A Nation on the Brink

How the Killing of George Floyd by Police Sparked Nationwide Protests and Calls for Systematic Change

by Christopher Zoukis, MBA

“If one of us is not free, none of us are free.”
– Max Mills and Ayesha Muzaffar, Co-Chairs, Students Against Mass Incarceration, University of California, Davis School of Law

The fires are burning, yet the oppressors continue to double-down. With riots in the streets of our capitals, the police and National Guard charge their armaments, preparing to quell the masses.

In cities across the country, protestors have flooded to the streets to protest the senseless murder of George Floyd, yet another unarmed Black person killed by police.

In recent years, America has experienced a string of such murders. It is with a heavy heart their names have become branded into the psyche of a generation: Breonna Taylor, Michael Brown, Eric Garner, Laquan McDonald, Tamir Rice, Walter Scott, Jamar Clark, Alton Sterling, Freddie Gray, and the list goes on ad nauseam.

The fires burn in California, New York, Florida, Illinois, Pennsylvania, Ohio, Michigan, North Carolina, Virginia, Massachusetts, Georgia, New Mexico, Texas, Rhode Island, and many other states, including the District of Columbia. Curfews have been imposed in at least 40 cities in 19 states nationwide. One would be right to ponder if we are on the brink of martial law.

Even with communities’ increasing willingness to protest – and even demonstrate on an increasingly visible and assertive basis – the killings continue. The trajectory of increasing violence and unrest begs the questions: At what point will law enforcement revise their thinking and practices, and how many cities must burn before police forces realize they are a part of their communities, not simply separate and distinct totalitarian authorities?

The Spark That Ignited the Powder Keg: George Floyd’s Murder

On May 25, 2020, at 8:08 p.m., a Minneapolis, Minnesota, store clerk called 911, reporting a customer had allegedly bought a pack of cigarettes using a counterfeit $20 bill. Police officers Thomas Lane and J. Alexander Kueng responded to the call.

Upon arrival, the officers located the suspect sitting in a blue SUV and closed in. Lane approached the driver’s side while Kueng approached the passenger’s side door. Lane ordered the driver, George Floyd, to exit the vehicle.

While speaking with Floyd, Lane brandished his firearm at Floyd before reholstering it when Floyd placed his hands on the steering wheel. After about 90 seconds of speaking with Floyd, Lane pulled Floyd out of the car, handcuffed him, and placed him against a nearby wall. The time was 8:12 p.m.

At 8:14 p.m., six minutes into the arrest, Lane and Kueng escorted Floyd to their squad car. Prior to entering the police cruiser, Floyd “stiffened up” and fell to the ground, advising officers he was claustrophobic. As this was occurring, at 8:17 p.m., officers Derek Chauvin and Tou Thao arrived on the scene in a separate cruiser. All four officers — according to the complaint subsequently filed against Chauvin — “made several attempts to get Mr. Floyd into the backseat of squad [car] 320 from the driver’s side.” During this altercation, Floyd repeatedly told the officers “he could not breathe.”

After Floyd was already in the police car, Chauvin pulled Floyd out the passenger side of the cruiser, with Floyd falling, handcuffed, face down. The time was 8:19 p.m.

While Officer Kueng held Floyd’s back, Lane restrained Floyd’s legs, and Chauvin placed his left knee “in the area of Mr. Floyd’s head and neck,” according to the criminal complaint. As Chauvin continued to bear down on Floyd’s neck, Floyd repeatedly asserted, “I can’t breathe” and called out for his mother.

At another point during the altercation, one officer can be heard on bystander video...
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Nation on the Brink (cont.)

asking Floyd, “What do you want?” Floyd responded, “I can’t breathe. Please, the knee on my neck. I can’t breathe.” One officer then told Floyd, “Well, get up and get in the car, man.” Floyd responded, “I will.” The same officer directed again, “Get up, get in the car.” Floyd replied, “I can’t move.” All the while, Chauvin, Kueng, and Lane continued to restrain Floyd.

While Floyd continued to plead with the officers that he couldn’t breathe, one officer on bystander video can be heard responding, “You are talking fine.” At one point, Lane asked Chauvin if they should “roll him on his side?” Chauvin responded, “No.”

When Lane exclaimed that he was “worried about excited delirium or whatever,” Chauvin retorted, “That’s why we have him on his stomach.”

During the altercation, Floyd told officers he couldn’t breathe 16 times. At no point did the officers heed his pleas for help.

Even as Floyd lay pinned to the ground, bystanders can be heard on cellphone video yelling at the police, “You having fun?”

At 8:22 p.m., one of the officers called for an ambulance. In dispatch recordings, the officer can first be heard calling for a “Code 2” (an ambulance request requiring no lights or sirens) due to Floyd bleeding from the mouth. By 8:23 p.m., the officers upgraded the call to a “Code 3” (an ambulance request requiring both lights and sirens).

By 8:24:24 p.m., Floyd was no longer moving. At 8:25:31 p.m., he was no longer breathing or speaking. Again, Lane asked Chauvin, “[W]ant to roll him on his side?” This time Chauvin conceded and checked for a pulse, stating to his fellow officers, “I couldn’t find one.”

By this point, bystanders started yelling, “Look at him,” “What is wrong with y’all?” and “Get off him now!” This was the point at which Chauvin pulled out his canister of mace, directing the bystanders to disburse. At this time, Thao can be seen shoving a bystander in the chest, telling him to leave. And then, perhaps the most chilling, a female voice in the cellphone video can be heard exclaiming, “Did they fucking kill him, bro?” At this point in the video, several bystanders demand that officers “check his pulse,” explaining to the officers that Floyd wasn’t moving.

The three officers continued to pin Floyd to the ground, with Chauvin’s knee on Floyd’s neck, never rendering medical assistance. The officers only released Floyd when the ambulance arrived, and an EMT directed them to cease. The time was 8:27:24 p.m.

After loading Floyd onto a gurney, the ambulance drove him away to another location. It was at this time the fire department was called for additional medical assistance. The fire department arrived on scene at 8:32 p.m. It took firefighters another five minutes to reach the location where the ambulance had stopped to treat Floyd. The ambulance then took Floyd to the Hennepin County Medical Center, where he was pronounced dead at 9:25 p.m.

In total, Officer Chauvin had his knee on Floyd’s neck for eight minutes and 46 seconds, a full two minutes and 53 seconds after Floyd was unresponsive.

Dueling Autopsy Findings

FLOYD UNDERWENT TWO AUTOPSIES: ONE BY THE Hennepin County Medical Examiner and a second commissioned by his family.

Dr. Andrew M. Baker, the Hennepin County Medical Examiner, released an autopsy report detailing the circumstances and causes of death. He made the following preliminary findings, as detailed in the criminal complaint against Officer Chauvin:

“The autopsy revealed no physical findings that support a diagnosis of traumatic asphyxia or strangulation. Mr. Floyd had underlying health conditions including coronary artery disease and hypertensive heart disease. The combined effects of Mr. Floyd being restrained by police, his underlying health conditions and any potential intoxicants in his system likely contributed to his death.”

Dr. Baker’s final autopsy report stated that Floyd died from “Cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression.” It detailed blunt-force injuries to Floyd’s forehead, face, upper lip, shoulders, hands, elbows, and legs.

The report also mentioned presumptive positives for fentanyl, methamphetamine, and cannabinoids. It highlighted that additional tests would be required to confirm these presumptive positive findings but that signs of fentanyl toxicity can include “[s]evere respiratory depression” and seizures.

In a subsequent press release, the Hennepin County Medical Examiner’s Office classified the cause of death as “Cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression.”
(i.e., a heart attack) and the manner of death as a homicide. The press release explains that Floyd “experienced a cardiopulmonary arrest while being restrained by law enforcement officer(s)” and noted the other significant conditions as “[a]rteriosclerotic and hypertensive heart disease; fentanyl intoxication; recent methamphetamine use.”

The private autopsy was performed by Drs. Michael Baden and Allecia Wilson. Dr. Baden, the University of Michigan Medical School director of autopsy and forensic sciences, is the former chief medical examiner of New York City and had previously been retained to conduct independent autopsies on Eric Garner and Michael Brown. The independent autopsy findings, while not yet released, were detailed during a news conference.

“The compressive pressure of the neck and back are not seen at autopsy because the pressure has been released by the time the body comes to the medical examiner’s office,” said Dr. Baden. “It can only be seen – serious compressive pressure on the neck and back can only be seen while the pressure is being applied or when, as in this instance, it is captured on video.”

In stark contrast to the county medical examiner’s opinion, Dr. Baden explained, “The cause of death, in my opinion, is asphyxia due to compression of the neck.” His autopsy also concluded that Floyd was healthy and had no evidence of heart disease. He also said that toxicology reports had not yet returned.

Benjamin Crump, the attorney representing the Floyd family, explained that the private autopsy report found that the officers’ actions restricted the blood flow to Floyd’s brain and that the pressure exerted from the officers’ knees on Floyd’s back made it impossible for him to breathe.

**Officers Fired, Criminally Charged**

The day following Floyd’s killing (May 26), all four officers were fired from the Minneapolis Police Department. The next day (May 27), Minneapolis Mayor Jacob Frey called for Chauvin to face criminal charges. The following day (May 28), local officials announced they had launched an investigation into Floyd’s death.

On May 29, Chauvin was arrested by local authorities and charged with third-degree murder and second-degree manslaughter with culpable negligence. The same day, the U.S. Department of Justice announced its own investigation into Floyd’s death. On June 3, Chauvin was charged with the additional crime of unintentional second-degree murder while in the commission of a felony.

Also on June 3, former officers Kueng, Lane, and Thao were charged with aiding and abetting second-degree murder while committing a felony and aiding and abetting second-degree manslaughter with culpable negligence.

“[Y]ou have to have premeditation and deliberation to charge first-degree murder,” explained Minnesota Attorney General Keith Ellison. “Second-degree murder, you have to intend for death to be the result. For second-degree felony murder, you have to intend the felony and then death be the result – without necessarily having it be the intent.”

“We would contend that George Floyd was assaulted, so that would be the underlying felony,” Ellison said.

Second-degree murder in Minneapolis carries a maximum penalty of up to 40 years in prison. Third-degree murder carries a maximum sentence of 25 years in prison. Charges of aiding and abetting carry the same criminal penalties.

While not directly relevant to the underlying criminal conduct, both Chauvin and Thao have previously been the subject of numerous complaints.

Chauvin, an 18-year police veteran, has been the subject of 18 complaints filed with internal affairs and been involved in three police shootings, one of which resulted in a fatality. Two of the 18 complaints were “closed with discipline,” meaning he received a letter of reprimand in each case for his conduct. Also unrelated to the pending criminal charges, Chauvin’s wife, Kellie Chauvin, filed for divorce the day after his arrest.

Thao has been the subject of six complaints filed with internal affairs, including a 2017 lawsuit over excessive force in which Thao settled with the victim for $25,000.

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While one of the six complaints remains under investigation, the remaining five were closed without discipline.

“A Riot is the Language of the Unheard” – Dr. Martin Luther King, Jr.

In the wake of Floyd’s death, protests and riots have erupted nationwide, resulting in curfews from Charleston, South Carolina, to San Francisco, California.

Over 17,000 National Guard troops had been deployed to 23 states to support local police in containing the violence. By June 4, the Associated Press reported that over 10,000 people had been arrested.

What follows is a sampling of both peaceful and violent protests across the country. It should be highlighted that most demonstrations have been peaceful. Violence and looting primarily have occurred during the evening and have not been perpetrated by the vast majority of demonstrators.

Minneapolis

Minneapolis, the site of Floyd’s killing, has seen both peaceful protests and violent uprisings.

The peaceful protests have called for accountability and justice. Thousands can be seen in broadcast video engaging in demonstrations, sit-ins, and community gatherings. Media reports indicate that on June 2 as many as 10,000 people peacefully protested outside the State Capitol. Flanked by police and National Guard troops, the protest was calm.

On May 29, in response to sometimes violent demonstrations, the city imposed a curfew from 8:00 p.m. to 6:00 a.m. Those in public places in violation of the curfew are subject to arrest, fines, and jail time.

On the night of May 30, the situation turned violent. Shortly after the 8:00 p.m. curfew, police dressed in riot gear and holding shields started making arrests. They also employed drastic use of force, shooting tear gas canisters and other non-lethal projectiles into crowds. Following protesters setting a car on fire, the National Guard “used a helicopter to dump water” on the burning vehicle, according to the New York Times. Between Friday night and Sunday morning, both law enforcement and protesters were injured, including three protester deaths.

In one particularly vivid protest, hundreds of demonstrators gathered near the Fifth Precinct as the curfew approached. Protesters can be heard on video chanting, “Hands up, don’t shoot.” Police responded to the crowd with tear gas and firing nonlethal projectiles.

New York

Thousands of protesters flooded into the streets of New York City to protest Floyd’s killing. As of June 5, protests had occurred daily for more than a week.

On June 1, New York City imposed a mandatory curfew, requiring the streets to be clear from 11:00 p.m. to 5:00 a.m. On June 2, following the looting and destruction of the iconic Macy’s store, and Nike and AT&T stores, the curfew was expanded to 8:00 p.m. to 5:00 a.m. Protesters also burned police vehicles and, in one instance, attacked a New York City police officer caught alone. A group of men was recorded “smashing him with pieces of wreckage until he pulled his gun and they ran,” according to the Associated Press.

In imposing the broader curfew, New York City Mayor Bill de Blasio explained, “We can’t let violence undermine the message
York. These numbers jumped on June 4, with protesters can’t identify them.

Police accountability, some NYPD cops have been observed covering their badge numbers, going from a complete stop to ramming into protesters who had been throwing objects at the vehicles. Almost in spite of the calls for city-mandated curfews.

For the most part, media reports indicate that law enforcement has taken a hands-off approach during the day when peaceful protests occur. Still, the situation can change drastically in the evening when protesters defy city-mandated curfews.

In one instance, on June 1, as protesters in Brooklyn approached the 77th police precinct, a capture from a police scanner recorded a cop saying, “Shoot those motherfuckers.” Another cop responded, “run them over.” Then, almost immediately, another transmission: “Don’t say that over the air.”

New York cops, when confronted by protesters, have ripped off protesters’ masks to pepper-spray them. In a particularly grisly May 31 incident, two NYPD vehicles are seen going from a complete stop to ramming into protesters who had been throwing objects at the vehicles. Almost in spite of the calls for police accountability, some NYPD cops have been observed covering their badge numbers, so protesters can’t identify them.

According to the Associated Press, as of June 3, 790 arrests have been made in New York. These numbers jumped on June 4, with over 250 additional protesters arrested while defying the curfew.

Georgia

Georgia has also seen demonstrations. Peaceful protests tend to occur during the day, while the evenings have seen sporadic instances of rioting.

On Wednesday, June 3, Atlanta officials imposed a Thursday curfew from 9:00 p.m. to sunrise, and a Friday, Saturday, and Sunday curfew from 8:00 p.m. until sunrise. Those in public places after the curfew are subject to arrest, fines, and imprisonment.

On June 4, the same day Floyd’s funeral was held in Minneapolis, over a thousand peaceful demonstrators marched in Atlanta. Starting at the King Center, the demonstrators marched two-and-a-half miles throughout the city to the state capital, sharing the messages of Dr. Martin Luther King, Jr., and showing solidarity with other peaceful demonstrations.

“We wanted to come together and do something as an organized unit in spite of the riots and the burning of buildings,” explained Anthony Armondis, a march attendant.

Atlanta City Councilman Antonio Brown agreed, explaining, “We stood together and we marched 2.5 miles, and we honored Martin Luther King, Jr. along the way. This is what peaceful protesting is about.”

But in a marked exception to the mostly peaceful protests, a riot broke out on the evening of May 29 when a largely peaceful protest turned violent. The protesters smashed the windows of the CNN Center in Atlanta and spray-painted the large red CNN sign.

A police car was set on fire, and demonstrators could be seen hurling objects into the lobby at a phalanx of Atlanta SWAT officers deployed to protect the news agency.

At one point, protesters hurled what was described as a “flash-bang device” into the crowd of SWAT members, resulting in clouds of smoke in the lobby. Police responded by firing tear gas canisters into the crowd, dispersing it.

In response to this disturbance and others, Georgia Governor Brian Kemp declared a state of emergency. He also activated 500 members of the National Guard.

According to a statement released by Atlanta Police Sergeant John Chafee, “There have been multiple instances of shots being fired in close proximity to our officers and shots were fired at an officer in a patrol vehicle on Peachtree Road at Lenox Road. We continue our efforts at restoring peace in our city.”

California

Demonstrations have occurred in communities across California.

On May 25, California Governor Gavin Newsom declared a state of emergency for Los Angeles County and deployed National Guard troops to the location in response to clashes between police and protesters. Various curfews were also imposed in numerous cities across the state.

On June 1, on the day of Floyd’s memorial, approximately 2,000 people rallied in the North Park area of San Diego. The march began in the afternoon in downtown San Diego and proceeded to Balboa Park. News reports indicate that many protesters were younger individuals.

“Im here because of course I support the end of police brutality. I support defunding the police,” said Rashanna Lee, one of the protest’s organizers. “And I think defunding the police is a fundamental step to re-enriching the communities because we can redirect those funds to San Diego.”

At the end of the protest, organizers asked the crowd to leave peacefully.

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“[I]t’s been generally peaceful,” said San Diego Police Department Sergeant Cory Mapston. “There haven’t been any mass arrests or significant incidents.”

In direct contrast to the above example, on June 4, San Diego County Sheriff Bill Gore defended his decision to request National Guard support, citing prior incidents of damage and looting. He explained that he would not “let this happen again.”

San Diego Sheriff’s Department Lieutenant Tim Matrzkwiw clarified that the National Guard troops would only be used for “force protection” to secure public buildings and not to aid in arrests.

As seen elsewhere, riots have also broken out in various cities across the state. On May 30, protesters demonstrated outside the Sacramento County Main Jail. Following protesters smashing the glass doors, police first used batons to push the protesters back and then fired tear gas into the crowd.

In another protest the same evening, police fired rubber bullets at protesters in response to demonstrators throwing rocks, glass bottles, and eggs at the cops, as reported by the Sacramento Bee. One protester was struck in the face by one of these non-lethal rounds.

