be disappointed if you do not receive a reply.
arrests. And arrests are most easily made in neighborhoods that are less cohesive and have less political power — poor and minority neighborhoods.

In 2011, Charles Bradley was 51 and had just gotten off the subway in New York City to visit his fiancée. While composing himself on the sidewalk outside her apartment, he was approached by police in an unmarked green van who asked, “What are you doing here?” Despite his polite explanation and his legitimate reason for being at that address, he was arrested, booked into jail, and charged with trespassing.

The arrest nearly cost Bradley his job as a security guard. But he was lucky in that The Bronx Defenders took his case, and a defense attorney obtained a notarized letter from his fiancée that he was visiting her. Afterward, the charges were dismissed.

Bradley’s case is illustrative of NYPD’s Operation Clean Halls, which ran from 2007 until 2012 and resulted in at least 16,000 arrests for trespassing. It also demonstrates the type of case NYPD brought because Bradley was not guilty of trespassing not only because he was visiting his fiancée but also because he was on a public sidewalk, not private property. 37% of the 16,000 trespassing cases were resolved in the defendants’ favor, usually because the prosecutors declined to prosecute, or like Bradley’s, the case was dismissed. Approximately 3,000 were diverted. The remaining around 7,000 defendants pleaded guilty. Few went to trial.

Baltimore police were infamous for using loitering charges to inflate their arrest rates, regardless of whether the person was loitering or not. This led to a 2006 NAACP lawsuit against Baltimore for racially discriminatory policing — especially using bogus loitering charges against Black men. In 2010, Baltimore agreed to roll back the arrest and quota practices in a consent decree, but six years later, a U.S. Department of Justice investigation found that Baltimore police were still being pressured to make large numbers of arrests. Between 2010 and 2015, Baltimore police made over 25,000 arrests for nonviolent misdemeanors such as loitering and trespassing — mostly in poor, Black neighborhoods. Over half of them were so obviously bogus that prosecutors declined to prosecute them.

But how often do wrongful arrests lead to wrongful convictions?

“It happens all the time,” according to Baltimore Deputy District Public Defender Natalie Finegar. “We might want to go to trial, but clients are locked up, they want to get out, they want time-served. Or we [ask for] a jury trial and go downtown to Circuit Court, and the clients get scared and want to take the deal.”

The overpolicing of petty offenses in minority neighborhoods results in guilty pleas by innocent defendants who are jailed, criminalization of harmless conduct, and criminal records for a larger portion of the community. A misdemeanor conviction serves as a gateway into the criminal justice system and greatly increases the likelihood of future convictions.

Blatant Racism

With policies of harsh overpolicing in minority neighborhoods, one would expect an admission of racism from police departments. But when confronted with statistics showing a racial disparity in arrest rates, police and their supporters simply claim that minorities commit more crimes. But what do they say when the racism is so blatant that it cannot be explained away?

Clarence Brandley and Henry Peace, two custodians at a high school in Conroe,
Racism & Wrongful Convictions (cont.)

Texas, found the body of 16-year-old Cheryl Dee Ferguson in a loft above the school's auditorium on August 23, 1980. Ferguson was a student from another high school who was there for a volleyball game and had gone missing. Brandley was the only one of the school's five custodians who was Black.

Texas Ranger Wesley Styles led the murder investigation. During a joint interview with Brandley and Peace, he told them, "One of you is going to have to hang for this" then turning to Brandley, he said, "Since you're the nigger, you're elected." He convinced the other custodians to give statements implicating Brandley. Custodian John Sessum told him the statements were not true, and he had seen another custodian, Gary Acreman, follow Ferguson up a staircase leading to the auditorium. But Styles threatened him with arrest if he gave a statement inconsistent with Brandley's guilt. Brandley was convicted of capital murder and sentenced to death.

During appellate proceedings, it was discovered that police lost evidence including semen, a Caucasian pubic hair, other hairs that belonged neither to Brandley nor Ferguson, and photographs taken the day of the offense that showed Brandley was not there for a volleyball game and had gone missing. Brandley was the only one of the school's five custodians who was Black.

Another aspect of police racism is racist police feel free to use more coercive measures to coerce a confession from minority suspects. That is what happened to then-17-year-old Keith Bush in 1975. Suffolk County, New York, police arrested Bush for the murder of 14-year-old Sherese Watson. They kicked and beat Bush, coercing him through "brute force and physical assault into signing a false statement the [police] wrote for his signature—a statement that was never true and incorporated facts later proven to be false."

Bush was convicted and sentenced to 20 to life in prison. He was released on parole in 2007 but was subject to monitoring and registration as a Level 3 sex offender. Bush was exonerated by DNA evidence in 2019. In a lawsuit, Bush alleged police also hid exculpatory evidence, and the state's forensic expert gave false testimony at his trial. The detectives who handled his case were later "the subject of multiple investigations and discipline for coercing other similarly situated individuals to falsely confess," according to the lawsuit. The lawsuit accused the detectives of racial bias and substituting their racist fantasies about how young Black men behave for proof Bush had committed a crime.

Chicago police beat Nevest Coleman and called him a "lying-assed nigger" until he confessed to a 1994 rape and murder he did not commit. Coleman had no prior criminal history and, in 2017, was exonerated by DNA testing, which implicated a man who had been
convicted of other rapes. Coleman filed a federal civil rights lawsuit against the city, and the state awarded him and another man wrongly convicted of the rape-murder certificates of innocence and $169,876 in compensation.

Chicago police Lt. John Burge and the detectives who worked under him had become infamous for torturing confessions out of young Black men. That is what happened to Shawl Whirl, who was 20 years old when Detectives James Pienta and William Marley tortured him until he signed a false confession. This led to a wrongful conviction and 60-year sentence for murder in 1991.

A finding by the Illinois Torture Inquiry and Relief Commission that Whirl had been tortured led to the reversal of his conviction in 2015. The prosecution dropped the charges, and in January 2017, Chicago settled a federal civil rights lawsuit he brought against the city for $4 million. In 2010, Burge was convicted in federal court of perjury for denying he tortured suspects during direct examination in a federal civil rights lawsuit brought by other torture victims. He was sentenced to 4 1/2 years' imprisonment.

These are just a few examples of police using violence to coerce confessions out of Black men. Presumably, police target Black men, especially Black youth, because they are less likely to have the political and economic resources to fight back. They are easy targets. Further, like the media’s invention of the concept of “wilding” during the Central Park 5 debacle, the police are likely to believe in the grotesque racial stereotype of bestial behavior being the norm among young Black men.

A study of racial politics and the adoption of state laws to require police to record interrogations showed that states with a Republican governor and a large Black population were the least likely to adopt policies aimed at wrongful convictions. Likewise, states with strong public support for Republican presidential candidates were less likely to adopt laws requiring police to record custodial interrogations, but states with citizen-initiated legislation through ballot initiatives were more likely to adopt such laws. However, states with Republican-controlled legislatures were not less likely to adopt a law requiring police to record custodial interrogations.

The primary resistance to laws requiring police recording of custodial interrogations comes from law enforcement agencies. They express the concern that witnesses and suspects are less likely to be forthcoming if an interrogation is recorded. However, studies have shown that recording interrogations does not reduce the number of confessions and incriminating statements, and there are fewer trials when police have recorded evidence.

Racism also can affect the decision to prosecute, whether the judge and jury believe witnesses — especially alibi witnesses — and whether judges grant post-conviction relief or parole boards grant parole. An example of prosecutorial racism is that, in 1991, every single federal defendant represented by the federal public defender in Los Angeles, California, on possession of crack cocaine charges was Black. The state prosecutors had the discretion on whether to charge a defendant in state court or refer them to federal court where the penalties for possession of crack cocaine were greater. The defendants tried to force the prosecution to produce records regarding their intentions for the racially skewed referrals to federal court, but the Supreme Court held that there was insufficient evidence of discrimination to justify ordering the state to produce the documentation. Because of this, “selective prosecution” remains nearly impossible to prove or challenge.
Racism & Wrongful Convictions (cont.)

Because such racism is pervasive and because the courts remain reluctant to permit defendants the leeway needed to challenge it, we can expect it to remain a distinctive aspect of the criminal justice systems in the future.

Cross-Racial Misidentification

In a study titled “Race and Wrongful Convictions,” the October 2016 National Registry of Exonerations was used to show that eyewitness misidentification was the cause of wrongful sexual assault convictions in 79% of cases with innocent Black defendants and 51% of cases with innocent White defendants. Furthermore, about 70% of sexual assaults with White victims were perpetrated by White men, and only 13% were perpetrated by Black men. Yet 57% of White-victim sexual assault exonerees were Black men, and only 37% were White men. This means that a Black man convicted of sexually assaulting a White woman is eight times more likely to be innocent than a White man with a similar conviction. One reason for this disparity is the difficulty Whites have in identifying non-Whites.

A study titled “Victims’ Race and Sex Leads to Eyewitness Misidentification of Perpetrator’s Phenotypical Stereotypicality” showed that White witnesses tended to exaggerate the stereotypical racial features they associated with Black criminal perpetrators (full lips, dark skin, and broad nose) they had been told were suspects in a drive-by shooting. The effect was more pronounced among women and when the victim was believed to be White or female. However, there was no effect if the crime was one not perceived as stereotypically committed by Blacks (serial killing). Previous studies had shown that Blacks with greater stereotypicality (fuller lips, darker skin, and broader noses) were perceived as more dangerous, violent, and criminal than those with less stereotypicality.

Other studies showed that misidentification was more likely in a cross-racial situation, but the witnesses’ racial prejudices did not affect the rate of cross-racial identification errors.

Studies have shown that, relative to atypical Black features such as narrower nose, lighter skin, and thinner lips, stereotypical Black features such as darker skin, broader nose, and fuller lips were unduly associated with categorizing a person as a drug dealer, misidentification of a person as a carjacker, receiving longer sentences, and a greater chance of receiving the death penalty. Other studies also showed that White men who expressed stereotypical Black features received similar biased negative judgments.

A study of Black men exonerated by the Innocence Project showed that the men who were convicted based on eyewitness misidentification had more stereotypical faces than those wrongly convicted for other reasons. However, this was true regardless of the race of the victim — suggesting that cross-racial misidentification did not play a role in the misidentification, or its role was substantially outweighed by the tendency of all eyewitnesses to exaggerate the stereotypicality of the perpetrators’ faces. This means that Black men with more stereotypical features such as larger lips, darker skin, and a broader nose are at an increased risk of being misidentified as a criminal perpetrator.

Cross-racial misidentification has been considered enough of a problem that some states may require a jury charge on the matter when the witness and defendant are of different races. Such was the case for Otis Boone, whose conviction for a 2011 robbery was reversed in 2017 by the New York Court of Appeals. The court announced that, “In light of the near consensus among cognitive and social psychologists that people have significant greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, the risk of wrongful convictions demands a new approach.” Therefore, it required a trial court to give a jury charge on cross-race effects during final instructions upon request. Boone was acquitted upon retrial in 2019.

Police-Influenced Misidentification

Police witness tampering is known to have occurred in 31% of murder exoneration cases. Witness tampering by police can take on many forms. It might be as subtle as showing a witness several photographic lineups that each include a photograph of their prime suspect as the only repeatedly-shown photo in the series of lineups. Of course the face will look familiar. The effect was more pronounced among women and when the victim was believed to be White or female. However, there was no effect if the crime was one not perceived as stereotypically committed by Blacks (serial killing). Previous studies had shown that Blacks with greater stereotypicality (fuller lips, darker skin, and broader noses) were perceived as more dangerous, violent, and criminal than those with less stereotypicality.

A study of Black men exonerated by the Innocence Project showed that the men who were convicted based on eyewitness misidentification had more stereotypical faces than those wrongly convicted for other reasons. However, this was true regardless of the race of the victim — suggesting that cross-racial misidentification did not play a role in the misidentification, or its role was substantially outweighed by the tendency of all eyewitnesses to exaggerate the stereotypicality of the perpetrators’ faces. This means that Black men with more stereotypical features such as larger lips, darker skin, and a broader nose are at an increased risk of being misidentified as a criminal perpetrator.

Cross-racial misidentification has been considered enough of a problem that some states may require a jury charge on the matter when the witness and defendant are of differing races. Such was the case for Otis Boone, whose conviction for a 2011 robbery was reversed in 2017 by the New York Court of Appeals. The court announced that, “In light of the near consensus among cognitive and social psychologists that people have significant greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, the risk of wrongful convictions demands a new approach.” Therefore, it required a trial court to give a jury charge on cross-race effects during final instructions upon request. Boone was acquitted upon retrial in 2019.

Police-Influenced Misidentification

Police witness tampering is known to have occurred in 31% of murder exoneration cases. Witness tampering by police can take on many forms. It might be as subtle as showing a witness several photographic lineups that each include a photograph of their prime suspect as the only repeatedly-shown photo in the series of lineups. Of course the face will look familiar. The effect was more pronounced among women and when the victim was believed to be White or female. However, there was no effect if the crime was one not perceived as stereotypically committed by Blacks (serial killing). Previous studies had shown that Blacks with greater stereotypicality (fuller lips, darker skin, and broader noses) were perceived as more dangerous, violent, and criminal than those with less stereotypicality.

A study of Black men exonerated by the Innocence Project showed that the men who were convicted based on eyewitness misidentification had more stereotypical faces than those wrongly convicted for other reasons. However, this was true regardless of the race of the victim — suggesting that cross-racial misidentification did not play a role in the misidentification, or its role was substantially outweighed by the tendency of all eyewitnesses to exaggerate the stereotypicality of the perpetrators’ faces. This means that Black men with more stereotypical features such as larger lips, darker skin, and a broader nose are at an increased risk of being misidentified as a criminal perpetrator.

Cross-racial misidentification has been considered enough of a problem that some states may require a jury charge on the matter when the witness and defendant are of differing races. Such was the case for Otis Boone, whose conviction for a 2011 robbery was reversed in 2017 by the New York Court of Appeals. The court announced that, “In light of the near consensus among cognitive and social psychologists that people have significant greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, the risk of wrongful convictions demands a new approach.” Therefore, it required a trial court to give a jury charge on cross-race effects during final instructions upon request. Boone was acquitted upon retrial in 2019.
and explained away his lighter skin tone and different build than the perpetrator by telling her he had been in prison working out with little exposure to the sun. She later said she was pressured into making the identification but not until Johnson spent a decade in prison before being exonerated by DNA evidence.

A less subtle form of witness tampering happens when police simply coerce a witness into falsely implicating a suspect as happened in the Brandley case. In that case, police not only coerced witnesses into making statements that falsely implicated Brandley but also suppressed a truthful statement implicating another person. Coerced suppression of exculpatory witness statements is yet another form of witness tampering that leads to wrongful convictions.

Of course, the least subtle of all witness tampering is when the police themselves simply make up an alleged criminal offense whole cloth and testify about it. This is especially prevalent among the misdemeanors previously mentioned but also applies to felony offenses — especially drug offenses and resisting arrest. A variation on this occurs when police arrest a suspect knowing or suspecting that the person reporting the crime is lying, and no crime actually occurred.

No-crime convictions are racially skewed with Blacks making up the majority (54.7%) of no-crime drug exonerations, and Whites making up the majority of no-crime sexual assault (55.4%), murder (71.7%), and child sex abuse (68.9%) exonerations.

No-crime exonerations are also influenced by gender. Women constitute less than 5% of actual crime exonerations but almost 20% of no-crime exonerations. This overrepresentation of women in the no-crime category is sufficient to raise their percentage among exonerations overall to 10%.

The Influence of the Victim’s Race

As previously noted, one study showed that witnesses tended to exaggerate the stereotypical features of a Black suspect when they believed the victim was White or female. They did not do so when they believed the victim was a Black male, or the crime was one not considered typical for Blacks to commit. This shows one way the race of the victim can influence misidentification.

The effect of victim race interacts with the effect of the race of the defendant to cause more wrongful convictions of Blacks in murders involving White victims. According to the FBI, only around 15% of murders committed by Blacks have White victims, yet 31% of the exonerations of Blacks for murder involve White victims. This cannot be wholly accounted for by the higher rate of exonerations for Black murder defendants who comprise 40% of the people imprisoned for murder and 50% of the people exonerated of murder.

The victim’s race can also influence the harshness of punishment. For instance, in North Carolina, although Whites make up only about 40% of the state’s murder victims, 100% of the state’s death row exonerates were convicted of murdering Whites. Further, six out of the state’s seven death row exonerations (86%) involved non-White defendants accused of murdering Whites.

This type of disparity exists throughout the South. “Southern states, which tend to have larger black populations than other regions, are the most likely to wrongfully convict and sentence innocent people to death…. In other regions, whites are the most likely to be exonerated following wrongful conviction, followed by ‘other’ race/ethnic groups, followed by blacks. In Southern death penalty states, however, the trend is completely reversed.
Of all black death row exonerees, nearly two-thirds have been freed in the South."

Racism in the Length of Time Served Before Exoneration

The average time between conviction and exoneration for innocent Black murder defendants is 14.2 years. For Whites, it is 11.2 years. Death row exoneration for Blacks averaged 16 years compared to 12 years for Whites. Black sexual assault exonerees spent an average of 13.3 years in prison compared to 8.9 years for Whites. They also received harsher sentences than Whites with 28% sentenced to life compared to 17% for Whites.

Australia: The ‘Managerialism’ Approach and Racism

A recent study of the managerialism approach to criminal justice in Australia showed that it increased the probability of wrongful conviction of Indigenous Australians. Managerialism involves prioritizing efficiency, expediency, and risk management over due process. One aspect of this approach is an increasing emphasis on “performance measures” and “deliverables,” making policing more akin to an industrial product. Another is permitting a negative inference when a suspect fails to respond to police questioning.

To this end, the Northern Territory’s Police Administration Act permits”paperless arrests” to encourage faster processing times and more efficient use of police resources. This, combined with an initiative called Operation Ascari II, encourages the arrest of public-drinkers, almost all of whom are Indigenous even though it is a fine-only offense.

Indigenous Australians face discrimination similar to that faced by Blacks in the U.S. They represent only 3% of the country’s population but make up more than 25% of its prison population. There are no statistics available on what percentage they are of the country’s known wrongful convictions. However, a number of managerialist factors could easily lead to wrongful convictions of Indigenous Australians.

Indigenous Australians often go silent when presented with direct questions — something foreign to their culture. The silence can be misconstrued as unwillingness to cooperate, rather than cross-cultural shock. Indigenous Australians may also agree with any question put to them — especially when a lack of English skills makes it impossible to understand the question. This is seen as respecting authority in their culture. Such “gratuitous concurrence” could be misconstrued as confessing to a crime.

Even the Indigenous Australians’ own lawyers can misunderstand their responses, as was the case with Kina, who was convicted of murdering her husband after her lawyers deemed her unwilling to give evidence. Her silence was the result of cultural and language barriers, not unwillingness. Five years into her life sentence, an appeals court first heard evidence of the physical abuse she had suffered at the hands of her husband. Subsequently, the Supreme Court quashed her conviction.

This is why the involvement of an Aboriginal legal agency in the defense of Indigenous Australians is essential to a successful defense. Although the Australian experience does not transfer entirely into the American legal system, it is a strong reminder that valuing expediency over justice may get you neither and that the cultural circumstances of the defendant should be taken into account when preparing a defense to criminal charges.

Conclusion

Race is a factor in wrongful convictions, increasing the probability of minorities — especially Blacks — being wrongfully convicted. An acceptance of a criminality stereotype that more pronounced stereotypical features such as darker skin, broader nose, and fuller lips equates to more dangerous, violent, and criminal means that people with such more pronounced features are at even greater risk of misidentification as a criminal. The racial bias continues at all levels of the criminal justice system, making it more likely that Blacks will be coerced into falsely confessing, will be charged with more serious offenses, will be disbelieved as witnesses, will receive longer sentences, and will take longer to be exonerated. This endemic racism in the criminal justice system results in a higher representation of Blacks in exonerations. We can expect this to continue unless and until the criminal justice system takes measures to address the racism that pervades it.


Sixth Circuit Grants Habeas Relief After Michigan Court Violates Confrontation Clause

by Dale Chappell

The U.S. Court of Appeals for the Sixth Circuit held on April 7, 2020, that a Michigan court’s violation of a defendant’s right to confront the witness against him in court was not “harmless,” as the state court had held, and granted habeas corpus relief requiring his release or a new trial.

There was no dispute that the State violated Joseph Reiner’s constitutional right to confront its witness against him. The State admitted as much, after it used a statement made by the broker of a pawn shop that Reiner had been in the shop on the day of a home invasion and stabbing that lead to the death of a woman in Macomb County in 2011. Reiner was charged with several counts, including murder.

The State’s case relied heavily on the pawn broker’s statement. He told detectives that Reiner came in the shop on that day and threw “some items” on the counter and asked what they were worth. When the detective asked about a ring he saw in a canister matching the description of a ring taken from the victim, the broker said it was possible that Reiner had brought in the ring to pawn. He said the same thing about a necklace the detective asked about. Having no witnesses to the crime, no DNA evidence, no fingerprints, or anything placing Reiner at the crime, the broker’s statements were the best evidence the State had.

But there was one problem: The pawn broker died just before trial.

The State nevertheless used the pawn
broker’s testimony, and the jury found Reiner guilty. He was sentenced to life in prison. On appeal, the state court found that Reiner’s constitutional right to confront the witness against him was in fact violated but said that the error was harmless because other evidence tied Reiner to the pawn shop that day, mostly old receipts that supposedly matched his signature on the receipt the day he pawned “some items” as stated by the pawn broker. The court concluded that it was “clear beyond a reasonable doubt” that the jury would still have convicted Reiner.

After exhausting his state appeals, Reiner filed a pro se federal habeas corpus petition under 28 U.S.C. § 2254, challenging the violation of his right to confrontation under the U.S. Constitution’s Sixth Amendment. The federal district court, however, dismissed his petition but granted a certificate of appealability on whether the state court had violated Reiner’s constitutional rights to confrontation and due process.

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” As noted, Reiner’s rights under the Confrontation Clause were violated. But not all violations of the Confrontation Clause require reversal. Instead, a constitutional violation can be harmless if the court has “a belief that it was harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18 (1967). And in the habeas context, there must also be “actual prejudice,” which means it had a “substantially and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619 (1993).

Because the Antiterrorism and Effective Death Penalty Act requires a federal habeas court to give “deference” to the state court’s decision, the federal court here could grant relief only if the state court’s decision “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.” § 2254(d). In other words, relief could be granted only if the state court’s decision was contrary to the standard set out in Chapman.

Using the five-factor test in Delaware v. Van Arsdall, 475 U.S. 673 (1986), which the state court failed to do, the Sixth Circuit found that every single factor weighed in Reiner’s favor that admission of the deceased pawn broker’s testimony was not harmless: (1) the pawn broker’s statements were “the most important evidence presented” and therefore satisfied the first factor of how important the testimony was to the State’s case (i.e., could the case have survived without the testimony); (2) the testimonial evidence was not merely cumulative; (3) the state offered no evidence to corroborate the pawn broker’s testimony; (4) there was no cross-examination since the pawn broker had died; and (5) the overall strength of the State’s case “was circumstantial.”

“Application of the Van Arsdall factors establishes that the prosecutor’s case was materially weaker without [the pawn broker’s] statements — the strongest evidence connecting Reiner to the home invasion and stabbing,” the Court concluded. “This creates, at the very least, grave doubt as to whether the error had a substantial and injurious effect or influence in determining the jury’s verdict.” The Court therefore concluded that the Michigan state court unreasonably applied Chapman in finding the constitutional violation harmless.

Accordingly, the Court remanded with instructions to grant a conditional writ of habeas corpus directing the State to either release or retry Reiner. See: Reiner v. Woods, 955 F.3d 549 (6th Cir. 2020).
Ninth Circuit: Mental Impairment that Prevented ‘Monitoring’ of Habeas Counsel’s Actions May Require Equitable Tolling

by Dale Chappell

The U.S. Court of Appeals held on March 25, 2020, that a prisoner’s mental impairment that prevented him from “monitoring” his habeas counsel’s actions, which led to the delayed filing of his state habeas petitions, may have been cause for equitable tolling with respect to the late filing of his federal habeas petition.

Thomas Milam is serving a life sentence in a California state prison. His family hired a lawyer, Stratton Barbee, to file a state habeas corpus petition in 2007. The petition was filed just months after Milam’s conviction became final in 2008, and it was denied two months later on the merits by the state trial court. But Barbee didn’t file an appeal until nearly eight months later, and when that was summarily denied, he filed an appeal with the California Supreme Court over three months later. [Writer’s note: California has a unique habeas system, where an “appeal” is taken by simply filing another habeas petition in the next highest court, and there is no time limit as long as it’s filed within a “reasonable time.” Valdez v. Montgomery, 918 F.3d 687 (9th Cir. 2019).]

Milam’s family then hired a new lawyer, Al Amer, to file his federal petition. However, Barbee’s many delays resulted in Milam’s subsequent federal petition under 28 U.S.C. § 2254 being filed too late, because the one-year clock to file a federal petition is tolled when the state proceedings are “properly filed” and diligently pursued. 28 U.S.C. § 2244(d)(2). Amer never responded to the State’s argument that the petition was too late, even after being warned by the judge to do so. Judge John Kronstadt of the U.S. District Court for the Central District of California agreed with Magistrate Judge Michael Wilmer that Milam’s federal petition was filed too late and dismissed it. This was in May 2012. No appeal was filed by Amer.

At this point, it may be helpful to explain how Milam’s § 2244 petition made its way to the Ninth Circuit years after it was already denied.

Reopening Milam’s Federal Petition

Milam filed another § 2254 petition in the district court in October 2014. This time, acting pro se, he raised the issue of his mental health issues and included documents to support his claim. While the district court determined that Milam’s petition was an unauthorized “Second or successive” petition (he was required to obtain authorization from the Ninth Circuit to file another petition as per 28 U.S.C. § 2244), the court found a “potential basis for equitable tolling” based on his mental capacity and appointed the federal public defender (“FPD”) to represent him. The court also hinted that Milam may be able to file a motion under Federal Rule of Civil Procedure 60(b) to reopen his dismissed original § 2254 petition because of federal counsel’s “ineptitude.”

The FPD followed the court’s suggestion and filed a Rule 60 motion four years after the original petition was dismissed in 2012. The State argued that Milam’s motion was filed too late. Under Rule 60(b)(6), there is no time limit, but a motion must be filed within a “reasonable time.” The State argued that Milam wasn’t diligent in seeking Rule 60 relief, and the delay was unreasonable. But it did acknowledge that the conduct of Milam’s federal lawyer, Amer, could constitute “gross negligence.”

The district court explained that while Rule 60 relief “occurs rarely in the habeas context,” gross negligence by a habeas attorney that amounts to “abandonment” is an “extraordinary circumstance” justifying the grant of a Rule 60 motion to reopen a federal habeas case. The court found that Milam’s federal lawyer, who was later disbarred, effectively abandoned Milam when he had a “viable claim for equitable tolling for various periods of time before the commencement of the federal case” that could have been raised as a reason to excuse his late federal petition. The court reopened Milam’s dismissed § 2254 petition. Milam v. Harrington, 2018 U.S. Dist. LEXIS 30797 (C.D. Cal. 2018).

Second Round of Milam’s § 2254 Petition

Back before the same court that granted Milam’s Rule 60 motion to reopen his § 2254 petition dismissed as untimely, the FPD submitted an expert’s opinion that Milam’s “mental impairment combined with the ineffective assistance of his state habeas counsel made it impossible to meet the filing deadline for his federal petition. It was the first time any argument or evidence was offered in federal court that Milam’s mental condition might excuse his late filing. The expert opined that “even with the assistance of others, Milam does not process the capacity to understand what is required of him” to ensure his petition was timely filed.