He was seen in a video being taken away with blood pouring from his face.

In yet another disturbance the same evening, police fired pepper balls and what appeared to be flash bang grenades into a crowd in response to protesters throwing objects at police.

In a particularly violent May 30 incident, one Department of Homeland Security Federal Protection Service officer was killed, and another injured when shots were fired from a vehicle. The officers had been assigned to protect the federal courthouse in Oakland.

Governor Newsom quickly issued a statement cautioning, “No one should rush to conflate this heinous act with the protests last night.” The suspects have not been found.

International

Demonstrations have also been held in over a dozen foreign countries in response to Floyd’s killing. In London, protesters defied officials and marched to the U.S. embassy. In Germany, demonstrators rallied in front of the Brandenburg Gate in Berlin. In Paris, marchers took a knee in response to the killing, while others held signs reading, “I can’t breathe” and “We are all George Floyd.”

Protests were also held in Denmark, Italy, Syria, Brazil, Ireland, New Zealand, Canada, Poland, and Australia, according to CNN.

Police Assault on the Free Press

One particularly alarming development concerns law enforcement’s attacks on members of the news media. While sometimes these appear to be deliberate, in others the attacks result from the indiscriminate use of force on protesters.

In New Jersey, Asbury Park Press reporter Gustavo Martinez Contreras was arrested while documenting protesters. Delaware News Journal reporter Jeff Neiburg and video strategist Jenna Miller were detained while covering protests in Philadelphia. And in Minnesota, CNN reporter Omar Jimenez was arrested during a live national broadcast. These are only a few of the reported cases of reporters being arrested or detained.

In Iowa, Des Moines Register reporter Andrea Sahouri was arrested by police. When she identified herself as a member of the press, a cop sprayed her in the face with pepper spray.

In Michigan, Detroit Free Press reporters Brandon Hunter and JC Reindl were taken to the hospital following police use of chemical...
agents. Hunter had been tear-gassed by police, while Reindl was pepper-sprayed even after presenting his press credentials.

In another case, reporters covering a peaceful protest near the White House were caught in the line of fire. Federal agents deployed tear gas and flash-bang grenades to clear the peaceful protest. Neither peaceful protester nor reporter was spared.

Police have also physically attacked reporters (as opposed to using flash-bang grenades and chemical agents). In New York, Wall Street Journal reporter Tyler Blint-Welsh was struck several times in the face with a rubber bullet fired by “state police supported by National guard.” This, too, was reported as a peaceful protest.

One of the worst attacks on the press to date is the case of Linda Trado, a freelance reporter covering the protest in Minneapolis. A law enforcement-discharged rubber bullet struck her in the left eye, leaving her “permanently blinded.”

These instances and others show the true extent of police’s indiscriminate use of excessive force. The telling aspect is that due to the victims being members of the press, the stories were told. This raises the question of whether peaceful protest near the White House were presenting his press credentials.

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These instances and others show the true extent of police’s indiscriminate use of excessive force. The telling aspect is that due to the victims being members of the press, the stories were told. This raises the question of how many protesters are being assaulted by police’s physical and chemical weapons, yet the stories aren’t being reported.

It’s Time to Rethink the Structure of Institutions: Calls for Racial and Social Justice

As the fires have continued to burn, calls for action have reached a fever pitch. While racial overtones are clearly prevalent, and justifiably so, this must be seen as an American issue – an issue affecting all oppressed peoples.

It’s been well documented that police and prison officials have a sordid history of both implicit and explicit bias against minorities, and more broadly, the economically disenfranchised.

“It’s important for journalists to understand first and foremost that George Floyd is not an anomaly but rather the everyday lived reality of black people in the U.S.,” explains Rachel Hardeman, Assistant Professor of Health Policy and Management at the University of Minnesota.

Thema Bryant-Davis, Associate Professor of Psychology at Pepperdine University, agrees.

“I see protests as a cry, a scream, a demand and a lament of generations of continued harassment, degradation and oppression. I see it as a response to the systematic violation of the human rights of black people, through government, educational, financial, health and criminal justice.”

“The killing of those in police custody must stop. George Floyd’s death, along with Breonna Taylor’s and countless other deaths, must serve as a catalyst to not only our acknowledging the problem of policing, but also serve as a point in which we can start developing the solution to eventually end policing,” explains Ayeshia Muzaffar, Students Against Mass Incarceration co-chair. “This must consist of more than words. Police must be held accountable through external oversight and community accountability, at a minimum. Furthermore, prosecutors must be stopped from filling our nation’s jails and prisons with little to no thought about how such policies harm our country, communities, and, ultimately, people.”

While an issue of racism and classism, it is more than this. This is not solely a Black and White issue. It is a matter of collective oppression and the institutionalized systems that have contributed to this oppression.

In the effervescent words of Dr. Martin Luther King, Jr., “We must learn to live together as brothers or perish together as fools.”

While we have not yet achieved that ideal, the collective protests show the power in community and people.

“It is from the numberless diverse acts of courage and belief that human history is shaped,” wrote Robert F. Kennedy. “Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance.”

It is this collective oppression and harm that must be challenged at its very core. And as we have seen throughout our nation’s history, it is the bright, young minds, the true believers, who will stay in the course and fight the good fight.

“SAMI condemns the brutal acts of state violence disproportionately inflicted against communities of color and the indigent,” explains Max Mills, SAMI co-chair. “As an organization dedicated to ending mass incarceration, we are also dedicated to ending the terror perpetrated by the police. Just as we advocate for the abolition of prisons, we advocate for the abolition of police... We do this to pursue our collective liberation.”

These are bold thoughts, but they point to a stark reality: over the last 30 years, American law enforcement and corrections have become a militarized, oppressive regime focused not on public safety and the prosperity of our nation but authority and control.

And while we may not yet be at the point where we can dismantle these systems of oppression and strife, the fires that burn in our hearts and cities act as a beacon to the change that is coming.

About the Author: Christopher Zoukis, author of the Directory of Federal Prisons, Federal Prison Handbook, Prison Education Guide, and College for Convicts, is the Managing Director of the Zoukis Consulting Group, a federal prison consultancy specializing in federal prison matters. He is currently a student at the University of California, Davis School of Law. He can be found online at www.prisonerresource.com.


Additional Sources: Interview with Max Mills and Ayeshia Muzaffar, Students Against Mass Incarceration Co-Chairs, University of California, Davis School of Law
The Office of Homeland Security ("OHS") has been purchasing "anonymized" cellphone location data for use in Customs and Border Protection ("CBP") investigations, according to information obtained by the Wall Street Journal.

Under Carpenter v. United States, 138 S. Ct. 2206 (2018), law enforcement agents are required to obtain a search warrant demonstrating probable cause in order to obtain a user’s cellphone-location data. However, records show that OHS has been purchasing bulk data from VennTel Inc., which purchases location history data from companies that collect it, such as those that provide cell, search, and phone-app services to users. It then "merges, categorizes and interprets disparate location data" and provides "global coverage."

Since this data is anonymized and commercially available, government lawyers have argued that Carpenter doesn't apply. "In this case, the government is a commercial purchaser like anybody else. Carpenter is not relevant," according to Paul Rosenzweig, a former OHS official and now resident senior fellow at the conservative and libertarian think tank, the R Street Institute.

But whether this information is actually "anonymous" and how it is being used calls this conclusion into question.

"The data was used to detect cellphones moving through what was later discovered to be a tunnel created by drug smugglers between the U.S. and Mexico that terminated in a closed Kentucky Fried Chicken outlet on the U.S. side near San Luis, Arizona," said people with knowledge of the operation. This led to the 2018 arrest of the restaurant’s owner on conspiracy charges. However, police records make no mention of the cell phone data, instead attributing it instead to information gathered from a routine traffic stop.

When law enforcement uses unconstitutional means to gather evidence of a crime, but then finds a legal means to later obtain that evidence for use in a criminal case, this practice is known as "parallel construction." It is illegal for law enforcement to do this, and when parallel construction is proved, evidence is routinely suppressed.

While this case highlights one instance of abuse of its authority, it is unclear how widespread such abuses are in the agency's use of such data.

"OHS should not be accessing our location information without a warrant, regardless whether they obtain it by paying or for free," said Nathan Freed Wessler, a staff attorney for the ACLU’s Speech, Privacy, and Technology Project. "The failure to get a warrant undermines Supreme Court precedent establishing that the government must demonstrate probable cause to a judge before getting some of our most sensitive information, especially our cell phone location history."

Sources: gizmodo.com, 9to5mac.com, Wall Street Journal

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PLN Needs Your Photos, Videos, Verdicts and Settlements!

We are expanding the multimedia section on PLN’s website, and need more prison and jail-related content! We know many of our readers have pictures and videos related to prison and criminal justice topics, and we’d like to post them on our site. We are seeking original content only – photos or video clips that you have taken yourself.

Please note that we are not seeking articles, editorials, poems or other written works; only photos and videos. They can be taken inside or outside of prison, but must relate to prisons, jails or criminal justice-related topics. By sending us multimedia content, you are granting us permission to post it on our website. Please send all submissions via email to:

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Please confirm in your email that the photos or videos are your original content, which you produced. Also please provide some context, such as where and when they were taken. Your name will not be posted online or otherwise disclosed. Please spread the word that PLN needs photos and videos for our website.

We also need verdicts and settlements in cases won by the plaintiff. Note that we are only seeking verdicts, final judgments or settlements – not complaints or interim orders in cases that are still pending. If you’ve prevailed in court against prison or jail staff, please send us a copy of the verdict, judgment or settlement and last complaint so we can post them on our site and potentially report the case in PLN. If possible, please e-mail your submissions; we cannot return any hard copy documents. Send to:

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Floyd's final moments, his killing feels qualitatively different than the countless other police killings of unarmed individuals that plague America. True, there have been many others that were captured on video, and many involved a White police officer taking the life of a Black person. But for the most part, those killings occurred in an instant, or if we suspend our disbelief and push the outer bounds of credulity to the breaking point, arguably, the victims were actively resisting or otherwise posed a potential threat at the time of the killing. That simply can’t be said about the death of George Floyd.

He died as a result of being handcuffed and pinned to the ground on his stomach with two police officers applying pressure to his torso and legs and a third officer with his knee planted on the back of his neck for an inexplicable eight minutes and 46 seconds. The officer can be seen on video periodically digging his knee into Floyd’s neck with even greater force as he struggles for air and literally pleads for his life in vain. Heartbreakingly, there comes a point when Floyd appears to realize that he’s going to die on the street at his hands of these police officers as he cries out for his “Mama” and presciently declares, “I’m going to die.” Video shows that the officer kept his knee dug in to the back of Floyd’s neck for two minutes and 53 seconds even after he had become unresponsive. Bystanders on scene, as well as those who have viewed the video, understood that the officers were crushing the life out of Floyd. They can be heard on video begging the officers to get off of him so that he can breathe; there was particular urgency in the pleas for the officer to remove his knee from Floyd’s neck, all to no avail.

None of the customary defenses and rationalizations trotted out by the police and their apologists can reasonably be invoked with even a semblance of credibility and good faith in the killing of George Floyd. He wasn’t killed in a split-second decision, so it can’t be claimed that the speed of events clouded the officers’ perception of the situation. Instead, his killing occurred over the course of nearly nine excruciating minutes, during which time the officer grinding his knee into Floyd’s neck had ample time to contemplate exactly what he was doing. Nor can it be said that Floyd was actively resisting or posed a threat when the three officers had him pinned to the ground. By that time, they had gained control of him. Even the police’s catchall, get-out-of-jail-free card of “I was in fear for my life” isn’t available to the officers in this case. Any attempt to assert that troublingly dependable defense wouldn’t even pass the so-called giggle test.

The reaction to the video of George Floyd’s killing has been visceral, which has sparked sustained protests across the country for over three weeks, with no sign of abating any time soon. The officers’ actions were just so incomprehensibly gratuitous, so casually cruel. As a result, these protests appear more widespread and seemingly have more momentum than those that have followed the many widely publicized police killings of unarmed Black people over the past few years.

Unfortunately, widespread, impassioned protests decrying police brutality and systemic racism in the criminal justice system alone are unlikely to bring about meaningful change. There must also be a concerted effort to eliminate qualified immunity and reform the current law governing municipal liability. Both barriers to genuine police accountability were erected by the U.S. Supreme Court but can be remedied by Congress. In addition, the near-automatic indemnification of police officers by their government employers must be eliminated for civil liability reforms to be truly effective.

Qualified immunity was first invoked by the Supreme Court in *Pierson v. Ray*, 386 U.S. 547 (1967). It shields police officers, among others, from civil liability for violating a person’s rights unless they violate a “clearly established” statutory or constitutional right. In its current form, the standard for denying an officer qualified immunity is exceedingly high. Thus, if there’s no realistic avenue for legal recourse when a person’s rights have been violated, then those rights are effectively rendered meaningless, as are the civil remedies designed to hold police accountable.

Similarly, municipalities are shielded from liability for the misconduct of their police officers as a result of the Supreme Court’s decision in *Monell v. Dept of Soc. Servs.*, 436 U.S. 658 (1978). Unlike employers who are responsible for the actions of their employees based on the principle of respondeat superior, *Monell* established that municipalities are not likewise responsible for the wrongful actions of their employees. The narrow exception to this immunity is when the victim can prove that the employee acted in accordance with official government policy or custom. In the real world, municipalities are not enacting official policy sanctioning police misconduct, so it is practically impossible to successfully sue them. Again, this frequently leaves victims without any recourse when their rights have been violated, so bad actors are not held accountable and thus have no incentive to alter their behavior.

Congress can provide a solution to this lack of genuine accountability by enacting legislation to eliminate or modify both qualified immunity and the current law governing municipal liability. Since the Supreme Court was interpreting statutes and examining common law, not the Constitution, when it fashioned its rules on these issues, Congress has the power to fix them.

The prospect of potentially ruinous monetary judgments against police officers in their personal capacity together with their employers will undoubtedly serve to rein in police misconduct more effectively than any of the current mechanisms for oversight and accountability, which are failing miserably. However, for such potential judgments to have any material effect on curbing police officers’ abusive behavior, the current practice of their public employers’ near-universal indemnification of officers must also be eliminated. Currently, even in the rare cases in which a monetary judgment is obtained against an officer, the officer’s employer indemnifies the wrongdoer, i.e., pays the judgment on the officer’s behalf. As a result, taxpayers are the ones

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**From the Editor**

*by Richard Resch*

For virtually every person who’s seen the horrifying video of George Floyd’s final moments, his killing feels qualitatively different than the countless other police killings of unarmed individuals that plague America. True, there have been many others that were captured on video, and many involved a White police officer taking the life of a Black person. But for the most part, those killings occurred in an instant, or if we suspend our disbelief and push the outer bounds of credulity to the breaking point, arguably, the victims were actively resisting or otherwise posed a potential threat at the time of the killing. That simply can’t be said about the death of George Floyd.

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Congress can provide a solution to this lack of genuine accountability by enacting legislation to eliminate or modify both qualified immunity and the current law governing municipal liability. Since the Supreme Court was interpreting statutes and examining common law, not the Constitution, when it fashioned its rules on these issues, Congress has the power to fix them.

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Actually paying for police misconduct. This lack of incentive to curtail abusive behavior can be fixed by requiring police officers to carry personal liability insurance as other professions do. Insurance companies are extremely good at managing risks, so those officers who pose a high risk for abuse will be forced to pay higher premiums or be unable to get insured at all and thereby be barred from working as a police officer.

Protesters and their sympathizers should direct their energy at pressuring Congress to reform qualified immunity and municipal liability. They need to maintain a sustained lobbying campaign up until the November elections and support only those candidates for the U.S. House of Representatives and Senate who are committed to supporting such reforms if elected. Likewise, they need to pressure elected local officials to reform the current practice of indemnification by supporting those candidates who are committed to doing so at election time. Although the scourge of police brutality is national in scope, the solution to help stamp it out requires coordinated action at both the local and national levels.

Using Location Surveillance to Fight COVID-19 May Chill Free Speech and Association

by David M. Reutter

As governments act to contain COVID-19, tracing persons who have come in contact with infected persons is at the forefront of the move to contain the disease’s spread. Tracing people via location surveillance may prove to be an effective tool, but at what cost?

The Electronic Frontier Foundation (“EFF”) warns that governments’ use of location surveillance can “turn our lives into open books for scrutiny for police, surveillance-based advertisers, identity thieves, and stalkers.” The information can be used to draw “sensitive inferences,” from visits to a “health center, criminal defense lawyer, an immigration clinic, or a protest planning meeting.” EFF warned in an article.

The “fear of surveillance chills and deters free speech and association,” EFF said. “What’s more, whatever personal data is collected by government can be misused by government employees, stolen by criminals and foreign governments, and unpredictably redirected by agency leaders to harmful new uses.”

Yet several governments have used location surveillance to fight COVID-19. China reportedly built new infrastructures to track movements of massive numbers of identifiable people as a COVID-19 response. Cellphone location data to identify virus carriers was tapped by Israel; it issued quarantine orders based on that information.

The U.S. has sought large volumes of de-identified location data from Facebook and Google. About a dozen countries are reportedly using a spy tool built by NSO Group that uses cellphone location data to match them with infected people in their vicinity. Surveillance location data are also being used to predict the next virus hotspot.

A “constant infosec threat,” EFF said, is data re-identification of de-identified data. “De-identification is especially hard, since location data points serve as identification of their own. Also re-identification can be achieved by correlating de-identified data with other publicly available data like voter rolls, and with oceans of information about identifiable people that are sold by data brokers.”

As computer science and privacy specialist Professor Matt Blaze said, “One of the things we have learned over time is that something that seems anonymous, more often than not, is not anonymous, even if it’s designed with the best intentions.”

EFF also pointed out that “when government builds new surveillance programs in secret, these programs quickly lead to unjustified privacy abuses.” Thus, governments should not be able to use COVID-19 as an excuse to use location surveillance data “unless they can show the public how these powers would actually help, in a significant manner, to contain COVID-19.”

Even then, EFF urged there must be “safeguards, limits, auditing, and accountability measures.” It pointed out that COVID-19 may now be so widespread, that the use of location surveillance data is no longer a significant way to reduce its transmission.