The district court, however, ruled that Milam’s mental capacity was “irrelevant to the equitable tolling because Petitioner was represented by an attorney during his incarceration.” The court adopted a categorical rule that having a lawyer meant Milam’s mental state could not be considered as to whether his petition was filed on time. The court then dismissed Milam’s petition as untimely (again) but granted a certificate of appealability. Milam v. Harrington, 2019 U.S. Dist. LEXIS 13450 (C.D. Cal. Jan. 4, 2019).

The Appeal

Equitable tolling applies to excuse a late habeas only when the petitioner shows “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing,” the Ninth Circuit explained, citing the U.S. Supreme Court’s position on equitable tolling. But equitable tolling is done on a “case-by-case” basis, which is ill-fitting for categorical rules, the Court instructed.

A lawyer’s errors are normally not enough by themselves to invoke equitable tolling, but they are a “part of the overall assessment” of equitable tolling. Bills v. Clark, 628 F.3d 1092 (9th Cir. 2010). “A petitioner’s mental impairment might justify equitable tolling if it interferes with the ability to cooperate with or monitor assistance the petitioner does secure” with the help of a lawyer, the Court reiterated under Ninth Circuit case law. “If Milam’s impairment prevented the monitoring of his state habeas lawyer, and if monitoring would have prevented state habeas counsel from waiting so long between filings, Milam’s impairment could have been a but-for cause of the untimely filing.” Judge Andrew Hurwitz wrote for the majority opinion, citing other circuits that have reached the same conclusion.

The Court also noted that the district court had assumed incorrectly that attorney abandonment was required to find Barbee’s
Tenth Circuit Vacates District Court’s Order Sealing Plea Supplement, Explaining Local Court Rule Doesn’t Abrogate Common Law Right of Access to Judicial Records

by Douglas Ankney

The U.S. Court of Appeals for the Tenth Circuit vacated the order of the U.S. District Court for the District of Utah that sealed the supplement to Michael A. Bacon’s plea agreement.

Bacon pleaded guilty to multiple counts, including bank robbery. At issue in this appeal was the district court’s decision to file under seal Bacon’s supplement to his plea agreement.

Bacon had refused to cooperate with the Government, and he informed the trial court that his life would be in danger when other prisoners read that his supplement was under seal because fellow prisoners would wrongly conclude the sealed record meant he had cooperated.

The Government argued the supplement should be sealed pursuant a local rule of the District of Utah that required all supplements to plea agreements be filed under seal, for the sake of uniformity.

The district court, relying on the local rule, sided with the Government. On appeal, Bacon argued that the district court erred by failing to consider the common law right of access to judicial records and by failing to make case-specific findings regarding sealing of the record.

Because Bacon had objected to the sealing of the record only on the ground that sealing endangered his life, the Tenth Circuit determined his common-law right of access argument was raised for the first time on appeal. United States v. A.B., 529 F.3d 1275 (10th Cir. 2008). Consequently, the Court reviewed for plain error. Id. To prevail, Bacon had to show (1) an error occurred (2) that was plain (3) which affected his substantial rights and which (4) seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Gonzalez-Huerta, 403 F.3d 727 (10th Cir. 2005).

As to the first and second factors, there was plain error because the Court had previously held “it is clearly established that court documents are covered by a common law right of access,” United States v. McVeigh, 119 F.3d 806 (10th Cir. 1997). There is a strong presumption in favor of public access that can be overcome only where “countervailing interests heavily outweigh the public interests in access.” Colony Ins. Co. v. Burke, 698 F.3d 1222 (10th Cir. 2012). The burden is on the party opposing disclosure “to articulate a sufficiently significant interest that will justify” overriding the presumption of public access. United States v. Pickard, 733 F.3d 1297 (10th Cir. 2013).

When deciding whether to seal specific documents, courts “must consider the relevant facts and circumstances of the particular case and weigh the relative interests of the parties.” United States v. Hickey, 767 F.2d 705 (10th Cir. 1985). Basing a decision to seal or unseal a record on a blanket policy does not satisfy either constitutional or common law standards. United States v. DeJournett, 817 F.3d 479 (6th Cir. 2016).

In the instant case, the Court explained that the district court erred because it failed to recognize the strong presumption in favor of public access; based its decision to seal the record on a blanket policy authorized by local rule; failed to require the Government to articulate specific reasons in favor of sealing the plea supplement; and failed to weigh Bacon’s safety argument and the public’s interest against any argument advanced by the Government.

As to the third factor, Bacon demonstrated that the error affected his substantial rights because there was a reasonable probability that, had the district court considered the strong presumption of public access to judicial records, the plea supplement would not have been filed under seal. United States v. Andrews, 447 F.3d 806 (10th Cir. 2006). Finally, Bacon demonstrated that the error seriously affected the integrity of the judicial proceedings because public access to court records is fundamental to a democratic state. United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980). The unnecessary sealing of records breeds public mistrust of the judiciary. Sealing, Judicial Transparency and Judicial Independence, 53 Vill. L. Rev. 939 (2008).

The Court concluded Bacon established plain error.

Accordingly, the Court vacated the district court’s decision to keep Bacon’s plea supplement filed under seal and remanded for further proceedings consistent with the Court’s opinion. See: United States v. Bacon, 950 F.3d 1286 (10th Cir. 2020).
O n a cold February 2003 night, my life was shattered. That is when I was arrested and charged with a crack cocaine conspiracy along with two § 924(c) counts. My mandatory minimum sentence could be no lower than 40 years. And after a three-week trial, that is exactly what I was sentenced to at 24 years old.

I was sent to USP Big Sandy in Kentucky, where I immediately began going to the law library and working on my appeal. With the assistance of attorney Jillian Harrington, I was successful on my appeal in part. The case was remanded to the district court for a hearing related to ineffective assistance of counsel that occurred during the plea-bargaining stage. After the hearings, my request for relief was denied. A new appeal on that issue was also rejected. At that point, my 40-year sentence was looking like my reality for the next four decades.

This was a prospect that I could not accept. This is when my game plan changed — I decided that my days would now be spent in the law library. Researching the law became easy for me, and in time, I would read some very helpful opinions from former Federal Judge John Gleeson. They gave me hope that I might someday obtain relief. The most significant was United States v. Holloway, 2014 U.S. Dist. LEXIS 102707 (E.D.N.Y. 2014). In that opinion, Judge Gleeson, the former federal prosecutor who prosecuted infamous crime boss John Gotti, urged then-U.S. Attorney Loretta Lynch to reopen Holloway’s case, dropping some of the stacked § 924(c) counts so that he could impose a more just sentence. At first, Lynch balked at the prospect, but with more urging from Judge Gleeson, she did just that. Judge Gleeson was now empowered to impose a new sentence that would allow Holloway a second chance to reclaim his life — which he did.

Immediately upon discovering that revelatory opinion, I began to write my own Holloway-based motion and sent it off to the court in 2016.

After filing my motion pro se, I reached out to Holloway’s attorney, Harlan Protass, for help. I outlined my institutional record and all of the rehabilitative programs that I had completed.

Within a week, I received a letter from Mr. Protass that said he had sent my letter to someone who might be able to help, and that if that person decided to help, I would hear back from him.

He never said who the person was, but three weeks later, I found out when a letter arrived from Judge Gleeson, who had stepped down from the bench and was again practicing law.

Judge Gleeson and his team began reviewing my case. By the end of that review, he advised me that while he was unable to help me at that time, he encouraged me to keep working and to look into college. He commented that he might help down the road. Shortly after receiving that letter, I enrolled in a correspondence-degree program and began work on earning a degree. Then came the latest denial from my judge on my Holloway motion. That denial seemed to indicate that the judge was proud of my accomplishments, but he simply did not have the power to reopen the case absent the prosecution’s consent. Unlike Holloway’s case, there was no consent from the prosecution but instead a harsh response.

Two years later, the First Step Act was signed into law. The legislation came with four criminal justice reform aspects. One of those sought to eliminate the overly harsh sentences for stacked § 924(c) offenses. The only problem was that the changes were not going to be retroactive. I read each and every word of the First Step Act. Slowly, I realized that there was a jewel inside the bill. A gem that could restore those who deserved a second chance to reclaim their lives.

My decision was to try the Holloway option first. In early 2019, I wrote and filed a pro se Holloway motion outlining the changes in the First Step Act to stacked 18 U.S.C. § 924(c).

Then in March, much like Judge Gleeson, my sentencing Judge David G. Larimer issued a decision asking the Government to reopen my case and dismiss one of the § 924(c) counts, which would allow him to impose a more just sentence. (See prior CLN coverage).

Attorney Harrington, at the direction of Judge Larimer, filed a new pleading outlining my accomplishments and the reasons why the Government should reopen my case. Shon Hopwood and Jillian Harrington reached out to the Government on my behalf, seeking a resolution consistent with the judge’s order. The Government never responded. As months passed by with no answer, I began to wonder what would happen, whether I would obtain relief. With the judge’s decision, it felt like my liberty was within reach, but as the months passed by with nothing from the Government, I began to worry. This prompted me again to contact Mr. Gleeson for help in May 2019.

Mr. Gleeson and his team took over my representation. They, too, reached out to the Government with no response. This is when we began to discuss other options, such as filing a motion under 18 U.S.C. § 3582, asking the judge to grant relief absent the Government’s consent.

The First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow courts to modify sentences not only upon motion of the Director of the Bureau of Prisons but also upon “motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the BOP to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility.” The law allows a court to modify a defendant’s sentence if it finds on either the BOP’s or the defendant’s motion that “extraordinary and compelling reasons warrant such a reduction” and is consistent with applicable policy statements issued by the Sentencing Commission. United States v. Daniel Lynn Brown, Jr., 4:05-cr-00227-RP (S.D. Iowa).

The only way I could find relief through...
the § 3582 avenue and the First Step Act was to demonstrate that "extraordinary and compelling reasons" for a reduction in sentence were present. The policy statement regarding compassionate release sets forth three specific reasons that are considered "extraordinary and compelling," as well as a catch-all provision recognizing as "extraordinary and compelling" any other reason “[a]s determined by the Director of the Bureau of Prisons.” US Sentencing Guidelines 1B1.13 (D) cmt. n.1.

That policy statement has not yet been amended since the First Step Act, and some of that policy statement contradicts 18 U.S.C. § 3582 (c)(1)(A). United States v. Overcash, 2019 WL 1472104 (W.D.N.C. 2019). Prior to the First Step Act, we knew that the BOP would have to determine any extraordinary and compelling reasons for a sentence reduction — because only the BOP could bring the motion for a reduction of sentence under § 3582 (c)(1)(A). But, with the First Step Act, courts are now empowered to determine what are extraordinary and compelling circumstances that could support a reduced sentence.

The title of the section of the First Step Act that amends 18 U.S.C. § 3582 is "Increasing the Use and Transparency of Compassionate Release." That title supports the reading that U.S.S.G. § 1B1.13 cmt. nt.1 (D) is not applicable when a defendant requests relief under § 3582 (c)(1)(A), as amended, because it no longer explains an appropriate use of that statute. If the director of the BOP were still the sole determiner of what constitutes an extraordinary and compelling reason for a reduction in sentence, motions under § 3582 would necessarily be an exercise in futility. That would undermine the explicit purpose of the amendments.

Congress had never limited or defined what constitutes an extraordinary and compelling reason warranting a reduction in sentence. The First Step Act did something groundbreaking — it allows the people in the best position to judge to do just that. Federal sentencing judges were now given back the power to do what they were intended to do — make sound judgments based on the facts, law, and circumstances of each individual defendant. A growing number of courts have concluded that in the absence of a policy statement the Court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1 (A)-(C) warrant granting relief. United States v. Cantu, 423 F. Supp. 3d 345 (S.D. Tex. 2019); United States v. Fox, 2019 WL 3046086 (D. Me. 2019) (“I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.”).

With the law at hand, we filed our § 3582 motion, arguing that there were "extraordinary and compelling reasons" for the court to reduce my sentence. The first extraordinary and compelling reason for a reduction in sentence was that both Congress and President Trump determined that stacked sentences under § 924 (c) were not only outrageous, but they also were indefensibly unjust. Although the First Step Act did not make the § 924 (c) changes retroactive, that did not foreclose other avenues of relief for those with such sentences. In conjunction with our argument that the changes to § 924 (c) being extraordinary, we also argued that my rehabilitation was also an extraordinary and compelling reason that the court could consider.

Extraordinary and Compelling

Since my incarceration, I earned a college degree, completed over 100 rehabilitative programs, taught leadership classes, facilitated Alternative to Violence Project Seminars, volunteered as a suicide-prevention companion, and helped the men around me learn to read and write. We believed that all of these accomplishments constituted an extraordinary and compelling reason that the court could consider in light of the § 924(c) changes. While rehabilitation alone cannot constitute an extraordinary and compelling reason, it is one of the factors in conjunction with § 924(c) changes that can constitute extraordinary and compelling reasons for a reduction in sentence.

We believed that my record demonstrated extraordinary and compelling reasons to support a reduction in sentence.

18 U.S.C. § 3142 (g) and U.S.S.G. 1B1.13(2) also make it clear that a court must decide whether I present a danger to the safety of any other person or to the community. In our motion, we argued that I was not a threat to the community and others, outlining that I had not been convicted of any crime involving violence. My conviction was for a crime involving low-level sales of narcotics, and my lengthy sentence was not based in any way on the dangerousness of my criminal conduct or the need to incapacitate me. Instead, my lengthy sentence was the result of a sentence enhancement that the Government invoked solely because I proceeded to trial, i.e., I was subjected to the so-called "trial penalty."

In demonstrating to the court that I was not a danger, we also outlined the evolution of my character over the last 16 and half years that I have been incarcerated, which we argued precludes a finding that I would pose a danger to the community. The facts we argued demonstrated that I would be an asset to the community rather than a danger.

Once a court determines that a person is no longer a danger to the community, the court must assess the factors outlined in 18 U.S.C. § 3553(a) that direct courts to impose a pun-

---

Post Conviction Relief for Virginia Only

Services We Offer:

- State & Federal Habeas Corpus
- Appeals, Rule 35 and Rule 606 Motions
- Motions to correct Unlawful Sentence, Motion to Modify Sentence, And Other Post Conviction or Sentence Reduction Motions

Law Office of Dale Jensen, PLC
PO Box 338
Nellysford, VA 22958
(434) 260-6691
djensencllaw@gmail.com
www.jensenjusticelaw.com
Unsolicited Documents
Not Returned
Not a Pro Bono Law Firm
Info request: Send self-addressed stamped envelope

---

Representing Pennsylvania Inmates

Medical mistakes
Inadequate care
Delay in treatment

Criminal Legal News 15 June 2020
First Step Act Changes (cont.)

ishment that is sufficient, but not greater than necessary, to achieve the goals of sentencing.

Those factors include (1) the nature and circumstances of the offense and the history and characteristics of the defendant and (2) the need for the sentences imposed to:

(A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.

Our argument was that the § 3553(a) factors weigh strongly in favor of a sentence of time served. The record demonstrates that I have dedicated myself to the rehabilitation of myself and others and that I had personify the objectives of § 3553(a)(2). The time that I had served, we argued, was more than sufficient to achieve the objectives of my sentence and incarceration, including to deter similar conduct.

We also highlighted the fact that all of my codefendants had already been released, some many years ago. This demonstrated the disparity between my sentence and those involved in the same conduct as me.

The Government strenuously objected to our request for resentencing.

But October 18, 2019, brought joy and renewed hope when at 7:00 p.m. I had learned that Judge Larimer, earlier in the day, issued a decision ordering argument on the motions in the form of a sentencing hearing. As part of that order, he also ordered that the probation department amend my original presentence report with the applicable Guidelines together with the changes made to 18 U.S.C. § 924(c) by the First Step Act.

A second chance to possibly reclaim my life came through the First Step Act — my hope was that the judge would see me as worthy of his compassion. And that the law allowed him the power to reduce my grotesque 40-year term.

During the hearings, the Government attempted to paint me as a horrible, irredeemable person. In part of their attempt, they called a Special Investigation Officer (“SIS”) as a witness who testified falsely.

On April 20, 2020, Judge Larimer rejected the Government’s position. He found that the First Step Act permitted him to reduce my sentence. He also found that I was worthy of a second chance to reclaim my life. United States v. Marks, 2020 U.S. Dist. LEXIS 68828 (W.D.N.Y. 2020).

Judge Larimer, in his 39-page decision, found the SIS Officer’s direct testimony was lacking in credibility. At one point, he wrote, “This suggests, once again, an orchestrated effort to manufacture adverse information against Marks, no matter how speculative and conjectural.”

At the end of the day, the Department of Justice is supposed to be just what its name says — but in far too many cases, they are the Department of Prosecutions. My case is a textbook example of that.

However, I am a firm believer that justice is possible if we never give up the fight. On June 4, 2020, I am scheduled to find that justice by finishing up my long walk to freedom.

Latest Forensic Technology, Pattern Analysis, May Be ‘Pseudoscience’

by Michael Fortino, Ph.D.

T

elevision crime dramas and documentaries have, for decades, lulled the public into accepting the infallibility of forensic crime science. However, a groundbreaking study by the National Academy of Sciences (“NAS”) — made up of legal, technical, and policy experts authorized by Congress in 2005—was tasked with investigating the reliability of forensic science, ultimately casting serious doubt on many of the techniques investigators used to convict defendants.

According to S.J. Nightingale with the School of Information at the University of California, Berkeley, “The NAS Report” published in 2009, “calls for a broad and deep restructuring of how forensic techniques are validated and applied, and how forensic analysts are trained and accredited.” The report determined, “[with] the exception of nuclear DNA analysis ... no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”

One highly questionable technique routinely used over the past 50 years by the FBI to secure convictions is that of photographic pattern analysis. When subjected to rigorous, unbiased testing, photographic analysis may be used to compare something as innocuous as a seam pattern found on a pair of blue jeans. The analysis, however, when used to compare the stitch pattern worn by a subject captured on surveillance camera during a bank robbery to the pattern appearing on a suspect’s jeans, proved to be reliable only 20% of the time.

Alarming, FBI examiners claim that photographic comparison is recognized as central evidence in thousands of cases. According to a 2019 article by ProPublica, in many of these cases, juries have been misled by “baseless statistics [posited to show] the risk of errors in their analysis was extremely low.” The ProPublica article goes on to report, “examiners on the forensic Audio, Video and Image Analysis Unit based at the FBI lab in Quantico, Virginia, continue to use similarly flawed methods, and to testify to the precision of these methods.”

U.S. District Judge Jed Rakoff, ex officio on the National Commission on Forensic Science, is of the opinion that much of pattern analysis “science” is more about examiner intuition than real science. He opines, it is basically more about “hunches” rather than “facts.”

There have been a multitude of instances in which DNA evidence has substantially contradicted pattern analysis. These contradictions often arise in cases using hair follicle analysis.

Before DNA, hair follicle comparison was regularly used to convict defendants, and it was considered to be “reliable forensic science” in its day. As DNA technology progressed, many who had been found guilty largely on the basis of hair follicle analysis and sentenced to prison were later exonerated.

Other defendants have not been as fortunate. Joe Bryan, convicted solely on the basis of another flawed forensic discipline — blood-splatter analysis — has spent the last three decades in a Texas prison for the murder of his wife, a crime he maintains he did not commit.

Pattern analysis of garments worn by suspects continues to be used, and they’re not limited to jean stitch patterns. The use of this antiquated and highly dubious forensic technique has progressed to include photo analysis of body segments, including hands, arms or fingers, and comparing skin patterns...
and dissimilar conclusions. The same individual and arrived at inconsistent were directed to focus on different features of same sample image, different analysis methods yielded alarming inconsistencies. Given the McKreith, to this spree of robberies.

that directly connected the accused, Wilbert photo analysis evidence was the only evidence a 92-year prison sentence, V order Bruegge's investigation involving a multiple bank rob -

by V order Bruegge, are preposterous. In one

that may be analyzed within the photo.

Richard Vorder Bruegge, an FBI image analyst, has staked his reputation on photo analysis, a technique he claims is almost as reliable as DNA testing itself. In one case, he claimed that the fabric pattern in a plaid shirt worn by a suspect in a surveillance photo generated a “1 in 650 billion match ... give or take a few billion.”

Statisticians and other independent forensic scientists told ProPublica that this assertion, like multiple other statements made by Vorder Bruegge, are preposterous. In one investigation involving a multiple bank robery case, and one that earned the accused a 92-year prison sentence, Vorder Bruegge’s photo analysis evidence was the only evidence that directly connected the accused, Wilbert McReith, to this spree of robberies.

Karen Kafadar, chairwoman of the Statistics Department at the University of Virginia, has called Vorder Bruegge’s statements “brazen.” She suggests, studies carried out in the matching of various suspect features such as skin, face, arms or hands, or clothing, have yielded alarming inconsistencies. Given the same sample image, different analysis methods were direct to focus on different features of the same individual and arrived at inconsistent and dissimilar conclusions.

For most of its existence since 1932, the FBI crime lab has enjoyed an unchallenged reputation for reliability. That reputation was finally shaken when recent scientific advancements, such as DNA, upended the tried-and-true myths of crime forensic “science.”

In 1995, Fredric Whitehurst, a chemist on the bureau’s Explosives Unit, testified that inaccurate reports had been generated in the first World Trade Center bombing in New York. The Justice Department’s Office of the Inspector General investigated Whitehurst’s allegations and found in 1997 that “significant instances of testimonial errors, substandard analytical work, and deficient practices” existed in several high-profile cases, including the World Trade Center and the Oklahoma City bombings.

After finding these problems in the Explosives Unit, the Justice Department began reviewing hair and filament analysis on hundreds of other cases. The department found irreconcilable irregularities in at least 250 cases but refused to make its findings public. It also did not notify attorneys for defendants in those cases.

Another unit at the FBI Lab had been matching bullets based on their chemical composition. FBI chemists were making assertions that suggested certain compounds identified in a crime-scene bullet could be matched with compounds found in bullets possessed by a suspect. The National Academy of Science, Engineering and Medicine, however, found that such assertions could not — and should not — be made. Its report suggested that the accuracy of such findings could differ so much so that similar compositions could exist in anywhere from 12,000 and 35 million other matching bullets, hardly a reliable metric by anyone’s measure.

Under President Obama’s administration in 2016, another Council of Science and Technology was convened. “Advisors,” ProPublica reported, “highlighted the lack of validation in several Pattern evidence fields [and] called on the FBI to increase spending on studies to prove its methods.” Not only did the Department of Justice ignore the advisors’ conclusions, it has since doubled down on federal law enforcement’s reliance upon unproven forensic science. ProPublica went on to report in 2017, that, then-Attorney General Jeff Sessions, closed the National Commission on Forensic Science, “ending an effort to set standards for crime laboratory practices.”

The only “checks and balances” left in place is the Daubert Standard. (Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993)) This standard, upon which federal judges depend to evaluate accuracy and reliability, seeks to determine “whether the reasoning or methodology underlying the testimony [of an alleged expert witness] is scientifically valid’ before allowing it at trial.” Id. Unfortunately, the Standard is often neglected and is imperfect at best when utilized.

Given the overzealous and adversarial nature of judges and prosecutors over the previous three decades, it seems highly probable that junk forensic science will continue to be used as a prosecutorial tool, to the detriment of truthful and accurate justice.

Sources: propublica.org, pnas.org, forensicmag.org
The Supreme Court of the United States ("SCOTUS") held that in jury trials of criminal cases the verdict must be unanimous to convict the defendant, overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Evangelisto Ramos was convicted of a serious crime in Louisiana by a jury vote of 10 to 2. He was sentenced to a term of life imprisonment without the possibility of parole. Ramos challenged his conviction on the ground that a conviction by a non-unanimous jury violates his Sixth Amendment right to a jury trial.

Justice Gorsuch, writing for the Court, observed that "[i]n 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here." But at one time, all States required unanimous verdicts.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." The right to a jury trial in criminal cases is also enshrined in Article III, section 2, of the U.S. Constitution. But that venerable document does not define what is meant by "jury trial." Did those words convey, at the time James Madison penned the Sixth Amendment, that a jury must reach a unanimous verdict in order to convict?

The requirement of juror unanimity emerged in England in the 1300s and was soon accepted as a vital right protected by the common law. J. Thayer, Evidence at Common Law 86-90 (1898) ("Thayer"). No one could be found guilty of a serious crime unless "the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). A verdict, taken from eleven, was no verdict" at all. Thayer.

The Constitutions of Delaware, Maryland, North Carolina, Pennsylvania, Vermont, and Virginia explicitly required unanimous jury verdicts to convict. All States, even without an explicit provision in their respective Constitutions, required unanimity as an essential feature of a jury trial. *Commonwealth v. Fells*, 36 Va. 613 (1838). By the time the Sixth Amendment was written and ratified by the States in 1791, unanimous verdicts had been required for about 400 years.

And the right to unanimous verdicts continued in State courts in the years after ratification. In 1824, Nathan Dane reported as fact, in 6 N. Dane, Digest of American Law, ch. LXXXII, Art. 2, § 1, p. 226, that the U.S. Constitution required unanimity in criminal jury trials for serious offenses. And Justice Story explained that "unanimity in the verdict of the jury is indispensable." 2 J. Story, Commentaries on the Constitution of the United States § 777, p. 248 (1833).

SCOTUS had also repeatedly affirmed that the Sixth Amendment requires unanimity. A defendant enjoys a "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of twelve persons." *Thompson v. Utah*, 170 U.S. 343 (1898). "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." *Andres v. United States*, 333 U.S. 740 (1948).

In the 120-plus years since the *Thompson* decision, SCOTUS "has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times...." (See opinion for citations of those 13 cases.)

SCOTUS has explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). And the provisions of the Bill of Rights that have been incorporated under the Fourteenth Amendment apply with the same force and effect to the courts of the States as to the federal courts. *Mallory v. Hogan*, 378 U.S. 1 (1964). In light of this weight of history and precedent, how did Ramos come to be convicted by a Louisiana jury's 10-to-2 verdict?

Racists, racial supremacists, racism, and racial supremacy - the people and the ideology espoused by them - continue to impact the U.S. justice system. Often it is done in ignorance and done implicitly. But in Louisiana, non-unanimous verdicts for serious crimes were first explicitly endorsed for racist reasons at a constitutional convention in 1898. One committee chairman said the avowed purpose of the convention was to "establish the supremacy of the white race." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 374 (H. Hearsey ed. 1898). The men at that convention produced a document that included many of the insidious Jim Crow laws: the poll tax, the combined literacy and property ownership test, and clauses that exempted White residents from these laws.

At the time, the U.S. Senate was investigating Louisiana for systematically excluding Blacks from juries. In order to deprive Blacks of their rights without overtly passing a policy of blatant racial animus, the men attending the convention stripped Blacks of their power in another way. Keenly aware of the racial demographics, they sculpted a "racially neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless." *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist. 2018).

Similarly, in the 1930s, Oregon's rule permitting non-unanimous verdicts was the result of the rise of the Ku Klux Klan with the goal of diluting "the influence of racial, ethnic, and religious minorities on Oregon juries." *State v. Williams*, No. 15-CR-58698 (C.C. Ore. 2016).

In a "strange" pivot from the Court's jurisprudence, SCOTUS upheld the constitutional validity of this practice of criminal conviction by a non-unanimous jury in *Apodaca* and in the companion case *Johnson v. Louisiana*, 406 U.S. 356 (1972). The decision in *Apodaca* was 4-1-4. The plurality upheld the practice of conviction by non-unanimous verdict on the flimsiest and poorest of rationales. The plurality concluded that in today's modern times, the costs of requiring unanimous verdicts were not outweighed by any perceived benefits. That is, their view was that the purpose of jury verdicts was only to safeguard against an overzealous prosecutor, so requiring at least 10 jurors to convict is sufficient. Requiring unanimous verdicts didn't add any benefit but did add cost whenever hung juries resulted in new trials. The four dissenting Justices found the practice unconstitutional based on the weight of history and precedent.
Justice Powell broke the tie with his concurring opinion. He opined that the dissenting Justices were correct — the Sixth Amendment requires unanimous verdicts, but he further opined that the Sixth Amendment does not apply to the States to the same extent as it applies to federal courts. This was known as the “dual track” approach of applying the provisions of the federal Constitution to the States — an approach that had been rejected by SCOTUS nearly 10 years earlier. Malloy. SCOTUS explicitly held in the instant case that the Sixth Amendment right to a jury trial includes the right to a unanimous verdict and is applicable to the States via the Fourteenth Amendment, overruling Apodaca.

Accordingly, the Court reversed Ramos’ conviction. See: Ramos v. Louisiana, 206 L. Ed. 2d 583 (2020).

Writer’s Note: This decision is applicable to those who were convicted by non-unanimous verdicts and have appeals pending. It is currently an open question if those whose cases have become final after appeal can benefit from this decision via collateral attack, i.e., habeas corpus. However, we will soon have an answer. SCOTUS granted certiorari in Edwards v. Vannoy on May 4, 2020, to answer the following question: “Whether this Court’s decision in Ramos v. Louisiana, 590 U.S. ___ (2020), applies retroactively to cases on federal collateral review.[-]

**ATF: What Is a Gun?**

by Jayson Hawkins

Making a decision about what is or is not a “firearm” under the law would seem to be a fairly straightforward process, but recent controversy about the regulations used by the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosive (“ATF”) has shown that the definition of a gun is not nearly as clear as it seems.

The legal definition of a firearm is laid out in the 1968 Gun Control Act. That law’s definition includes not only what most people would think of as a gun but also “the frame or receiver of any such weapon.” 18 U.S.C. § 922(a)(3). Defining what a receiver or frame is, however, was left up to regulating agencies — in this case, the ATF. The ATF defined a receiver as having three elements: hammer, bolt or breech-lock, and firing mechanism. This “receiver,” even without the rest of the weapon, is legally considered a firearm in itself.

The problem with this definition, according to former ATF agent and firearms expert Dan O’Kelly, is that roughly 60 percent of the guns in America do not have a single part that fits this description. As a practical matter, this means the ATF should not be able to charge a person with possessing a firearm if they have a piece of a weapon that does not exactly fit the regulatory definition. The problem that has arisen, and has led O’Kelly to testify against his former employer, is that the ATF is pursuing prosecutions in cases where the firearm part in question does not fit the legal definition.

The part at issue belongs to an AR-15 assault rifle. This type of rifle does not have a stereotypical receiver. Instead, it splits the functions of a receiver across two parts—an upper and lower receiver, neither of which meet all three factors in the ATF’s own regulatory definition.

The ATF administratively decided to classify the lower receiver as the legally prohibited part, despite O’Kelly’s protests while still serving as an agent, and the bureau launched legal actions based on this administrative decision. It is unclear how long the ATF has followed this policy or how many prosecutions have been undertaken, but starting in 2014, O’Kelly began to testify on behalf of defendants facing prosecution for the possession of AR-15 lower receivers. In the first three of these cases, the defendants prevailed, but the government withdrew its charges before a precedent-setting decision was made. Then, in late 2019, the ATF and federal prosecutors risked the setting of a precedent in an Ohio court where two felons were charged with possession of lower receivers.

Dan O’Kelly testified at an evidentiary hearing for the defendants’ motion to dismiss, as did a current ATF agent. Despite government protests that they had broad discretion to interpret regulation, the court ruled that when the text of a regulation is clear and the action of the agency runs counter to that text, the agency’s action cannot stand. Specifically, if the defendants do not possess that part of a firearm that is defined as illegal, the agency cannot arbitrarily alter the standard to charge them with a crime.

O’Kelly takes no pleasure in being in an adversarial relationship with his former employer, nor does he like seeing criminals go free. He says the ATF needs to redefine the legal bar for what a receiver is. But, until then, when called to testify, he will tell the truth.

Sources: CNN.com, United States v. Rowold, 2019 U.S. Dist. LEXIS 217016 (N.D. Ohio 2019)

---

**A CARING HAND UP TO RECENTLY PAROLED AND RELEASED INMATES**

**IN BEAUTIFUL SANTA BARBARA COUNTY**

**CALIFORNIA**

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

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

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

We would like you to join us upon leaving prison.

WE’RE WAITING FOR YOU!

Criminal Legal News
Michigan Supreme Court Announces that Duress May be Asserted as an Affirmative Defense to Felony Murder, Overruling Gimotty and Etheridge

by Douglas Ankney

In a case of first impression for the Supreme Court of Michigan, the Court announced that the affirmative defense of duress may be asserted in a prosecution for felony murder if such defense is available for the underlying felony, overruling People v. Gimotty, 549 N.W.2d 39 (Mich. Ct. App. 1996), and People v. Etheridge, 492 N.W. 2d 490 (Mich. Ct. App. 1992).

Tiffany Lynn Reichard agreed to help her boyfriend, Michael Beatty, rob Matthew Cramton. Reichard knocked on Cramton’s door. When Cramton came to the door, Beatty entered with a gun to rob him while Reichard acted as a lookout. Beatty exited the home carrying a knife and covered in blood. Reichard drove Beatty to his mother’s home and helped him dispose of his clothes. Cramton died of multiple stab wounds.

Reichard was charged with open murder under a felony-murder theory with armed robbery as the underlying felony in violation of MCL 750.316. Prior to trial, Reichard filed a motion to present a duress defense. Reichard claimed that Beatty had physically and sexually assaulted her in the past and that she aided him in the robbery because she was under duress. She contended that because she committed the underlying felony under duress, she could not be guilty of felony murder. The trial court granted the motion allowing Reichard to present her duress defense, and the prosecutor appealed.

Relying on People v. Henderson, 854 N.W. 2d 234 (Mich. Ct. App. 2014), a panel of the Court of Appeals reversed. The panel reasoned that if this were simply a second-degree murder case with Reichard’s liability based upon an aiding and abetting theory, both she and Beatty would be guilty of second-degree murder, and the duress defense would be unavailable pursuant to Henderson. Since it was the existence of the predicate felony that raised the liability of Beatty from second-degree murder to first-degree murder under the felony-murder doctrine and Reichard’s role of an aider and abettor remained the same, her criminal responsibility should also be raised to first-degree murder. Consequently, the Court of Appeals held that “the trial court erred by granting defendant’s motion to raise duress as a defense to the murder charge, including the felony-murder theory.”

The Supreme Court of Michigan ordered oral argument in response to Reichard’s application for leave to appeal to address “whether the Court of Appeals correctly determined that duress is not an available defense to the charge of felony murder under any circumstances.”

The Court observed that MCL 750.316 provides, in pertinent part, that a person is guilty of first-degree murder when the murder is committed in the perpetration of, or attempted perpetration of, several enumerated felonies, including robbery. While in common law the felony-murder doctrine recognized the intent to commit the underlying felony to be sufficient mens rea for murder, Michigan’s felony-murder statute requires the malice to be separately shown. People v. Aaron, 299 N.W. 2d 304 (Mich. 1980). To convict a defendant under the statute, “it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm.” Id. Thus, MCL 750.316 operates only to elevate second-degree murder to first-degree murder, if the murder was committed in the commission, or attempted commission, of one of the enumerated crimes. Id.

A defense of duress requires a defendant to produce some evidence to support a conclusion that: (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear in the mind of the defendant, (3) the fear was operating upon the defendant’s mind while the alleged crime was occurring, and (4) the defendant committed the alleged crime to avoid the threatened harm. People v. Lemons, 562 N.W. 2d 447 (Mich. 1997).

But historically, duress was not permitted as an affirmative defense to murder. This was premised on the theory that it was better for a person to allow himself or herself to be killed rather than to kill an innocent person to avoid being killed. 4 Blackstone, Commentaries on the Laws of England, p. 30. The Court of Appeals first recognized the principle in People v. Ditris, 403 N.W. 2d 94 (Mich. Ct. App. 1987), in which it held that “duress is not a valid defense to homicide in Michigan.” And in Gimotty, the defendant was found guilty of felony murder. The Court of Appeals found that Gimotty was not entitled to an instruction on duress because “[i]t is well settled that duress is not a defense to homicide.”

But the Supreme Court of Michigan had never addressed whether duress was a defense to felony murder. And the Court observed that the conclusion in Gimotty made little sense in light of the rationale for excluding the defense of duress for other types of murder. That is, in other types of murder a person is faced with the choice of sparing his or her own life or that of an innocent – and the law expects that person to spare the life of an innocent. For example, if a perpetrator points a loaded gun at a man and tells the man he will be killed unless the man pushes his wife off a bridge, the law expects the man to accept being killed rather than kill his wife.

But in felony murder, the defendant is faced with a choice of being killed or committing some lesser felony for the defense of duress to arise. The lesser felony does not include the killing of an innocent. In Tully v. State, 730 P.2d 1206 (Okla. 1986), the Oklahoma Court of Criminal Appeals explained:

“It is compatible with the common law policy of duress that the defense should attach where the defendant consented, by duress, only to the commission of the lesser crime and not to the killing, and, at the time of his participation in the lesser felony, had reason to believe his life or the life of another was immediately in danger unless he participated.”

The Michigan Supreme Court also observed that disallowing the defense of duress could result in illogical and unacceptable conclusions. For example, if the underlying felony alone was charged, the defendant may be acquitted by duress. But if the underlying felony and the felony murder were charged together, the defendant could be acquitted of the underlying felony based on duress but convicted of the felony murder.

The Court concluded that duress may be asserted as an affirmative defense to felony
Texas Court of Criminal Appeals: Failure to Include ‘Or Others’ in Jury Instruction for Self-Defense Against Multiple Assailants Deprived Defendant of Defense

by Dale Chappell

The Texas Court of Criminal Appeals ("TCCA") held on February 5, 2020, that the failure to include "or others with him [the primary assailant]" in the jury instruction for a self-defense against multiple assailants defense was a "calculated" omission that deprived a defendant of his defense, requiring reversal of the conviction.

Patrick Jordan was encouraged by an ex-girlfriend, Summer Varley, to stop by a local bar to buy her a drink since he was moving out of town. Jordan and his friend Coby Bryan already planned to eat at a restaurant next to the bar, so he agreed. When they arrived at the bar, the two were met by Varley’s large, angry friends, who had been drinking and advised Jordan not to speak to Varley. Jordan agreed and they went next door to eat.

Varley’s friends, Jordan Royal, Austin Crumpton, Damon Prichard, and Joshua Stevenson, followed Jordan and Bryan and became “aggressive” with them. Jordan and Bryan then changed their minds about eating there and tried to leave. However, Varley’s friends turned violent, with Royal knocking out Bryan, Jordan fell and the mob followed him, with Royal attacking him.

Jordan then stopped the attack by shooting his gun three times. One shot hit Royal in the leg, another hit Varley in the chest, and the third hit Crumpton, the instruction mandated a rejection of the instruction “focused exclusively on Royal’s action,” the Court said, because “Royal or others” would never justify shooting at Varley and Crumpton. The jury, so instructed, hung on the aggravated assault charge regarding Royal but convicted on the deadly conduct charge. Jordan was sentenced to four years in prison, and the court of appeals affirmed.

An instruction may include other assailants in the instruction, even though only one assailant was the attacker, the TCCA explained. Instead, the defense only requires that the defendant had a reasonable fear of serious bodily injury from a group of people acting together, the Court further explained. The defense “may be raised even as to those who are not themselves aggressors as long as they seem to be in any way encouraging, aiding, or advising the aggressor.” Black v. State, 145 S.W. 944 (Tex. Crim. App. 1912).

The TCCA concluded that the jury instruction should have included the words “Royal or others” regarding the deadly conduct charge involving only Varley and Crumpton. “It does not matter whether Crumpton or Varley individually used deadly force against [Jordan]; it matters whether [Jordan] had a reasonable apprehension of actual or apparent danger from a group of assailants that included Crumpton and Varley. If there is evidence of more assailants than one, the charge must inform the jury that the accused can defend against either, and it is error to require the jury to believe or find that there is more than one assailant attacking the accused,” the Court explained.

“Since a need to shoot at Royal alone would never justify shooting at Varley and Crumpton, the instruction mandated a rejection of self-defense,” the Court said, because the instruction “focused exclusively on Royal’s actions.” Whereas, the evidence pointed to Jordan facing a “mob.” “Correct instruction would have authorized an acquittal if Appellant reasonably believed that shooting in the direction of Varley and Crumpton had been immediately necessary to protect himself against Royal or others,” the Court pointed out. “The difference between the instructions that were given and those that should have been given is the difference between foreclosing self-defense and allowing fair consideration of it. That difference clearly demonstrates that Appellant was harmed by the refusal to instruct on multiple assailants.”

Accordingly, the Court reversed the court of appeals and remanded the case to the trial court for further proceedings consistent with its opinion. See: Jordan v. State, 593 S.W.3d 340 (Tex. Crim. App. 2020).
Virus Vigilantes v. Virus Violators: Shunning, Shaming, or Policing COVID-19 May not Be the Cure

by Michael Fortino, Ph.D.

C rizes have a way of bringing out the best as well as the worst in all of us. When driven by fear of the unknown, and in this case the unknown is a microscopic viral assailant known respectfully as COVID-19, a society’s response can vary dramatically.

In the media, we are shown messages of hope, endurance, and recovery, yet for every positive message, the media seem to feed us two that promote shunning, shaming, and of course, political slamming.

Fear of the unknown tends to breed contempt, and during a crisis, the blame game turns to war. Human nature attempts to mask its own fear through the use of deflection, and because we are all at war with this epidemic, we tend to deflect by offering our opinion on who misspoke, who mis-stepped, or who misled us deeper into this contagion.

Of course, not everyone is focused on the negative. We see people creating nonprofit food banks, setting up websites to offer volunteer services for the sick or elderly, and people handing-sewing masks from their basement or garage. We see the best in people.

On the flip side of that equation, however, we also witness the worst in people. There are those who insist on hoarding despite others in need or those who take advantage of a societal vulnerability through scams and exploitation. And then, there are those who resist newly imposed rules and restrictions in an act of sheer defiance.

Since the signing of the Declaration of Independence, Americans, by nature, show reflexive resistance to rules that infringe on their personal freedom. Unfortunately, this resistance may be counterintuitive when those very rules are intended to save lives.

If you’ve paid attention to the media in recent weeks, you have likely witnessed countless acts of defiance. There is the case of the mega-church minister in Washington County, Pennsylvania, who scheduled a “Woodstock-size” revival meeting, anticipating more than 100,000 unmasked participants, each encouraged to drive in from all over the country to proclaim their faith and their freedom. Then spring breakers crowded Florida beaches who seem to be more compelled by hormones than health. And finally, the everyday people we see wandering aimlessly down the street wearing their mask prominently on their forehead or chin. As concerned citizens, we have an innate need to point out each other’s carelessness or reckless behavior. We feel, at times, that it is our civic duty and our social responsibility to indict each other as part of the war effort.

What better way to fight an invisible enemy than to focus on what (or whom) we can see, then attack. The contagion thrives in chaos. This invisible enemy capitalizes on our weakness. It causes us to turn on ourselves, to spend our precious time identifying and policing our neighbors or those who may fall out of lockstep.

Inevitably, we are most influenced by the media, especially during a lockdown when our only connection to the world is what we are told rather than what we may experience firsthand. Today’s media, however, are a far cry from the days of Walter Cronkite who seemed to only report the facts. Media feeds on fear, especially in the wake of a pandemic. Our source of information today is often comprised of hate-mongering “talking heads” who realize that ranting equates to ratings.

On a recent Fox news interview, former prosecutor-turned-pundit, Nancy Grace, was excoriating prison officials for letting any offender back into our communities and onto our streets. She dutifully cited an extreme example in which a county jail released one of its pre-trial detainees, who was recently brought in on charges for car-jacking. The jail believed it could not keep its detainees safe from exposure to the virus, so it proceeded to temporarily release (furlough) the population until such time that the epidemic could be brought under control.

For purposes of sensationalizing, Grace was able to capitalize on one lone example in order to decimate an entire “compassionate release” movement. Granted, the optics were disturbing in this particular case. It seems, the carjacking suspect, upon walking through the gate after receiving his furlough, proceeded to “carjack” another vehicle within 37 minutes. One may assume he had no ride home. In this case, however, even the most compassionate in society would have difficulty with this release, ride or no ride.

The question remains, however: Should we condemn all prisoners to a possible death sentence based on the actions of one? A more rational approach might be to consider each release on a case-by-case basis and evaluate that releasing candidate’s rehabilitative initiative, his or her prison record, and most important, their support system on the outside. Rational policy should not be based on extreme examples.

The reality is that the vast majority of prisoners held in lower-security prisons and in county detention centers are non-violent. Nevertheless, there are rallying cries all over the country to condemn many prisoners to what may likely become a death penalty irrespective of their particular crime or current health risk. Again, we may point to fear and deflection particularly when elderly and ailing prisoners who may be the most vulnerable to the contagion are left without a voice.

Then there is the case of the Philadelphia Police officers, who violently pulled a man off a city bus for not wearing a mask, or the case of New York police officers arresting a woman for not practicing social distancing while cuddling with her boyfriend in public. She was detained by police and spent 36 hours in a cell, which she had to share with nearly two dozen other women. Throughout her entire lockup, police offered no soap and only a few drops of hand sanitizer.

The Wall Street Journal reported that a suburban Chicago neighborhood was posting “shaming” photos on its community Facebook page of people who were not living up to the ideals of proper social distancing. One photo in particular was posted in order to shame William Zordani and his family who happened to take a leisurely neighborhood walk with their golden retriever. These shaming, now popping up all over the country, have become known as “virus vigilantes.”

Zordani and his family seemed to take it all in stride. “I think a lot of people are really scared,” Zordani said, “and the only way they can get some sense of security is to try to police other people.”

As the mortality rate continues to grow in some communities, there seems to be a corresponding upsurge in the number and type of virus vigilantism being executed. Some vigilantes have made it their life’s ambition during the outbreak to go after “coughing commuters,” to antagonize “kissing couples,” or to hunt down and photograph anyone failing to wear a mask, even those drinking a coffee alone on
a park bench. A popular hashtag is #covidiot designed specifically to report “virus violators.” In a world where we have little to hold onto but fear, we seem to find solace in pointing at others. Jennifer Weiner of The New York Times suggests that anger is “a way of exerting a tiny measure of control.”

Shaming, however, does not work. It does not work in the criminal justice system, and it does not work in the general public. In the criminal justice system, prisoners often receive condemnation and belittlement from their custodians, having to endure comments like, “you misfit,” “you loser,” or “you failure.” This vitriol and negativity exacerbates something called the “shame cycle.” Much the way an alcoholic might act the morning after waking up and remembering how much he embarrassed himself the evening before – the first thing that crosses his mind is to have another drink to medicate the pain. Psychology professor June Tangney of George Mason University and author of “Shame and Guilt,” says, “By shaming people, we’re actually encouraging the opposite.”

We may be able to take a lesson from history. In the late 19th century, Americans blamed Jewish immigrants from Eastern Europe for a cholera outbreak despite the fact that the outbreak was a result of contaminated water. This blame eventually cumulated in a New York Times article demanding absolute prohibition against all immigration in 1892. If that had happened, many of us would not be here today. Shortly before the cholera outbreak, the bubonic plague broke out in California inflaming suspicion that the disease likely originated with Chinese immigrants. That panic led to the burning of Chinese ghettos and the formation of Chinese quarantine camps. The event led to the 1882 Chinese Exclusion Act banning all Chinese immigration for 40 years.

In an article on Slate.com, Aviva Shen suggests, “In normal times policing has been America’s primary response to most of societal ills that cannot be solved by punishment. Homelessness, mental illness, violence, racism, poverty and toxic masculinity are all fed through the criminal justice system rather than getting addressed in any meaningful way, never mind resolved.” Perhaps Americans believe they can police their way out of fear by imposing more laws, more rules, more scrutiny, and more shame, yet it is this very attitude that drives us out of sync with that which makes for a civilized democratic and pluralistic society.

In the days and months ahead, we will have to choose between mercy and punishment, between reason and lunacy, between sanity and insanity, between hope and hopelessness. The punitive choices we have made in the past have failed. They continue to haunt us and to shape our communities as we move forward. The virus is intent on reducing us to our lowest common human denominator – survival. But humans do more than merely survive; they thrive. COVID-19 has no interest in our politics or in our courts or prisons. It does not care how we define good and evil, crime and punishment, love and hate. It is an inanimate predatorial force that affects all of us in one way or another. We should fear it, but we should not let it warp us or push us over the cliff. We are already far too close to the edge.

Simply put, we cannot police the virus. We can only police ourselves through encouragement, productivity, and compassion. We must appeal to our best qualities, to the ideals America’s Founders imagined and brought to life – a life that we all share for better or worse.

Source: slate.com, nytimes.com, wsj.com, guardian.com

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!
SCOTUS: Due Process Doesn’t Require States to Adopt a Specific Test for Determining Insanity

by Douglas Ankney

The Supreme Court of the United States (“SCOTUS”) determined that “no insanity rule in this country’s heritage was ever so settled as to tie a State’s hands centuries later” and held that Kansas did not violate due process by failing to “adopt an insanity test turning on a defendant’s ability to recognize that his crime was morally wrong.”

James Kahler was charged with capital murder after he shot and killed four members of his family. Prior to trial, he filed a motion arguing that Kansas had “unconstitutionally abolished the insanity defense” by allowing the conviction of a mentally ill person “who cannot tell the difference between right and wrong.”

Kansas’s statutory scheme for allowing an insanity defense permits juries to acquit only if a defendant “as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense” and “mental disease or defect is not otherwise a defense.” Kan. Stat. Ann. § 21-5209. Culpable mental state is the “mens rea” or “intent formed in the mind” to commit a crime.

Kahler argued that this deprived him of due process because he wanted to present an insanity defense based on his moral incapacity; to wit, he had the culpable mental state in intending to kill his victims but he lacked the mental capacity to understand his actions were wrong. In Kansas, this defense cannot be raised during the guilt phase of the trial — meaning a defendant cannot be acquitted based on the fact that a mental defect caused him to not know his actions were wrong. A defendant in Kansas can present such evidence of moral incapacity only at the sentencing phase to mitigate punishment. Kan. Stat. Ann. §§ 21-6815(c)(1)(C), 21-6625(a).

The trial court denied Kahler’s motion, leaving him to attempt to convince the jury that his mental defect (severe depression) prevented him from forming the intent to kill. The jury rejected his claim and convicted him of capital murder. During the penalty phase, the court permitted Kahler to offer additional evidence of his mental illness and to argue in whatever way he chose as to why it should mitigate his sentence. The jury imposed the death penalty.

On appeal, Kahler reasserted his challenge to the constitutionality of Kansas’ approach to insanity claims. The Kansas Supreme Court rejected his argument. SCOTUS granted certiorari.

The High Court observed: “A challenge like Kahler’s must surmount a high bar. Under well-settled precedent, a state rule about criminal liability — laying out either the elements of or the defenses to a crime — violates due process only if it ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” Leland v. Oregon, 343 U.S. 790 (1952). The Court’s primary guide in application of that standard is “historical practice.” Montana v. Egelhoff, 518 U.S. 37 (1996). In assessing historical practice, SCOTUS looks “primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions.”

In Clark v. Arizona, 548 U.S. 735 (2006), SCOTUS identified four “strains variously combined to yield a diversity of American standards” used when determining whether to absolve mentally ill defendants of criminal culpability. The first two strains descend from the landmark English decision M’Naghten’s Case, 10 Cl. & Fin. 200 (H.L. 1843). The first strain asks about “cognitive capacity” — whether a mental illness left a defendant “unable to understand what he [was] doing” when he committed a crime. Clark. The second examines a defendant’s “moral capacity” — whether his illness rendered him “unable to understand that his action [was] wrong.” Id. If a defendant lacks either moral or cognitive capacity, he is not criminally responsible for his behavior.

Beginning in the mid-19th century, a third strain became popular and focused on a defendant’s “volitional capacity,” i.e., whether the mental disease made him subject to irresistible impulses or made him unable to control his actions. Id. Finally, in Clark’s accounting, the fourth strain was the “product-of-mental-illness test” that broadly considers whether a defendant’s criminal act stemmed from a mental disease.

But these four strains by no means exhaust the complexity of insanity defenses available among the states. For example, in some jurisdictions, the jury must determine if the defendant understood his act was immoral, People v. Schmidt, 110 N.E. 945 (N.Y. 1915), while other jurisdictions require a determination of whether the defendant understood his actions were illegal. State v. Hamann, 285 N.W.2d 180 (Iowa 1979). Thus, if a defendant knew it was illegal to kill his neighbor but believed he was morally right in doing so because of a delusion that God told him to do it in order to save the human race, he would be acquitted in the former jurisdiction but convicted in the latter.

In Powell v. Texas, 392 U.S. 514 (1968), SCOTUS upheld the policy of Texas in not recognizing the disease of “chronic alcoholism” as a defense to the crime of public drunkenness, emphasizing the paramount role of the states in “setting standards of criminal responsibility.” While the defense was recognized in other states, SCOTUS refused to impose “a constitutional doctrine” defining standards of criminal responsibility. The Court recognized that the “constantly shifting adjustment” of “changing religious, moral, philosophical, and medical views of the nature of man...” could not proceed in the face of rigid constitutional formulas.” Powell.

Nowhere had the Court held more closely to that view than when addressing the contours of the insanity defense. “[P]sychiatrists disagree widely and frequently on what constitutes mental illness, on [proper] diagnosis, and on cure and treatment.” Ake v. Oklahoma, 470 U.S. 68 (1985). And in Clark, the Court noted that the states”limit, in varying degrees, which sorts of mental illness” can support an insanity claim. In Leland, the defendant lost his argument that Oregon violated due process for using the moral-incapacity test (the test Kahler was asking the Court to impose upon Kansas) in lieu of the volitional-incapacity test. Concerning the differing views of mental illness and insanity, the Court said in Leland, “This whole problem has evoked wide disagreement.”

But the Court agreed with Kahler that for hundreds of years judges and jurists have recognized the principle that insanity is a defense relieving the accused of criminal responsibility. Sir William Blackstone wrote “lunatics are not chargeable for their own acts, if committed when under these incapacities.”
4 Commentaries on the Laws of England 24 (1769). Sir Edward Coke wrote "the act and wrong of a mad man shall not be imputed to him." 2 Institutes of the Laws of England § 405 (1628) ("Coke"). And Henry de Bracton was of the opinion that a "madman" could no sooner be found criminally liable than a child. 2 Bracton on Laws and Customs of England 384 (S. Thorne transl. 1968). And Kansas, in permitting an insanity defense, had not departed from that principle.

But there was no consensus among those venerable men or within historical judicial decisions that any particular test for determining insanity prevailed. For example, Lord Coke expressed that the test for an insane person was one who was so utterly "without his mind or discretion" that he could not form the needed mens rea. Coke, § 405. Yet, as already observed, M'Naghten's Case considered moral incapacity to be a test for insanity.