Increasing surveillance of citizens in the name of health may be effective, but it also comes at the cost of impinging on citizens’ privacy and may chill their right to free speech and association. Source: EFF.com
This Is Not a Revolution. It’s a Blueprint for Locking Down the Nation

by John W. Whitehead, The Rutherford Institute – Commentary

“When it gets down to having to use violence, then you are playing the system’s game. The establishment will irritate you — pull your beard, flick your face — to make you fight. Because once they’ve got you violent, then they know how to handle you.” — John Lennon

Race yourselves. There is something being concocted in the dens of power, far beyond the public eye, and it doesn’t bode well for the future of this country.

Anytime you have an entire nation so mesmerized by political theater and public spectacle that they are oblivious to all else, you’d better beware.

Anytime you have a government that operates in the shadows, speaks in a language of force, and rules by fiat, you’d better beware.

And anytime you have a government so far removed from its people as to ensure that they are never seen, heard or heeded by those people, you’d better beware.

What is unfolding before us is not a revolution. The looting, the burning, the rioting, the violence: this is an anti-revolution.

The protesters are playing right into the government’s hands, because the powers-that-be want this. They want an excuse to lockdown the nation and throw the switch to all-out martial law. They want a reason to make the police state stronger.

It’s happening faster than we can keep up.

The Justice Department is deploying federal prison riot teams to various cities. More than half of the nation’s governors are calling on the National Guard to quell civil unrest. Growing numbers of cities, having just barely emerged from a coronavirus lockdown, are once again being locked down, this time in response to the growing upheaval.

This is how it begins.

It’s that dystopian 2030 Pentagon training video all over again, which anticipates the need for the government to institute martial law (use armed forces to solve domestic political and social problems) in order to navigate a world bedeviled by “criminal networks,” “substandard infrastructure,” “religious and ethnic tensions,” “impoverishment, slums,” “open landfills, over-burdened sewers,” “a growing mass of unemployed,” and an urban landscape in which the prosperous economic elite must be protected from the impoverishment of the have-nots.

We’re way ahead of schedule.

The architects of the police state have us exactly where they want us: under their stamping boot, gasping for breath, desperate for freedom, grappling for some semblance of a future that does not resemble the totalitarian prison being erected around us.

This way lies certain tyranny.

For just one fleeting moment, “we the people” seemed united in our outrage over this latest killing of an unarmed man by a cop hyped up on his own authority and the power of his uniform.

That unity didn’t last.

Indeed, it didn’t take long — no surprise there — for us to quickly become divided again, polarized by the misguided fury and senseless violence of mobs taking to the streets, reeking of madness and mayhem.

Deliberately or not, the rioters have directed our attention away from the government’s crimes and onto their own.

This is a distraction.

Don’t allow yourself to be so distracted.

Let’s not lose sight of what started all of this in the first place: the U.S. government.

More than terrorism, more than domestic extremism, more than gun violence and organized crime, the systemic violence being perpetrated by agents of the government constitutes a greater menace to the life, liberty and property of its citizens than any of the so-called dangers from which the government claims to protect us.

Case in point: George Floyd died at the hands of the American police state.

The callous, cold-blooded murder of the unarmed, 46-year-old black man by police is nothing new: for 8 minutes and 46 seconds, police knelt on Floyd’s neck while the man pleaded for his life, struggled to breathe, cried out for his dead mother, and finally passed out and died.

Floyd is yet another victim of a broken system of policing that has placed “we the people” at the mercy of militarized cops who have almost absolute discretion to decide who is a threat, what constitutes resistance, and how harshly they can deal with the citizens they were appointed to “serve and protect.”

Daily, Americans are being shot, stripped, searched, choked, beaten and tasered by police for little more than daring to frown, smile, question, challenge an order or just exist.

I’m talking about the growing numbers of unarmed people who are being shot and killed for just standing a certain way, or moving a certain way, or holding something — anything — that police could misinterpret to be a gun, or igniting some trigger-centric fear in a police officer’s mind that has nothing to do with an actual threat to their safety.


Now you can make all kinds of excuses to justify these shootings, and in fact that’s exactly what you’ll hear from politicians, police unions, law enforcement officials and individuals who are more than happy to march in lockstep with the police. However, as these incidents make clear, the only truly compliant, submissive and obedient citizen in a police state is a dead one.

Sad, isn’t it, how quickly we have gone from a nation of laws — where the least among us had just as much right to be treated with dignity and respect as the next person (in principle, at least) — to a nation of law enforcers (revenue collectors with weapons) who treat us all like suspects and criminals?

This is not how you keep the peace.

This is not justice. This is not even law and order.

This is certainly not freedom. This is the illusion of freedom.

Unfortunately, we are now being ruled by a government of psychopaths, scoundrels, spies, thugs, thieves, gangsters, ruffians, rapists, extortionists, bounty hunters, battle-ready warriors and cold-blooded killers who
communicate using a language of force and oppression.

The facts speak for themselves.

We're being ravaged by a government of ruffians, rapists and killers. It's not just the police shootings of unarmed citizens that are worrisome. It's the SWAT team raids gone wrong that are leaving innocent citizens wounded, children terrorized and family pets killed. It's the roadside strip searches—in some cases, cavity searches of men and women alike carried out in full view of the public—in pursuit of drugs that are never found. It's the potentially lethal—and unwarranted—use of so-called "nonlethal" weapons such as tasers on children for "mouthing off to a police officer. For trying to run from the principal's office. For, at the age of 12, getting into a fight with another girl."

We're being held at gunpoint by a government of soldiers—a standing army. While Americans are being made to jump through an increasing number of hoops in order to exercise their Second Amendment right to own a gun, the government is arming its own civilian employees to the hilt with guns, ammunition and military-style equipment, authorizing them to make arrests, and training them in military tactics. Among the agencies being supplied with night-vision equipment, body armor, hollow-point bullets, shotguns, drones, assault rifles and LP gas cannons are the Smithsonian, U.S. Mint, Health and Human Services, IRS, FDA, Small Business Administration, Social Security Administration, National Oceanic and Atmospheric Administration, Education Department, Energy Department, Bureau of Engraving and Printing and an assortment of public universities. There are now reportedly more bureaucratic (non-military) government civilians armed with high-tech, deadly weapons than U.S. Marines. That doesn't even begin to touch on the government's arsenal, the transformation of local police into extensions of the military, and the speed with which the nation could be locked down under martial law depending on the circumstances. Clearly, the government is preparing for war—and a civil war, at that—and "we the people" are the perceived enemy.

We're being taken advantage of by a government of scoundrels, idiots and cowards. American satirist H.L. Mencken calculated that "Congress consists of one-third, more or less, scoundrels; two-thirds, more or less, idiots; and three-thirds, more or less, poltroons." By and large, Americans seem to agree. When you've got government representatives who spend a large chunk of their work hours fundraising, being feted by lobbyists, shuffling through a lucrative revolving door between public service and lobbying, and making themselves available to anyone with enough money to secure access to a congressional office, you're in the clutches of a corrupt oligarchy. Mind you, these same elected officials rarely read the legislation they're enacting, nor do they seem capable of enacting much legislation that actually helps rather than hinders the plight of the American citizen.

We're being locked up by a government of greedy jailers. We have become a carceral state, spending three times more on our prisons than on our schools and imprisoning close to a quarter of the world's prisoners, despite the fact that crime is at an all-time low and the U.S. makes up only 5% of the world's population. The rise of overcriminalization and profit-driven private prisons provides even greater incentives for locking up American citizens for such non-violent "crimes" as having an overgrown lawn. As the Boston Review points out, "America's contemporary system of policing, courts, imprisonment, and parole ... makes money through asset forfeiture, lucrative public contracts from private service providers, and by directly extracting revenue and unpaid labor from populations of color and the poor. In states and municipalities throughout the country, the criminal justice system defyrs costs by forcing prisoners and their families to pay for punishment. It also allows private service providers to charge outrageous fees for everyday needs such as telephone calls. As a result people facing even minor criminal charges can easily find themselves trapped in a self-perpetuating cycle of debt, criminalization, and incarceration."

We're being spied on by a government of Peeping Toms. The government, aided by its corporate allies, is watching everything you do, reading everything you write, listening to everything you say, and monitoring everything you spend. Omnispresent surveillance is paving the way for government programs that profile citizens, document their behavior and attempt to predict what they might do in the future, whether it's what they might buy, what politician they might support, or what kinds of crimes they might commit. The impact of this far-reaching surveillance, according to Psychology Today, is "reduced trust, increased conformity, and even diminished civic participation." As technology analyst Jillian C. York concludes, "Mass surveillance without due process—whether undertaken by the government of Bahrain, Russia, the US, or anywhere in between—threatens to stifle and smother that dissent, leaving in its wake a populace cowed by fear."

We're being forced to surrender our freedoms—and those of our children—to a government of extortionists, money launderers and professional pirates. The American people have been repeatedly sold a bill of goods about how the government needs more money, more expansive powers, and more secrecy (secret courts, secret budgets, secret military campaigns, secret surveillance)
in order to keep us safe. Under the guise of fighting its wars on terror, drugs, domestic extremism, pandemics and civil unrest, the government has spent billions in taxpayer dollars on endless wars that have sown the seeds of blowback, surveillance programs that have subjected all Americans to a surveillance society, and militarized police that have turned communities into warzones.

We’re being robbed blind by a government of thieves. Americans no longer have any real protection against government agents empowered to seize private property at will. For instance, police agencies under the guise of asset forfeiture laws are taking property based on little more than a suspicion of criminal activity.

And we’re being forced to live in a perpetual state of emergency. From 9/11 through the COVID-19 lockdowns and now the threat of martial law in the face of growing civil unrest, we have witnessed the rise of an “emergency state” that justifies all manner of government tyranny and power grabs in the so-called name of national security.

Whatever else it may be—a danger, a menace, a threat—the U.S. government is certainly not looking out for our best interests, nor is it in any way a friend to freedom.

When the government views itself as superior to the citizenry, when it no longer operates for the benefit of the people, when the people are no longer able to peacefully reform their government, when government officials cease to act like public servants, when elected officials no longer represent the will of the people, when the government routinely violates the rights of the people and perpetrates more violence against the citizenry than the criminal class, when government spending is unaccountable and unaccounted for, when the judiciary act as courts of order rather than justice, and when the government is no longer bound by the laws of the Constitution, then you no longer have a government “of the people, by the people and for the people.”

What we have is a government of wolves. Our back is against the proverbial wall.

The government and its cohorts have conspired to ensure that the only real recourse the American people have to express their displeasure with the government is through voting, which is no real recourse at all.

The penalties for civil disobedience, whistleblowing and rebellion are severe. If you refuse to pay taxes for government programs you believe to be immoral or illegal, you will go to jail. If you attempt to overthrow the government—or any agency thereof—because you believe it has overstepped its reach, you will go to jail. If you attempt to blow the whistle on government misconduct, there’s a pretty good chance you will go to jail.

For too long, the American people have obeyed the government’s dictates, no matter how extreme. We have paid its taxes, penalties and fines, no matter how outrageous. We have tolerated its indignities, insults and abuses, no matter how egregious. We have turned a blind eye to its indiscretions and incompetence, no matter how imprudent. We have held our silence in the face of its lawlessness, licentiousness and corruption, no matter how illicit.

We have suffered.

How long we will continue to suffer depends on how much we’re willing to give up for the sake of freedom.

America’s founders provided us with a very specific explanation about the purpose of government and a roadmap for what to do when the government abuses its authority, ignores our objections, and establishes itself as a tyrant.

We must choose between peaceful slavery (in other words, maintaining the status quo in servitude to the police state) and dangerous freedom. That will mean carving out a path in which we begin to take ownership of our government, starting at the local level, challenging the status quo, and raising hell—nonviolently—whenever a government official steps out of line.

We can no longer maintain the illusion of freedom. As I make clear in my book Battlefield America: The War on the American People, we are at our most vulnerable right now.

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

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Fourth Circuit Expands Savings Clause of § 2255(e) to Include Later Retroactivity of New Rule

by Dale Chappell

The U.S. Court of Appeals for the Fourth Circuit held on March 4, 2020, that the savings clause of 28 U.S.C. § 2255(e) is available even if based on a court decision that existed earlier but was not made retroactive until after the direct appeal and first motion under § 2255.

When Quentin Braswell was sentenced after his 2009 conviction for federal drug and firearm charges, the Government relied on his prior 1997 North Carolina conviction for possession with intent to sell cocaine to require the sentencing court to impose a mandatory minimum sentence of at least 10 years in prison.

Because at the time the Fourth Circuit’s rule looked at the maximum sentence any defendant could have faced for a prior North Carolina conviction, Braswell’s prior met the criteria for the federal enhancement: “an offense that is punishable by imprisonment for more than one year.”

But then United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc), was decided, which held that under the North Carolina sentencing scheme, a federal court cannot assume the maximum possible for sentence for any defendant for use of a prior conviction but “may only consider the maximum possible sentence that the particular defendant could have received.”

This took Braswell’s prior conviction out of the reach of the federal enhancement because he, in particular, could not have been sentenced to more than a year in prison. He filed a § 2255 motion, his first, to invoke the new Simmons rule, but the district court ruled that Simmons does not apply retroactively.

Six months later, the Fourth Circuit held in United States v. Miller, 735 F.3d 141 (4th Cir. 2013), that Simmons applies retroactively on collateral review. Braswell attempted another § 2255 motion but was denied, the court saying that it was an improper “second or successive” motion.

Braswell then turned to the “savings
savings clause. He appealed.

This meant that if Braswell couldn’t pass the savings clause criteria for the Fourth Circuit. Specifically, the court said that because Simmons was decided after Braswell’s § 2255 motion but not made retroactive until after his motion was denied, he could not use the savings clause. He appealed.

The Fourth Circuit’s Savings Clause Test

Under United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018), the Fourth Circuit devised a four-part test for use of the savings clause:

“(1) at the time of sentencing, the law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h); (2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.”

It was the second prong of the Wheeler test that held up Braswell. The district court ruled that “Wheeler requires both the substantive law to change and for that change to be retroactive subsequent to petitioner’s first § 2255 motion.” On appeal, the Government argued that the use of the word “and” instead of “or” in the second prong meant that the change in law and retroactivity determination both had to be done after the § 2255 motion to invoke the savings clause.

Because the Fourth Circuit is one that considers the judge-made savings clause criteria to be jurisdictional, the Court had to decide first if it had jurisdiction to hear the appeal. This meant that if Braswell couldn’t pass the Wheeler test, his appeal would be denied.

The Court found that the Government’s argument (and therefore the district court) was incorrect, and he passed the test. “Wheeler demonstrates that the change in settled substantive law and retroactivity determination work together as a package deal,” the Court said. The whole idea is whether the change in law was made retroactive to allow use of that new rule, the Court said. “Otherwise, the prisoner would not be able to test the legality of his detention in a § 2241 proceeding, which is the ultimate goal of the savings clause.”

It’s the “retroactive change” in the law that renders the sentence fundamentally defective, the Court explained. Wheeler could not receive the benefit of Simmons on § 2255 because it didn’t exist. In the same vein, Braswell could not receive the benefit of Simmons on § 2255 because it was not yet retroactive. “If we adopted the government’s contrary view, we would in essence punish [Braswell] for being too diligent or for submitting his petition to an efficient court,” the Court reasoned. “If [Braswell] had waited longer to file his first § 2255 motion, or if the district court had processed his case more slowly, his claims could have been successful.”

A Wrongful Mandatory Minimum Sentence Is a Fundamental Defect

The Government also argued that because Braswell was sentenced within the statutory range even without the wrongful mandatory minimum, his sentence with the mandatory minimum was not a fundamental defect to allow the savings clause under the fourth prong. However, the Court reiterated that Wheeler expressly rejected such an idea. “An increase in the congressionally mandated sentencing floor implicates separation of powers principles and due process rights fundamental to our justice system,” the Court said, and it’s a “fundamental defect” because it “wrongly prevents the sentencing court from exercising the proper range of its sentencing discretion.” Braswell’s erroneous mandatory minimum was therefore a “fundamental defect” for the fourth prong, the Court held.

The Court also mentioned that while this rule would not apply to Braswell, who was sentenced as a career offender under the advisory Guidelines, it would apply to career offenders sentenced under the mandatory Guidelines. See Lester v. Flournoy, 909 F.3d 708 (4th Cir. 2018).

Braswell’s Plea Agreement Waiver

Finally, the Government invoked Braswell’s plea agreement waiver to argue he wasn’t entitled to postconviction relief. In his plea agreement, Braswell waived his right to file any postconviction proceeding. The Court rejected this position, noting its longstanding rule that it would not enforce a waiver if “to do so would result in a miscarriage of justice.” The Government did acknowledge this rule and that Wheeler foreclosed the argument, but it nonetheless said that it “believes that the waiver in the plea agreement signed by Braswell remains valid.”

Finding no good reason to uphold the waiver under the Government’s contradictory argument, the Court ruled that Braswell’s waiver did not prevent savings clause relief.

Conclusion

Accordingly, the Court found that Braswell passed the Wheeler test and reversed the district court’s dismissal of his savings clause petition and remanded. See: Braswell v. Smith, 952 F.3d 441 (4th Cir. 2020).

Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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

Please contact Kathy Moses at kmoses@humanrightsdefensecenter.org, or call (561) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth Beach, FL 33460.
In a case of first impression, the U.S. Court of Appeals for the Seventh Circuit ruled that it is impermissible to admit a statement made by the defendant to Pretrial Services for the purpose of impeaching the testimony of a witness at trial.

In August 2014, Detective Robert Erdely recorded the Internet Protocol (“IP”) address of a computer transmitting child pornography to him over the internet. The sender was using a rare software program called “Tixati” to access the “BitTorrent” network and send the child pornography in torrent file 817e. (BitTorrent allows users to combine multiple files into one electronic package called a “torrent file.”) The IP address corresponded to an account in the name of Eva Chaparro (hereinafter “Eva”) to avoid confusion) at a home in McHenry, Illinois.