The Court concluded that Kahler failed to demonstrate that the moral-incapacity test is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and Kansas has no constitutional duty to adopt it.

Accordingly, SCOTUS affirmed the decision of the Kansas Supreme Court. See: Kahler v. Kansas, 140 S. Ct. 1021 (2020).

**Fifth Circuit: Defendant Lacked Culpability in Attempting to Export Ammunition by Merely Purchasing It**

_by Anthony Accurso_

The U.S. Court of Appeals for the Fifth Circuit held that a district court clearly erred in assigning a defendant a three-level enhancement for attempting to export ammunition when he had purchased the ammunition but was yet to take further steps toward its export.

Rodolfo Rodriguez-Leos was on a non-immigrant visa to the U.S. from Mexico when he purchased a case of ammunition from an Academy Sports store in McAllen, Texas, an illegal act based on his visa status. Federal agents followed him until he stashed the shells in a bush in a residential neighborhood. They arrested him shortly afterward in nearby Hidalgo, Texas, while he was shopping at an auto parts store.

Rodriguez admitted to purchasing the ammunition for "El Chivo," who would pay him $50 to buy ammunition and later deliver it to an "unknown male" at a Whataburger in Hidalgo. He stashed the ammunition in McAllen, so it would not be in his possession until El Chivo called him "a day or two later."

Rodriguez pleaded guilty to unlawful possession of ammunition, a base level of 14 as per the U.S. Sentencing Guidelines under § 2K2.1. He was enhanced to level 26 through a cross-reference to § 2X1.1 because the crime was committed in connection to the exportation of ammunition without a valid export license under § 2M5.2.

However, under § 2X1.1(b)(1), a defendant qualifies for a three-level reduction if he attempted, but did not complete the offense, "unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control."

The PSR failed to account for this reduction, so Rodriguez objected to the omission. The district court denied his objection and sentenced him to 50 months' imprisonment, within the 46- to 57-month range. Rodriguez then appealed.

Though Rodriguez didn't mention § 2X1.1(b)(1) in his objection, he used language substantially similar to that provision in his objection, preserving his issue for clear error review on appeal. United States v. Ocana, 204 F.3d 585 (5th Cir. 2000).

To prevail, Rodriguez had to prove the district court's finding "implausible in light of the record as a whole." United States v. Griffith, 552 F.3d 607 (5th Cir. 2008).

The Court reviewed whether his conduct (or lack thereof) qualified him for the three-level reduction based on four, non-exhaustive factors set forth in United States v. Waskom, 179 F.3d 303 (5th Cir. 1999), which courts consider in applying § 2X1.1(b)(1): (1) focus on the substantive offense and the defendant's conduct in relation to that specific offense; (2) no reduction is required for a conspirator who has made substantial progress in his criminal endeavor simply because a significant step remains before commission of the substantive offense becomes inevitable; (3) a defendant is entitled to the reduction unless the circumstances demonstrate that the balance of the significant acts completed and these remaining acts towards completion of the substantive offense, considering the quality, not just the quantity, of the completed and remaining acts; and (4) consider the temporal frame of the scheme and the amount of time the defendant would have needed to finish his plan, had he not been interrupted because as the completion of the offense becomes more imminent, the reduction will become less appropriate."

Similar to the defendant in United States v. Soto, 819 F.3d 213 (5th Cir. 2016), all Rodriguez did to advance the export was buy the ammunition. Unlike Soto, who was granted the three-level reduction on review by the Court of Appeals, Rodriguez did not even have the ammunition in his possession when he was arrested. Further, it was unclear when he would take the steps to complete the export. Thus, the Court concluded the district court clearly erred in denying Rodriguez a three-level reduction under § 2X1.1(b)(1).

Accordingly, the Court vacated his sentence and remanded for resentencing. See: United States v. Rodriguez-Leos, 953 F.3d 320 (5th Cir. 2020).
The Supreme Court of Iowa ruled there was no factual basis to support a defendant’s guilty plea to possessing a tool with the intent to use in the unlawful removal of a theft detection device. The Court further ruled that defense counsel was ineffective for allowing the defendant to plead guilty to the charge.

Before the Court was the appeal of Charles Edward Ross. He was arrested, along with co-defendant Calvin Lacey, in the early morning hours of September 24, 2018. Ross used bolt cutters to cut the padlock off a steel cable that was wrapped around a riding lawn mower that was on display at a local farm-supply store onto a rented truck. An employee who was arriving for work saw them and called police.

They fled but were apprehended down the road. A search of the vehicle resulted in discovery of bolt cutters, the mower, a ski mask, and methamphetamine. Ross was charged with theft in the second degree, possession of a “tool, instrument or device to remove a theft detection device” under Iowa Code § 714.7B(3), and possession of methamphetamine.

A plea agreement was reached on April 1, 2019. It provided for the dropping of a habitual offender enhancement on the theft charge and a seven-year combined sentence on the three charges. After sentencing, Ross appealed and argued his trial counsel was ineffective for allowing him to plead guilty to possession of a “tool, instrument or device to remove a theft detection device.”

Iowa Code § 714.7B(4) defines a “theft detection device” as “any electronic or other device attached to goods, wares, or merchandise on display or for sale by a merchant.” The Court found the statute’s plain language and its title — “Theft detection devices — shield or removal prohibited” — is clear that its purpose is to prohibit people from using theft detection shielding devices or removing theft detection devices.

The State urged focusing on the word “device” to support the lock and cable was a theft detection device. The Court said that interpretation would render the words “theft detection” meaningless. Instead, the Court focused on the word “detection.”

“Here, the padlock-steel cable combination that Ross cut did nothing to detect or determine that Ross was committing the theft,” the Court wrote. “It was the store employee — not the padlock-steel cable combination — who detected any theft.”

The Court concluded that the padlock-steel cable combination constitutes a theft prevention device, not a theft detection device. To qualify as an offense under § 714.7B, “the ‘device’ must be a theft detection device, not just any device attached to merchandise,” the Court explained.

Based upon its findings, the Court held there was no factual basis to support Ross’ guilty plea to possession of a “tool, instrument or device to remove a theft detection device.” It further ruled that trial counsel was ineffective for allowing Ross to plead guilty to that offense.

Accordingly, the Court vacated Ross’ guilty plea and remanded for further proceedings consistent with its opinion. On remand, the State has the option of withdrawing the plea agreement and reinstating any charges it previously dismissed. See: State v. Ross, 941 N.W.2d 341 (Iowa 2020).

Second Circuit: Habeas Petition Not Moot Where It Attacked Inactive Original Order That Gave Rise to Current Active Order Restraining Petitioner’s Liberty

The U.S. Court of Appeals for the Second Circuit held that a habeas petition is not moot where it attacks an earlier order that is inactive but gave rise to a current active order restricting the petitioner’s liberty.

In December 2007, Steven Janakievski attacked a coworker with a knife. He was charged with first-degree assault and tried in the County Court for Monroe County, New York.

At trial, psychiatric experts for the prosecution and the defense agreed that, at the time of the knife attack, Janakievski was suffering from a psychotic disorder and did not appreciate the wrongfulness of his conduct. The trial court accepted Janakievski’s plea of not responsible by reason of mental disease or defect pursuant to CPL § 330.20 based upon the experts’ testimony.

CPL § 330.20(2) required Janakievski to undergo a psychiatric examination. Based upon that examination, the trial court, in April 2009, found that he suffered from a dangerous mental disorder and committed him to the Rochester Psychiatric Center (“RPC”). The trial court issued subsequent retention orders continuing Janakievski’s commitment in October 2009, October and December 2010, and August 2012 on the ground that Janakievski continued to suffer from mental illness. In the August 2012 order, the trial court determined he was no longer dangerous but remained mentally ill and in need of inpatient treatment at RPC.

In April 2014, Janakievski filed a pro se petition for a writ of habeas corpus in the U.S. District Court for the Western District of New York. The petition attacked the initial commitment order of April 2009 and the subsequent retention orders. He alleged, inter alia, that there was insufficient evidence supporting the finding that he suffered from a dangerous mental illness requiring his initial commitment to RPC. He further argued that hospital records showed he was in remission at the time of the April 2009 hearing. He challenged the subsequent retention orders on numerous grounds, including ineffective assistance of counsel.

In June 2018, while the habeas petition was pending, the trial court ordered Janakievski’s release from RPC, subject to the “order of conditions” required by CPL § 330.20(12). The trial court found that Janakievski’s condition warranted release from inpatient treatment because he did not have a mental disorder and was not mentally ill. The order of conditions required that for three years (until June 2021) Janakievski would continue in outpatient treatment, refrain from use of drugs...
or alcohol, and seek the State’s approval before leaving New York or changing his address.

The order of conditions also permitted the State to make application to have Janakievski recommitted upon a showing by a preponderance of the evidence that he suffered from a dangerous mental disorder. CPL § 330.20(14). If the State made such application, Janakievski must attend a hearing or he could be jailed for failure to appear. Id. If the court found that he suffered from a dangerous mental disorder, it must order him remitted to a secure facility. CPL § 330.20(1)(f).

In September 2018, the federal district court dismissed the habeas petition as moot because Janakievski’s release from inpatient custody meant he was “no longer subject to any of the orders” that he challenged in the petition. Janakievski appealed, and the Second Circuit issued a certificate of appealability.

The Court observed that “[t]o satisfy the Constitution’s case-or-controversy requirement, a party must, at each stage of the litigation, have an actual injury which is likely to be redressed by a favorable judicial decision.” United States v. Mercurris, 192 F.3d 290 (2d Cir. 1999). If a case ceases to involve such an injury, it ceases to fall within the federal court’s jurisdiction and must be dismissed for mootness. Id. A habeas petition is generally not moot as long as the petitioner is incarcerated, Dibansa v. Krueger, 917 F.3d 70 (2d Cir. 2019), or subject to the restraints upon his liberty inherent in parole, Spencer v. Kemna, 523 U.S. 1 (1998).

A habeas petition is not moot when the order it challenges is no longer in effect if (1) the petitioner continues to suffer some concrete, continuing injury from the challenged order, Mercurris, and (2) the injury can be redressed by a favorable judicial decision. Chafin v. Chafin, 568 U.S. 165 (2013). A petition is not moot if the favorable judicial decision provides only partial redress. Church of Scientology of Cal. v. United States, 506 U.S. 9 (1992).

The Court determined that Janakievski suffers restraint on his liberty as a result of the June 2018 ‘order of conditions.’ He is required to participate in outpatient treatment, he is required to seek prior approval before moving or leaving the state, and he is required to refrain from the use of alcohol. He also is subject to recommittal at any time based on the lower ‘preponderance of evidence’ standard. He is subject to the 2018 order of conditions only because, in 2009, the trial court determined he suffered from a dangerous mental health disorder, which required the court to order him committed to RPC pursuant to CPL § 330.20.

Janakievski challenged that order in his habeas petition. Should he prevail on his challenge, the April 2009 commitment order would be vacated, and the trial court’s June 2018 order of conditions would be without statutory authority or effect. Janakievski also challenged the subsequent retention orders of October 2009, October and December 2010, and August 2012. Should he prevail on any of those challenges, he would be eligible for discharge from the order of conditions earlier than June 2021.

The Court concluded the habeas petition wasn’t moot because a favorable judicial decision vacating the April 2009 order would provide Janakievski with redress of his injury, and a judicial decision vacating any of the subsequent retention orders would provide Janakievski partial redress of his injury.

Accordingly, the Court vacated the district court’s order dismissing the habeas petition and remanded for further proceedings. See: Janakievski v. Executive Director, 955 F.3d 314 (2d Cir. 2020).
Federal District Court Finds ‘Confusion’ Over Law in State Court Excused Late Filing of § 2255 Motion

by Dale Chappell

Finding confusion in the state courts over the status of the law and obstacles put in place by the federal prison system that hindered filing for relief, the U.S. District Court for the District of Vermont granted resentencing, excusing the late filing of a motion to vacate a sentence under 28 U.S.C. § 2255.

Federal prisoner Shawn Simard filed a motion to vacate his sentence under § 2255 after he successfully challenged a prior conviction in state court that was used to double his federal sentencing range. He had been convicted of possession of child pornography under 18 U.S.C. § 2252(a)(4)(B) and sentenced in 2012 to just over 10 years in federal prison without parole, under a 10-year mandatory minimum for having a qualifying prior sex offense in Vermont. Without the prior conviction, Simard faced up to 10 years in prison.

Simard’s motion was filed five years after his sentencing and three years after that sentence became “final,” but he argued that his motion was filed within the one-year limit of § 2255 because he had filed it within one year of the vacatur of his prior conviction by the state court.

The magistrate judge assigned to review Simard’s motion recommended dismissal of the motion as untimely, not because Simard filed it too late, but because he didn’t act with “due diligence” in getting his prior conviction vacated. Indeed, Simard’s prior was from 2004, and he didn’t file his state postconviction challenge until 2016. That years-long delay after federal sentencing before any state court challenge was filed was not diligent, the magistrate judge concluded.

But District Judge William K. Session III rejected the magistrate’s recommendation upon Simard’s objections, finding he was diligent in seeking vacatur of his prior conviction. The Court cited at least two reasons: (1) the state of the law about whether Simard could have successfully challenged his prior was not clear until 2017, and (2) the obstacles put in place by the federal prison system caused part of the delay in filing for relief in state court.

Section 2255’s One-Year Limit

Under § 2255(f)(4), there’s a one-year limit for filing a § 2255 motion. Most often, that one-year clock begins to run from “the date on which the judgment of conviction becomes final.” § 2255(f)(1). However, there are three other triggers that restart that one-year clock. Here, the provision under subsection (f)(4) restarted the clock for Simard: “the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.”

In Johnson v. United States, 544 U.S. 295 (2005), the Supreme Court held that vacatur of a prior conviction used to enhance a federal sentence was a “fact” for purposes of § 2255(f)(4). However, the Court also held that a movant must show diligence by challenging his prior conviction “as soon as he is in a position to realize that he has an interest in challenging the prior conviction.” The question came down to whether Simard was diligent in seeking vacatur of his prior conviction.

Confusion in the State Court Excused Simard’s Delayed Challenge to His Prior Conviction

The “lack of clarity in Vermont law” about whether Simard could have filed for relief played a major role in Simard’s diligence. At the time of his state conviction and sentencing, the law in taking a guilty plea was at odds. In State v. Yates, 726 A.2d 483 (Vt. 1999), the Vermont Supreme Court ruled that a defendant must personally admit in court the factual basis for the charge. Instead, the Court said, was “diligent” under § 2255(f)(4), considering that he also faced obstacles the movant must show diligence by challenging his prior conviction “as soon as he is in a position to realize that he has an interest in challenging the prior conviction.” The problem with Simard’s prior conviction was that the trial court never asked him during the guilty plea whether he admitted to the factual basis for the charge. Instead, the court simply asked him whether he understood the charge, and counsel (not Simard) agreed to the facts.

When Manosh overturned Morrissette, he began the process of filing for relief. The state court found that Simard’s guilty plea was invalid and vacated his conviction. The state then dropped the charge.

The “due diligence” measuring stick under § 2255(f)(4) applies to how promptly a movant files for state postconviction relief; it has nothing to do with how soon he files his federal § 2255 motion. Once the prior is vacated, the § 2255(f)(4) one-year clock runs from the date of the state court’s vacatur order. The Second Circuit, and every other circuit, has held that “due diligence” does not mean “maximum feasible diligence” but only “due, or reasonable diligence.” Wims v. United States, 225 F.3d 186 (2d Cir. 2000). In other words, the court ruled that a movant is not required to “undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts.”

While Simard filed his state challenge 18 months after Manosh, the district court found that the state of confusion in the state courts still wasn’t cured until Bridger in 2017, though his conviction was vacated in 2016. Simard, the Court said, was “diligent” under § 2255(f)(4), considering that he also faced obstacles put in place by the federal prison system.

The Federal Prison System Hindered Simard’s Ability to Timely File a State Postconviction Challenge

The district court also found that the federal prison system hindered his ability to promptly file his state challenge, adding to its conclusion that he was diligent. After
Seventh Circuit Reiterates IAC Requires Only ‘Reasonable Probability,’ Not ‘More Likely Than Not,’ of Different Outcome

by Dale Chappell

The U.S. Court of Appeals for the Seventh Circuit held that the federal district court unreasonably applied “clearly established federal law” when it erroneously required a more demanding standard of review than the law requires for ineffective assistance claims (“IAC”) where trial counsel was clearly ineffective, requiring remand to grant habeas relief.

The state trial court agreed that Terez Cook’s trial lawyer was ineffective. Cook lost at trial after numerous errors prompted the trial judge to grant him a new trial, saying that counsel’s “deficiencies are so big that I would have to conclude if it had been tried correctly, that there’s a probability of a different result.”

When the State appealed, the Wisconsin Court of Appeals reversed, holding that Cook would not have won at trial absent the errors. Cook then filed a habeas corpus petition in federal court, raising several IAC claims. The district court found that the state court of appeals had in fact applied the wrong IAC standard but nonetheless concluded it was required to give deference to the state courts, so it denied Cook’s petition. He appealed.

Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), a federal court may not grant a habeas corpus petition unless the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court.” That’s the relevant provision of the AEDPA in question in Cooks’ case.

In Strickland v. Washington, 466 U.S. 668 (1984), the U.S. Supreme Court held that in order to show IAC a habeas petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” And that’s the “clearly established federal law” at issue under the AEDPA here.

Of all the errors by counsel that the Seventh Circuit found undermined the confidence in the outcome of Cook’s trial, one error stood out. Cook was portrayed by the State as an accomplice to a home invasion, but his claim was that another man he knew (and who looked like him) was the other robber. However, counsel never made any effort to locate the other person.

That was a crucial error, the Court said, because Cook and the other man resemble each other, and having the witness confront both of them at trial may have raised a reasonable doubt with the jury.

The Court was also concerned with a “serious misapprehension of the facts” by the State in the state court of appeals. The State told the court that Cook admitted he was there when the robbers were buying goods to commit the crime. But the record did not show this, and at oral argument, the State “overstated perhaps the most material facts in the case,” the Seventh Circuit said. “The state shoulders a weighty obligation to play entirely straight with the facts that affect a person’s liberty. Too much is at stake for all involved to see what we did here from the state.”

But, “once again,” Cook’s lawyer never challenged the State’s false evidence that Cook admitted he was part of the crime.

“Prejudice” — or the reasonable probability of a different outcome — under Strickland, though, considers all of counsel’s errors “as a whole,” the Court explained. While three significant errors made up most of the Court’s opinion (failure to locate the other man, to question incentivized codefendants who testified at trial, and to object to use of Cook’s cell phone location information), “taken together, these instances of deficient performance undermined the trial judge’s confidence in the result of the trial, and as an objective matter we come to the same conclusion.”

The district court therefore erred by giving too much deference to the state court of appeals’ decision, the Court said. “Cook did not need to prove that counsel’s deficient conduct more likely than not altered the outcome in the case.” Instead, he had to show only a “reasonable probability” of a different outcome. The district court unreasonably applied the Strickland standard, the Court concluded.

Accordingly, the Court reversed the district court’s denial of relief and ordered the court to grant Cook’s habeas corpus petition. See: Cook v. Foster, 948 F.3d 896 (7th Cir. 2020).
Divide and Conquer: New Algorithm Examines Crime-Scene Bullets Segment by Segment
by the National Institute of Standards and Technology, U.S. Department of Commerce

On the morning of March 22, 1915, residents of the small town of West Shelby, New York, awoke to a horrific scene. A woman clad only in a bloodied nightgown lay shot to death in the snow on the doorstep of an immigrant farmhand, Charles Stielow. Across the street, in the farmhouse where Stielow had recently begun work and where the dead woman had kept house, 70-year-old farmer Charles Phelps was found shot and unconscious. He died a few hours later.

After finding that Stielow lied when he told investigators he did not own a gun, the police arrested him on Aug. 21, 1915. During Stielow's trial, a self-proclaimed criminologist, Albert Hamilton, testified that the nine bumps he said he found inside the barrel of Stielow's .22 caliber revolver matched the nine scratch marks he had identified on the same caliber bullets at the crime scene. Although Hamilton never showed his evidence to the jury, declaring the findings were so technical they could only be discerned by an expert, Stielow was found guilty of murder in the first degree. He was sentenced to death in the electric chair and sent to Sing Sing prison to await execution.

Several people familiar with the case, including the deputy warden at Sing Sing, became convinced that Stielow was innocent and that his confession contained words that the farmhand, who was mentally challenged, could not have understood let alone uttered. Just one week before Stielow was scheduled to be electrocuted on December 11, 1916, the Governor of New York called for a reinvestigation. A firearms expert from the New York City police department compared the bullets from the murder scene with those test-fired from Stielow’s gun. Even by eye, the markings on the two sets of bullets did not look similar but to make certain, optician Max Poser studied them under the microscope. The bullets from the murder scene could not have been fired from Stielow’s gun, he declared.

Poser’s analysis not only set Stielow free, it made history as one of the first examples of applying modern forensic techniques to identify firearms.

Today, forensic scientists still use a type of microscope, developed and perfected by two of Poser’s colleagues in the 1920s, to examine crime-scene bullets or cartridge cases—the metal cylinders that hold the powder and bullets before they are fired. Known as a comparison microscope, the device consists of two microscopes connected by an optical bridge.

The microscope’s split screen allows for a side-by-side comparison of the miniscule scratch marks, or striations, on bullets or cartridge cases found at the crime scene with the markings on bullets or cases test fired from a particular gun. These striations are imparted on bullets as they squeeze through the spiral windings, called rifling, down a gun barrel at high speed and pressure.

The firearms examiner adjusts the position of the test-fired bullet until its striations best match those on the crime-scene bullet. In this way, the examiner can provide her expert opinion about whether the crime-scene bullets came from the same gun that was test fired.

The method is highly successful, but the comparison results are subjective, dependent on the expertise of the examiner. The visual comparison does not allow the firearms expert to objectively quantify the level of uncertainty in the comparison. For example, what is the likelihood of obtaining the comparison result if the bullets in fact came from the same firearm or from different firearms? Courts now prefer such statistical information, which is, for example, routinely provided by DNA experts when they testify about genetic evidence.

Last year, NIST scientists premiered a computer-based comparison method that can provide this numerical information. The algorithm, known as congruent matching profile segments (CMPS), relies on detailed 3D maps.

“Firearm experts are actually quite good at making comparisons, so it’s not a question of replacing human judgment with a computer algorithm,” noted NIST scientist Robert Thompson, a member of the NIST team. “The algorithm provides a way to mathematically rate the reliability of the expert’s findings.”

Crucially, instead of comparing the overall map, or profile, of one bullet to another, the algorithm first divides the profile of each crime-scene bullet into tiny, non-overlapping segments. Then, it looks to see if any of the individual segments match up with any section of a test-fired bullet.

The segmentation is an important feature because crime-scene bullets usually deform or fragment after ricocheting off a solid surface or rapidly decelerating in the human body. As a consequence, rifling striations may be erased, expanded or shifted in position. Comparing the entire profile of such a deformed bullet with the pristine markings of a bullet test-fired into a water tank may indicate a low probability of a match—even though the bullets may have been shot by the same gun. Searching for matching features segment-by-segment provides a much more accurate way of comparing crime-scene and test bullets.

Before the team applied their comparison method, the researchers used image reconstruction techniques to “straighten out” and display as parallel scratch marks that had become distorted or slanted as the bullets deformed. But even after the markings on the crime-scene bullets are straightened, they may not line up with the position of similar markings on the test bullets. That’s where CMPS comes in, says PML scientist Johannes Soons. The algorithm takes a small section of the markings on the deformed bullet and hunts for any place on the test bullets that may prove a match. The software then evaluates how many segments were found at a correct position relative to the markings on the test-fired bullet. The method builds upon an older algorithm, developed by PML scientist John Song, that compares impressed firearm marks on cartridge cases.

In the initial study that the NIST-led team reported last December in Forensic Science International, the scientists only used the CMPS method to compare non-deformed bullets fired from known guns. The team shot 35 9-mm Luger bullets into a water tank from 10 gun barrels that had consecutively manufactured.

Each barrel in the study imprinted scratch marks on the bullets. The researchers found that CMPS more accurately determined the origin of each bullet than a comparison method that did not divide the bullet markings into segments.

In the team’s newest study, published in
the January Forensic Science International, the researchers for the first time employed the CMPS method to examine deformed bullets. The team fired 57 bullets with varying degrees of fragmentation from the same .9 mm pistol into a water tank. To create bullet fragments with varying degrees of deformation, the researchers aimed the gun at a slight angle, so that the bullets struck the sides of a heavy gauge steel tube placed in front of the water tank instead of shooting straight into the water.

The team conducted two kinds of tests using the image reconstruction software and the CMPS algorithm. The researchers compared severely distorted markings on bullets with those imprinted on near-pristine reference bullets shot directly into the water tank. They also compared deformed bullets before and after image reconstruction that straightened the distorted markings. The scientists found that together, image reconstruction and CMPS significantly improved the ability to match the markings on deformed bullets with each other and with the pristine bullets.

The team is now planning to conduct further studies to test the CMPS method. With the freedom—and perhaps the life—of a defendant hanging in the balance, these studies are critical for determining if—and when—CMPS can be routinely incorporated into the analysis and testimony of firearm experts, says Soons.

Papers:

See video at nist.gov, as described on the website: When a bullet is fired from a gun, the barrel leaves distinctive scratch marks on the surface of the bullet. These microscopic marks are highly similar for bullets fired from the same gun, meaning they can be used for forensic comparison, matching bullets taken from a crime scene to a particular gun. However, crime-scene bullets are often deformed from collisions, which can make direct comparison difficult. Now, NIST researchers have developed a new algorithm that makes this matching more accurate, by dividing the markings on the deformed bullets into segments, and correlating those segments with the reference bullet. — Sean Kelley/NIST

This article was originally published March 26, 2020, by the National Institute of Standards and Technology on NIST.gov; reprinted with permission.

U.S. Supreme Court Justice Files Statement on Court’s Refusal to Hear Habeas Case, Despite Deep Circuit Split

by Dale Chappell

While the U.S. Supreme Court refused to hear a case to settle a deep and widening split among the federal courts, the Court’s newest justice filed a statement on March 23, 2020, saying that he would grant certiorari in the “right case” to resolve a problem that even the government admits needs fixing.

In his statement, Justice Kavanaugh seemed to suggest that the U.S. Court of Appeals for the Sixth Circuit was wrong in the way it denied habeas relief to Edwin Avery, who filed a motion to vacate his federal prison sentence under 28 U.S.C. § 2255 based on a retroactive change in federal law by the Supreme Court. The problem was that Avery was denied relief by the district court, and instead of appealing, he filed an application in the Sixth Circuit for authorization to file another § 2255 motion raising the same claim.

The Sixth Circuit granted him permission to file another motion in the district court, but the district court dismissed his motion, saying he was barred from filing the same claim he had filed in his earlier motion. When he appealed that denial, the Sixth Circuit agreed and instructed that Avery’s motion be dismissed for lack of jurisdiction.

The controversial rule that the Sixth Circuit applied is 28 U.S.C. § 2244(b)(1), which says that “a claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” This provision was added to § 2244 by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and deals with second or successive (“SOS”) applications filed by state prisoners.

AEDPA also added § 2255(h) for federal prisoners, limiting SOS § 2255 applications to two narrow instances, but it said nothing about barring applications raising the same claims as an earlier motion or application. Nevertheless, several federal courts adopted the § 2244(b)(1) rule for federal prisoners, even though the language of that statute clearly says it applies only to state prisoners. The Sixth Circuit was one of those circuits but has since done an about-face on the issue.

The problem for Avery was that his SOS § 2255 application was filed and denied before the Sixth Circuit changed its position in Williams v. United States, 927 F.3d 427 (6th Cir. 2019). In that case, the court analyzed § 2244(b)(1) and concluded that it indeed only applies to state prisoners. The plain language of the statute, the court said, is clear on that point. “There is, accordingly, no reason to doubt that in including the restrictive clause referring exclusively to state prisoners in § 2244(b)(1), Congress said what it meant and meant what it said,” the court reasoned in holding that § 2244(b)(1)’s limit on repeat claims does not apply to federal prisoners.

The Williams Court criticized the Eleventh Circuit’s decision in In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), which held that § 2244(b)(1) also applies to federal prisoners. Although § 2244(b)(1) explicitly applies to petitions filed under § 2254, which applies to state prisoners, it would be odd indeed if Congress had intended to allow federal prisoners to refile precisely the same non-meritorious motions over and over again while denying that right to state prisoners,” a panel of the Court wrote.

Justice Kavanaugh identified in his statement the six circuits that have agreed with Baptiste. He also pointed out the Sixth Circuit’s opposite stance, which is the newest and arguably most thorough opinion on the matter. But he stopped short of saying that Avery’s petition should have been granted. Instead, Kavanaugh said that “in a future case, I would grant certiorari to resolve the circuit split on this question of federal law.”

Though the government opposed Avery’s
petition, it also argued that the Sixth Circuit was right — § 2244(b)(1) doesn’t apply to federal prisoners. Kavanaugh acknowledged as much. But Avery’s case may have had reasons to make the Supreme Court pause. The district court had ruled that his plea agreement waiver barring a collateral attack was valid and that he still had enough qualifying prior convictions for the Armed Career Criminal Act enhancement. While the district court’s decision on these points was rendered invalid by the sixth Circuit’s finding that the district court lacked jurisdiction to even reach those issues, they may still have been a factor in the Supreme Court’s decision to deny certiorari.

The problem now is that it could be a while before a “future case” ever reaches the Supreme Court, while federal prisoners continue to be denied relief by a law that “clearly” doesn’t apply to them. When a federal court of appeals denies a federal prisoner’s SOS § 2255 application, he cannot appeal it. “The grant or denial of authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or writ of certiorari.” § 2244(b)(3)(E).

So, how would a future case get before the Supreme Court? The same way Avery’s did: the court of appeals originally granted his SOS application and then the district court denied his motion, which allows him to take an appeal from the denial of the motion (not the application). However, more often than not, the application gets denied by the court of appeals, not the district court, under § 2244(b)(1). Avery’s case was in an odd procedural posture before the Supreme Court.

Justice Kavanaugh’s “future case” may be more fantasy than reality. But the reality for now is that federal prisoners will continue to be barred from filing another § 2255 motion if the court of appeals got it all wrong the first time, in most circuits, while those lucky enough to be in circuits like the Sixth Circuit can get relief. See: Avery v. United States, 140 S. Ct. 1080 (2020) (Kavanaugh, J., concurring).

**SCOTUS: Knowledge that Driver’s License of Vehicle’s Registered Owner Was Revoked Provides Reasonable Suspicion to Initiate Traffic Stop**

*by Douglas Ankney*

The district court granted Glover’s motion to suppress. But the Court of Appeals reversed, ruling that “it was reasonable for Mehrer to infer that the driver was the owner of the vehicle” because “there were specific and articulable facts from which the officer’s common-sense inference gave rise to a reasonable suspicion.”

However, the Kansas Supreme Court then reversed the decision of the Court of Appeals, ruling that Mehrer’s assumption that the registered owner was likely the driver was merely a “hunch” and did not give rise to reasonable suspicion of criminal activity. SCOTUS then granted Kansas’ petition for a writ of certiorari.

Justice Thomas, writing for the majority, observed that “[u]nder this Court’s precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity.” United States v. Cortez, 449 U.S. 648 (1981). Although a “hunch” will not create reasonable suspicion, “the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.” Prado Navarette v. California, 572 U.S. 393 (2014). The standard “depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Id. Additionally, SCOTUS has recognized that states have a “vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed.” Delaware v. Prouse, 440 U.S. 648 (1979).

Prior to initiating the traffic stop, Mehrer observed an individual driving a 1995 Chevrolet 1500 pickup truck; a check on the license plate revealed the registered owner of the truck had a revoked license, and the model of the truck matched the observed vehicle. From these facts, Mehrer drew the common sense inference that Glover was the likely driver of the vehicle, which provided more than reasonable suspicion to initiate the stop, according to the Court.


Additionally, Kansas law reinforces the reasonableness of Mehrer’s inference that Glover was driving the vehicle because
licenses are revoked from “drivers who have already demonstrated a disregard for the law or are categorically unfit to drive.” Driver’s licenses must be revoked upon convictions for vehicular homicide, reckless driving, fleeing or attempting to elude a police officer, or a felony in which a vehicle was used. Kan. Stat. Ann. §§ 8-254(a), 8-252. Revocation is discretionary if the driver has been convicted of serious violations of traffic regulations with such frequency as to indicate a disrespect for traffic laws; has been convicted of three or more moving traffic violations on separate occasions within a 12-month period; or have been convicted of a moving traffic violation while the person’s driving privileges were already restricted, suspended, or revoked. Id. at §§ 8-254(a) (1) - (4).

Justice Thomas emphasized the “narrow scope” of the holding, opining that the reasonableness standard “takes into account the totality of the circumstances: the whole picture.” Navarette. As a result, the presence of additional facts might dispel reasonable suspicion. For example, if an officer knows the registered owner of the vehicle is a male in his mid-sixties but observes the driver is a female in her mid-twenties, then the totality of the circumstances would not “raise a suspicion that the particular individual being stopped is engaged in wrongdoing.” Cortez. Justice Thomas concluded that “[u]nder the totality of the circumstances of this case, Deputy Mehrer drew an entirely reasonable inference that Glover was driving while his license was revoked” because Mehrer possessed no information that would negate the inference. Consequently, the Court reversed the decision of the Kansas Supreme Court and remanded for proceedings not inconsistent with the Court’s opinion.

Justice Kagan, joined by Justice Ginsburg, concurred with the majority. But Justice Kagan would have reached a different result if Kansas had merely suspended Glover’s license or if Kansas revoked licenses for matters that had nothing to do with road safety, e.g., failing to pay parking tickets, court fees, or child support. If that were the case, then the Court’s reasoning that a person with a revoked license will keep driving because he has a history of disregarding traffic laws would no longer apply. And Mehrer’s inference would then be not much different from a “hunch” and not create “reasonable suspicion.” Navarette.

Justice Sotomayor dissented. In her view, the majority’s conclusion that the seizure of the vehicle was constitutional “because drivers with revoked licenses (as opposed to suspended licenses) in Kansas ‘have already demonstrated a disregard for the law or are categorically unfit to drive’” is erroneous. The distinction between suspended and revoked licenses would not hold up in other jurisdictions. Other states revoke licenses for offenses that have nothing to do with driving, e.g., Kentucky revokes if the license is used to buy alcohol, K.R.S. § 186.560, as does Montana, Mont. Code Ann. § 61-5-206. And in Oklahoma, “revocation” is the label assigned to a temporary sanction, which may be imposed for infractions such as failure to comply with child support payments. Okla. Stat., Tit. 47, § 6-201.1.

Yet, the “empirical studies” cited by the majority do not account for these variances in “revoked” licenses. One study lumped drivers with suspended and revoked licenses together, and the other study merely examined the license status of motorists involved in fatal collisions. Neither study supported the conclusion that drivers with revoked licenses continue to drive because they have a history of flouting driving regulations.

Don’t Allow Government to Abuse Emergency Powers After COVID-19 Threat Subsidies

by Douglas Ankney

During this COVID-19 crisis, state and local authorities are ordering people to shelter in place, banning large gatherings, and closing businesses. These restrictions are implemented under traditional police powers that allow designated officials to take emergency actions to protect the public’s health, safety, and welfare during a crisis. But from history, we see that some of those officials who exercise extraordinary powers during times of crisis abuse this authority long after the crisis has abated.

During World War I, President Woodrow Wilson urged Congress to pass the Espionage Act of 1917 in response to the perceived threat of enemies within the U.S. The Espionage Act criminalized anti-war speech. And presidential candidate Eugene Debs was convicted under the Espionage Act in 1918 for a mild anti-war speech he gave at an afternoon picnic. Even though the U.S. was no longer at war with Germany, the U.S. Supreme Court upheld Debs’ conviction in 1919. He remained in prison for speaking out against the war until President Warren G. Harding pardoned him. Astonishingly, the Espionage Act, though amended several times, continues to be current law to this day.

During that same war, state governments passed laws infringing upon the rights of German immigrants. In Nebraska, it became illegal for both public and private schoolteachers to instruct in any language other than English.

This law targeted the many Lutheran parochial schools where the students and teachers commonly spoke German. Robert Meyer, a Bible teacher who taught in German, filed suit. The Nebraska Supreme Court ruled against Meyer, saying the state legislature “had seen the baleful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land.” It wasn’t until 1923 — long after the war’s end — that the U.S. Supreme Court reversed the Nebraska ruling.

Having witnessed the “baleful effects” of authorities abusing power in the past, let us all demand that the COVID-19 restrictions disappear as soon as the crisis is gone.

Source: reason.com
Jason Brown was a ‘lock’em up tight and throw away the key type. One of the most disliked prosecutors in Caddo Parish, Louisiana, history, he was a hard-charging and inflexibly tough prosecutor who pushed for maximum punishments. Several of them were recounted by investigative journalist Jon Campbell in The Appeal.

Back in 2015, Brown left his Assistant District Attorney (‘ADA’) job with 11 other DAs immediately after retired Court of Appeal Judge James Stewart became the parish’s first Black District Attorney (‘DA’), Brown was fired.

In March 2020, Calcasieu Parish District Attorney’s Office fired Brown as a prosecutor for his handling of a continuance motion in the Joey Julian murder trial. In addition, the defense in that case accused him of withholding “a mountain” of exculpatory evidence.

In Caddo, Brown worked with death penalty champion Dale Cox, who appeared on 60 Minutes, saying the state should use capital punishment more often.

Among Brown’s many victories was winning a guilty verdict with a life without parole sentence for Fate Winslow. A homeless man, Winslow sold a $20 baggie of marijuana to an undercover cop.

Brown secured a life sentence for Larry John Thompson over “five individually packaged rocks of cocaine” on a possession with intent to distribute rap. Brown prosecuted James Cass for possessing with intent to distribute 1.5 ounces of marijuana. The sentence: 40 years.

Former Caddo Parish Public Defender Ernest Gilliam, III, had Brown’s name saved in his phone as simply “The Devil.”

“There’s never been anyone quite like Jason Brown,” stated Gilliam.

Brown was also part of a joint police-prosecutor squad called the Zombie Response Team. The squad did “search and arrest operations,” sporting custom-embroidered patches and customized vehicle license plates. They disbanded in July 2012 after a state investigation found two of the squad’s DAs had submitted falsified documents to a military-surplus weapons procurement program.

In 2013, Brown prosecuted a case where a cop forged another cop’s signature to a false DNA report. The objective was to use the report to convince the suspect to confess to a murder. Louisiana’s Second Circuit Court of Appeals addressed this matter in its November 30, 2016, opinion, holding it harmless because it was never entered into evidence at trial.

The Appeal found that Brown associate Rick Raster testified that the former prosecutor owns an art studio in downtown Shreveport. The building was erected in the 1930s and still sports Jim Crow-era signage over restroom doors, labeling them for use by “colored” and “whites only.”

Brown told The Appeal that the signs, revealed during renovations, have been covered up.

But Joey Julian’s lawyer Clemons sees this as speaking to Brown’s character. It’s another example, he told The Appeal, why Brown shouldn’t be “adjudicating someone’s justice—or lack of justice—in the courtroom.”

Source: theappeal.org

Illinois Supreme Court: Failing to Stipulate Felon Status Allowing Jury to Hear About Murder Conviction Constitutes IAC

by Anthony Accurso

The Supreme Court of the State of Illinois reversed a defendant’s conviction because his attorney failed to stipulate his felon status at trial, and the jury was likely prejudiced by knowing his previous conviction was for murder.

Leslie Moore was pulled over in Joliet, Illinois, because he failed to signal his intent to turn at least 100 feet prior to turning. During the traffic stop, a gun was located in the center console of his vehicle. Because of a 1990 murder conviction, he was charged with being a felon in possession of a firearm.

Three witnesses were heard from at trial. Moore’s friend Sherry Walls testified that he was helping her move and that she had borrowed Moore’s car earlier that day. She used his car to transport her two pistols, for which she demonstrated legal proof of ownership. She testified that she placed one of the pistols in the center console and did not realize until after Moore had left that she had forgotten to remove it from the vehicle.

Will County Sheriff’s Deputy Thomas Hannon testified that he observed Moore “dip” his right hand or shoulder to the center console during the traffic stop, but because of the dashcam’s poor quality, this action was imperceptible on the video. He also claimed Moore seemed nervous, so he asked Moore to exit the vehicle. Upon asking why Moore was so nervous, he stated that Moore admitted to having a loaded firearm in the center console. This statement could not be verified because the microphone on the dashcam was allegedly inoperable. Hannon testified that the backup officer, Deputy Ambrosini, arrived as Hannon cuffed Moore and that Hannon then recovered the gun from the vehicle. However, review of the dashcam showed that, contrary to his testimony, Ambrosini recovered the gun.

Moore testified that he was not nervous or sweating during the 1:15 a.m. traffic stop. He testified that Hannon asked him to step out of the vehicle, asked him why he was in Joliet, and whether he had any weapons or drugs. He said Hannon cuffed him claiming it was “for safety reasons.” When officers recovered the gun during the search of the vehicle, he testified he did not know it was there.

Several times during trial, it was reiterated to the jury that Moore had previously been convicted of murder to prove that he was in fact a felon when he possessed the gun. Moore was convicted by the jury.

On appeal, he claims his lawyer provided ineffective assistance by not stipulating to the fact that Moore was a felon. Instead, counsel, through a misunderstanding of the law, allowed the court to notify the jury several times that Moore had been convicted of murder. He claims this tainted the jury, causing undue bias. His conviction was upheld by the appellate court, but was granted leave to appeal to the Illinois Supreme Court.

Ineffective assistance claims must prove that (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland v. Washington, 466 US 668 (1984). Illinois adopted this standard in People v. Domagala, 987 N.E.2d 767 (Ill. 1984). Defendant bears the burden of proving both prongs.

The U.S. Supreme Court held that when the prosecution only needs to establish the defendant’s felon status introducing the name and nature of the prior conviction has no probative value and presents a substantial risk of unfair prejudice, and thus they should generally be excluded. Old Chief v. United States, 519 US 172 (1997). The Old Chief Court explained that a stipulation or admission could establish the defendant’s felon status, and such a method is less prejudicial to the defendant. The Illinois Supreme Court adopted the ruling in Old Chief in People v. Walker, 812 N.E.2d 339 (Ill. 2004), agreeing with the U.S. Supreme Court that where the defendant’s felon status is an element of the charged crime revealing the nature of the prior conviction creates a risk of unfair prejudice.

In light of the settled case law, the Court noted that “deficient performance in this case is not seriously disputed.” The Court concluded that trial counsel’s failure to stipulate to Moore’s felon status was objectively unreasonable under the first prong of Strickland.

Regarding prejudice, the Court ruled that the conviction likely turned on the jury’s analysis of the credibility of the witnesses only — which was conflicting as to whether Moore knew the gun was in the vehicle — because there was no objective evidence (such as Moore’s fingerprints on the gun) showing that Moore had knowledge of the gun. Reiterating multiple times that his prior conviction was for murder likely allowed the jury to find him guilty “on a ground different from proof specific to the offense charged” or that his possession of a gun after conviction of a violent crime “called for a preventative conviction” in this case, the Court stated, quoting Old Chief.

Thus, the Court concluded Moore’s counsel provided ineffective assistance, and the deficient performance likely prejudiced the jury against him, satisfying Strickland.

Accordingly, the Court reversed his sentence and conviction but allowed for a retrial with his felon status stipulated. See: People v. Moore, 2020 Ill. LEXIS 8 (2020).

The U.S. Court of Appeals for the Tenth Circuit ruled that the evidence was insufficient to support John Terry Chatman, Jr.’s conviction of obstruction of justice by attempting to kill a witness.

Chatman was walking around the corner of the Trade Winds Hotel when two officers from the Tulsa Police Department asked him for identification. Chatman said he didn’t have any ID and asked if he was free to leave. The officers replied yes, so Chatman got into a van and drove away. The officers ran a check on the license plate and discovered it did not match the van. They then located the van parked outside a Quik Trip convenience store. The officers saw Chatman’s girlfriend coming out of the convenience store, and she indicated to them that Chatman was in the van.

The officers saw Chatman in the backseat of the van. They informed him that was under arrest, but he refused to step out of the van. The officers called for backup. Sergeant Mike Parsons arrived on scene, along with several other officers. Parsons began firing pepper balls at Chatman in an attempt to get him to exit the van.

After sharing a tearful goodbye with his girlfriend, Chatman announced “Y’all are going to have to kill me.” Chatman then pulled a gun, firing several rounds and hitting Parsons. Officers returned fire, hitting Chatman in the neck and stomach. Medics arrived and treated both men’s wounds. Chatman was tried on three counts: being a convicted felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count One); obstruction of justice by attempting to kill a witness in violation of 18 U.S.C. § 1512(a)(1)(C) & (a)(3) (Count Two); and using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(i)(A)(iii) (Count Three).

The Government agreed at trial that if the evidence was insufficient on Count Two, then Count Three could not stand. After the prosecution rested, defense counsel moved for a judgment of acquittal on Count Two, arguing the Government had failed to meet its burden of showing Chatman shot Parsons “with the intent to prevent information from being conveyed to [federal] law enforcement officers generally.” The district court denied the motion, and the jury convicted Chatman on all three counts. He appealed, arguing that the Government failed to present sufficient evidence.

The Tenth Circuit observed that under § 1512(a)(1)(c), “the Government must prove (1) a killing or attempted killing, (2) committed with a particular intent, namely, an intent (a) to prevent a communication (b) about the commission or possible commission of a Federal offense (c) to a federal law enforcement officer or judge.” Fowler v. United States, 563 U.S. 668 (2011) (internal quotations omitted). While the Court will reverse a conviction for insufficient evidence only when no reasonable jury could find the defendant guilty beyond a reasonable doubt, United States v. Aya, 727 F.3d 1043 (10th Cir. 2013), the Court “will not uphold a conviction that was obtained by nothing more than piling inference upon inference ... or where the evidence raises no more than a mere suspicion of guilt.” United States v. Rafai, 732 F.3d 1175 (10th Cir. 2013). “A jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility.” Id.

The Court determined that several factors prevented the drawing of a reasonable inference that Chatman shot Parsons with the intent of preventing Parsons from communicating with other officers that Chatman was committing a Federal offense. First, Chatman was not the subject of any federal investigation but was first detained by Tulsa police in a routine traffic stop. Second, other officers were on scene who witnessed the federal crime (Chatman’s possession of the firearm and ammunition), so shooting Parsons would not prevent the communication. And third, Parsons’ statement that officers would have to kill him and his tearful goodbye to his girlfriend indicated his intent in firing his weapon was to provoke the officers to kill him, i.e., “suicide by cop.” The Court concluded that the Government failed to prove the required intent.

Accordingly, the Court remanded the case to the district court to vacate and dismiss Chatman’s convictions under Counts Two and Three and resentenced him under Count One alone. See: United States v. Chatman, 952 F.3d 1211 (10th Cir. 2020).
$369,000 Settlement in Police Raid of Journalist's Home and Office

It was a quieting day for First Amendment freedom when San Francisco cops and the FBI raided the home and newsroom of freelance journalist Bryan Carmody May 10, 2019, in search of the source of a confidential police report into the Feb. 22, 2019, death of elected San Francisco Public Defender Jeff Adachi. They came armed with a sledgehammer and search warrants.

In March 2020, San Francisco reached a $369,000 settlement to a lawsuit filed August 29, 2019, by Carmody against the city and county. The payout was approved March 31 by the Board of Supervisors, the San Francisco Chronicle reports. In addition, Police Chief William Scott apologized for his department’s handling of the situation and conceded the searches were probably illegal; the warrants did not fully identify Carmody as a journalist, although Carmody had a police press pass for 16 years.

“I knew what they wanted,” Carmody told the Los Angeles Times after the incident. “They wanted the name.” They handcuffed Carmody for six hours while they hauled off notebooks, documents, cameras, phones, computers, and an iPod, according to latimes.com. The eight- to 10-officer squad drew their guns and combed through his belongings before transporting him to his office, which they also searched. Two weeks earlier, cops also stopped by his home seeking the name, even though California’s Shield Law “protects journalists from being bullied by police into revealing confidential sources,” mercurynews.com reports.

Carmody received the leaked police report on Adachi, which had earlier been the subject of rumor. He provided it and photos to news outlets as a freelance journalist. San Francisco’s wrongful actions against Carmody threaten fundamental journalistic freedoms which are vital to a functioning democracy.

Sources: missionlocal.org, sfchronicle.com, latimes.com, abc7news.com, sjporcal.org, mercurynews.com

Delaware Supreme Court Clarifies Meaning of ‘Mixture’ as Used in State’s Controlled Substances Act

by Douglas Ankney

The Supreme Court of Delaware clarified the meaning of “mixture” as the term is used in Delaware’s Uniform Controlled Substances Act (“Act”).

Police recovered from the person of Darren Wiggins a vial containing an amber liquid and brown chunks. Wiggins was ultimately charged with several offenses, including one count of Aggravated Possession of PCP based on the contents of the vial.

At Wiggins’ trial, forensic chemist Heather Moody testified that the amber liquid tested positive for phencyclidine (“PCP”). She did not test the brown chunks and did not know what they were. She testified that the combined weight of the liquid and the chunks was 17.651 grams, but she had not weighed either the liquid or the chunks separately. The State offered no evidence as to the comparison of the brown chunks or their relationship to the liquid PCP mixture.

After the prosecution rested, Wiggins moved for judgment acquittal on the Aggravated Possession charge, arguing the State failed to prove the PCP mixture met the 15-gram statutory weight threshold.

The State had not proven the weight of the liquid PCP mixture and had not shown the brown chunks were part of that mixture. The Superior Court denied the motion. Wiggins appealed the denial, arguing the State presented insufficient evidence to convict him of aggravated possession.

The Delaware Supreme Court observed that it “review[s] the denial of a motion for judgment of acquittal de novo to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.” Pardo v. State, 160 A. 3d 1136 (Del. 2017).

At the time of Wiggins’ arrest the Aggravated Possession provision of the Act read “any person who … [p]ossess a controlled substance in a Tier 3 quantity … shall be guilty of a class B felony.” 16 Del. C. § 4752 (4). A Tier 3 controlled substance quantity was defined as “15 grams or more of phencyclidine [PCP], or of any mixture containing any such substance.” 16 Del. C. § 4751C (3)(f). Resolution of the appeal then turned on the definition of “mixture” as used in the Act.

In Chapman v. United States, 500 U.S. 453 (1991), the Supreme Court of the United States (“SCOTUS”) interpreted the meaning of “mixture” in a federal Aggravated Possession statute that was similar to Delaware’s. In Chapman, SCOTUS considered whether liquid LSD and the blotter paper on which it was applied were a “mixture” for the purpose of weight for sentencing — the greater the weight, the steeper the penalty. SCOTUS noted that “Congress adopted a market-oriented approach to punish drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence.” Id.

SCOTUS observed that blotter paper was used to facilitate distribution of LSD; was not easily separated from the LSD; and was often ingested with the LSD. Id. SCOTUS distinguished the blotter paper from packaging materials and containers like glass vials, which could not be considered part of a mixture. Id. Because the blotter paper was a “medium used to facilitate the distribution of the drug” and acted as a “tool of the trade for those who traffic in [LSD],” SCOTUS held that the LSD and the blotter paper were a mixture and included the weight of the blotter paper for sentencing. Id.
Since Chapman, the federal circuits have split in the application of the decision to other mixtures. The “Second, Third, Sixth, Seventh, Ninth and Eleventh Circuits have adopted the approach that sentencing calculations… may not be based on the weight of mixtures containing unusable unmarketable materials.” United States v. Killion, 7F 3d 927 (10th Cir. 1993). This is referred to as “the majority approach” and bases the determination of whether a component is part of a mixture on whether the compound remains “usable in the chain of distribution after the component is included.” United States v. Rodriguez, 975 F2d 999 (3d Cir. 1992).

Other federal circuits reject the majority approach. The First, Fifth, and Tenth Circuits do not consider the marketability of a drug substance as long as the mixture contains a detectable amount of a controlled substance. Killion.

In Traylor v. State, 458 A.2d1170 (Del. 1983), the Delaware Supreme Court acknowledged that the General Assembly intentionally adopted a “market-oriented” sentencing scheme that was similar to the federal scheme in Chapman.”[D]angerous drugs are generally marketed in a diluted or impure form. If illegal substances are so distributed, then the General Assembly does not act irrationally or unreasonably when it addresses the marketing of the compound rather than the pure form of the drug.” Traylor.

The Court concluded that “the plain meaning of ‘mixture’ read in context with Delaware’s statutory scheme is consistent with the approach adopted by the Third Circuit and the majority of other federal circuits that have considered the issue; mixtures include only those compounds that are marketable or ‘usable in the chain of distribution.’”

In the instant case, the State failed to present any evidence on which a rational jury could find that the brown chunks were marketable or usable in the chain of distribution. The standard for the State was not high. It required only some evidence that the chunks were a PCP byproduct, or were necessary for distribution, or were consumed along with the PCP etc. But the State presented no evidence other than the chunks were in the vial with the liquid PCP mixture.

Accordingly, the Court reversed the conviction for Aggravated Possession because no rational jury could have found the mixture met the 15-gram threshold weight without the brown chunks, and the Court remanded for re-sentencing based on the lesser offense of Misdemeanor Possession. See: Wiggins v. State, 2020 Del. LEXIS 135 (2020).

### Colorado Supreme Court: Defendant Has No Duty to Bring Himself to Trial

By Douglas Ankney

The Supreme Court of Colorado ruled that Edward Kevin DeGreat had no duty to bring himself to trial and ordered his charges dismissed with prejudice for violation of his right to a speedy trial.

In October 2018, the Supreme Court of Colorado affirmed the court of appeals’ decision reversing DeGreat’s conviction for aggravated robbery, concluding that he was entitled to a new trial where he could introduce evidence that he had acted in self-defense. People v. DeGreat, 428 P.3d 541 (Colo. 2018).

On November 6, 2018, the court of appeals issued a mandamus returning jurisdiction of the case to the Arapahoe County District Court for the purpose of a new trial. On December 3, 2018, the district court issued a scheduling order directing counsel for DeGreat and for the People to contact chambers to set the case for a status conference at “the soonest available date.” The public defender’s office entered an appearance on behalf of DeGreat on December 6, 2018, and then no further action was taken by the court, the People, or defense counsel.

On June 4, 2019, DeGreat filed a motion to dismiss, asserting that the failure to commence trial within six months of the issuance of the mandate from the court of appeals violated his statutory right to a speedy trial.