Based on a tip from Erdely, the McHenry County Sheriff’s Office executed a search warrant on the home on December 2, 2014. When police arrived at the house, only three people were inside: Eva, her husband Hector Chaparro, and Eddie Ramos. Officers found three computers, including a Compaq-brand desktop recovered from an upstairs bedroom that Eva said was where her grandson Michael Chaparro slept. An on-site forensic examination of the desktop computer revealed that someone used the hard drive to access child pornography on July 30, 2013, and pieces of torrent file 817e had been downloaded to it in addition to other images of child pornography. The computer had a single user account named “M1KEY” and had Tixati software installed in it.

But the forensic examination also revealed that the computer had not been powered on since August 24, 2013, so it could not have been used to send the child pornography to Erdely in August 2014. While the search was in progress, Michael Chaparro arrived at the home. Police seized an LG-brand smartphone from him that was later determined to have images of child pornography that were stored to its memory on November 24, 2014.

Police charged Michael Chaparro with transmitting child pornography over the internet in August 2014 (Count 1), accessing child pornography on the smartphone in November 2014 (Count 2), and accessing child pornography on the desktop in July 2013 (Count 3).

At trial, the Government presented no evidence in its case-in-chief that Chaparro lived at Eva’s home in the years before the search on December 2, 2014. Defense then called Ramos who testified that Michael lived with a girlfriend from Easter 2013 to Thanksgiving 2014.

The Government, without prior notice, then called Pretrial Services Officer James Wheatley, requesting he be permitted to testify as a rebuttal witness “for the purpose solely of impeaching Mr. Ramos.” The trial court initially denied the Government’s request, ruling that 18 U.S.C. § 3153 “shields the Pretrial Services officer from having to give this testimony.”

Minutes later, the trial court reversed itself based upon United States v. Griffith, 385 F.3d 124 (2d Cir. 2004), which held that statements made during a defendant’s pretrial interview may be used to impeach the defendant. The district court recognized that the Government was seeking to impeach a defense witness and not the defendant, but determined the case was on point anyway.

Before Wheatley testified, the district court gave a limiting instruction to the jury: “the testimony that Mr. Wheatley may give regarding the Defendant’s statements may be considered by you only insofar as it may affect the credibility of Eddie Ramos and not for any other purpose.” Wheatley then testified that he had interviewed Chaparro on March 3, 2016, to gather information for a bond report, and Chaparro had stated that he “had lived with his grandparents from approximately December of 2011 to December of 2014” and did not mention living anywhere else.

The jury convicted on all counts, and Chaparro appealed. He argued, inter alia, that the district court erred by allowing Wheatley to testify as to Chaparro’s statement that was made during the pretrial interview.

The Seventh Circuit observed that 18 U.S.C. 3153(c)(1) “establishes a baseline rule that pretrial services information should remain confidential: ‘Except as provided in paragraph (2) of this subsection, information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used for the purpose of a bail determination and shall otherwise be confidential.’” Paragraph (2) lists five exceptions to the confidentiality bar, none of which applied to this case. But 18 U.S.C. § 3153(c) (3) states in pertinent part: “Information made confidential under paragraph (1) of this subsection is not admissible on the issue of guilt in a criminal judicial proceeding. . . .”

The pretrial confidentiality mandated by Congress in this statute is designed to enable judges to make prompt, accurate, and lawful pretrial release decisions. Judges rely on the information obtained during the pretrial interviews to determine who may pose a danger if released, conditions of release, etc. United States v. Mundy, 2019 WL 3729318 (S.D. Ind. 2019). It is essential that Pretrial Services be able to obtain truthful and accurate information swiftly, often being required to prepare their reports within hours of a detainee’s arrest. James R. Marsh, Performing Pretrial Services: A Challenge in the Federal Criminal Justice System, Fed. Probation, Dec. 1994. Without the promise of confidentiality, detainees are reluctant to answer questions, and many, upon advice of counsel, refuse to be interviewed. Id.

Yet in spite of the strong policy concerns favoring confidentiality, the First, Second, Third, Eighth, and Tenth Circuits have carved an exception not found in the statute based on the canon of “negative inference.” (See opinion for listing of supporting citations from those Circuits.) That is, because § 3153(c)(3) specifically bars evidence “on the issue of guilt,” these Circuits have held the statute implicitly permits such evidence for impeachment purposes. These Circuits reason that because evidence on the issue of guilt (evidence offered as true for the purpose of showing guilt) is different from impeachment evidence (evidence offered only to impugn the credibility of a witness), then Congress implicitly permitted impeachment evidence by explicitly prohibiting only evidence establishing guilt, i.e., “the expression of one thing suggests the exclusion of others.” Exelon Generation Co., LLC v. Local 15, IBEW, 767 F.3d 566 (7th Cir. 2012).
The Seventh Circuit expressed reservations about the reasoning of those Circuits but determined that even assuming Congress intended to create an impeachment evidence exception the exception was inapplicable to this case. Of the five general methods for impeaching a witness, two of them are (1) introducing a prior inconsistent statement and (2) contradicting the substance of the testimony. United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996).

Testimony that a witness gave a statement before trial that is inconsistent or “at odds with” a statement made during trial isn’t presented to the jury as an offer that the previous statement was true and the statement at trial was false. Evidence of inconsistent statements is presented only to show that the witness had made irreconcilable statements at different times, calling the witness’s credibility into question as neither statement may be true. United States v. Dietrich, 854 F.2d 1056 (7th Cir. 1988). But impeachment by offering a contradictory statement requires the jury to accept the contradictory statement as true and the witness’s trial statement as false. United States v. Boswell, 772 F.3d 469 (7th Cir. 2014). Otherwise, there would be no impeachment. Id.

The Seventh Circuit illustrated this point with a case from American judicial lore involving Abraham Lincoln as a defense attorney. A witness testified he saw the defendant commit the crime because a bright, full moon was high overhead. Lincoln presented an almanac that stated that at the time of the crime there was only a quarter-moon low in the sky. The only way the witness could be impeached is if the jury believed the almanac.

In the instant case, the jury was instructed to consider Wheatley’s testimony only for the purpose of impeaching Ramos. Ramos testified that Chaparro did not live at the home during the time period that the crimes charged in Counts 1 and 3 occurred. Wheatley testified that Chaparro had stated that he did live at the home during the relevant time period. The only way Wheatley’s testimony could impeach Ramos is if the jury believed Wheatley’s testimony was true. This meant the jury was asked to consider as true the evidence that Chaparro was at the home during the relevant time period. This also meant the testimony was offered as evidence “on the issue of guilt,” which is prohibited by § 3153(c)(3).

The Court concluded that without the testimony of Wheatley, there was reasonable doubt that the jury would’ve convicted Chaparro of Counts 1 and 3 and vacated those convictions.

As a remedy, Chaparro could be resentenced on Count 2 (vacatur of Counts 1 and 3 meant his sentencing Guidelines range would be lower), or the Government could retry him on the two vacated offenses.

Accordingly, the Court vacated Counts 1 and 3 and remanded for further proceedings consistent with its opinion. See: United States v. Chaparro, 956 F.3d 462 (7th Cir. 2020).

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California Court of Appeal Explains Procedural Requirements for Vacating Felony-Murder Conviction Via Section 1170.95 Petition

by Douglas Ankney

The Court of Appeal of California, Sixth Appellate District has explained the procedural requirements for adjudication of petitions filed pursuant to Penal Code § 1170.95.

In the middle of the night on June 14, 1991, John Lewis Drayton and three other men entered the Wards’ home with the intent of robbing a safe. Drayton and two of the other men were armed. Mr. and Mrs. Ward were awakened in their bedroom. One of the men then brought the Wards’ teenage daughter into the room, placed a firearm in her vagina, and threatened to rape her if Mr. Ward did not reveal the location of the safe. Drayton told the man not to rape the girl. Mr. Ward and two of the men went into a closet where the safe was located. Drayton held Mrs. Ward to the floor with his foot in the middle of her back, and he struck Mrs. Ward with his gun, grazing her head but not injuring her.

A struggle ensued inside the closet, and one of the other men shot and killed Mr. Ward. Drayton told Mrs. Ward to wait 15 minutes before doing anything, and then all four men left the home. Neither Drayton nor any of the other men did anything to seek help for Mr. Ward.

Drayton turned himself into the police the next day. He and the other three men were ultimately charged with nine felonies, including murder. Drayton pleaded guilty to murder in violation of Penal Code § 187 and admitted an enhancement for personal use of a firearm pursuant to Penal Code §§ 1203.06(a)(1) and 12022.5. Drayton admitted that he “entered [the] Ward[s] [r]esidence with intent to commit theft and a human being was killed,” and that he “had a 32 cal[iber] pistol in his possession.”

The probation report filed prior to sentencing revealed that Drayton’s only prior conviction was for a misdemeanor, and he had no reported history of violence. Drayton told a clinical psychologist prior to sentencing that he did not participate in the planning of the robbery, and when he tried to stop the other men from doing it, one of them pointed a gun at him and told him to “shut up.” In March 1992, Drayton was sentenced to 29 years to life imprisonment.

In January 2019, Drayton filed a pro se petition for resentencing pursuant to Penal Code § 1170.95. He submitted a declaration where he checked preprinted boxes indicating he was eligible for relief, one of which asserted that he “was not a major participant in the felony or [he] did not act with reckless indifference to human life during the course of the crime.”

The trial court appointed counsel for Drayton, and in March 2019, the Monterey County District Attorney’s Office (“Prosecution”) filed an opposition. The Prosecution argued that Drayton was a major participant in the underlying felonies of robbery and murder because he went to the Ward home, participated in the robbery, and pointed a gun at Mrs. Ward. The Prosecution further argued that Drayton acted with reckless indifference to human life because he brought his gun to the crime scene and did not assist Mr. Ward after he had been shot.

Drayton, by counsel, filed a response and requested the trial court issue an order to show cause and conduct a hearing “where the evidence will show whether [Drayton] acted with reckless indifference to human life.” Drayton argued that he had made a prima facie showing that he did not act with reckless indifference to human life because he never fired his gun; he had tried to stop the robbery; he prevented Mrs. Ward from being killed and prevented the rape of the daughter; he had the gun for personal protection due to an unrelated incident that had occurred earlier in the day; and that on the evening of the crime he met the man who killed Mr. Ward and had no prior knowledge of the man’s propensity for violence.

The trial court denied the petition without taking any evidence. The trial court determined Drayton’s statements were not credible and found that “Petitioner has failed to state a prima facie showing for release.” Drayton appealed the summary denial of his petition.

The California Court of Appeal observed that Senate Bill No. 1437 (“SB 1437”) added subdivision (e) to Penal Code § 189 that limits liability for felony murder only to cases where: (1) the defendant was the actual killer; (2) the defendant was not the actual killer, but, with intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or (3) the defendant was a major participant in the underlying felony and acted with reckless indifference to human life, as described in Penal Code § 190.2. People v. Flores, 44 Cal. App.5th 985 (2020).

SB 1437 created a petition process, codified in § 1170.95, for defendants to seek relief if they believe they were convicted of felony murder for an act that no longer qualifies as murder as redefined by SB 1437. To be eligible for relief, the defendant (1) must have been charged with felony murder or murder under the natural and probable consequences doctrine; (2) convicted of first or second degree murder; but (3) cannot any longer be convicted of first or second degree murder due to changes to Penal Code §§ 188 or 189. Penal Code § 1170.95(a). The petitioner must include a declaration that he or she is eligible for relief, provide the case number and year of conviction, and indicate whether appointed counsel is requested. § 1170.95(b)(1).

If any of this information is missing, the trial court may deny the petition without prejudice. § 1170.95(b)(2).

“The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.... The prosecutor shall file and serve a response ..., and the petitioner may file and serve a reply.... If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” § 1170.95(c). Once the court issues an order to show cause and schedules a hearing to determine whether the petitioner is entitled to relief, “the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.” § 1170.95(d)(3).

The trial court first reviews the petition under § 1170.95(b)(2) to determine if the petitioner is eligible for relief, i.e., that the petition is facially sufficient in meeting the criteria of §§ 1170.95(a) and (b)(1). People v. Verdugo, 44 Cal.App.5th 320 (2020). If the
petitioner has made a *prima facie* showing that he or she is eligible for relief, the trial court then must determine if the petitioner has made a *prima facie* showing that he or she is entitled to relief. *Id.*

But since the statute is silent on the procedure to be employed by the trial court in making this determination, the Court was persuaded by the Second District’s reasoning in *Verdugo* that looked to habeas corpus procedures for guidance due to the similarities. That is, habeas corpus procedures also allow the Attorney General to file a response in opposition, and then the petitioner is permitted a reply similar to the procedures of § 1170.95(c). And both petitions are collateral attacks seeking relief from an unlawful judgment. In a habeas corpus proceeding, the court initially takes the petitioner’s allegations as true, and if the allegations make a *prima facie* showing that the petitioner is entitled to relief, the court must issue an order to show cause. *People v. Duvall*, 9 Cal. 4th 464 (1995).

If no *prima facie* showing is made, the petition must be summarily denied. *Id.* The court must not dismiss the petitioner’s factual allegations on credibility grounds without conducting a hearing. *In re Serrano*, 10 Cal. 4th 447 (1995).

Using the habeas corpus procedures as a guide, the Court concluded that a trial court’s review of a petition under § 1170.95(c) to determine if the petitioner has made a *prima facie* showing that he or she is entitled to relief requires the trial court to assume that all facts alleged by the petitioner are true, and the trial court is to refrain from making credibility determinations prior to a hearing. If the *prima facie* showing is made, the trial court is required to issue an order to show cause. At any subsequent hearing on that order, the prosecution must prove beyond a reasonable doubt that the petitioner is not entitled to relief, and it is at this hearing that the trial court may make credibility determinations, the Court explained.

In the instant case, Drayton made a *prima facie* showing that he is entitled to relief. The trial court erred in summarily denying his petition without issuing an order to show cause and conducting the requisite hearing.

Accordingly, the Court of Appeal reversed the trial court’s order denying his petition and remanded with directions to issue an order to show cause and to hold a hearing to determine whether to vacate Drayton’s murder conviction, recall his sentence, and resentence him. See: *People v. Drayton*, 47 Cal. App. 5th 965 (2020).

**Police Violence Detrimental to Public Health**

*by Douglas Ankney*

THE 25,000-MEMBER AMERICAN PUBLIC HEALTH ASSOCIATION (“APHA”) ISSUED A STATEMENT ADDRESSING POLICE VIOLENCE THAT BEGINS: “LAW ENFORCEMENT VIOLENCE IS A CRITICALLY PUBLIC HEALTH ISSUE.” AND IN WHAT COULD BE TERMED A “TYPICAL CASE IN SUPPORT,” JOSEPH GOLDSTEIN OF THE NEW YORK TIMES REPORTED THE TRAGIC STORIES OF KHIEL COPPIN AND NA’IM OWENS — TWO BROTHERS SHOT AND KILLED BY NEW YORK POLICE DEPARTMENT (“NYPD”) OFFICERS.

THE BROTHERS LIVED IN THE BEDFORD-STUYVESANT NEIGHBORHOOD OF BROOKLYN. THEIR MOTHER, DENISE ELLIOTT-OWNES, WAS A TEACHER FROM TRINIDAD AND TOBAGO WHO HAD MOVED TO NEW YORK TO PURSUE HER DREAM OF BECOMING A LAWYER. KHIEL WAS KILLED IN 2007 BECAUSE OFFICERS REPORTEDLY MISTOOK A HAIRBRUSH INSIDE HIS SWEATSHIRT FOR A HANDGUN. A FEW MONTHS LATER, NA’IM TURNED 16 AND BECAME A REGULAR “TARGET” FOR COPS.

THIS WAS THE ERA OF STOP-AND-FRISK. BEGINNING IN 2008, NYPD OFFICERS STOPPED NA’IM REGULARLY.

THAT YEAR, ACCORDING TO GOLDSTEIN, POLICE RECORDED 540,000 Stops. BY 2011, THERE WERE OVER 685,000 STOPS ANNUALLY.

FORMER MAYOR MIKE BLOOMBERG CLAIMED STOP-AND-FRISK WAS A SUCCESSFUL MEASURE ADDRESSING GUN VIOLENCE. BUT THE FACTS REVEAL GUNS WERE RECOVERED IN FEWER THAN 0.2 PERCENT OF THE Stops. STOP-AND-FRISK WAS A PRETEXT SIMPLY TO ROUTINELY STOP, HARASS, HUMILIATE, AND ABUSE BLACK AND LATINX BOYS AND MEN. ALMOST 90 PERCENT OF ALL STOPS FROM 2002 THROUGH 2011 WERE OF BLACK AND LATINX RESIDENTS.

NA’IM WAS ROUTINELY SUBJECT TO THE RITUAL DEGRADATION OF BEING FORCED TO LEAN AGAINST A CAR, SPREADING HIS LEGS, AND GETTING PATTED DOWN. IN ONE RECORDED COMPLAINT TO THE CIVILIAN COMPLAINT REVIEW BOARD, HE DESCRIBED HOW AN OFFICER BEAT HIM WITH A BATON. HIS SISTER, KAY (SHE IS NOW AN ATTORNEY AND REQUESTED TO BE IDENTIFIED ONLY BY NICKNAME), SAID, “STOP-AND-FRISK IS ONE OF THE REASONS I THINK WHY OUR PATHS DIVERGED AND NA’IM WENT TOWARD THE STREET. I CHANGED THE WAY I THINK HE SAW HIMSELF.” NA’IM WAS KILLED IN 2014 IN A SHOOTOUT WITH UNIFORMED AND PLAINCLOTHED OFFICERS.


THE APHA CONCLUDED: “IN SHORT, TO ADDRESS LAW ENFORCEMENT VIOLENCE AS A PUBLIC HEALTH ISSUE, IT IS CRITICAL THAT THE PUBLIC’S HEALTH AND WELL-BEING BE PRIORITIZED.”

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Indiana Supreme Court: Removal of Police’s GPS Tracker on Suspect’s Vehicle Not Probable Cause of Theft, Suppression of Evidence

by Anthony Accurso

The Supreme Court of Indiana suppressed all evidence resulting from search warrants obtained on the basis that the sheriff’s department concluded a suspect “stole” the GPS device being used to track him when it failed to transmit its location for 10 days.