Neither the district court nor the People responded to the motion. DeGreat then filed two subsequent requests for a ruling on the motion, first on July 19, 2019, and again on August 30, 2019, both of which likewise received no response. Then on October 16, 2019, the district court denied the motion to dismiss, stating it was unwarranted “[g]iven the failure of all counsel to comply” with the court’s December 3, 2018 scheduling order. The district court reasoned that “[a]ny delay in the instant case is attributable to both the People and Defendant and thus tolls speedy trial” and set a status conference for November 25, 2019, to discuss how to proceed with DeGreat’s retrial.

DeGreat initiated an original proceeding in the Colorado Supreme Court under C.A.R. 21, arguing that the district court’s failure to abide by the statutory six-month deadline for retrial stripped that court of jurisdiction to proceed with DeGreat’s pending charges. Because DeGreat claimed he was entitled to dismissal of the charges without being subjected to a retrial, an appellate remedy would be inadequate because he must be retried before he could avail himself of an appeal. Therefore, the Supreme Court determined he was entitled to an “extraordinary remedy” and chose to exercise its jurisdiction under C.A.R. 21. People v. Kilgore, 455 P.3d 746 (Colo. 2020).

The Court observed that “Colorado’s speedy trial statute is intended to safeguard a defendant’s constitutional right to a speedy trial and to prevent unnecessary prosecutorial and judicial delays in the prosecution of a criminal case.” Mostly v. People, 592 P.3d 1198 (Colo. 2017). The statute provides that “[i]f trial results in conviction which is reversed on appeal, any new trial must be commenced within six months after the date of the receipt by the trial court of the mandate from the appellate court.” C.R.S. § 18-1-405(2). The trial court and the prosecuting attorney are responsible for ensuring that a case is brought to trial within the statutory speedy trial limits. Hills v. Westminster Mun. Court, 245 P.3d (Colo. 2011).

The defendant has no duty to bring himself to trial. Barker v. Wingo, 407 U.S. 514 (1972). The defendant’s only affirmative duty under Colorado’s speedy trial statute is to move for dismissal when the statute is violated. Harrington v. Dist. Court, 559 P.2d 225 (Colo. 1977). The statute requires dismissal of the case whenever the defendant is not retried within the six-month period, unless the delay qualifies for one of the exclusions set out in C.R.S. § 18-1-405(6). People v. Deason, 670 P.2d 792 (Colo. 1983). The trial court has no discretion to make exceptions to the six-month rule beyond those enumerated in the statute. People v. Byrne, 762 P.2d 784 (Colo. 1988).

Any period of delay caused by the defendant must be excluded from the six-month period. C.R.S. § 18-1-405(6)(f). To be caused by the defendant, he must demonstrate “express consent to the delay or other affirmative conduct” evincing a clear intent to waive the right to a speedy trial. People v. Bell, 669 P.2d 1381 (Colo. 1983). His conduct must be the “moving force” behind the delay. Id.

The Colorado Supreme Court determined that DeGreat had done all that was required of him to secure his rights when he filed his motion to dismiss. The district court’s find-
Fifth Circuit Finds IAC for Failure to Object to Court's Jury Instructions that Constructively Amended Indictment by Lowering Government's Burden of Proof

by Dale Chappell

The U.S. Court of Appeals for the Fifth Circuit ruled on March 31, 2020, that the district court’s constructive amendment to an indictment that allowed the Government to prove its case with an alternative, lower standard constituted ineffective assistance of counsel (“IAC”) where trial counsel failed to object to the error.

The Tagged.com profile said she was 18, so Brian Phea made arrangements for the teen to come to Texas and engage in prostitution. He was charged with the prostitution of a minor — because the girl, K.R., was actually 14. Count one of the indictment charged Phea “knowingly recruited ... Jane Doe knowing that Jane Doe had not attained the age of 18 years and that Jane Doe would be caused to engage in a commercial sex act.” 18 U.S.C. § 1591(a). Count two charged aiding and abetting the promotion of a business enterprise involving prostitution.

Phea took his case to trial, where the district court gave this jury instruction: “If the government proves beyond a reasonable doubt that the defendant had a reasonable opportunity to observe the person recruited ... then the government does not have to prove that the defendant knew that the person had not attained the age of eighteen (18) years.”

Phea’s lawyer never objected to this instruction.

The jury convicted Phea of both counts, and he was sentenced to a total of 26 years in federal prison without parole and 25 years of supervised release. He appealed, arguing that the district court’s jury instruction was really a constructive amendment to the indictment because it allowed the Government to prove the “knowing” element with a lower burden of proof. But because Phea’s trial lawyer didn’t object to the jury instruction, review on appeal was limited to only plain error. The Fifth Circuit concluded that because no controlling case law in the circuit existed on whether § 1591 allows a conviction “based solely on finding that the defendant had a reasonable opportunity to observe the victim,” the error “could not have been plain.” The Court affirmed Phea’s conviction, and the Supreme Court denied certiorari.

Phea then filed a pro se motion to vacate his conviction under 28 U.S.C. § 2255, claiming ineffective assistance of counsel (“IAC”) based on trial counsel’s failure to object to the district court’s jury instruction that constructively amended the charge in the indictment. To prove IAC, Phea had to show (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) “any such deficiency was prejudicial to the defense” — the familiar standard under Strickland v. Washington, 466 U.S. 668 (1984).

A constructive amendment to an indictment occurs when the trial court, through its instructions to the jury, allows proof of an essential element of the crime on an alternative basis provided by the statute that was not charged in the indictment. That’s what happened here. While § 1591(c) does allow the Government to prove a defendant knew the victim’s age if “the defendant had a reasonable opportunity to observe the person,” that was not what the indictment charged in Phea’s case.

Was trial counsel ineffective if circuit precedent didn’t directly address the error? The Fifth Circuit said counsel was. “The absence of directly controlling precedent does not preclude a finding of deficient performance,” the Court said, citing one of its decisions that found IAC “for failing to raise a defense not previously considered by this Court” when the defense would have been “plausible.” The Court also noted that it had previously held in a different context that a district court’s altering of the “knowing” element of an offense “plainly modified as essential element of the charged offense.”

Counsel’s failure to object prejudiced Phea, the Court said, because there was a “reasonable probability the jury would have had reasonable doubt that Phea knew K.R. was under 18.” The Court cited at least six facts that supported the jury would have had reasonable doubt: (1) K.R.’s online profile said she was 18; (2) K.R. testified at trial Phea thought she was 18, and she only told him she wasn’t after the offense; (3) Phea testified at trial K.R. told him she was 18 and was a stripper; (4) transcripts of the Tagged.com messages made no mention of her age; (5) K.R. originally told law enforcement she was 19; and (6) her apparent “autonomy and willingness/ability to engage in adult activities” supported an inference she was over 18.

All of this “undermines our confidence in the outcome of the verdict,” the Court concluded.

Accordingly, the Court itself vacated Phea’s conviction on count one and remanded to the district court. See: United States v. Phea, 953 F.3d 838 (5th Cir. 2020).

Writer’s note: Are plain error and IAC the same thing so that the finding of one supports the finding of the other? Plain error and IAC may seem similar enough that proving one could support the finding of the other, and courts have held that the prejudice require-
Pennsylvania Supreme Court: Cronic’s Presumption of Prejudice Triggered by Counsel Failing to Secure Interpreter for First Day of Trial

by Douglas Ankney

The Supreme Court of Pennsylvania ruled that the defendant was denied the effective assistance of counsel where a Spanish-language interpreter was not secured for the first day of trial and that counsel’s failure to do so triggered the application of the presumption of prejudice articulated by the U.S. Supreme Court in United States v. Cronic, 466 U.S. 648 (1984).

Miguel Diaz was charged with committing several sexual offenses against the daughter of his live-in girlfriend. Attorney John Walfish met Diaz for the first time at the courthouse on the first day of trial. During their first meeting, Diaz asked Walfish to request a Spanish-language interpreter because Diaz had been unable to understand the earlier proceedings at the preliminary hearing. Walfish made the request to the trial court. The judge advised that no interpreter was available, and he did not want to postpone the trial again as the case had already been postponed several times.

Walisf then changed the request, informing the court that Diaz had explained to him that an interpreter would be needed only when Diaz testified. The trial court then allowed the proceedings to begin without an interpreter because Diaz wouldn’t be testifying that day.

The first day of trial included argument on pretrial motions, jury selection, opening statements, and both the direct and cross-examination of the victim. The following day, Walfish told the trial judge that Diaz had been “uncomfortable with his understanding how the proceedings were transpiring,” and the court provided Diaz with an interpreter for the remainder of the proceedings. The jury convicted Diaz of all charges, and his judgment was affirmed on appeal.

Diaz, via counsel, subsequently filed a petition under Pennsylvania’s Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 (“PCRA”) alleging 10 claims of ineffective assistance of counsel, including that counsel was ineffective for failing to secure an interpreter on the first day of trial.

The PCRA court heard evidence that Diaz was able to communicate in English with his adult daughters, work supervisor, and others. However, Diaz denied telling Walfish that he needed an interpreter only during his testimony. Further, Spanish/English language interpreter Raymond J. McConie, testifying as an expert, stated that while Diaz was “conversant in English on matters of everyday life,” Diaz would not have understood the proceedings on the first day of trial without an interpreter due to the stress factors and subject matter of a trial.

The PCRA court found that “there is undoubtedly merit in [the] contention that trial counsel was ineffective for failing to secure an interpreter, if, for no other reason, than trial counsel was unaware of the need for an interpreter until the day of trial.”

The PCRA court found Diaz’s testimony credible, but the testimony of Walfish was “nothing but justification, and for the most part poor justification, lacking credibility.” The PCRA court concluded that Diaz wasn’t entitled to relief based solely on the failure to secure an interpreter, but the failure was “part and parcel of the overarching argument that trial counsel’s multiple failings demonstrate his unacceptable lack of preparedness for trial.” The PCRA court found that Diaz was denied effective assistance of counsel under the standard announced in Strickland v. Washington, 466 U.S. 668 (1984), and adopted in Pennsylvania in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987).

The Commonwealth appealed to the Superior Court, arguing that the PCRA court failed to find that Diaz had suffered prejudice. The Superior Court affirmed, reviewing under the Cronic standard and observing that Diaz’s inability to understand English combined with the absence of an interpreter meant Diaz could not participate in his defense, and he was “constructively absent” from trial which constituted per se prejudice. The Supreme Court of Pennsylvania granted the Commonwealth further review.

The Court observed that the PCRA court’s factual findings and credibility determinations were supported by the record and were, therefore, binding upon the Court. Commonwealth v. Montalvo, 205 A.3d 274 (Pa. 2019). But the PCRA court’s application of Strickland, and not Cronic, was a legal conclusion and not binding on the Court. Id.

Criminal defendants have a right to effective assistance of counsel, and to prevail on a claim that this right was denied, the defendant must ordinarily demonstrate that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defense. Strickland. However, there are limited circumstances where prejudice may be presumed because they undermine confidence that a fair trial occurred. Cronic. These limited circumstances include the actual or constructive denial of counsel at a critical stage of the proceedings. Id. The denial of a defendant’s right to confer with his attorney about his case constitutes the actual or constructive denial of counsel and triggers the application of Cronic’s presumption of prejudice. Id. (citing Geders v. United States, 425 U.S. 80 (1976)). In Moore v. Purkett, 275 F.3d 685 (8th Cir. 2001), a defendant with limited writing abilities was ordered not to speak quietly with his attorney during trial. The court held that this constituted a constructive denial of his right to counsel.

In the instant case, the PCRA court found that in the absence of an interpreter, Diaz couldn’t understand anything that occurred during voir dire, during opening statements, or during most of the testimony of the complaining witness. The finding was supported by the record. This rendered Diaz unable to have communications with his attorney about his case during trial, depriving him of his right to effective assistance of counsel under Cronic.

Accordingly, the Court affirmed the judgment of the Superior Court. See: Commonwealth v. Diaz, 2020 Pa. LEXIS 1708 (2020).
U.S. Supreme Court Rejects Fifth Circuit’s Rule Barring Plain-Error Review of Unpreserved Factual Arguments

by Dale Chappell

In an opinion that amounted to just three paragraphs, the Supreme Court of the United States held on March 23, 2020, that the Fifth Circuit’s rule barring plain error review for unpreserved factual errors had “no legal basis,” and the Court vacated the lower court’s decision and remanded for review in the first instance.

When Charles Davis was convicted of drug and firearm charges after his 2016 arrest in Dallas, Texas, he was sentenced to just under five years in federal prison. But the judge ordered that sentence to run consecutively to whatever sentence the Texas state court would impose for offenses that occurred a year earlier. Davis never objected to his sentence.

Instead, on appeal to the U.S. Court of Appeals for the Fifth Circuit, Davis raised for the first time that the district judge should have run the sentences concurrent because the offenses were of the “same course of conduct” as provided under United States Sentencing Guidelines (“USSG”). Under USSG § 5G1.3(c), a federal sentence must run concurrent with any future state sentence “that is relevant conduct to the instant offense of conviction under ... § 1B.1.3 (relevant conduct).”

But the Court of Appeals refused to hear Davis’s claim. It said he was raising a factual issue, and it invoked the Fifth Circuit’s longstanding rule barring plain error review for factual issues. Davis appealed to the Supreme Court, which granted his petition for discretionary review.

Federal Rule of Criminal Procedure 52(b) states in full: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” The Fifth Circuit has long held that factual issues raised for the first time on appeal don’t fall under Rule 52(b), United States v. Lopez, 923 F.2d 47 (5th Cir. 1991).

The Supreme Court rejected the Fifth Circuit’s rule. “Almost every other Court of Appeals conducts plain-error review of unpreserved arguments, including unpreserved factual arguments,” the Court said in a short per curiam opinion. The text of Rule 52(b) does not immunize factual errors from plain-error review, and Supreme Court precedent does not shield any category of errors from plain-error review, the Court explained in rejecting the Fifth Circuit’s outlier practice. “Put simply, there is no legal basis for the Fifth Circuit’s practice of declining review to certain unpreserved factual arguments for plain error,” the Court concluded.

Accordingly, the Supreme Court granted certiorari, vacated the Fifth Circuit’s decision, and remanded for further review of Davis’ claim. See: Davis v. United States, 140 S. Ct. 1060 (2020).

Ohio Supreme Court Announces New Standard for ‘Actual Racial Bias’ for Jurors and Holds Counsel Was Ineffective for Failing to Strike Racially Biased Juror

by Douglas Ankney

The Supreme Court of Ohio held that Glen E. Bates was deprived of his right to effective assistance of counsel when his attorney failed to inquire into a juror’s expressed racial bias or strike the juror.

Bates was convicted by a jury of aggravated murder and other charges stemming from the abuse, torture, and death of his 2-year-old daughter Glenara Bates. After a mitigation hearing, the jury unanimously recommended a sentence of death. Bates raised numerous arguments on appeal, one of which was that he was denied his constitutional right to effective assistance of counsel when his attorney failed to question and strike a juror who made racially biased statements on her juror questionnaire.

When answering the question, “Is there any racial or ethnic group that you do not feel comfortable being around,” Juror #31 answered “yes” and wrote “sometimes black people.” She also answered that she “strongly agree[d]” that some races are more violent than others and then wrote “Blacks” in the space allotted for explanation.

Even though Bates is Black, his attorney never asked Juror #31 about her answers to those questions. Furthermore, after exercising five of the six allotted peremptory strikes, defense counsel waived the remaining strike instead of striking Juror #31. As a result, Juror #31 was one of the jurors who decided Bates’ guilt and was one of the jurors who sentenced him to death.

The Ohio Supreme Court reviewed this claim under the familiar standard of Strickland v. Washington, 466 U.S. 668 (1984), i.e., “counsel’s representation fell below an objective standard of reasonableness,” and the deficient performance prejudiced the defendant. An attorney performs deficiently under Strickland when he fails to question a juror about racially biased comments made on a juror questionnaire if there is no discernible reason for failing to do so. State v. Pickens, 25 N.E.3d 1023 (Ohio 2014). “Jury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice or predisposition about the defendant’s culpability.” Gomez v. United States, 490 U.S. 858 (1989). “Without an adequate voir dire, the trial judge’s responsibility to remove prospective jurors who will not be able to impartially follow the court’s instructions and evaluate the evidence cannot be fulfilled.” Rosales-Lopez v. United States, 451 U.S. 182 (1981).

But to demonstrate prejudice, the defendant “must show that [a] juror was actually biased against him.” State v. Mundt, 873 N.E.2d 828 (Ohio 2007). Actual bias can be established by a juror’s express admission or from circumstantial evidence of the juror’s biased attitudes. Hughes v. United States, 258 F.3d 453 (6th Cir. 2001). “Actual bias is ‘bias in fact’ — the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” United States v. Torres, 128 F.3d 38 (2d Cir. 1997).

In sum, a defendant must show the juror was not “capable and willing to decide the case solely on the evidence.” Smith v. Phillips, 455 U.S. 209 (1982). This is because “[o]ne touchstone of a fair trial is an impartial trier of fact — a jury capable and willing to decide the case solely on the evidence before it.” McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984).
The Ohio Supreme Court could find no discernible strategic reason for defense counsel’s failure to question Juror #31 about her answers that revealed her racial bias. Nor was there any reason to forego the sixth peremptory strike and fail to strike Juror #31. And, because Bates is Black, the answers of Juror #31 demonstrated she had actual bias against him. Consequently, the Court held that “counsel’s voir dire of juror No. 31 was objectively unreasonable under Strickland” and thus “was constitutionally ineffective....” 

The Ohio Supreme Court took this opportunity to clarify its current position on “actual bias” and “personal bias” with respect to jury selection. In Pickens, the Court ruled that defense counsel’s performance was deficient but “determined that there was no evidence that the juror was actually biased against Pickens himself.” The Pickens Court explained that the juror’s general comment about his unease around young “black men with their pants down to their knees [did] not necessarily reflect bias against Pickens personally.”

In the present case, the Ohio Supreme Court announced “we overrule Pickens to the extent that it held that actual racial bias must be shown by demonstrating bias against a defendant personally.” It explained that “actual racial bias may be present without a demonstration of bias against the defendant personally if the juror’s statement rises to a level of generality about a racial or ethnic group that indicates the juror’s inability to be impartial in the particular case before him or her.” The Court concluded juror No. 31’s statements meet that standard and thus constitute actual racial bias.

Accordingly, the Court reversed the judgments of conviction and sentence of death and remanded to the Hamilton County Court of Common Pleas for a new trial. See: State v. Bates, 2020 Ohio LEXIS 503 (2020).

---

**FBI’s Long History of Squelching Political Dissent Under the Guise of National Security**

_by Jayson Hawkins_

For nearly a century, one of the most important duties of the FBI has been to act as the primary counterterrorism force on American soil. Unfortunately, throughout that time, the FBI has shown a troubling tendency to surveil dissidents and view challenges to the status quo as national security threats. This tendency began with the young Bureau’s first large-scale raids and has continued, according to a recently released report, up to today.

The FBI began as the U.S. Department of Justice’s Bureau of Investigation in 1908. Founded by Theodore Roosevelt despite congressional resistance, this early Bureau was intended to be the leading edge of a national response to anarchists and violent unionists. After successfully silencing opposition to World War I, the Bureau began raids in 1919 aimed at what it called “subversives and Communists” but which really targeted Eastern European immigrants, Italians, and labor organizers, according to Alice Speri in her article, “The FBI Has a Long History of Treating Political Dissent as Terrorism.”

The so-called Palmer Raids (after then-Attorney General Mitchell Palmer) lasted months and led to the arrests of over 10,000 people in a dozen cities, though none of those arrested were even tied to any of the violence that purportedly inspired them. The raids did, however, have consequences. The first was the founding of the American Civil Liberties Union, organized just a few months after the raids began. The second was the dramatic career advancement of the young federal agent who orchestrated them—J. Edgar Hoover.

Hoover’s genius for policing dissent would come to the fore again in the 1960s. The FBI pursued an operation called COINTELPRO. Systematic efforts to infiltrate and sabotage civil-rights groups and anti-war protesters were carried out under the auspices of guarding national security. The exposure of these efforts led to congressional investigations and the application of some oversight. While this oversight may have reined in some of the Bureau’s worst excesses, there is evidence that old tendencies remain firmly in place.

After 9/11, many civil-rights activists expressed concern about what they believed was an FBI campaign targeting Muslim Americans. Eventually, the inspector general of the Justice Department would release a report in 2010 that acknowledged the Bureau had exceeded agency guidelines, but the report declined to definitively conclude that any action had resulted from political or religious bias. In October 2019, civil liberties group Defending Rights and Dissent published a report detailing a long list of political activists who have been the object of FBI surveillance and worse. The Bureau has watched Occupy Wall Street, Abolish ICE, Palestinian solidarity groups, and organizations dedicated to normalizing relations with Cuba and Iran. The report, based largely on public-records requests, reveals a broad effort of surveillance and infiltration, even at times before a group had staged a single protest.

Recent efforts aimed at domestic political dissent have shown several disturbing trends. The first is what appears to be a near single-minded focus on progressives and the left, despite the fact that most politically motivated violence over the last 10 years had its ideological origin on the right. Social justice, anti-war, and environmental activism remain the primary targets of FBI interest, just as they were during the Palmer Raids.

Secondly, the targeting of progressive causes is paired with what appears to be disproportionate targeting of immigrants, Muslims, and people of color. Some Muslims and African immigrants in the Minneapolis area report being “used to being surveilled by the government,” according to Mustafa Jumale, an activist with the Black Alliance for Just Immigration.

More troubling are instances of co-opting local law enforcement to pursue operations that could arguably be called entrapment. Creation of the Joint Terrorism Task Forces after 9/11 allowed the FBI to utilize manpower and resources from local law enforcement to pursue its policies while often escaping stricter federal rules. At the same time, as long as surveillance and infiltration failed to reveal criminal activity or violence, FBI agents or informants have reportedly resorted to acting as agent provocateurs. In one instance, after the protests in Ferguson, Missouri, FBI informants reportedly recruited and equipped two protestors with fake bombs and a list of targets. This type of activity is not legally entrapment, according to the courts.

Without a statutory charter outlining its authority or real oversight of its activity, the FBI seems committed to continue confusing dissent and terrorism.

Source: theintercept.com
The Supreme Court of Utah held that there was no previous request for post-conviction relief to support dismissal of a second petition under Utah Code § 78B-9-106(1)(d) of the Post-Conviction Remedies Act (“PCRA”) where the first petition was voluntarily dismissed under Utah Rules of Civil Procedure, Rule 41(a)(1)(A).

Ronald Hand was convicted of aggravated sexual abuse of a minor in August 2013. In 2017, he simultaneously filed pro se petitions in the U.S. District Court for the District of Utah and in the Second District of Utah (“State Court”). In both courts, he used the preprinted form used by the federal courts for filings under 28 U.S.C. § 2254. Both petitions raised substantially the same issues. But when the State Court asked Hand to pay the filing fee, he requested his state petition be withdrawn under Rule 41(a)(1)(A). The State Court granted Hand’s request. However, the federal district court reviewed Hand’s petition still pending in that court and appointed counsel.

With the assistance of counsel, Hand filed an amended petition in federal court and a new petition in the State Court. The State moved for dismissal, contending that the new petition was procedurally barred by § 78B-9-106(1)(d) of the PCRA because it asserted claims that were “raised or addressed in any previous request for post-conviction relief” or that “could have been, but [were] not, raised in a previous request for post-conviction relief.” The State Court granted the State’s motion, ruling that the petition that had been withdrawn pursuant to Rule 41(a)(1)(A) was a “previous request for post-conviction relief.” Hand appealed.

The Supreme Court of Utah observed that a voluntary dismissal under Rule 41(a)(1)(A) “renders the proceedings a nullity and leave[s] the parties as if the action had never been brought.” Barton v. Utah Transit Auth., 872 P.2d 1036 (Utah 1994). Since the proceedings leading up to the dismissal were a legal nullity, “there was no ‘previous request for post-conviction relief’ to sustain the procedural bar under Utah Code section 78B-9-106(1)(d).”

The Court rejected the State’s argument that Hand failed to preserve his issue and reliance on Rule 41(a)(1)(A). The Court opined that its jurisprudence distinguishes between raising new issues on appeal versus raising new arguments or citing other authority in support of properly preserved issues. State v. Johnson, 416 P.3d 443 (Utah 2017). Hand had properly preserved his issue and had only cited Rule 41(a)(1)(A) as additional authority supporting his preserved claim.

The Court also rejected the State’s alternative argument. While Rule 41(a)(1)(A) permits voluntary dismissal “[s]ubject to Rule 23(e) and any applicable statute,” the Court rejected the State’s contention that § 78B-9-106(1)(d) of the PCRA is an applicable statute. Rule 23(e) concerns class action lawsuits which precluded voluntary dismissal by a named plaintiff unless legal prerequisites are fulfilled. Section 78B-9-106(1)(d) does not concern itself with class-action lawsuits and is silent regarding petitions voluntarily dismissed under Rule 41(a)(1)(A).

Accordingly, the Court reversed the dismissal of Hand’s petition. See: Hand v. State, 459 P.3d 1014 (Utah 2020).

No Consequences for Prosecutors’ Bad Behavior
by Jayson Hawkins

It is not unheard of that the quest for justice occasionally ends in a mistrial. That the defendant would then be retried six times for the same crime, however, is less of a misfire than it is a miscarriage of justice—especially when four of the verdicts were thrown out due to prosecutorial misconduct.

Curtis Flowers’ legal purgatory has stretched into its third decade as he awaits a seventh trial for allegedly murdering four people in 1996.

He has never wavered from maintaining his innocence, yet Doug Evans, the district attorney now serving his eighth term for the Fifth Circuit Court district in Mississippi, has consistently resorted to illicit tactics to obtain guilty verdicts against Flowers. The U.S. Supreme Court overturned the most recent one in June 2019 after court records showed Evans attacked the credibility of witnesses without reason, introduced inadmissible evidence, and used race to disqualify potential jurors. Despite Mississippi’s large Black population, Flowers’ juries routinely lacked any fellow Blacks.

Evans’ flagrant violations of courtroom procedure not only were overlooked by the voters who returned him to office last year, but he also managed to avoid any public discipline for his actions. While people in other regions of the country may be tempted to attribute this to merely another example of long-entrenched Southern racism, the utter absence of consequences for prosecutorial misdeeds has become an American standard.

A report by the Innocence Project that examined criminal cases in five states in 2011 found 660 involving misconduct by prosecutors. Just one received public censure.

The National Registry of Exonerations calculated that the 30-year period from 1989-2019 saw more than 2,500 wrongful convictions overturned. Roughly 30 percent of those cases were attributed to prosecutorial misconduct, but less than 5 percent of the offending attorneys faced any discipline whatsoever.

A 1976 U.S. Supreme Court ruling, Imbler v. Pachtman, has shielded prosecutors from being sued for malpractice, instead leaving the taxpayers they represent to foot the bills for wrongful convictions. Prosecutors may be charged with crimes such as bribery or burying evidence. However, examples are rare, and the resulting sentences miniscule.

Michael Morton served over 20 years in Texas prison after being wrongfully convicted of murdering his wife in 1987. Ken Anderson, the now-former prosecutor who withheld exculpatory evidence at Morton’s trial, received a paltry 10 days in jail for his actual crimes that sent an innocent man to prison for two decades.
Nevada Supreme Court Rules Bail Determination Requires Due Process and Severs Unconstitutional Language from Bail Statute

by Douglas Ankney

The purpose of bail in Nevada is (1) to ensure the presence of the accused when and where demanded by the court, Malley, and (2) to protect the community, including the victim and the victim’s family, Nev. Const. art. 1, § 8A(1)(C). Thus, to be constitutional, the district courts must not set bail (except for Capital Offenses and specified murder offenses) in an amount greater than necessary to ensure the presence of the accused and to protect the community.