Derek Heuring was suspected of dealing methamphetamines by the Warrick County Sheriff’s Department, and in 2018, Officers Young and Busing obtained a warrant to attach a GPS tracker to Heuring’s Ford Expedition. The tracker was a black box, approximately 4 inches by 6 inches, and had no discernible markings. The warrant authorized 30 days of tracking, but the device failed to transmit its location after only seven days.

Officers noticed the vehicle inside Heuring’s father’s barn and believed the barn might be interfering with the signal. Ten days after receiving the last location notification from the device, the officers drove by Heuring’s home and the barn twice and confirmed the vehicle was not in the barn. However, the device was still not transmitting its location, and a technician advised the officers that this could be caused by someone tampering with the device. Officer Young tried to retrieve the device, but it was no longer attached to the vehicle.

Officer Busing obtained a warrant to search the home and barn for evidence of “theft” of the GPS device. A search of the home and barn resulted in the recovery of the device, as well as drugs, drug paraphernalia, and a handgun.

Before trial, Heuring moved to suppress the evidence on the grounds that the search warrant lacked reliable indicia to establish probable cause for theft. The district court and the Court of Appeals denied his motion, but the Indiana Supreme Court reversed.

An appeals court applies a deferential standard to probable cause findings by magistrates in issuing a warrant, but this deference “is not boundless.” United States v. Leon, 468 U.S. 897 (1984). A search warrant issued without probable cause is invalid and thus the subsequent search illegal. Shotts v. State, 925 N.E.2d 719 (Ind. 2010).

To establish probable cause for theft, the officers had to state enough facts to allege that Heuring exercised control over the property of the sheriff’s department (the GPS tracker) and that he did so “knowingly.” I.C. Section 35-43-4-1(a). However, the Court found the officers did not allege sufficient facts to meet this burden. “To find a fair probability of unauthorized control here, we would need to conclude that Hoosiers don’t have the authority to remove unknown, unmarked objects from their personal vehicles.” Thus, Heuring could not knowingly deprive the sheriff’s department of its property by removing the unlabeled, foreign object from his own truck, as he could not have known it belonged to the sheriff’s department.

This failure of the allegation did not necessarily mandate suppression of the evidence if the State could prove the officers acted in good faith. Leon. This is not subjective, but rather a test of whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” Id. Noting that a hunch does not meet the burden of establishing probable cause as per Navarette v. California, 572 U.S. 393 (2014), the Court found the warrant applications amounted to no more than a “hunch” based on “noncriminal behavior.”

In addition, the Court characterized the actions of the officers in conducting the search based on the facts presented in this case as “reckless.” The Court explained “that applying the exclusionary rule here will deter similar reckless conduct in the future.” Thus, the Court ruled that “the exclusionary rule requires suppression of all evidence seized from Heuring’s home and his father’s barn” during the initial searches of those locations, as well as all evidence seized during subsequent searches as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471 (1963).

Accordingly, the Court reversed the lower court’s decision and remanded for further proceedings consistent with this opinion. See: Heuring v. State, 140 N.E.3d 270 (Ind. 2020).

Congressmen File Amicus Brief Stressing Congressional Intent That First Step Act’s New Drug Laws Apply at Resentencing

by Dale Chappell

Courts often look to Congress when interpreting the meaning of a law. They look at Congress’ intent behind the law and any statements made by legislators in drafting the law. This is the “legislative history” of the law and one of the main tools courts use to divine a law’s meaning.

But the tables were turned when three Congressmen who helped write the First Step Act filed an amicus brief, saying that both the government and the district court got it wrong in a case where the court refused to apply the new drug laws under the First Step Act after the original sentence had been vacated.

Senators Richard Durbin, Charles Grassley, and Cory Booker filed the bipartisan amicus brief on May 12, 2020, urging the U.S. Court of Appeals for the Ninth Circuit to reverse the district court’s decision, Judge Derrick Watson of the U.S. District Court for the District of Hawaii adopted the government’s reasoning that the new, more lenient drug laws couldn’t apply at a resentencing after a sentence had been vacated, but only at a new, original sentencing.

“The interpretation advanced by the executive board and adopted by the district court in this case is contrary to Congress’ language and intent,” they wrote. “That unquestionably is not what Congress intended.”

The trio of lawmakers explained that the district court’s interpretation of the First Step Act “attributes to Congress a baffling motive: to give legal effect to illegal sentences.” In other words, by resentencing under the old drug laws, the court would be imposing an illegal sentence. “The First Step Act, they said, “treats defendants whose prior sentences were vacated no differently from individuals being sentenced for the first time.”

They stressed that “Congress tailored the text of Section 401 [the changes to the drug laws] to ensure that the statute it spent years developing reach its intended target.” That
“target” is those sentenced under the “harsh” mandatory minimum sentences of the “failed” two- and three-strikes drug laws that caused an “explosion” in the country’s federal prison population.

Under Section 401(c), Congress provided that the changes to the drug laws would apply to offenses committed before the First Step Act, “if a sentence for the offense has not been imposed as of such date of enactment.” The government had argued that the last part meant it applied for new, original sentences imposed, not vacated sentences, and the court agreed.

Section 401 of the First Step Act made two major changes to the drug laws. First, it limited the types of prior convictions that can qualify for the harsh mandatory minimums under the law. Now, the defendant must have “served” more than 12 months in prison for that prior, and any priors older than 15 years when the federal offense was committed don’t count. Second, it lowered the mandatory minimum sentences required for prior convictions — when the government requests them — to 15 years for one prior (instead of 20) and 25 years for two or more priors (instead of life).


“Had Congress intended to achieve a different outcome ... this Court can be sure that Congress would have spoken with utmost clarity,” using unambiguous language, they said.

“Vacatur nullifies a sentence, leaving the defendant in the same position as an individual who has never been sentenced,” they further explained, citing numerous cases that have held the same. Once a sentence is vacated, the court is working with a “clean slate,” and the court “must sentence the defendant as he stands before the court on the day of sentencing.”

Treating a vacated sentence as if no sentence had been imposed aligns with the purposes of the First Step Act, the drafters of the Act said. The old drug laws “created racially discriminatory outcomes and increased overcrowding and costs,” they quoted the president as saying when he signed the Act into law. Other Congressmen were quoted as saying that they don’t want federal prisons to become “nursing homes,” and the old laws disproportionately affected “people of color and low-income communities.”

In addition, they noted that “over the last several decades, it had become clear that inflexible mandatory minimum sentences that do not allow judges to distinguish between drug kingpins ... and lower-level offenders are not fair, smart, or an effective way to keep us safe,” they reasoned. “Put simply, the First Step Act’s resentencing reforms were widely regarded as a critical step ensuring that our criminal justice system is, in fact, just.”

This clear legislative intent filed by the primary drafters of the First Step Act should weigh heavily on the Ninth Circuit’s decision on whether the district court misinterpreted the Act, at the government’s urging, by refusing to apply the new drug laws during resentencing after the vacatur of a drug sentence imposed years before the Act. See: *Amicus Brief of Congressmen in Support of Defendant, United States v. Mapvatuli*, No. 19-10233 (9th Cir. May 12, 2020).

Additional source: *Durbin.Senate.gov*

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

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

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

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

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

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New Hampshire Supreme Court: Police Violated Miranda in Obtaining First Statement, and State Failed to Prove Second Statement Was Voluntary

by Douglas Ankney

The Supreme Court of New Hampshire affirmed a superior court’s decision suppressing the initial incriminating statements made by Dominic Carrier because police violated the protections of Miranda v. Arizona, 384 U.S. 436 (1966). The Court also affirmed the suppression of additional statements because the State failed to prove those statements were voluntarily made.

A 13-year-old girl, her father, Carrier, and Carrier’s mother all shared an apartment. After Carrier left for work, the girl told her father that Carrier had entered her bedroom and touched her vagina. The father called police. Officer Kekejian of the Nashua Police Department arrived at the apartment, and the father related the girl’s account to Kekejian.

Kekejian was dressed in his uniform with his gun and badge visible. Carrier returned home and entered the apartment. Kekejian immediately ordered Carrier outside and followed him onto the porch. Kekejian blocked the door to the apartment to prevent Carrier from reentering, telling Carrier the police were “investigating a matter,” and the apartment was “being held as a scene.” Kekejian pat-frisked Carrier. When Carrier attempted to use his cellphone, Kekejian took it without explanation and did not return it. Kekejian asked Carrier about entering the girl’s bedroom, and Carrier denied it.

About 10 minutes later, Officer Ciszek arrived. He also wore his uniform with his gun and badge visible. Carrier agreed to speak with detectives who were en route. The two officers stood on the porch with Carrier even though it was cold and windy. They continued to question him about his whereabouts that morning. At no time did Carrier leave the officers’ presence.

After about one hour, Detectives Hallam and McIver arrived in an unmarked Chevrolet Impala. The detectives wore dress pants and dress shirts, but their guns and badges were visible. The detectives escorted Carrier to the Impala, and all three got inside: McIver in the backseat, Hallam in the driver’s seat, and Carrier in the front passenger’s seat. Hallam told Carrier the conversation was being recorded. The doors were closed but unlocked. Hallam told Carrier he should “feel free” to leave and “not feel forced” to speak. But Carrier was speaking when these comments were made. Kekejian and Ciszek remained outside within view of the Impala.

In an interview lasting over an hour, the detectives questioned Carrier about the girl’s complaint. Carrier consistently denied entering the girl’s bedroom. But the detectives accused him of lying. They told him they weren’t interested in hearing his denials, but they were interested in hearing explanations for his conduct. They told Carrier they “wouldn’t be here investigating” if the allegations “were not true.”

Carrier wasn’t offered a break during the interview, and the detectives repeatedly accused him of sexually assaulting the 13-year-old girl. Finally, Carrier made incriminating statements.

Later that evening, Hallam arrested Carrier. While Carrier was being booked at the jail, Hallam read the Miranda warnings to him. Carrier agreed to waive his rights. Seconds later, Hallam told Carrier there were inconsistencies in his prior statements, and now that Carrier had been arrested, he needed to be “100 percent honest this time.” Carrier insisted he had been 100 percent honest, but Hallam insisted that Carrier had “led him down the wrong path” and that Carrier needed to “skip all that B.S.” stated earlier. Carrier then gave additional incriminating statements.

The State charged Carrier with aggravated felonious sexual assault. Carrier moved to suppress his statements. The trial court found that the State failed to prove beyond a reasonable doubt that the police did not violate Miranda when obtaining the statements in the Impala (“Impala Statements”). The trial court also found that the State failed to prove the statements made at the jail were freely given (“Jail Statements”). The trial court granted the suppression motion, and the State appealed.

The New Hampshire Supreme Court observed that the State must prove beyond a reasonable doubt that an accused’s rights under Miranda were not violated before any self-incriminating statements may be used. State v. Marin, 211 A.3d 692 (N.H. 2019).

Two conditions must be met before Miranda warnings are required: (1) the suspect must be “in custody,” and (2) he must be subject to interrogation. State v. Sachdev, 199 A.3d 249 (N.H. 2018). Custody does not require formal arrest, but courts are to examine the overall objective circumstances to determine if a reasonable person would have felt free to leave. Marin.

Factors considered in the analysis are the degree to which the accused was restrained, the duration of the interview, the character of the interview, the number of officers present, and the accused’s familiarity with his surroundings. Id.

Restraint isn’t limited to handcuffs and the like but may be in the form of verbal commands and physical gestures. Id. Pat-frisking and seizure of a phone especially weigh in favor of custody as these indicate the police are exercising their authority and control over the suspect. Id. In State v. Jennings, 929 A.2d 982 (N.H. 2007), the court ruled that an interrogation lasting two hours weighed in favor of custody. And accusatory questioning weighs in favor of custody because a “reasonable person understands that the police ordinarily will not set free a suspect when there is evidence strongly suggesting that the person is guilty of a serious crime.” Marin.

Kekejian restrained Carrier’s movements when he ordered Carrier from his own home, followed Carrier onto the porch, and blocked the door to prevent Carrier from reentering. He also pat-frisked Carrier and took his phone. Ciszek arrived, and both officers questioned Carrier concerning his whereabouts. The two uniformed officers remained on the porch with Carrier in the cold while awaiting the arrival of the detectives.

Hallam and McIver restrained Carrier’s movements by escorting him to the Impala and having him sit inside with the doors closed. There was doubt as to whether Carrier heard Hallam’s comments about feeling free to leave and not feeling forced to speak because Carrier was speaking when the comments were made. The interview was accusatory. Four armed officers were present, two in full uniform remaining in view of the car. Nearly two hours elapsed from the time the questioning began with Kekejian until the interrogation in the Impala concluded.

Those factors supported the trial court’s finding that Carrier was in custody when he gave the Impala Statements. Consequently,
5-Year Study Shows Police Stop Black Drivers Less Often at Night When ‘Veil of Darkness’ Obscures Race

by Douglas Ankney

In the largest-ever study of racial profiling by police during traffic stops, Stanford University has shown that Black people are much less likely to be stopped after sunset when “a veil of darkness” masks their race. The five-year study analyzed 95 million traffic-stop records that had been filed by officers from 21 state patrol agencies and 35 municipal police forces from 2011 to 2018.

The study was a collaboration between Stanford’s Cheryl Phillips (a journalism lecturer whose students obtained the raw data through public records requests), Sharad Goel (a professor of management science and engineering whose computer science team organized and analyzed the data), and Ravi Shroff (a professor of applied statistics at New York University who worked with Goel).

The team spent years culling through the data, eliminating records that were incomplete or from the wrong time periods (focusing on 7:00 p.m. local time when the sky is lighter or darker depending on daylight savings time), to create the 95 million-record database. The dataset provided a statistically valid sample size when drivers were pulled over, officers searched the vehicles of Blacks and Hispanics more often than Whites.

Researchers included a subset of data from Colorado and Washington after legalization of marijuana in those states and found that, although vehicle searches declined after the legalization, police continued to search Blacks and Hispanics more frequently than Whites. “Our results indicate that police stops and search decisions suffer from persistent racial bias, and point to the value of policy interventions to mitigate these disparities,” the researchers wrote in Nature Human Behavior.

Using the Stanford Open Policing Project, the researchers make the data available to reporters and hold workshops to teach them how to use the data to do local stories. Researchers helped reporters from the Seattle-based nonprofit news organization Investigate West use the data for stories that resulted in the Washington State Patrol reviewing its practices and boosting officer training with regard to interactions with Native Americans. The researchers similarly helped reporters from the Los Angeles Times use the data which ultimately resulted in a series of stories that prompted changes in the practices of the Los Angeles Police Department concerning stops and searches of minorities. “All told[,] we’ve trained about 200 journalists, which is one of the unique things about this project,” said Phillips. Goel and Phillips continue collaborating through a project called “Big Local News” to explore how data science can shed light on public issues like civil asset forfeiture.

Source: forensicmag.com
Declassified Court Ruling Details FBI Abuses of Mass Surveillance Data

by Anthony Accurso

The government declassified a court order from October 2018 that details the FBI’s misuse of its access to mass surveillance data collected in partnership with large tech and communications companies.

The order detailed what many Americans suspect: Federal agencies misuse mass surveillance in contravention of controls Congress has placed on them. What was not known by most Americans is that, at least as far as the FBI is concerned, these abuses occur hundreds of times a day.

In 1978, Congress passed the Foreign Intelligence Surveillance Act, which created the eponymous FISA Court. This court was designed to allow for non-public legal authorization for federal agencies to intercept the communications of foreign agents and terrorists. Section 702, passed in 2008, expands the scope of interception methods, essentially authorizing the gathering of mass amounts of communications, such as phone metadata and complete emails. And while it was originally used to surveil foreign agents, such intercepts routinely collect the communications of U.S. citizens.

The order issued by U.S. District Court Judge James E. Boasberg excoriated the FBI for performing “fishing expeditions through Americans’ personal emails and online messages.” The FBI has unfettered access to this database of intercepted communications, and agents are not reluctant to use this resource. Agents conduct approximately three million searches per year, yet refer only about 10,000 cases for prosecution annually.

While it’s not clear what purpose the bulk of the searches serve, it’s likely the FBI would justify these searches under its assessments loophole. The FBI is primarily only allowed to use this information after obtaining a FISA warrant, which itself requires probable cause linking a suspect to criminal activity. However, the FBI also is allowed to assess whether anyone — U.S. citizens included — poses a threat to national security and may access the database to perform the assessment without a warrant.

But even with such restrictions, agents are not shy about stretching the limits of legality. The court order enumerated the following frivolous uses and abuses in its voluminous 138 pages:

- A four-day period in March 2017 involved searches for communications to an FBI facility, suggesting agents were spying on other agents.
- An FBI contract linguist conducted searches on himself, other FBI employees, and relatives.
- The FBI regularly used the database to investigate potential witnesses who were neither suspects nor national security concerns.

In the case of Fazliddin Kurbanov, an Idaho man who was eventually convicted of providing material support to a terrorist group in Uzbekistan, the “FBI appeared to launder evidence obtained improperly through the NSA’s mass surveillance program by acquiring traditional FISA authority after the fact in order to reobtain the evidence through less controversial powers.” In other words, the FBI found evidence of a crime during an unauthorized search of the database, then asked the FISA court for access so it would appear that the evidence was obtained legally and thus be able to use it to prosecute Kurbanov.

This declassified court order shows that few, if any, limits exist as to how federal agencies use mass surveillance data collected on Americans. The FBI apparently has no effective limits on how it spies on us.

Second Circuit: Three Important Rulings Under First Step Act

by Dale Chappell

The U.S. Court of Appeals for the Second Circuit made three important favorable rulings on April 24, 2020, concerning relief under the First Step Act for career offenders, those who get released while their motion is pending, and the proper avenue for relief.

The case came before the Court after Jason Holloway’s First Step Act motion filed on February 1, 2019, was denied by Judge Charles Siragusa of the U.S. District Court for the Western District of New York, on the basis that Holloway was a career offender and therefore the First Step Act didn’t lower his guidelines range. After Holloway appealed, he was released in October, and the Government then argued his appeal was “moot” because his term of imprisonment was completed. The Second Circuit disagreed with all of this.

Holloway’s Appeal Was Not Moot

At the outset, the Court had to decide if Holloway’s appeal was moot, now that he was released from prison. A court must be able to grant some form of relief in order for a case to remain alive, or it’s “moot.” While Holloway filed for a reduced sentence under the First Step Act’s retroactive application of the Fair Sentencing Act of 2010 (“FSA”), he also requested his supervised release term be reduced under the FSA’s lower statutory term for his offense. He was subject to a 10-year term, which the FSA reduced to eight years. The Court ruled that because the district court had the ability to reduce his supervised release, Holloway’s appeal was not moot.

Standard of Review

The Court noted that it typically reviews a district court’s denial of a sentence reduction for an “abuse of discretion” by the judge in denying relief but recognized here that because the district court misinterpreted the statutory avenue for relief, review was de novo, meaning that the Court would consider Holloway’s appeal without any deference to the district court’s reasoning for its decision.

Holloway’s Career Offender Status and First Step Act

The district court ruled that because Holloway was a career offender, he was not entitled to First Step Act relief since “the amendment does not have the effect of lowering Holloway’s applicable guideline range.” The district court relied on the new presentence
Thus erred in considering his GSR for First and supervised release term. The district court accurately his statutory do with Holloway's guidelines range but more concluded that this provision has nothing to First Step Act § 404(b). The Second Circuit the time the covered offense was committed."

Under the First Step Act, so he wasn't eligible for relief. This was wrong, the Second Circuit said. Holloway was convicted under 21 U.S.C. § 841(a) and sentenced according to § 841(b)(1)(A), for possessing more than 50 grams of crack cocaine. This required a mandatory minimum sentence of 20 years in prison plus a minimum of 10 years on supervised release. The FSA changed the amount of crack for that stiff of a penalty up to 280 grams. Therefore, under the retroactive application of the FSA to Holloway under the First Step Act, he now faced the penalties under § 841(b)(1)(B), which was an 8-year term of supervised release and a 10-year minimum prison sentence.

Under the First Step Act, a person is eligible for a new reduced sentence; "as if sections 2 and 3 of the [FSA] were in effect at the time the covered offense was committed." First Step Act § 404(b). The Second Circuit concluded that this provision has nothing to do with Holloway's guidelines range but more accurately his statutory range for his sentence and supervised release term. The district court thus erred in considering his GSR for First Step Act eligibility, the Court concluded. In other words, Holloway being a career offender doesn't matter under the First Step Act.

The Proper Avenue for Relief

Joining other circuits, the Second Circuit determined that the proper avenue for First Step Act relief is under 18 U.S.C. § 3582(c)(1)(B), not § 3582(c)(2). The district court filed a standard court form stating that Holloway was denied relief under § 3582(c)(1)(B), but the Second Circuit found the basis of the district court's order was actually under § 3582(c)(2), when it denied relief because it said "the amendment does not have the effect of lowering [Holloway's] applicable guideline range." This is the same language used for retroactive guideline amendments under § 3582(c)(2), the Court noted.

Instead, "a First Step Act motion is based on the Act's explicit statutory authorization, rather than on any action of the Sentencing Commission" amending the guidelines, the Court explained. "For this reason, such a motion falls within the scope of § 3582(c)(1)(B)." Under § 3582(c)(1)(B), "a court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute."

The "statute" referred to here is § 404(b) of the First Step Act, the Court explained. While this avenue allows a court to reduce a "term of imprisonment," the Court cited the Supreme Court's decision in Mont v. United States, 139 S. Ct. 1826 (2019), which instructed: "Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment as part of the same sentence." Given this reasoning, the Second Circuit concluded that a reduction in a term of supervised release under the First Step Act was no different from a reduction in a term of imprisonment.

The Court held that (1) Holloway's First Step Act motion was not rendered moot by his release since his term of supervised release could still be reduced; (2) the First Step Act is about a reduction in statutory penalties, not guideline penalties like career offender; and (3) § 3582(c)(1)(B) was the proper avenue for relief.

Accordingly, the Court vacated the district court's order denying Holloway's motion and remanded for consideration of a reduction in his term of supervised release consistent with its opinion. See: United States v. Holloway, 956 F.3d 660 (2d Cir. 2020).
Marijuana Possession in Virginia Remains Illegal But Is Decriminalized
by Douglas Ankney

On May 21, 2020, the Commonwealth of Virginia became the 16th state to decriminalize possession of marijuana when Governor Ralph Northam signed Senate Bill 2 and House Bill 972.

The law, which becomes effective July 1, 2020, creates a civil penalty of no more than $25 for possession of up to an ounce of cannabis, with no jail time. A violation will be charged by a summons.

There will be no court costs. The violation won’t be recorded in the person’s criminal history, and no charges or judgments will be reported to the state’s Central Criminal Records Exchange. But if the violation occurs while the person is driving, it will go on the person’s driving record and be reported to the Department of Motor Vehicles. Additionally, past records related to arrests, charges, and convictions for marijuana possession will be sealed “except in certain circumstances.” Employers and educational institutions will be prohibited from requiring individuals to disclose those records.

The new law is the latest in progressive action taken by state Democrats since they took control of the Governor’s Office, Senate, and House of Delegates for the first time in more than 20 years. “We applaud the legislature and the governor for implementing a policy that will allow law enforcement to focus resources on more serious crimes and prevent Virginians from having their lives derailed for possessing cannabis, a substance that is safer than alcohol,” said Steve Hawkins, executive director of the cannabis legalization organization Marijuana Policy Project.

But some activists, including the Virginia chapter of the American Civil Liberties Union, opposed the decriminalization measure because it didn’t go far enough. Arguing for complete legalization, they point out that decriminalizing possession does nothing to remove the ban on selling marijuana. This forces consumers to purchase from criminal organizations who use the revenue for violent operations. And the fines, while less punitive than arrests and prison time, cause hardship and are often applied in a racially disparate manner.

However, some opponents of legalization favor decriminalization as a means of undoing America’s past “tough on crime” policies that were far too harsh and costly. Yet they don’t want full legalization because they argue it will make pot too accessible, lead to an increase in the number of users, and allow big corporations to market the marijuana irresponsibly.

In addition to the 16 states that have decriminalized marijuana possession, 11 states and Washington, D.C. have legalized marijuana (although Vermont and D.C. don’t allow sales).

Sources: cnn.com, vox.com

Eleventh Circuit Holds Hobbs Act Robbery Doesn’t Trigger Career Offender Enhancement
by Dale Chappell

The U.S. Court of Appeals for the Eleventh Circuit held on March 24, 2020, that substantive Hobbs Act robbery is “too broad” and doesn’t qualify to require a sentencing enhancement under the career offender provision of the United States Sentencing Guidelines (“USSG”).

In a consolidated direct appeal by three defendants from the U.S. District Court for the Southern District of Florida, the question before the Eleventh Circuit was whether substantive Hobbs Act robbery (and not conspiracy to commit Hobbs Act robbery) meets the definition of a “crime of violence” under the USSG to apply a career offender enhancement to each defendant. All three argued that Hobbs Act robbery cannot support a career offender sentence because it includes violence toward property, as well as persons, which falls outside the career offender definition requiring violence toward only a person.

Under USSG § 4B1.1(a), a person may be sentenced as a career offender if (1) he is at least 18 at the time of the instant offense, (2) the instant offense is a “crime of violence” or “controlled substance offense,” and (3) he has at least two prior felony convictions for either a crime of violence or controlled substance offense. The term “crime of violence,” at issue here, is defined under § 4B1.2 as any offense punishable by more than a year that either “has an element the use, attempted use, or threatened use of physical force against the person of another” or is one of the enumerated offenses in the guideline, which includes “robbery.”

Hobbs Act robbery is defined for purposes of this appeal as an act by someone who “commits or threatens physical violence to any person or property” in furtherance of “committing a robbery.” Robbery, in turn, is defined as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force ... to his person or property.” 18 U.S.C. § 1951(a), (b).

Clearly, the “or property” language was crucial to this appeal.

The Eleventh Circuit began by recognizing that other courts have held that Hobbs Act robbery is not a crime of violence for the career offender guideline, because it extends to violence toward property as well as persons. Under the familiar categorical approach, the Court said it looks only to the language of the statute and not to what the defendants actually did. The Court then compared the elements of the Hobbs Act robbery statute to the definition of crime of violence in the career offender guideline. If the statute “sweeps more broadly” than the guideline definition, it does not count for the career offender enhancement. [Writer’s note: The Supreme Court ruled in United States v. Davis, 139 S. Ct. 2319 (2019), that the categorical approach also applies even when the predicate conviction is also before the court as the instant offense, as it was in this case.]

Hobbs Act robbery can be committed with threats of violence to person or property, the Court noted. “Because a person can commit Hobbs Act robbery without using, attempting to use, or threatening to use physi-
The Court concluded that the defendants did not need to point to a Hobbs Act robbery conviction under only the property provision because the Hobbs Act robbery statute itself expressly includes violence to property in the offense. “We cannot ignore the statutory text and construct a narrower statute” for the Government’s sake, the Court said.

The Government’s third argument, that the Supreme Court’s decision in Stokeling v. United States, 139 S. Ct. 544 (2019), which held that Florida robbery is a crime of violence for the ACCA, also supports Hobbs Act robbery as a crime of violence for the career offender guideline. The Court acknowledged that Florida robbery qualifies but only because it requires the use of force against a person, not property. Again, the Government ignored the “or property” language of Hobbs Act robbery that is missing from the career offender guideline.

The Government’s fourth attempt to save Hobbs Act robbery under the career offender guideline was an argument that “robbery” is one of the enumerated offenses under § 4B1.2 and thus counts. While it is named in the guideline, the Court said that “We disregard the label on a crime” in determining whether it qualifies as an enhancement offense. The guidelines do not define “robbery,” but the Court has defined it in other cases as violence only toward a person. “Thus, Hobbs Act robbery is not a categorical match for the enhancement offense of robbery.”

The final argument by the Government, and one that got the most attention from the Court, was that Hobbs Act robbery should qualify for the career offender guideline because the U.S. Sentencing Commission is talking about amending the career offender guideline to include Hobbs Act robbery. Therefore, the Government said, the Court should not hesitate to create a “circuit split” by being the first to apply the proposed change. The Court disagreed. While the commission “appears to be in the process” of changing the career offender guideline to include Hobbs Act robbery, “we nevertheless must stick to the plain text of the Hobbs Act robbery statute and the guidelines.”

Accordingly, the Court concluded that Hobbs Act robbery does not qualify as a “crime of violence” under the career offender guideline and vacated the defendants’ sentences. See: United States v. Eason, 953 F.3d 1184 (11th Cir. 2020).
Biden Accuser Accused of Inflating Credentials to Qualify as Expert Witness, Calling Convictions into Question

by Derek Gilna

Tara Reade, who has accused presumptive Democratic presidential nominee Joe Biden of sexually assaulting her in 1993 when she worked for him as an aide, now faces accusations that she inflated her academic credentials to win certification as a prosecution expert witness on domestic violence in several criminal proceedings in Monterey County, California. That county’s public defender has promised to investigate those charges and a list of clients who might have been affected is being compiled.

Questions about Reade’s credentials include whether she received an undergraduate degree at Antioch University in Washington state. A spokesman for the university said that although Reade attended classes, she received no degree, which Reade disputes. Reade later earned a law degree from Seattle University.

On May 21, 2020, Reade’s lead attorney, Douglas H. Wigdor, known for his vigorous advocacy of victims of sexual assault, further complicated the situation when he withdrew from representing her, without providing reasons for the move, stating the move was “by no means a reflection on whether then-Senator Biden sexually assaulted Ms. Reade. Much of what has been written about Reade is not probative of whether then-Senator Biden sexually assaulted her, but rather is intended to victim-shame and attack her credibility on unrelated and irrelevant matters.” It is not unusual for lawyers to withdraw from client representation for a variety of reasons.

Defense attorneys, even before this development, had questioned Reade’s expert credentials in court proceedings. One, Roland Soltesz, said that his client, Victoria Ramirez, and a co-defendant were convicted largely as a result of Reade’s testimony, and he complained that, “People have been convicted based upon this [testimony] and that’s wrong.”

According to Mark J. Reichel, a Sacramento-based criminal defense attorney, “An expert can only testify in certain circumstances. One of them is that they have expertise above the regular person. The jury is entitled to hear your qualifications.”

The Monterey County Public Defender’s Office, according to Jeremy Dzubay, an assistant public defender, is reviewing cases in which Reade’s court testimony might have tipped the scales against one of their clients. If it is found that she misrepresented her credentials, the credibility of her testimony in many criminal proceedings could be cited as grounds for vacating those convictions and set the stage for new trials.

Sources: nytimes.com, politico.com, montereycountyweekly.com

COVID-19 Creates Opportunity for Big Brother in the Sky

by Michael Fortino, Ph.D.

Now that COVID-19 has brought about new public enforcement policies, a dystopian world where government agencies watch our every move may not be as far in the future as we might think. With the intent of observing crowd activities in public places (and private ones as well), law enforcement and health authorities have begun to utilize drones and other monitoring technologies ostensibly to forecast or prevent possible coronavirus outbreaks. These surveillance tools have proven extremely effective as “infectious disease tracking” technology, but many people are beginning to fear we must now sacrifice coveted privacy in exchange for safety.

Various applications for the technologies focus predominantly on contact tracing, including the monitoring of safe social distancing or the detection of an individual’s fever through thermal imaging. Other more general uses of drone technology involve strategic deliveries where exposure may be risky. Drone couriers now deliver pharmaceuticals to the sick, personal protection equipment to the front line, or emergency supplies to COVID-19 ravaged environments. Although these applications may sound practical and noble, local, state, and federal agencies have moved beyond mere COVID-related usage and have begun to exploit the pandemic in an effort to invade other areas of our life and privacy.

Surveillance drones have been in use by various agencies and police departments to monitor traffic congestion, track missing persons, assist in rescue operations, and to assess civil unrest during street protests or demonstrations. The additional features of thermal imaging and facial recognition, each still in their infancy stages of development, add yet another invasive layer to the intrusion of government surveillance into the personal lives of its citizenry.

According to the Constitutional Project, there are already an estimated 30 million security cameras in the United States, and most are easily accessible and conveniently hackable through back-door internet protocols. Now, with the ubiquitous application of GPS embedded in our personal technologies, and combined with the need to track a novel pandemic, Big Brother’s eye in the sky could significantly intensify law enforcement’s paranoid vigilance and its thirst for control over the masses.

David McGuire, executive director of the ACLU, Connecticut, suggests, “The biggest red flag for the ACLU is when the use of technology [leads] to arrest.” Again, such measures are by no means an apparition of some distant and imaginary Orwellian future. They have already become a part of our everyday life. For years, police have been using remote cameras to write citations against traffic violators. In every city in America, law enforcement has utilized strategic camera placement with the express purpose of capturing damning footage intended to seal a suspect’s fate in the courtroom.

Laws that limit surveillance are constantly under attack, yet lawmakers in Congress routinely push the envelope against Fourth Amendment rights and privacy. Today, and at every level of the justice system, search, seizure, and surveillance that circumvent constitutional restrictions have become commonplace.

Unfortunately, there is no playbook for balancing a worldwide pandemic against unbridled democratic freedom. Civic organizations and watchdog groups demand guarantees requiring, at the conclusion of
our current health crisis, officials return to a limited use of surveillance and spying.

Unfortunately, there simply are no guarantees. It is virtually impossible to foretell where the use of these new technologies will eventually lead. If we have learned anything from history, it is that a society built on paranoia fear will cease to remain open and pluralistic. Our obsession with absolute public safety may well be our own downfall—just consider the new six million laws in this country and the immensity of our ever-expanding prison population.

Catalyst for Authoritarianism?

In comparing the terrorist attacks of 9/11, which ushered in the excesses of the Patriot Act, the novel coronavirus pandemic may be another powerful catalyst for more authoritarian rule.

The old adage “the road to hell is paved with good intentions” is most appropriate in these uncertain times. There is great eagerness to fully reopen our society, to restore our stricken economy, to return to life as we knew it pre-COVID-19. Two questions remain however: What health consequences are we willing to pay for a free and open economy — and what freedoms are we willing to sacrifice to remain healthy? It is simply impossible to find a perfect balance in an imperfect world.

As we look to the distant past and the superficially halcyon “happy days” of the 1950s, our predecessor generations remind us of a time when Americans faced similar dilemmas. During the Cold War, we turned to technology (nuclear weapons) to safeguard us from the potential evils of the “red menace” — Communism.

In the 1970s, Americans followed a hopeless crusade into Vietnam in an effort to stop the domino-like collapse of Asia into socialism. In the ’80s and ’90s, we turned to a war on drugs followed by a war on crime, each time exchanging freedom for superficial safety. Now, three decades later, we must, once again, adopt a new balance between freedom and safety in defending, this time, against an unseen enemy.

If there is a silver lining in this dark COVID-19 cloud, it’s that a worldwide pandemic may usher in a new era of global awareness and international cooperation between nation-States of the world.

Unfortunately, the containment of COVID-19 in the United States, like many other nations, has begun to reveal the many cracks and fissures within our flimsy socio-economic edifice. Because of these two dichotomies, we, as Americans, are at a crossroads. We could ignore this cooperative opportunity and retreat to a claustrophobic society premised on paranoid isolationism, or we could embrace the opportunity to establish new and renewed ties with the rest of the world as we work together to defeat a common enemy.

Technology is not in and of itself a positive or a negative entity. It is only within its application that we may evaluate social contribution or social threat. While attempting to “contain” the virus, we, as Americans, must also remember to “contain” the exploitation of the very technology designed to protect us. If we fail to learn from history, we may find Big Brother looking down and observing our every baited breath.

Source: eff.org

Perjurous New York City Cop Sentenced to a Single Day in Jail

by Ed Lyon

Pedro Barbosa lives in New York City. Michael Bergmann is a former New York City cop who was fired from the force for providing false testimony in court that could have sent Barbosa to prison for up to 15 years.

“They [referring to Bergmann and his partner] would follow me wherever I went. They’d tell me, ‘We’re going to get you off the streets,’” said Barbosa in an interview with the New York Post. “If they found anything in my car, even a screwdriver, they’d arrest me for burglary tools,” he added.