Pretrial detainees who have not been convicted of any crime have an interest in their liberty. Stack v. Boyle, 342 U.S. 1 (1951). This liberty interest is fundamental. United States v. Salerno, 481 U.S. 739 (1987). Because the interest in liberty is fundamental, substantive due process requires a compelling governmental interest before any infringement upon that liberty may be imposed. Id. When the amount of bail is more than the detainee can afford, it operates as a detention order because it results in the continued detention of the detainee. Therefore, the Court concluded that substantive due process demands that bail determinations be subject to the same procedural due process protections as other deprivations of liberty.

The Court then set forth the “procedural requirements attendant to that decision.” If indicted defendants remain in custody, they must be brought promptly before district courts for an individualized custody status determination. District courts are to first determine if bail is necessary since, in Nevada, many cases allow the detainee to be released on his or her own recognizance or other nonmonetary terms. In such cases, any amount of bail would be “greater than necessary” and unconstitutional. The detainee has a right to counsel at the hearing and a right to testify and present evidence at the hearing. The State has the burden of proving cause requirement before releasing a person on nonmonetary conditions.

The purpose of bail in Nevada is (1) to ensure the presence of the accused when and where demanded by the court, Malley, and (2) to protect the community, including the victim and the victim’s family, Nev. Const. art. 1, § 8A(1)(C). Thus, to be constitutional, the district courts must not set bail (except for Capital Offenses and specified murder offenses) in an amount greater than necessary to ensure the presence of the accused and to protect the community.

Pretrial detainees who have not been convicted of any crime have an interest in their liberty. Stack v. Boyle, 342 U.S. 1 (1951). This liberty interest is fundamental. United States v. Salerno, 481 U.S. 739 (1987). Because the interest in liberty is fundamental, substantive due process requires a compelling governmental interest before any infringement upon that liberty may be imposed. Id. When the amount of bail is more than the detainee can afford, it operates as a detention order because it results in the continued detention of the detainee. Therefore, the Court concluded that substantive due process demands that bail determinations be subject to the same procedural due process protections as other deprivations of liberty.

The Court then set forth the “procedural requirements attendant to that decision.” If indicted defendants remain in custody, they must be brought promptly before district courts for an individualized custody status determination. District courts are to first determine if bail is necessary since, in Nevada, many cases allow the detainee to be released on his or her own recognizance or other nonmonetary terms. In such cases, any amount of bail would be “greater than necessary” and unconstitutional. The detainee has a right to counsel at the hearing and a right to testify and present evidence at the hearing. The State has the burden of proving cause requirement before releasing a person on nonmonetary conditions.

The State also must prove by clear and convincing evidence that its requested bail amount is no more than necessary to secure its interests. Factors to be considered in determining bail or other release include: the detainee’s ties to the community, employment, court history, current charged offense, and potential penalties if convicted. The district court must make findings of fact and must state its reasons for the bail decision.

The Nevada Supreme Court also severed the “good cause” language from NRS 178.4851(1), which reads: “Upon showing of good cause, a court may release without bail any person entitled to bail if it appears to the court that it can impose conditions on the person that will adequately protect the health, safety and welfare of the community and ensure that the person will appear at all times and places ordered by the court.” The Court determined that the good-cause requirement before releasing a person on nonmonetary conditions undermines the constitutional right to non-excessive bail because it excuses courts from considering less restrictive conditions before determining that bail is necessary. And the good-cause requirement relieves the State of its burden to prove that bail is necessary to secure its interests. Courts may sever constitutionally offensive language from a statute if the remaining language of the statute can be given legal effect and it accords with legislative intent. Cty. of Clark v. City of Las Vegas, 550 P.2d 779 (Nev. 1976).

Accordingly, the Court severed the “good cause” language from NRS 178.4851(1) but denied the petitions for writs of mandamus because the petitioners had already been convicted, and the Court could order no relief for them. See: Valdez-Jimenez v. Eighth Judicial Dist. Court of Nev., 460 P.3d 976 (Nev. 2020).

Source: law360.com
The U.S. District Court for the Southern District of Indiana overturned the conviction of Russell Taylor, a person linked to Jared Fogle’s child pornography case, finding that Taylor’s counsel failed to advise him that “the government never really had a case” with some of the charges it filed, before advising him to plead guilty, the Court said.

Taylor pleaded guilty in 2015 to 12 counts of producing child pornography and one count of possessing child pornography, after a woman told Indiana State Police that during a sex chat Taylor suggested to her he had images of “young girls.” Based on this information, law enforcement obtained a search warrant and found that Taylor had hidden cameras in his house that had captured images of minors showering and changing clothes. Authorities also found that Taylor had sent some images to Fogle, the longtime pitchman for Subway and founder of the Jared Foundation. Taylor worked closely with Fogle as the head of his foundation.

Fogle was also arrested and charged with receipt of child pornography and further charged with traveling to engage in sexual conduct with minors for going to New York City to have sex with two underage prostitutes. He pleaded guilty and sentenced to just over 15 years in prison; Taylor received 27 years.

Taylor filed a motion to vacate his conviction under 28 U.S.C. § 2255 in December 2016, claiming ineffective assistance of counsel (“IAC”) for (1) failing to seek suppression of an unconstitutional search warrant and (2) failing to notify him that the Government could not prove the elements of three of the child production charges before advising him to plead guilty. The Court ordered the Government to respond, and after filing an improper response, the Government finally filed a corrected response almost a year and a half later. But not before the Court nearly granted Taylor default judgment because of the Government’s delays and actions that “disturbed and disappointed” the Court. Taylor v. United States, 2018 U.S. Dist. LEXIS 197295 (S.D. Ind. 2018) (order on Taylor’s motion for default judgment and denying search warrant claim).

Taylor claimed that his guilty plea was not knowing and voluntary because his lawyer never told him that the Government could not prove its case for the three charges, since it was missing a crucial element to convict him, viz., “sexually explicit conduct.” Three of the charges were based on videos captured of the minors who were merely getting dressed, and there was never a focus on the genitals. Taylor argued that had counsel investigated the evidence, and the law for that matter, he would not have pleaded guilty to those charges.

At the evidentiary hearing, counsel admitted that Taylor was his first federal case and that he researched the law using Google, papers on the charging statute, and by talking to the federal public defender’s office. It was uncovered that counsel never researched case law to understand the specific elements of the offense that the Government had to prove. All of his research was focused on sentencing.

Counsel’s lack of diligence in researching the law likely came from his desire to secure a plea agreement with the Government, the Court surmised. Less than five hours after he filed his notice of appearance, counsel emailed the prosecutor asking about a plea agreement. Counsel admitted he wanted to reach a “global” resolution to the case with a favorable sentence. When Taylor told him he didn’t want to plead to the three charges, counsel advised him it was all or nothing, that he would “be much worse off in terms of sentencing” if he challenged those charges.

For the first time in the case, the prosecutor submitted the three videos in question to the Court. After reviewing them, the Court said: “The Court has determined as a matter of law that those videos do not depict sexually explicit conduct and that they do not support counts 9 through 11.” The Court also found that because of the Government’s deficient filings in response to Taylor’s motion it had waived its argument on this point.

Therefore, Taylor’s motion, the Court said, “narrowed to what measures [counsel] took to learn about the law and evidence underlying counts 9 through 11 and how he advised Taylor with respect to those charges.” The Supreme Court has explained that “an attorney’s ignorance on a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.” The Court held in Strickland v. Washington, 466 U.S. 668 (1984), that counsel is constitutionally ineffective when his errors affect the outcome of the proceeding.

Under 18 U.S.C. § 2251, the Government must prove that a person has induced, enticed, or coerced a minor to engage in “sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” The Seventh Circuit has held that “more than nudity is required to make an image lascivious; the focus of the image must be on the genitals or the image must be otherwise sexually suggestive.” United States v. Griesbach, 540 F.3d 654 (7th Cir. 2008).

The Court concluded that counsel did not do the “basic research” required of him to understand the elements of § 2251 to properly advise Taylor on whether to plead guilty. A criminal defendant “counts on his attorney to evaluate evidence under applicable law, understand how it supports or detracts from the government’s case, and use it to advocate for him,” the Court stated.

The Court also rejected the Government’s argument that Taylor’s counsel’s bad advice was cured by the stipulation in the plea agreement that the images and videos in every count contained “sexually explicit conduct” and by his statements at the plea hearing that he understood the charges. “It is correct, after all, that the statements a criminal defendant makes while pleading guilty in open court are generally presumed true,” Judge Tanya Walton Pratt said in her earlier order denying the search warrant claim. “But the government again focuses its argument on irrelevant facts and ignores the central issue. A plea entered without the effective assistance of counsel is not knowing and voluntary and therefore not valid.... A defendant’s statements in court do not have the power to rewrite the law. They do not expand the reach of a statute and criminalize conduct falling outside its definition.”

The Court therefore vacated Taylor’s conviction and sentence and directed the clerk to reopen the criminal case. It also left Taylor with some advice: “Taylor could have proceeded to trial, where he would have had a strong case (indeed, a strong motion for judgment of acquittal on counts 9 through 11).” See: Taylor v. United States, 2020 U.S. Dist. LEXIS 34341 (S.D. Ind. Feb. 28, 2020).

Writer’s note: Taylor’s postconviction law-

Federal Court Overturns Conviction for Person Linked to Former Subway Spokesperson’s Child Porn Case

by Dale Chappell
While this country has the highest rate of incarceration in the world, with 2.3 million of its residents in prison, it also has the alarmingly high rate of people on probation or parole: 4.5 million.

In other words, 1 in 55 adults in this country is on probation or parole. And of those 4.5 million, 40 percent will be re-arrested within one year of release and 70 percent within three years.

The Institute for Justice Research and Development ("IJRD"), a research center within the College of Social Work at Florida State University, filed its sixth quarterly report shedding some light on what the re-arrest of those who are on supervision means. Here's what the multi-year study found.

Purpose of the Study

The study states up front that its focus is not about the rate of recidivism. Instead, the focus of the report is to highlight the impact that re-arrest of those on supervision has on them, their families, and society as a whole. The authors provide facts that might show re-arrest for non-criminal conduct could do more harm than good.

The idea, the authors say, is to create change by providing facts about supervision and recidivism and to open conversation points for those authorities responsible for making the decision to re-arrest someone. The report is just a small part of a larger study involving many states over the course of several years. The authors say they hope to show "just how complex recidivism is for some individuals as they leave prison."

‘Recidivism’ Doesn’t Mean a New Criminal Conviction

A big misconception about recidivism, the study says, is that the public thinks that recidivism means a new criminal conviction. While a new conviction would surely be part of recidivism, it’s just a small piece of a much bigger picture.

The “broadest metric” used to assess recidivism is the re-arrest of a person on parole or probation. And a person might be re-arrested for all sorts of reasons, including new criminal behavior. They could also have violated the terms of their release, known as a “technical violation.” Circumstances beyond their control may also lead to re-arrest, such as detainers and warrants that could be many years old, predating their original conviction.

Perhaps the better metric to measure new criminal conduct and true recidivism would be reconviction, the study suggests. This happens when someone with a criminal record who may or may not be on supervision is convicted of a new crime — the most common understanding of “recidivism.”

Questions for Authorities Allowing Re-Arrests for Non-Criminal Conduct

The study highlights 35 people who were re-arrested for non-criminal technical violations of supervision, quoting them on their reasons for the re-arrest. Below are some of those direct quotes:

- "I moved and didn’t tell my PO. Unknown whereabouts equals absconding."
- "I did not have enough to pay bills, take care of my kids, and pay my supervision fees."
- "I was sitting in my car with my girlfriend outside my own apartment. My probation officer showed up and said it was a curfew violation."
- "Couldn’t pay my child support."
- "I failed to register my new phone number."

The authors then posed a series of questions to authorities that allow re-arrests for such non-criminal conduct: For what reasons are stakeholders most comfortable reincarcerating individuals? Are the non-criminal behaviors described in this report reason enough to send someone to jail? Is it worth the financial costs and associated social costs?

For example, they cited the re-arrest of the person unable to pay child support. "How did incarceration [for six months] help that participant be able to make support payments?" And what about when new charges are dropped against those on supervision? "How does incarceration help them to live positively as they move forward?"

Conclusion

Those who are re-arrested lose jobs, housing, transportation, money, and get set back on any progress they have made. Additionally, more than five million kids have a parent in jail or prison. The re-arrest of that parent after their release makes the child endure another cycle of loss and separation, the study notes. "How can we develop children’s well-being and help families heal when they feel this cycle may take years to end?"

Incarceration costs this country's taxpayers over $1 trillion annually. That’s over $2,900.00 for every man, woman, and child living in this country. This means every single member of society is also impacted by the re-arrest of people on supervision for non-criminal, technical violations of their parole or probation. The authors of the study want to change that.

Source: ijrd.csw.fsu.edu

Writer's note: Many years ago, I had the experience of being thrown in jail without bond for “violating” my probation. It took six weeks before I could see a judge, and when I finally did get a hearing, he let me go right away. He found that my stopping at a store to pick up charcoal on my way home was not a violation at all. The kind judge ripped into the prosecutor for even pursuing such a frivolous charge and reminded everyone that I was not forbidden from going to the store. Still, he gave the state more time to attempt to gather more evidence proving that I really did violate my probation, but the state finally admitted it had nothing. When I met with my PO upon my release, he said, “Did I get my point across? Remember that I’m in charge.” Luckily, I did not lose my job, and I had paid my house payments in advance. So I was covered. I didn't lose anything. But I easily could have, and most people would have.

April 2020

Criminal Legal News 45

June 2020
Utah Residents Suffer from the highest payday and auto loan interest rates in the United States. It is one of only six states that does not have an interest-rate cap on such loans. Moreover, despite Congress’ ban on debtors’ prison, more and more residents are finding themselves in jail after defaulting on their loans.

President Obama began drafting federal regulations to govern payday and auto loans while he was in office. Prior to that, these loan companies had never been regulated. The Trump administration has delayed this proposal, resulting in current payday and auto loan rules varying by state.

Many states have banned these loans entirely, but six (including Utah) have left them completely unregulated. Utah’s average annual interest rate is 652 percent with some as high as 2,607 percent. This means that a $700 loan could cost as much as $18,249 at the end of one year.

Although Utah’s unemployment rate is one of the country’s lowest and its population is the nation’s highest percentage of white, middle-class citizens, nonetheless, 25 percent of that population’s household income is less than $39,690 a year.

A Federal Reserve Board study stated that one in four adults could not handle an unexpected $400 expense without having to borrow money or sell something to pay for it.

What civil liberty advocates find most disconcerting is that those who default on their loans many times find themselves in jail because they don’t know court procedure or what their rights are and cannot afford representation that could inform them.

When borrowers default on their loan, a suit is filed in small claims court. These claims make up a large percentage of cases heard in that court. Loans for Less, an auto title and installment loan company in Utah, claims made up 95 percent of all those cases heard in South Ogden in 2018.

Ralph Silverstone, owner of Loans for Less, said court is a necessary function of his business. “At this point, small claims court is in the model. If we didn’t have that avenue, I’ll be honest... we could be out of business,” he stated.

An analysis of court records between September 2017 and September 2018 showed that payday and auto loan companies had a lower threshold for filing a claim than others, with a median claim being $994, which is defaulted to the loan companies when the defendants fail to show up as they so often do. The loan companies can then place liens and garnish wages of the debtor. If the debtor misses a subsequent meeting to review their assets, a bench warrant is issued for their arrest.

Utah passed a bill in 2014 that allows creditors to seize a defendant’s bail money, and the collections officer receives a commission for the funds they help to recover. So a defendant pays on the principal of his debt every time he makes bail.

Opponents to this practice state that the average consumer only knows that they ended up in jail because of a debt that they owed. From here, many family and friends go to one of these same loan companies for bail, creating a downward spiraling, never-ending crisis. The pen holder in a Loans for Less branch office reads: “If you think nobody cares if you’re alive, try missing a payment.”

---

California Court of Appeal: Unoccupied Running Vehicle Doesn’t Justify Warrantless Search of Residence

by Douglas Ankney

Division One of the Fourth Appellate District of the California Court of Appeal ruled that an unoccupied vehicle left running in a driveway satisfied neither the “emergency aid exception” nor the “exigent circumstances exception” to justify the warrantless search of a residence. The Court further ruled that Senate Bill No. 136 (“SB 136”) limiting sentence enhancements based on prior convictions applied retroactively to cases not final as of January 1, 2020.

In December 2014, officers from the Palm Springs Police Department responded to a call that an unoccupied vehicle had been left running in the driveway of a residence for about 30 minutes. The car was determined to be owned by a rental company. One of the officers later testified at a suppression hearing that they became concerned that an occupant of the residence might be in distress or that crime was afoot. The residence was dark and no noise came from inside. A porch light was on. They rang the front doorbell and knocked but received no response. About 10 feet from the front door and under the same roofline, officers discovered another door which they believed opened to the main residence (but the door actually opened to a casita that lacked access to the front door). Finding the door unlocked, they opened it and announced “police.” They stepped into the room and discovered Skylar Damon Smith, along with drug paraphernalia and methamphetamine.

The Riverside County District Attorney filed an information charging Smith with five counts, including possession of methamphetamine and heroin. Then in September 2015, Smith was involved in a motorcycle accident and was hospitalized. The motorcycle had to be towed. Police conducting an inventory search discovered methamphetamine, cash, and a loaded firearm. The prosecutor amended the information to charge five additional counts. The cases were consolidated and all 10 counts were tried together.

Smith moved to suppress all evidence obtained from the casita, arguing the search and seizure were unreasonable. The trial court denied his motion. A jury convicted Smith of all 10 counts, and the trial court also found that Smith had two prior convictions: one for assault likely to cause great bodily injury and one for possessing a firearm. The trial court imposed a sentence of 10 years, eight months in prison, including consecutive terms of one year each for the priors.

Smith appealed, arguing, inter alia, that the trial court erred when it denied his suppression motion. The Court of Appeal affirmed. However, the California Supreme Court denied Smith’s petition for review.

Source: truthout.org
Court granted review, transferred the case back to the Court of Appeal, and instructed that court to vacate their decision and to reconsider the cause in light of People v. Ovieda, 446 P.3d 262 (Cal. 2019). While the cause was pending in the Court of Appeal, the Legislature enacted SB 136 - which amended Penal Code § 667.5(b) to limit one-year prison terms for prior convictions to only those cases where the prior was for “a sexually violent offense as defined in ... the Welfare and Institutions Code [§ 6600(b)].” The amended statute became effective January 1, 2020.

The Court of Appeal observed that the Fourth Amendment of the federal constitution prohibits the government from conducting unreasonable searches and seizures of private property. Arizona v. Gant, 556 U.S. 332 (2009). Warrantless searches are unreasonable per se - subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S.347 (1967). Two of those exceptions are (1) exigent circumstances that require police to act immediately to prevent a suspect from escaping or destroying evidence or (2) an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property whether or not a crime might be involved. Ovieda.

But police may not speculate or attempt to create an emergency situation when there are no objective signs to support such a belief. People v. Smith, 496 P.2d 1261 (Cal. 1972). In People v. Ray, 981 P.2d 928 (Cal. 1999), the California Supreme Court held that the “community caretaking exception” permits police to enter a home to conduct a welfare check in the absence of exigent circumstances. But in Ovieda, the California Supreme Court disapproved of Ray because the community caretaking exception in the absence of exigent circumstances was not recognized by the U.S. Supreme Court.

The Court of Appeal determined that an unoccupied vehicle left running in the driveway is neither an exigent circumstance nor is it an emergency situation. There were no noises or moans coming from inside the home or any blood or other indications that anyone was in distress. Nor were there any signs of a burglary or other crime being committed.

The Court concluded that the trial court erred in not suppressing the evidence recovered from the casita. And regarding SB 136 amending Penal Code § 667.5(b), the statute is retroactive and applies to all cases not yet final when it became effective January 1, 2020. In re Estrada, 408 P.2d 948 (Cal. 1965). Accordingly, the Court reversed Smith’s convictions for counts one through five and remanded to the trial court with directions to strike the enhancements under Penal Code § 667.5(b) and to resentence Smith. See: People v. Smith, 46 Cal. App. 5th 375 (2020).

Interpreting Emojis as Court Evidence

by Anthony Accurso

Emojis on cellphones and other digital devices have advanced their popularity as a way to express emotion. It should be no surprise then that their ubiquity has brought them into court cases. However, the accepted meanings of the emojis has not caught up to their ubiquity. Enter “forensic linguistics”—a field being remade to include analysis of the meaning and usage of emojis in communication, especially where the meaning of a phrase or image can be contentious.

In the U.S., one circuit court held that the use of the “tongue out” emoji was “intended to insult, ridicule, criticize and denigrate” the plaintiff on social media platforms.

In France, in 2016, a man was convicted of threatening his ex-girlfriend and sentenced to three months in prison after sending her a gun emoji. The court said it translated to a “Death threat in the form of an image.”

In civil cases in the U.S., the “thumbs up,” “fist bump,” “handshake,” and “glasses” emojis have variously constituted an agreement or an intention to enter into a contractual agreement.

Other emojis are less definite in their interpretation. The monkey or pig emojis may be insulting, degrading, or racist depending on the sender or the recipient. The “pinching your fingers together” emoji likely means “What do you want?” when the sender is Italian, but it could be interpreted as “Are you hungry?” if the recipient is from India.

The “thumbs up” emoji is variously an insult or a sign that everything is in order, depending on the region where it is used.

Emojis have come a long way since they were first developed in Japan in the late 1990s. Rhodes University in South Africa recently held a two-day colloquium for forensic linguists and legal practitioners to discuss developments in international laws as they relate to emojis.

Like it or not, emojis are here to stay, and they are up to interpretation in a court of law. The burgeoning field of their study as part of forensic linguistics signals how seriously they are being taken by plaintiffs, including governments and law enforcement. The author of this article wonders how long before a sexual harassment case hinges on the use of an eggplant emoji.

Source: theconversation.com

LAPD Officers Accused of Entering Names of Innocent People Into Gang Database

by Douglas Ankney

Officers from an elite division within the Los Angeles Police Department (“LAPD”) are under investigation regarding allegations that they falsified reports and listed some innocent people as gang members.

LAPD Police Chief Michel Moore announced in January that he was seeking to fire one officer for his role in falsifying the records. “The California Gang Database is a critical tool for law enforcement in its efforts to solve violent crime,” Moore said. “The information entered must be accurate. We are committed to holding anyone who falsified information accountable and will also fully cooperate with the State Attorney General Office.”

In a letter sent on February 10, 2020, to the LAPD, Attorney General Xavier Becerra promised an independent audit of the department’s CalGang entries. “We do not have a full or clear picture of what occurred, but we know enough that we must act,” Becerra said.

While Becerra acknowledged that those wrongly added to the database could be subjected to additional police scrutiny, he defended CalGang as a “good policing tool that keeps the community safe.” Nearly 80,000 persons are listed in the database.

In 2016, a state audit of CalGang revealed racially biased entries, violations of civil liberties, inaccurate entries, including “gang members” younger than one, transparency problems, and failures to follow basic rules.

Sources: reason.com, abc7.com.
Julian Betton was in his home mind- ing his own business when the police crashed through his front door. The cops entered without knocking or identifying them- selves as law enforcement, and Betton reacted as any citizen would to masked individuals shouting threats and brandishing weapons: He confronted the armed intruders with a gun of his own. The police shot him nine times, paralyzing him from the waist down and severely damaging his internal organs.

Betton was a victim of an aggressive form of warrant service called ‘dynamic entry,’ commonly known as “no-knock” warrants. Police officers argue that no-knock warrants are necessary to ensure their safety and to prevent suspects from destroying evidence. Yet there is no evidence to suggest that serving warrants this way is safer for either law enforcement or citizens. In fact, when police masquerade as violent home invaders, they often provoke an armed response that results in serious injury, and even death in some cases, for everyone involved.

With no-knock raids, police departments have taken a page out of the military’s playbook. In recent years, the U.S. Department of Defense’s 1033 program has promoted the militarization of law enforcement by providing cops with surplus military equipment. Adopting military tactics better suited to the battlefield than to neighborhoods radically changes the relationship between police and the citizens they have sworn to protect and serve. Citizens are seen as enemy combatants in an urban war zone. During dynamic entry, the individual inside his home becomes the intruder rather than the invading police and, from the perspective of law enforcement, does not have the right to defend himself.

Fortunately, the Castle Doctrine, based on the Fourth Amendment protections against unlawful searches and seizures, gives citizens the right to defend their home from invaders, even when they happen to be cops.

The Fourth Circuit Court of Appeals agrees. Betton filed suit against the officers who shot him. Members of the task force testified that they followed the search warrant’s specifications to knock and announce. However, Betton’s home security footage contradicted their claims. Betton won his suit, but David Belue, one of the Myrtle Beach Police Department officers involved, appealed. Belue’s attorney argued in court that the illegal entry was immaterial, and the only relevant matter in the case was Belue’s perception of how the incident unfolded. In effect, Belue’s lawyer claimed that citizens do not have the right to protect themselves from home invaders. The Fourth Circuit rejected this absurd claim and ruled in Betton’s favor.

Police officers attempt to change legal standards by claiming that simply being a cop gives them the right to act with impunity. So far, the courts have resisted tipping the scales in favor of law enforcement over citizens in such cases. For instance, in the highly publicized “wrong place, wrong time” murder of Botham Jean by Dallas patrol officer Amber Guyger in 2018, the court rejected her claim that because she was a cop, Guyger could accidentally enter Jean’s apartment and shoot him when he ignored her orders to raise his hands.

When the police are not held to the same legal standards as citizens, they no longer enforce the law but lawlessness.

Unfortunately, this double standard comes at the expense of public safety and the lives of citizens.

Source: techdirt.com

Massachusetts Supreme Judicial Court Clarifies Standards for Exit Order and Patfrisk

by Anthony Accurso

The Supreme Judicial Court of the Commonwealth of Massachusetts affirmed the suppression of evidence resulting from a patfrisk that was conducted after the defendant had exited his vehicle unprompted by police, and twice looked back into it during his encounter with officers.

Manuel Torres-Pagan (“Torres”) was pulled over in a Springfield, Massachusetts, neighborhood because officers noticed his windshield was cracked and his inspection sticker expired. After officers turned on their lights, Torres pulled over into the driveway of a residence and exited the vehicle without being instructed to do so by the officers. He remained standing outside the vehicle with the door open as officers approached. On more than one occasion during the encounter, Torres turned to look inside the vehicle.

The officers decided this was “furtive” behavior, placed him in handcuffs, and performed a patfrisk on him. They found a knife in his pants pocket. They then asked him if he had any other weapons. He responded that he did, and they located a firearm on the floor of the driver’s side of the vehicle.

Prior to trial, Torres filed a motion to suppress the evidence of the weapons, claiming they were the result of an unconstitutional search because he argued officers lacked proper justification for the patfrisk. The district court granted his motion, though its decision was overturned on an interlocutory appeal. The Supreme Judicial Court then granted leave for appeal to hear the case.

Both the Fourth Amendment to the U.S. Constitution and Article 14 of the Massachu- setts Declaration of Rights protect against unreasonable searches and seizures. A patfrisk is a “carefully limited search of the outer clothing of a person … to discover weapons” for safety purposes. Terry v. Ohio, 392 US 1 (1968). A patfrisk is “permissible only where an officer has reasonable suspicion that the suspect is armed and dangerous.” Arizona v. Johnson, 555 US 523 (2009).