Bergmann reportedly had been harassing Barbosa for months, especially since Barbosa’s driver’s license had been suspended. In the wee morning hours of February 1, 2019, on a street devoid of witnesses, Bergmann pulled his prow car next to Barbosa’s already parked car by the curb. Seeing his nemesis, Barbosa drove away.

Without any witnesses, Bergmann filed a complaint against Barbosa for first degree assault. “The defendant locked eyes with me, turned the car into reverse, floored the vehicle into reverse approximately seven feet,” testified Bergmann. And his perjury did not stop there. “As I’m still yelling, the defendant put it in drive, turned the vehicle towards me to the point where I was in between his headlights, and if I didn’t jump out of the way, I would have been under his vehicle.” He claimed an elbow injury resulting from his alleged leap from in front of Barbosa’s onrushing car.

Without witnesses to support him, Barbosa was looking at 15 years in prison had it not been for the tenacity of a public defender’s office investigator identified only as Julia. In the words of public defense attorney Scott Hechinger: “I remember when Julia knocked on my door. I got video surveillance in the Barbosa case. They lied. It’s clear. She handed me a DVD. Popped it into my computer and watched. ‘Holy shit!’ I know, right?’ she said.” The video was part of a nearby business’ security system. The persecution of Barbosa ceased mid-trial, and the charges against him were dismissed.

Bergmann was charged with perjury. He was fired from his cop job. Then it was his turn to go before the bench. The prosecutors sought a year of jail time, but because Bergmann had been a cop, they realistically expected him to receive only a six-month sentence, tops.

To everyone’s surprise, Judge Danny Chun sentenced Bergmann to serve one day in jail and four years on probation. Chun went on record saying he felt that a six-month sentence would have been "unduly harsh."

Given the propensity of New York City cops to perjure themselves (C.L.N, December 2019, p. 40), Chun may have been accustomed to that sort of thing from cops in his court.

Then again, this is not the first example of hackneyed justice and inane sentences for former cops in Chun’s court. In one case where two former cops sexually assaulted a teenage girl in exchange for releasing her, Chun questioned the victim’s “credibility” and said that “both sides” had been guilty of crimes relating to the “bribe.” Another cop who drew a probated sentence had shot a man twice in the face and then tampered with the evidence. With a sentencing record like that, no one should have been at all surprised with Chun’s disposition of Bergmann’s case. And with a sentencing record like that, Chun should be keeping company with Bergmann in the unemployment office.

Sources: independent.co.uk, reason.com
Nebraska Supreme Court: Multiple Theft Charges for Stealing Items Belonging to Several People at Same Time and Place Violates Double Jeopardy

by Dale Chappell

In a case of first impression, the Nebraska Supreme Court held on March 13, 2020, that theft from multiple owners “at the same and in the same place … constitutes a single offense,” and thus multiple theft charges violates the Double Jeopardy Clause of both the Nebraska and U.S. Constitutions.

Jonathan Sierra took part in the theft of several tools belonging to three different people from an auto shop in York, Nebraska, in 2017. He was charged with three counts of theft, among other charges, for the theft. He took his case to trial, was found guilty of those three counts, and sentenced to 16 to 20 years in prison.

On appeal to the Nebraska Supreme Court, Sierra argued that by charging him with multiple counts of theft, even though the tools taken were owned by different individuals, his convictions violate the Double Jeopardy Clause of the Nebraska and U.S. Constitutions because the theft constitutes a single offense.

The Court began by explaining that the Double Jeopardy Clause under both constitutions is designed to protect against three distinct abuses: “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.”

While the Nebraska Supreme Court had held that multiple items stolen at the same time from the same place is a single offense, it had never addressed the question of whether separate charges may be filed if those items belong to different people.

The Court looked to Neb. Rev. Stat. § 28-518, which provides that the value of all the items stolen may be considered together to determine the grade of the offense under law. Importantly, the statute forbids the value of the items to be aggregated into more than one offense. The Court concluded that this supports the idea that multiple thefts in the same criminal conduct amounts to just one offense.

“This principle of considering theft of multiple items as one offense has been applied by a majority or jurisdictions, even when the property taken has more than one owner,” the Court reasoned, collecting decisions from other state courts. “We accordingly find that charging and convicting Sierra with three separate offenses for theft … violated the Double Jeopardy Clauses of the Nebraska and U.S. Constitutions and constituted plain error.”

The Court concluded that this supports the idea that the statute forbids the value of the items to be aggregated into more than one offense. The Court reviewed for “plain error” because Sierra’s lawyer never objected to the error in the trial court. Instead, the error was raised on appeal by new counsel for the first time. For an error to be “plain,” there must (1) be an error, (2) that is plainly evident from the record but not objected to at trial, (3) that affects the substantial rights of the litigant, and (4) that if left uncorrected would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process. Mays v. Midnite Dreams, 915 N.W.2d 71 (Neb. 2018).

“Left uncorrected, this error would be a violation of Sierra’s fundamental rights and damage the integrity of the judicial process,” the Court said in finding plain error.

Accordingly, the Court vacated two of Sierra’s three theft convictions to cure the double jeopardy violation. See: State v. Sierra, 939 N.W.2d 808 (Neb. 2020).

Fourth Circuit: Standalone Rehaif Error Requires Automatic Vacatur of Guilty Plea

by David M. Reutter

The U.S. Court of Appeals for the Fourth Circuit held that the district court’s failure to give a defendant notice that he belonged to a class of persons prohibited from possessing a firearm during his plea colloquy constitutes a structural error that requires his guilty plea to be vacated. It is the first Court of Appeals to address the question of whether this error is a structural error—denial of due process—that mandates the vacatur of the guilty plea and conviction.

The Court’s ruling came in an appeal brought by Michael Andrew Gary. He was arrested in South Carolina on January 17, 2017, following a traffic stop for driving on a suspended license. An inventory of the vehicle uncovered a loaded firearm and nine grams of marijuana. Gary admitted to possessing both items and was charged under state law with possession of a firearm and possession of a firearm “travelled in interstate or foreign commerce.”

Gary again ran afoul of the law in June 16, 2017, after two officers patrolling a motel parking lot smelled marijuana. As they approached, Gary had a joint in his lap. A consensual search uncovered large amounts of cash on Gary and his companion, a digital scale, a stolen firearm, ammunition, and “a large amount of marijuana.” Gary was again charged under state law with possession of a firearm by a convicted felon.

A federal grand jury indicted Gary under 18 U.S.C. § 922(g)(1), and he later pleaded guilty without a plea agreement to two counts of possession of a firearm and ammunition after having been convicted of a felony. During the plea colloquy, the federal district court informed Gary of the elements it understood would have to be proven at trial: (1) that Gary had “been convicted of a crime punishable by imprisonment for a term exceeding one year;” (2) that he “possessed a firearm;” (3) that the firearm “travelled in interstate or foreign commerce;” and (4) that he did so knowingly; that is that [he] knew the item was a firearms and [his] possession” was voluntary and intentional. After accepting the guilty pleas, the court sentenced Gary to 84 months on each count, to run concurrently.

On appeal, Gary argued that Rehaif v. United States, 139 S. Ct. 2191 (2019) was relevant to his case. In Rehaif, the Supreme Court held the Government must prove not only that a defendant charged pursuant to § 922(g) knew he possessed a firearm but also knew he belonged to a class of persons barred from possessing a firearm. In an en banc ruling, the Fourth Circuit considered the impact of Rehaif on a defendant’s guilty plea, concluding it requires the plea to be vacated. United States v. Lockhart, 947 F.3d 187 (4th Cir. 2020). However, Lockhart addressed two errors, i.e., failure to advise defendant of his sentencing
is “plain error to accept a guilty plea based on a pre-Rehaif understanding of the elements of a Section 922(g)(1) offense.” The parties agreed that the first two prongs of Olano plain error review were satisfied as a result of the district court’s failure to provide notice of the Rehaif element of the § 922(g) offense to Gary, and the Court concurred with their assessment.

The Court then turned to the third prong of the plain error standard: whether the error affected Gary’s substantial rights. The Government argued the error didn’t because Gary knew he had been convicted of a crime punishable for a term exceeding one year, for which he served 691 days on a felony burglary conviction. As such, he couldn’t show a reasonable probability that he wouldn’t have pleaded guilty but for the error, the Government asserted.

The Court rejected the Government’s position. Ordinarily, the defendant must indeed show that but for the error he would not have pleaded guilty; however, the Court noted that the Supreme Court has instructed that a constitutional invalid guilty plea cannot stand even when there’s “overwhelming evidence that the defendant would have pleaded guilty regardless.” United States v. Rodriguez Benitez, 542 U.S. 74 (1993).

The Court observed that the Supreme Court has long recognized “a special category of forfeited errors that can be corrected regardless of their effect on the outcome” and that “not in every case” is a defendant required to “make a specific showing of prejudice” to meet the affecting substantial rights prong. Olano. The Fourth Circuit recognizes this special category as “structural errors.” United States v. David, 83 F.3d 638 (4th Cir. 1996).

The Court found the error at issue is structural because it “violated Gary’s right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest.” Thus, he had the right to make an informed choice on whether to plead guilty or to exercise his right to go to trial. The misinformation on the elements deprived Gary of his “right to determine the best way to protect his liberty.”

The Court also found the deprivation of the autonomy interest under the Fifth Amendment due process clause has consequences that “are necessarily unquantifiable and indeterminate,” rendering the impact of the district court’s error “simply too difficult to measure.” Thus, the Court ruled the “district court’s erroneous acceptance of a constitutionally invalid guilty plea seriously affects the fairness, integrity or public reputation of judicial proceedings.” Olano.

Accordingly, the Court vacated Gary’s guilty plea and convictions and remanded the case to the district court for further proceedings. See: United States v. Gary, 954 F.3d 194 (4th Cir. 2020).

Is the Death Penalty Slowly Dying Across the Nation?

by Chad Marks

In 1972, the Supreme Court of the United States (“SCOTUS”) in Furman v. Georgia eliminated the death penalty. The Court, in striking down state-sanctioned killing, identified problems such as racism, arbitrary application, and the fact that ending people’s lives did little to nothing in the way of public safety.

While Furman abolished the death penalty, it did not take long to get the killing machine back up and running. In 1976, SCOTUS upheld a new set of laws in Gregg v. Georgia, paving the way to walk people back down the lonely hallway of death.

Forty-four years after Gregg, support for the death penalty is dwindling. For example, in 1998 — almost 300 death sentences were imposed in the U.S. Twenty years later, in 2018, only 43 were imposed. In the last 10 years, six states have rid themselves of the state-sponsored killings by either legislation or court order. Four others have imposed moratoriums on executions. As of April 2020, the death penalty is legal in 28 states, plus the federal government and military, according to deathpenaltyinfo.org.

For the same reasons SCOTUS tossed out the death penalty in Furman, the general public’s support for the death penalty is decreasing. The National Academy of Sciences has suggested that there are hundreds of Americans who are innocent and slated to be put to death. This suspicion points to the unsettling reality that both innocent men and women across the nation have been put to death under a broken criminal justice system that includes the death penalty.

Putting people to death based on faulty or incomplete police work, prosecutorial misconduct, ineffective assistance of counsel, junk science, and a host of other issues has raised eyebrows even among conservatives and other tough-on-crime constituencies.

For example, the conservative-led state of Wyoming has been looking at repealing its stance on the death penalty, which proponents see as impractical, too costly, and a failure at deterring crime.

Since July 2, 1976, over 1,448 people have been executed, while 132 people have been exonerated. Those numbers should leave citizens to wonder how many of the 1,448 were innocent yet nevertheless put to death by the government. 2,373 people that were sentenced to die were resentenced. This means that courts have stepped in to correct errors that occurred during the trial process. While death sentences are declining year after year, the number of people of color sentenced to die in recent years has increased. The facts show that capital punishment has failed. People are recognizing this truth. When even one innocent person is put to death, the whole system has failed — and should be scrutinized. For those who aren’t bothered by the execution of a single factually innocent person, ask yourself what if it were you or someone you love. Would that single execution bother you now?

Perhaps in a government For the People, By the People we should be marching the death penalty to its own execution. Folks on both sides of the aisle seem to support this. Why wait when doing so may result in the execution of another innocent person?

Source: theintercept.com
HUNDREDS OF ROGUE JOINT STATE-FEDERAL TASK FORCES—ACCOUNTABLE TO NO ONE, AND ACTING AS UNITS OF VIGILANTE JUSTICE—CONTINUALLY VIOLATE THE CONSTITUTIONAL RIGHTS OF INDIVIDUALS WHILE HIDING BEHIND THE AGES OF “QUALIFIED IMMUNITY.”

The concept of the “joint task force” was first initiated by President Richard Nixon in the early 1970s and designed to conduct raids as part of the “war on drugs.”

Dan Baum, author of the 1996 publication Smoke and Mirrors, suggests these entities were basically designed to be a “strike force that could kick down doors and put the ‘fear of God’ into drug offenders without burdensome hurdles like the Fourth Amendment or separation of powers.”

The ‘70s were a turning point in America’s concept of crime and punishment. On the big screen, actors like Charles Bronson in Death Wish or Clint Eastwood as Dirty Harry portrayed vengeful enforcers with no respect for social or constitutional restraints. Such restraints were viewed as impediments to “getting the bad guys”—the beginning of a social acceptance that suggested “get the bad guys, at any cost.” Hollywood fed the public’s xenophobic fear of lawless thugs by providing villains that begged to be viciously stomped on. In fact, it received public encouragement in the form of tolerances and social acceptance that suggested “get the bad guy into drug offenders without burdensome hurdles like the Fourth Amendment or separation of powers.”

The public’s tolerance of rogue police practices became the seeds of punitive justice that we endure 50 years later.

Task force protocols and enforcement often show little regard for the bedrock constitutional principle of “innocent until proven guilty.” Increasingly, more and more innocent Americans have found themselves the subject of a criminal investigation and with an agent’s jackboot on their neck, both figuratively and literally.

One such victim was James King of Grand Rapids, Michigan. The 21-year-old college student was walking from one part-time job to another when he was accosted by two men who had been leaning against a black SUV. King had no way of knowing that he was being confronted by two agents—one, an FBI agent, the other, a local detective. The two officers were part of a joint task force looking for a fugitive who had stolen “a box of empty cans and several bottles of liquor” from King’s former boss’ apartment.

The men did not identify themselves as police. Instead, they began threatening King and pinned him against their vehicle. When they took his wallet, King believed he was being mugged and tried to escape; at which time, he was summarily tackled, choked unconscious, and severely beaten by the agents.

While he was being brutalized, King screamed for help from two passersby, who also did not recognize the attackers as police. The witnesses dialed 911. Interestingly, the bystanders captured the incident on video, but when police officers arrived on scene, the “uniformed” police followed “good-ol’-boy” protocols and moved to protect the agents by demanding that the witnesses immediately delete the contents of their video.

Agents then charged King with serious felonies despite the fact that the agents were carrying a photo of the actual suspect who looked nothing like King. Eventually, law enforcement admitted that King was not the suspect for whom they were originally searching, but the agents proceeded to arrest him anyway. King was cuffed, taken to a hospital, and later jailed until his parents posted bail. The county took him to trial despite not being the suspect, where he was eventually acquitted by a jury on all charges but not before bankrupting his family who funded his defense.

After the trial, King attempted to sue the two officers for violating his rights but ran head-on into a “blue wall.” The system closed ranks to protect the officers from any accountability for their lawless behavior.

The case was dismissed on federal jurisdictional grounds as a result of the claim having been filed within a state court, despite the fact that the charges originated with the State of Michigan.

The agents would now claim federal jurisdiction controlled, and all while hiding behind qualified immunity protections.

Military Roots

The concept of “qualified immunity” began with the U.S. military as a safeguard to minimize lawsuits from soldiers who were accidentally injured as part of their standard training in the field.

Because the military could not account for every type of injury, a blanket policy existed to provide legal immunity from lawsuits unless it could be determined that military personnel willfully and intentionally inflicted harm upon a soldier.

In the 1980s, the U.S. Supreme Court adopted this concept and opened a doorway to allow qualified immunity protections to become part of civilian jurisprudence. Now, law enforcement agencies and other governmental entities would be permitted to violate the Constitution if doing so was necessary to perform their duty. The exception would be those instances where previous court rulings had explicitly prohibited a specific action by a police officer or an agent of the government. This blanket protection has now been stretched to protect every governmental agency from liability, including most government medical providers like the Department of Health and Human Services, which oversees medical care in many prisons and jails. Qualified immunity has made it nearly impossible for anyone (especially prisoners) to successfully prevail in a lawsuit against a governmental entity.

Essentially, if you’re a governmental bad actor who is the first to commit a specific type of bad act and thus before a federal court expressly points out the brutally obvious—that the act is in fact a bad act, you’re protected by qualified immunity. It’s basically the functional equivalent of the one-bite rule in tort law, where dogs get one “free bite” after which their owners are held responsible for damages. Based on the behavior of many law enforcement officers who are shield from accountability by qualified immunity, it’s an apt analogy.

In King’s case, the U.S. Circuit Court of Appeals for the Sixth Circuit eventually reversed the decision of the state court but...
Colorado Supreme Court: Requiring Defense to Disclose Exhibits to Prosecution Before Trial Violates Due Process Rights

by Dale Chappell

Ending what had been a “standard case-management practice,” the Supreme Court of Colorado held that a trial court may not order a defendant to turn over his defense exhibits to the prosecution prior to trial under the discovery rule because it violates a defendant’s constitutional rights under the Due Process Clause.

The question of first impression came before the Court after the La Plata County District Court ordered Joshua Kilgore to disclose his defense strategy and exhibits to the prosecution prior to the start of his criminal trial. When Kilgore objected, the trial judge overruled the objection, saying that turning over the defense’s strategy to the prosecution would “foster efficiency and allow for a fair trial.” If Kilgore didn’t comply with the order, he would not be allowed to use any exhibits or strategy not turned over to the prosecution, the court instructed.

Kilgore went straight to the Colorado Supreme Court, requesting the Court to invoke its original jurisdiction because he would otherwise suffer irreparable harm, in that the error could not be corrected later on appeal. He argued that the trial judge’s order violated his constitutional due process rights, among other rights to which he is entitled. The Supreme Court agreed.