The Court acknowledged that, in the past, it had issued confusing guidance regarding the standard for a patfrisk, especially as it relates to the standard for exit orders. The Court observed that it sometimes conflated the two standards. In the past it stated, inaccurately, that the standard for a patfrisk is the same as that which is required to justify an exit order, citing Commonwealth v. Torres, 745 N.E.2d 945 (Mass. 2001). Additionally, “we mistakenly have described a patfrisk as being constitutionally justified when an officer reasonably fears for his own safety or the safety of the public … or when the police officer reasonably believes that the individual is armed and dangerous,” the Court lamented.

The Court then announced: “we clarify today that an exit order is justified during
a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds…. A lawful patfrisk, however, requires more; that is, police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous.” The Court explained that different standards for exit orders and patfrisks is logical since the degree of intrusion associated with each is also different.

Applying the clarified standards to the present case, the Court rejected the Commonwealth’s argument that the patfrisk was justified because Torres exited the vehicle un-
prompted by the police coupled with the fact he looked inside the vehicle multiple times.

The Commonwealth argued that the Torres’ actions were “furtive” and thus established reasonable suspicion that he was armed. The Court, however, noted that “furtive” means “done by stealth” or “secret” and that merely looking into the vehicle wasn’t stealthy and indicated nothing illegal by itself. While exiting the vehicle may have been unexpected, it wasn’t altogether peculiar, unusual, or threatening, according to the Court.

The Commonwealth also argued that the patfrisk was justified because Torres was pulled over in a “high crime area.” The Court rejected this argument as well, citing Commonwealth v. Jones-Pannell, 35 N.E.3d 357 (Mass. 2015): “That one or more crimes occurred at some point in the past somewhere on a particular street does not necessarily render the entire street a high crime area, either at that time or in perpetuity.” Given the facts of the case, the Court concluded that simply because the stop may have occurred in a high crime area doesn’t constitute reasonable suspicion that Torres was armed and dangerous.

The Court therefore ruled that the patfrisk of Torres and subsequent search of his vehicle were unconstitutional.

Accordingly, the Court vacated the decision of the Appeals Court and reinstated the district court’s grant of Torres’ motion to suppress. See: Commonwealth v. Torres-Pagan, 138 N.E. 1012 (Mass. 2020).}

---

## A Mass Purge of Misconduct Records by Phoenix, Arizona Police

by Bill Barton

Few people realize that Phoenix police regularly “purge” the disciplinary records of police, an Arizona Republic investigation uncovered. And it’s been going on for two decades.

The Republic uncovered “more than 600 acts of wrongdoing” committed by 525 cops (out of nearly 3,000 sworn employees) in just the past five years, with 90 percent of all “sustained misconduct investigations” being purged.

Police unions hold sway. As techdirt.com pointed out in a September 9, 2019, article by Tim Cushing, “There’s nothing about American policing that police unions can’t make worse. A powerful obstacle standing in the way of accountability and transparency, police unions ensure Americans remain underserved by their public servants.”

In Phoenix, The Republic “obtained the complete list of misconduct records from the Fiscal Management Bureau, which is responsible for transferring disciplinary records from the Police Department to the city’s Human Resources Department. The Republic also obtained a list of misconduct record kept by the Police Department’s Professional Standards Bureau which conducts internal affairs investigations. By cross-referencing the two sets of records, The Republic identified hundreds of disciplinary cases that had been hidden from internal affairs and the Department’s leadership.”

Kevin McGowan was among them. The now-former officer “earned top marks in his 2015 evaluation despite being disciplined for serious misconduct during the previous year. An internal investigation concluded McGowan used excessive force when he stomped on an 18-year-old man’s neck, driving his face into the tile floor of a convenience store and knocking out three of the man’s teeth. The incident was captured in surveillance footage taken from the store.

“McGowan was initially fired, but the union interceded and he ended up with only a 30-day suspension. A few years later, the disciplinary files were purged, resulting in this cop being commended for being such a great cop. Phrases like ‘positive attitude’ and community contributor’ were tossed around by supervisors unaware of McGowan’s recent past.”

Judging from the now-available information, this situation appears to be far from an anomaly—and it has an effect on police oversight.

As techdirt.com pointed out, “If the goal is to keep bad cops employed indefinitely, it’s been super-effective.”

Sources: azcentral.com, techdirt.com

## Cops in Missouri Exploit Loophole to Seize $2.6 Million from Innocent Citizens

by Douglas Ankney

According to St. Louis Public Radio, police in Missouri abused a civil asset forfeiture scheme to seize at least $2.6 million from motorists during traffic stops in 2018.

St. Charles County cops stopped people for minor traffic violations and directed the drivers to a private lot owned by Superior Towing.

Officers searched the vehicles and claimed that drug-sniffing dogs detected the odor of marijuana on the occupants’ cash.

Cops then informed the unfortunate citizens that they had two options: go to jail or sign away their possessions to the police department and leave with a traffic ticket.

Of the 39 traffic stops, one-third were conducted after midnight. While no criminal charges were filed, almost half the drivers had Hispanic or Asian surnames.

State law requires a criminal conviction before forfeiture. But the cops exploited the federal Equitable Sharing program, which allows the cops to seize assets without a conviction as long as the feds get a 20 percent cut. Legislation was introduced by Representative Shamed Dogan to close the loophole and force cops to comply with state law. But the bill was defeated due to extensive opposition by a local police lobby.

Dogan, a libertarian Republican, has attempted for several years to reform the illegitimate practice of seizing assets from people who haven’t been convicted of any crime.

Source: reason.com
How Old Is That Fingerprint?
by Douglas Ankney

While forensic scientists have, for more than a hundred years, been able to opine that a fingerprint came from a particular person, the limitations of science did not permit them to state when the fingerprint was left by that person.

But that limitation may have been recently shattered. Using a method of matrix-assisted laser/desorption ionization mass spectrometry (“MALDI-MS”), researchers were able to track shifting levels of triacylglycerols (body oil). Pinning down the time the person touched the object and left the fingerprint would assist investigators in establishing a better timeline, in ruling out a suspect or in contradicting one’s story.

The new study, published in *Analytical Chemistry* by researchers Paige Hinners, Madison Thomas, and Young-Jin Lee from Iowa State University, indicates the researchers could reliably determine the triacylglycerol degradation rate for each person over the course of seven days.

“Most compounds in fingerprints can be measured using this technique,” said Lee. “But we focused on triacylglycerols as they are highly abundant and much more reliably measured than others.” The rate of degradation differed according to each individual, and more testing needs to be done using the MALDI-MS to account for multiple variables such as environmental factors and experimental conditions.

Source: forensicsmag.com

News in Brief

**Arizona:** Tucson has a new ordinance to punish those who fail to stay outside designated crime scene perimeters, the *Tucson Star* reports. The law aims to halt ‘cop haters’ with cameras, but the potential fallout is a stifling of First Amendment rights. While people should not provoke police, critics worry the new law could stop cellphone filmers or ‘First Amendment authors’ from filming at crime scenes and holding police accountable by posting the footage online. According to the *Tucson Star*, the ordinance states “A. Police officers or Community Service Officers conducting enforcement activity, investigations, and other police-related activities may restrict 2 individuals from physically entering crime scenes or areas immediately surrounding where such enforcement activity, investigations, and other police-related activities are taking place. Police Officers or Community Service Officers may establish the boundaries of a restricted area by using physical barriers, placing visual markers like caution tape, or expressly communicating that an area is temporarily restricted for police activity” and “B. If a Police Officer or Community Service Officer has established a restricted area, it shall be unlawful for any person to enter the restricted area without a Police Officer’s or Community Service Officer’s express permission to enter; or to refuse to comply with a Police Officer’s or Community Service Officer’s request or direction to leave the restricted area.”

**California:** Rancho Cordova Police Officer Brian Fowell is accused of pinning and punching a 14-year-old boy over a Swisher Sweet tobacco product before handcuffing him and citing him for underage tobacco use in April 2020. The boy bought the tobacco from a stranger but handed it to the cop when confronted. A video of the incident shot by the boy’s friends reportedly shows the officer grabbing the teen by the throat, thefreethoughtproject.com reports. “He’s on top of me and it looks like he’s about to hit me. Like, I’m reacting like any other normal human being would,” the teen told Fox40. “It could’ve been better on both of our parts in this situation.” The officer attempted to handcuff the boy. “So when he did that, I pulled my right hand back and that’s when he started getting aggressive and trying to fight,” said the teen. Fowell has since been reassigned outside the police department, fox40.com reports.

**Colorado:** Mental Health Colorado has expanded its focus to include criminal justice, thanks to David and Laura Merage’s The Equitas Project, mentalhealthcolorado.org reports. “Behaviors associated with poor mental health and addiction are mistaken for, and treated as, willful criminality,” said David Merage. “Rather than supporting people’s health and providing access to quality care and education, we default to law enforcement and incarceration, where health declines further and poor behavior is exacerbated.” The work of Equitas includes “coordinating with prosecutor offices nationally to prevent incarceration of people who have unmet mental health needs.” In addition, the Model Law Writing Group has been working to establish a set of national standards for mental health crisis response, “which is a select group of national experts re-defining civil commitment law to improve the ability to stabilize and provide care for people experiencing mental health crises” will work under the auspice of Mental Health Colorado.

**Connecticut:** The city of Westport has put the brakes on an Orwellian-like program of using “pandemic drones” to monitor citizens 24/7 to see if they are heeding social distancing, NBC reports. Police pulled back after opponents compared the drone program to “living in a police state in China.” The drones could ‘monitor people’s temperatures from 190 feet away and detect sneezing, coughing and heart and breathing rates amid the COVID-19 pandemic,” NBC reports. Supporters, however, defended Draganfly technology, saying it “does not employ facial recognition or collect individualized data, single out individuals and is not used for surveillance or contact tracing.” Meanwhile, New York has used drones to check whether residents are heeding social distancing.

**Florida:** Davie Police Chief Dale Engle is on leave and under investigation by the town manager after “suggesting that a Broward County sheriff’s deputy died from the coronavirus because he was gay, according to a complaint,”nytimes.com reports. He was put on leave on April 11 “pending further review of allegations brought forward by the Fraternal Order of Police,” town Administrator Richard J. Lemack told the media. Engle allegedly “belittled” his officers at an April 7 briefing on the coronavirus. He ordered them to a parking lot in formation. He allegedly yelled ‘about their ‘baseless’ concerns,’” the complaint said before mentioning Shannon Bennett, a Broward sheriff’s deputy who had died of COVID-19, the disease caused by the coronavirus, four
days before. Engle “suggested that Officer Bennett had contracted the coronavirus and died from it because ‘he was a homosexual who attended homosexual events,’” the complaint said. Bennett, nytimes.com reports, “left work early on March 23 because he was not feeling well. He tested positive for the coronavirus on March 27 and died on April 3, according to the Sheriff’s Office.”

**Georgia:** A Cartersville police lieutenant who served as a school cop resigned amid an investigation into inappropriate behavior with girls at Cartersville Middle School, ajc.com reports April 28, 2020. Lt. Ryan Prescott is accused of sending dozens of texts and Snapchat messages to preteen girls. The assistant superintendent contacted police Chief Frank McCann, who ordered the investigation. The Atlanta Journal Constitution says “School officials were aware of messages between Prescott and three middle school students.” Prescott taught several classes, including “ Sexting and Social Media.” Prescott told investigators that an eighth-grader showed him how to Snapchat, and his goal was to “build a trusting relationship with the student (who set up his account) since he had concerns about her being bullied,” ajc.com reports. Investigators reportedly found “20 pages worth of Snapchat and text messages.” In some instances, he claimed to be ‘drunk’ texting but denied this in an interview. No criminal charges were filed.

**Illinois:** Ariel Roman, an unarmed 33-year-old man, was tackled and shot by police in February 2020 after he illegally walked from one subway car to another on Chicago’s public transit, cbsnews.com reports. Bystander video “shows officers tackling Roman, pepper spraying and Taser ing him as he tries to wriggle from their grasp,” according to cbsnews.com. Roman can be heard saying, “I did nothing to you.” Footage shows the man shot in the stomach walk up the escalator and then collapse when he is then shot in the back. Roman’s attorney said his client was having an anxiety attack. Officers Melvina Bogard and Bernard Butler have since been relieved of their duties as the Civilian Office of Police Accountability investigates. “Two days after Roman was shot, the Cook County State’s Attorney Kim Foxx’s office dropped resisting arrest and criminal narcotics charges against Roman at the request of then-interim Police Superintendent Charlie Beck,” cbsnews.com reports.

**India:** The long arm of the law in the northern city of Chandigarh has an unusual weapon that looks like giant tongs, npr.org reports April 30, 2020. Now in the prototype stage, it features a pole with a movable, two-pronged claw for catching a suspect around the waist. Police, clad in face masks, tweeted a video of it and a message: “VIP Security wing of Chandigarh Police has devised this unique way of tackling non-cooperating corona suspects and curfew breakers. Great equipment, great drill !!!” Head constable Gurdeep Singh told NPR: “We call it a social distancing clamp’ or a ‘lockdown-breaker catcher.” He added: “This is especially used in instances where we suspect that someone has the coronavirus and they are not cooperating with us.” In the city of Nagpur, officers forced curfew breakers to do exercise squats in the street and in Rishikesh area police made foreign backpackers “write I did not follow the rules of lockdown. I am very sorry’ 500 times,” npr.org reports.

**Iowa:** A state auditor of former Des Moines County Chief Deputy Jeff White has uncovered unauthorized purchases, desmoinesregister.com reports. Investigators say White used county money to buy about $7,400 in computers, drones and bullets for a personal gun. He has “returned about $3,100 worth of items he bought, Iowa Auditor Rob Sand said. Items valued at over $4,200 were not returned or could not be located in the sheriff’s office. Some of the items that remain unaccounted for include an Apple computer and ammunition.” White had been chief deputy since 2001 but retired in 2018.

**Kansas:** Former Kansas City Officer Kelly Sapp, 53, was charged in March 2020 with making a false report, a misdemeanor. Police questioned his story about being shot in the chest by an unknown gunman Sept. 14 while he patrolled a shopping center moonlighting as a security guard, the Associated Press reports. And “police swarmed the area looking for a shooter after Sapp radioed he needed help.” However, his story did not match security video, the AP reports. He told police that bullets came from a wooded area. His court date had been set May 28.

**Louisiana:** Former sheriff’s deputy Jonathan Colgin “pleaded guilty to hiding information about a dealer from whom a friend was buying steroids,” WWLTV.com reports. Colgin made the plea via video conference on April 16, 2020, according to the Shreveport Times. He faces “one count of withholding information about a felony while he was a Bossier Parish deputy,” according to the U.S. Attorney’s Office in Shreveport. Colgin is accused of “concealing a federal crime in connection with a steroid distribution scheme,” the Times reports. Investigators said that in August 2016 Colgin “was assigned to investigate an individual shipping anabolic steroids through the U.S. Mail. Colgin identified Brant Landry as the individual shipping the steroids and learned of the details of Landry’s steroid trafficking, including the location where Landry produced the anabolic steroids. During his assignmment to the investigation, Colgin also learned that a friend was obtaining steroids from Landry.” Colgin did not identify Landry in his reports and “admitted that he concealed his friend’s role and conduct from law enforcement.” Although Colgin is free on bond, he could receive three years in prison and a $250,000 fine.

**Michigan:** St. Joseph County Prosecutor John McDonough was arrested and charged with OWI after crashing his SUV into a fence May 11, 2020 near Three Rivers, mlive.com reports. Deputies reported damage to the vehicle and to a fence on Lovers Lane. In addition, McDonough was charged with having an open container of alcohol in his vehicle.

**New Hampshire:** A Peterborough police program that maps homes that contain surveillance devices has drawn concern by the ACLU. “Jeanne Hruska, the political director for the ACLU of New Hampshire, said the program is a big step toward creating a surveillance state in which people are monitored by authorities without warrants, subpoenas, or any form of notice,” unionleader.com reports. “This is deeply alarming to me,” Hruska told the newspaper. Cops said the list would give police more resources to respond to crimes.

**New York:** Judges Robert Cicale of Suffolk County and Marc Seedorf of Westchester County have resigned after being told removal proceedings would commence against them, the ABA Journal reports April 6, 2020. Both were suspended without pay last year. Cicale

---

**NEWMEM PENPALS**

Newmen pen pals is an affordable pen pal service delivering the best customer experience and results in the industry, working with our members via Jpay and Corrlinks. We repost your ad weekly on 50+ Facebook pen pal groups, Instagram and Twitter. Sorry no SOs, no crimes against women, children, or the elderly. Rates $25/2 months, $5/addl. month, or $65/year. For an application via Jpay, or Corrlinks email joenewmen2020@gmail.com, or write: Newmen Penpals P.O. BOX 5556 Kennewick, WA 99336.

Ask Joe about a free one year membership!
News In Brief (cont.)

“pleaded guilty in September 2019 to second-degree attempted burglary for trying to steal the undergarment of an intern who worked for him when he was a town attorney,” ABA Journal reports. He was discovered “on the street carrying several pairs of the woman’s soiled undergarment” and later disbarred. Seedorf “pleaded guilty to tax evasion in December 2019 after he was accused of failing to file tax returns from 2005 to 2015.” He resigned March 12, 2020, and was scheduled for sentencing in July. Both have agreed to never seek a judicial post.

New York: NYPD sent 1,000 officers out to enforce social distancing mandates the weekend of May 1, 2020. Two plainclothes officers in the East Village tussled with a couple as they attempted to handcuff them outside a deli over social distancing. Officers “observed a bag of alleged marijuana in plain view,” an NYPD spokeswoman said. According to nydailynews.com, after pinning the suspect, “one officer gets up, draws his Taser and ap- proaches a bystander while yelling, ‘Move the f—k back right now... Don’t flex.’” The man approaches a bystander while yelling, ‘Move the
to precipicit,” an NYPD source told nypost.com.

Texas: El Paso County Sheriff’s Deputy Robert Easter was arrested by Colorado Springs Police in April 2020 and charged with second-degree assault in connection with a domestic violence investigation, KKTV.com reports. Easter, 50, who is part of the sheriff’s office Court and Transport Section, is now on administrative leave as internal and criminal investigations take place. He was booked into the El Paso County Jail.

Utah: Three Utah County prosecutors — Craig Johnson, Chase Hansen and Pona Sitake — resigned in early February 2020 during an investigation that alleged that defense attorney Dennis Pawelek paid for their Utah Jazz tickets in February 2019 in the lower bowl, which was valued at hundreds of dollars, The Salt Lake Tribune reported March 17, 2020. The fact that the trio quit amid an HR misconduct investigation into allegations they received “inappropriate gifts.” In addition, a human resources probe involved “Sitake, who was investigated last fall for a sexual harassment complaint alleging he took photos of women in court and shared them in a group message where men debated whether they were attractive.” Utah County Attorney David Leavitt told the newspaper that “in a criminal justice system that heavily relies on plea deals instead of jury trials, it is an inherent conflict of interest for prosecutors to receive anything of value from their courtroom opponents.” However, the “prosecutors denied that Pawelek buying them Jazz tickets had any influence on how they did their work, and said they did not often interact with Pawelek in court.”

Washington, D.C.: A DEA special agent with a penchant for rowdy yacht parties and prostitutes in bikinis allegedly laundered millions of dollars “for the very Colombian drug cartel he was fighting against,” washingtonpost.com reports February 24, 2020. Former DEA agent Jose Irizarry was arrested on charges of conspiring to launder money, as well as honest services wire fraud, bank fraud, conspiracy to commit bank fraud, conspiracy to commit identity theft and aggregated identity theft. His wife, Nathalia Gomez-Irizarry, was also arrested and charged with conspiracy to launder monetary instruments.” The details are in a 35-page indictment, which was “filed [in February] in the U.S. District Court in Tampa, prosecutors accuse Irizarry of working with a Colombian public official and the head of a drug trafficking and money-laundering organization who would eventually become the godfather to Irizarry’s children.” Investigators say the couple ran “a shell company” from their home in Miramar, Florida.

CLN Classifed

Free Sample Catalog from Krasnya
120 Babes in each catalog
SASE with 2 first class stamps!
Male or Female babes
Nude or BOP-friendly
Krasnya (CLN)
PO Box 32082
Baltimore, MD 21282

Little Freebie from SENZA to You
Order your free SENZA “99 Hotties” sample catalog
Just send us
2 US Forever stamps
and a SASE to:
SE NZA (CLN)
PO Box 5840, Baltimore, MD 21282

REMOTE ONLINE NOTARY PUBLIC
Inmates-Attorneys-Families
Serving 50 states (941)363-1595
tishman@pacrimfl.com
Certified-Insured-Bonded

4x6 Photos 70¢ each-No Minimum
CNA Entertainment, LLC attn PLN
PO Box 185 - Hitchcock, TX 77563
Send SASE for catalog list OR
Send SASE plus 3 Forever stamps for 3 random catalogs
www.CNAEntertainment.com

Play Magic the Gathering Today
Best strategic card game ever
Decks/singles/custom orders
Prison & jail approved materials
Receive through your mail room
For a free catalog send SASE to:
Prison Proxies, PO Box 39940
Downey, CA, 90232-0940

Sexiest Photos Free Catalog
You read it right! Just send us
2 US Forever stamps and a SASE &
we’ll send you 1 color nude or
BOP-friendly sample catalog
with 84 gorgeous girls:
Branlettes (CLN)
PO Box 5765, Baltimore, MD 21282
Prison Profiteers, edited by Paul Wright and Tara Herivel, 323 pages. $24.95. This is the third book in a series of Prison Legal News anthologies that examines the reality of mass imprisonment in America. Prison Profiteers is unique from other books because it exposes and discloses who profits and benefits from mass imprisonment, rather than who is harmed by it and how.

Prison Nation: The Warehousing of America’s Poor, edited by Tara Herivel and Paul Wright, 323 pages. $35.95. PLN’s second anthology exposes the dark side of the ‘lock-em-up’ political agenda and legal climate in the U.S.

The Ceiling of America, An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright, 264 pages. $22.95. PLN’s first anthology presents a detailed “inside” look at the workings of the American justice system.


Represent Yourself in Court: How to Prepare & Try a Winning Case, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 536 pages. $39.99. Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court.

The Merriam-Webster Dictionary, 2016 edition, 939 pages. $9.95. This paperback dictionary is a handy reference for the most common English words, with more than 75,000 entries.


Legal Research: How to Find and Understand the Law, 17th Ed., by Stephen Elias and Susan Levinkind, 363 pages. $49.99. Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises.

Deposition Handbook, by Paul Bergman and Albert Moore, Nolo Press, 426 pages. $34.99. How-to handbook for anyone who conducts a deposition or is going to be deposed.

Criminal Law in a Nutshell, 5th edition, by Arnold H. Loevy, 387 pages. $49.95. Provides an overview of criminal law, including punishment, specific crimes, defenses & burden of proof.

Protecting Your Health and Safety, by Robert E. Toone, Southern Poverty Law Center, 325 pages. $10.00. This book explains basic rights that prisoners have in a jail or prison in the U.S. It deals mainly with rights related to health and safety, such as communicable diseases and abuse by prison officials; it also explains how you can enforce your rights within the facility and in court if necessary.

*ALL BOOKS SOLD BY CLN ARE SOFTCOVER/PAPERBACK*
Hepatitis and Liver Disease: What You Need to Know, by Melissa Palmer, MD, 471 pages. $19.99. Describes symptoms & treatments of Hepatitis B & C and other liver diseases. Discusses medications to avoid, diets to follow and exercises to perform, plus includes a bibliography. 1031

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

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


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

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

Subscription Rates

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

Subscription Bonuses

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2 years</td>
<td>- 2 bonus issues for 26 total issues</td>
</tr>
<tr>
<td>3 years</td>
<td>- 4 bonus issues (40 total) or a free book (see other page)</td>
</tr>
<tr>
<td>4 years</td>
<td>- 6 bonus issues (54 total) or a free book (see other page)</td>
</tr>
</tbody>
</table>

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

Please Change my Address to what is entered below

Mail Order To:

Name: ___________________________

DOC #: ________________________

Suite/Cell: ____________________

Agency/Inst: ___________________

Address: _______________________

City/State/Zip: _________________

Mail Order To: Criminal Legal News

P.O. Box 1151

Lake Worth Beach, FL 33460

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

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

Order to: ______________

Mail Payment To: ______________

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

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

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

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

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


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

* Subscription free books OR book orders OVER $50! | Qty. |

6 month subscription (prisoners only) - $28

1 yr subscription (12 issues)

2 yr subscription (2 bonus issues for 26 total!)

3 yr sub (write below: FREE book, Arrested: What to Do... or 4 bonus issues for 40 total!)

4 yr sub (write below: FREE book, The Habeas Citebook 2nd Ed. or 6 bonus issues for 54 total!)

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

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

Add $6.00 S/H to BOOK ORDERS under $50 (CLN subs do not count towards $50 for free S/H for book orders)

Add $6.00 S/H to ORDER for UNDER $50

TOTAL Amount Enclosed:

* NO REFUNDS on CLN subscription or book orders after orders have been placed.

* We are not responsible for incorrect addresses or address changes after orders have been placed.

* Please send any address changes as soon as possible; we do not replace missing issues of CLN due to address changes.

Mail Payment To: Criminal Legal News

P.O. Box 1151

Lake Worth Beach, FL 33460

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

Order to: ______________

Mail Payment To: ______________

Add $6.00 S/H to BOOK ORDERS under $50 (CLN subs do not count towards $50 for free S/H for book orders)

FL residents ONLY add 6% to Total Book Cost

TOTAL Amount Enclosed:

* NO REFUNDS on CLN subscription or book orders after orders have been placed.

* We are not responsible for incorrect addresses or address changes after orders have been placed.

* Please send any address changes as soon as possible; we do not replace missing issues of CLN due to address changes.

June 2020

Criminal Legal News
Introducing the latest in the Citebook Series from Prison Legal News Publishing

The Habeas Citebook: Prosecutorial Misconduct

By Alissa Hull
Edited by Richard Resch

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

The Habeas Citebook: Prosecutorial Misconduct is an excellent resource for anyone seriously interested in making a claim of prosecutorial misconduct to their conviction. The book explains complex procedural and substantive issues concerning prosecutorial misconduct in a way that will enable you to identify and argue potentially meritorious claims. The deck is already stacked against prisoners who represent themselves in habeas. This book will help you level the playing field in your quest for justice.

—Brandon Sample, Esq., Federal criminal defense lawyer, author, and criminal justice reform activist

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

By: ☐ check ☐ credit card ☐ money order

Name _________________________________________________________________

DOC/BOP Number ______________________________________________________

Institution/Agency ______________________________________________________

Address _______________________________________________________________

City __________________________ State _____ Zip ________________
COVID-19 Prison Legal News Subscription Special: $1 Six Issue Trial Subscriptions

To help ensure more prisoners are able to access news and information about their rights and staying safe during the COVID Pandemic a generous funder has donated almost 1,700 six month subscriptions to PLN for prisoners. If you are interested in receiving a six month subscription to PLN please send $1.00 to the address below. This offer does not apply to current or prior subscribers. Please do not respond if you have less than 9 months remaining on your sentence. Subscriptions will be entered on a first come, first served basis until they are exhausted. We will accept new unused stamps as payment.

Name______________________________________________________ Amount enclosed: $_____

DOC/BOP Number: ____________________________ Facility: _____________________________

Address: ________________________________________________

City: _____________________________________________ State: _______ Zip_______________

Human Rights Defense Center, PO Box 1151, Lake Worth Beach, FL 33460
561-360-2523 • www.prisonlegalnews.org