Invoking the Supreme Court’s original jurisdiction to hear an appeal is an “extraordinary remedy” that is only for “issues of significant public importance that we have not yet considered,” the Court said. “The disclosure order forces Kilgore to reveal to the prosecution some exculpatory evidence and his trial strategy. And once that happens, any prejudice to Kilgore cannot be undone,” the Court said. “As the old adage goes, you can’t unring a bell.”

The trial judge’s order was issued sua sponte. That is, it wasn’t prompted by either party, and it “appears to have been part of the court’s standard case-management practice,” the Supreme Court noted. Though Colorado Rule of Criminal Procedure 16 authorizes some mutual disclosure of discovery between the defense and the prosecution, the question was whether the trial court’s order went too far.

Colorado “remains one of the few states” that prohibits trial courts from ordering discovery outside the parameters of the statutes and rules that govern discovery, the Court explained. Trial court have no “freestanding authority” to expand discovery in criminal cases.

Rule 16 did not authorize the trial court to order Kilgore to turn over his trial strategy to the prosecution. The Court found that Rule 16 does not mention trial exhibits. And that did not mean that the trial court could add that provision to the rule, it being silent on the issue. “A district court has authority to order only discovery that is specifically authorized by Rule 16,” the Court said.

But there was another overarching issue the Court focused on: the trial court’s order violated Kilgore’s due process rights because had he turned over his trial strategy, it would have helped the prosecution meet its burden to prove its case “beyond a reasonable doubt.” The prosecution’s burden is so “universally accepted” that it has become an “organic component” of the term “due process of law,” the Court explained.

The trial court’s order, in effect, forced Kilgore to “tip his hand vis-a-vis his investigation and theory of his defense” to the prosecution, the Court said. “This is problematic.” There is not a problem per se with Rule 16, the Court clarified, only the trial court’s expansion of the rule. “The provisions of Rule 16(II) adequately ensure that the prosecution is not ambushed at trial without infringing on a defendant’s constitutional rights,” the Court said. A trial court cannot go beyond the rule’s boundaries. Thus, the Court concluded that the district court erred in requiring Kilgore to turn over his trial strategy and exhibits to the prosecution.

Accordingly, the Court made the rule to show cause absolute. See: People v. Kilgore, 455 P.3d 746 (Colo. 2020).

Source: washingtonpost.com, reason.com, ij.org (Institute for Justice)
The Supreme Court of Iowa ordered the dismissal of charges after determining the State breached a plea agreement wherein the State had promised the charges would not be brought.

A fire on January 26, 2018, burned a pole barn in Poweshiek County. Poweshiek County Sheriff’s Deputy Steve Kivi believed the fire was intentionally started and focused an investigation on Montezuma firefighter Chance Ryan Beres as the arsonist. Shortly thereafter, there were additional unexplained fires, including an April 12 fire burning a grass field and a shed. And an April 29 fire burning grass that was followed by another fire on April 30 at the same location that burned an abandoned farmhouse.

Investigators obtained a warrant to install a GPS tracking device on Beres’ vehicle. An abandoned barn was burned in a subsequent fire on May 27, 2018, and the GPS tracking data showed Beres was at the scene of the fire shortly before the fire started. Beres was arrested for starting that fire. Beres admitted to Kivi that he had started the May 27 barn fire and the April 12 grass fire. He denied starting the other three fires. Investigators later obtained cellphone records and cell-site location information (“CSLI”) that showed Beres was at or near the scene of the other fires before, during, and after each fire. Beres was charged with second-degree arson of the agreement, and Beres entered his guilty plea to sentencing.

Then during an informal discussion just moments before the sentencing hearing, the county attorney reiterated he would be bringing additional charges against Beres and suggested that if Beres wanted to withdraw his plea the State would not oppose. Beres declined to withdraw his plea and proceed with sentencing. Neither party raised a possible breach or modification of the plea agreement.

A presentence investigation report (“PSI”) discussed Beres’ involvement in the other fires, but upon objection, the district court did not consider that information. The court entered a deferred judgment and placed Beres on probation for five years. The following month, the State brought four additional charges against Beres related to the fires occurring before the May 27 fire. Beres moved to dismiss those charges, arguing that the State violated the plea agreement in bringing them. The district court denied the motion to dismiss the charges, and Beres took an interlocutory appeal. The Iowa Supreme Court stayed the proceedings pending the outcome of the appeal.

The Court observed “[p]lea bargains are akin to contracts.” State v. Macke, 933 N.W.2d 226 (Iowa 2019). When a plea rests in any significant degree on a promise or agreement of the prosecutor that was part of the inducement or consideration for the plea, the promise must be fulfilled. Santobello v. New York, 40 U.S. 257 (1971). Because of the important role plea agreements play in America’s scheme of justice, strict compliance with the terms of those agreements is required. State v. Beares, 748 N.W.2d 211 (Iowa 2008). When the State breaches the agreement by failing to perform as promised, the defendant is entitled to the remedy of specific performance. Macke. If the prosecution breaches the agreement by bringing additional charges, the court may enforce the agreement by dismissing the indictment. United States v. Brown, 801 F.2d 352 (8th Cir. 1986).

The State argued on appeal that because Beres was never interviewed and the interview was a condition of the agreement, the State’s agreement not to bring other charges went away. But the Court disagreed. When a party’s breach of a contract contributes to the non-occurrence of another party’s duty, that non-occurrence is excused. Restatement (Second) of Contracts § 245. Said succinctly, it was the State that determined it no longer needed the interview, so the State couldn’t use its failure to schedule an interview to claim that Beres didn’t honor the plea agreement. Emp. Benefits Plus, Inc. v. Des Moines Gen. Hosp., 535 N.W.2d 149 (Iowa Ct. App. 1995).

The State also argued that after entering into the agreement, it obtained additional “damning evidence” that made the interview of no value to the State. When pressed, the State claimed that this additional evidence was the CSLI evidence. While admitting the State had the evidence before entering into the agreement, the State argued on appeal that it hadn’t analyzed the evidence to determine the strength of the evidence until after the agreement.

The Court rejected this argument as well, determining that the State had all the pertinent evidence of Beres’ involvement in the fires before the plea hearing. The State was basically arguing “frustration of purpose,” whereby a party is relieved of a contractual obligation if the party’s principal purpose for entering into the contract was frustrated by the occurrence of an event of which the party assumed would not occur. Restatement (Second) of Contracts § 265. This principle was illustrated in Krell v. Henry, 2 KB 740 (Eng. 1903) where a renter’s obligation to rent a flat for two days to observe the King’s coronation was discharged when the King developed appendicitis, and the coronation was postponed. But in the instant case, the State could not “point to a new event that altered the landscape” because, as already determined, it had the pertinent evidence against Beres before entering into the agreement.

Finally, the Court rejected the State’s argument that Beres ratified its unilateral modification of the plea agreement when he refused the State’s offer to withdraw from the agreement and start over. But Beres’s failure to respond wasn’t evidence of any ratification on his part. When the State told Beres it planned to not bring any additional charges related to the other fires before, during, and after each fire, the State would not oppose. Beres declined to withdraw his plea and proceed with sentencing. Neither party raised a possible breach or modification of the plea agreement.

The Court observed “[p]lea bargains are akin to contracts.” State v. Macke, 933 N.W.2d 226 (Iowa 2019). When a plea rests in any significant degree on a promise or agreement of the prosecutor that was part of the inducement or consideration for the plea, the promise must be fulfilled. Santobello v. New York, 40 U.S. 257 (1971). Because of the important role plea agreements play in America’s scheme of justice, strict compliance with the terms of those agreements is required. State v. Beares, 748 N.W.2d 211 (Iowa 2008). When the State breaches the agreement by failing to perform as promised, the defendant is entitled to the remedy of specific performance. Macke. If the prosecution breaches the agreement by bringing additional charges, the court may enforce the agreement by dismissing the indictment. United States v. Brown, 801 F.2d 352 (8th Cir. 1986).
to bring additional charges and offered not to oppose Beres’ motion to withdraw his plea, the State had not yet breached the agreement. When a breach is anticipated, the injured party may wait until the breach is completed before taking action to hold the party responsible for nonperformance. Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988).

Furthermore, the State’s unilateral decision to withdraw from the agreement and an offer not to oppose Beres’ motion to withdraw his plea wasn’t a “new agreement” as evidenced by the fact that the State did not inform the district court at sentencing of any new or modified agreement (which the State was required to do under Iowa R. Crim. P. 2.8(2)(c)). And most importantly, “the State may withdraw from a plea bargain at any time prior to, but not after, actual entry of the guilty plea by the defendant...” State v. Weig, 285 N.W.2d 19 (Iowa 1979). There was no new agreement to be ratified because the State could not legally withdraw from the plea agreement in October because Beres had pleaded guilty in July.

Accordingly, the Court reversed the district court’s order that denied Beres’ motion to dismiss and remanded with instructions to grant the motion and dismiss the charges. See: State v. Beres, 2020 Iowa Sup. LEXIS 50 (2020).

Carpenter Slowly Remaking Fourth Amendment Case Law
by Anthony Accurso

The U.S. Supreme Court issued a landmark decision in 2018, which has been slowly changing the way courts interpret the Fourth Amendment of the U.S. Constitution in our era of mobile technology — and impacting the day-to-day investigative efforts of police.

In Carpenter v. United States, 138 S. Ct. 2206 (2018), the Supreme Court ruled that the Fourth Amendment protects data generated by mobile phones known as historical cell-site location information. Previously, police departments could make informal requests of telecom companies to produce this data.

The Court said such information creates a “detailed chronicle of a person’s physical presence compiled every day, every moment over years” and that police must obtain a warrant before accessing this data.

Since the Court issued its decision in Carpenter, it has been cited in over 450 criminal and civil cases across the country.

Lower courts are applying Carpenter in ways that limit the investigative techniques of police because the nation’s top court has signaled this shift in how we should view the expectation of privacy in a world where technology facilitates sharing personal details with third parties (usually large corporations).

In Commonwealth v. Almonor, 120 N.E.3d 1183 (Mass. 2019), and State v. Muhammad, 451 P.3d 1060 (Wash. 2019), the courts applied Carpenter to require a search warrant before police may “ping” a cellphone to obtain its present location or the location of the vehicle.

In United States v. Moore-Bush, 381 F. Supp. 3d 139 (D. Mass. 2019), and People v. Tajoya, 2019 Colo. App. LEXIS 1799 (2019), the courts ruled the use of digital cameras mounted on poles, which can watch a person’s home or backyard for months on end, also violate our expectation of privacy and “provokes an immediate negative visceral reaction,” raising “the specter of the Orwellian state.” Just because a space is visible by the public does not mean police can observe and record it for months.

Databases of otherwise innocuous information also can be problematic. Police have been collecting data from automated license plate readers and use this data to create an aggregate portrait of a person’s life, including sensitive data like travel to doctor offices and places of worship.

Android and iPhone user-location data are also collected over time, and police have used “geofence warrants” to determine who was nearby when a crime was committed, an attempt to backtrack criminals, but which also sweeps up hundreds of innocent citizens for close scrutiny.

Police have used genetic databases in around 200 cases in 2019. Research shows that 60 percent of white Americans could be easily identified by using one database alone.

These tactics amount to the kind of “fishing expeditions” the Fourth Amendment drafters intended to protect us against.

Carpenter will continue to shape the intersection of technology and the law and will hopefully continue to curtail some of the most egregious abuses of modern surveillance by authorities.

Source: eff.org

Justice Office Awards $145 Million in Forensic Science Grants
by Anthony Accurso

The Office of Justice Programs at the Department of Justice recently announced grants of more than $145 million being awarded through various programs it helps to fund. These grants will cover initiatives centered on forensic science.

Notable inclusions from this total are:

• $78 million to state and local jurisdictions to help reduce DNA evidence backlogs.
• $18.7 million for funding into new or better forensic testing methods.
• $1.9 million for improving efficiency of current forensic testing methods.
• $27.3 million will go to state and local governments to fund crime labs, medical examiner’s offices, and coroner’s offices. This will also help clear backlogs of some physical evidence types.
• $5.5 million will go to fund daily operations of the National Missing and Unidentified Persons System (NamUs), which acts as a central repository for missing persons and unidentified decedents.

• $1 million will be used to fund prosecution of “cold” cases of violent crime using DNA testing.

Some readers may not know that the federal government spends tax dollars funding scientific research. But, knowing this, it’s refreshing to see the DOJ allocating at least some money to exonerating the wrongfully convicted.

According to OJP Principal Deputy Assistant Attorney General Katharine T. Sullivan, “The Department is committed to improving and investing in forensic science because it plays a vital role in providing indisputable and scientifically based information that protects our communities.

Source: forensicmag.com
California Federal Court Rejects Plea Agreement’s Waiver of Compassionate Release Provision

by David M. Reutter

The U.S. District Court for the Northern District of California rejected the plea agreement that required the defendant to waive his right to seek compassionate relief unless he exhausted all administrative rights of appeal for the Bureau of Prisons’ (“BOP”) failure to bring such a motion on his behalf.

The Court’s May 11, 2020, order began by asking, “Must a term of imprisonment be set in stone, no matter what happens after it is imposed?” It then posed a series of questions about what should occur if an “unforeseen tragedy,” such as “chronic illness, disability, or aging makes it impossible for the defendant to care for himself during incarceration.”

“[W]hile the Plea Agreement leaves open a path to compassionate release, it is hardly wider than the eye of a needle,” wrote Judge Charles R. Breyer. The waiver is “unacceptable inhumane.”

A brief history of compassionate release from its creation by the Parole Reorganization Act of 1976 and BOP’s “dismal record” of applying the “extraordinary and compelling reasons” standard was detailed. An Inspector General report “found that in general, the only requests given serious consideration were for inmates with life expectancies under twelve months.”

From 2006 to 2011, just 24 prisoners were granted compassionate release, and BOP did not approve a single non-medical request. In that time period, “twenty-eight defendants whose compassionate release requests had been approved by the Warden and Regional Director died waiting for the BOP Director to act.” BOP’s lack of time standards upon which to act on a prisoner’s request are also a problem when one considers having to navigate its administrative appeals process.

“[W]e are not about to create circumstances upon which prisoners exercise the tremendous discretion entrusted to them with such a lack of compassion?”

Accordingly, the Court rejected the plea agreement. See: United States v. Osorto, 2020 U.S. Dist. LEXIS 82661 (N.D. Cal. 2020).

Aggressive NYPD Police Tactics Spreading COVID-19

by Michael Fortino, Ph.D.

Like a scene out of Will Smith’s movie, Legend, one of the most iconic visual images during the New York City lockdown in the wake of COVID-19 is a photo of a lone policeman on horseback patrolling a deserted downtown street. Juxtaposed to that image is a different scene further uptown of three NYPD officers aggressively infiltrating a crowd of partygoers where no one, police nor patrons, is wearing a mask. The complex reality of this unusual setting is that some people, intent on returning to normal life, may begin to clash with police in defiance of social distancing, resulting in a risk of COVID-19 exposure on all sides of the equation.

Toward the end of March 2020, NYPD officers began to step up enforcement policies as social distancing became the catchphrase for a new order of compliance in the city. It began in Brooklyn when three individuals were arrested for failing to “socially distance themselves.” The violators were charged with obstructing governmental administration, unlawful assembly, and disorderly conduct. One of the perpetrators, a female, was ultimately thrown in jail for 36 hours with two dozen other female prisoners and all without masks, soap, or distancing protocols.

These infractions were followed by New York Governor Andrew Cuomo’s announcement threatening to make social distancing
posed to the virus. It is estimated that nearly physically accompany individuals following closely together, to restrain suspects, and to officers, city police are still obligated to patrol. "The NYPD has to get more aggressive. Period."

With any police action, there is almost always interaction. Police are usually the first responders on scene, and the first to make "physical contact" with that individual or group for whom they have been called upon to respond. With an obligation to infringe any non-compliant group failing to properly social distance, police intervention could quickly escalate into physical and possibly violent interactions. "It's basically just setting up police encounters, and any police encounter does have some potential to escalate," suggests Jennvine Wong, a staff attorney at Legal Aid's Cop Accountability Project. "One of the failings right now, she asserts, "is the NYPD has not been communicating very clearly to the public what their role actually is in policing during this time."

As of April 3, 2020, it was estimated that more than 1,400 NYPD employees, including more than 1,000 police officers, have tested positive for COVID-19, and that was early in the epidemic. Today, that number has increased dramatically. According to Thelntercept.com, the department's overall infection rate back in early April, 2020 exceeded 3.8 percent — far higher than the city's overall 0.5 percent, which would suggest that the public is at greater risk of exposure from NYPD than NYPD may be from the public.

One problem may be the fact that NYPD officers, although issued an equipment belt and a bullet-proof vest, have not been equipped to protect themselves from COVID-19 exposure. The Police Benevolent Association, the largest police union in the city, filed a complaint accusing the department of failing to issue officers personal protective equipment ("PPE"), including masks and gloves. Although PPE have only recently been made available to frontline officers, city police are still obligated to patrol closely together, to restrain suspects, and to physically accompany individuals following an arrest.

There also exists a cumulative effect on outside communities should an officer be exposed to the virus. It is estimated that nearly half of NYPD officers travel from and return to communities where they live outside of city limits. According to Alex Vitale of Policing and Social Justice Project at Brooklyn College. "The police are themselves both at risk of getting sick and at risk of spreading the disease." This concern first came to light when it was determined that guards at local, state, and federal prisons were being exposed to COVID-19 then becoming vectors of the contagion upon returning to their home and community.

With new social distancing laws in place, enforcement has its costs. Josmar Trujillo, a community organizer in East Harlem, is concerned that "police can come and escalate and make things worse." Trujillo points out that there exists disproportionate enforcement within poor neighborhoods and communities of color. He has witnessed NYPD raiding block parties, unplugging DJ events, and even removing the hoops from city basketball courts. Trujillo describes a more significant issue in assessing this compliance breakdown. He comments, "If I just looked out my window, the only semblance of government that I would see would be the NYPD. You don't see Health Department officials out here. You don't see people sanitizing public spaces like they did in China. It's a ghost town except for the police."

NYPD has long practiced a form of law enforcement known as the "Broken Windows Policing" — a concept of remaining vigilant and addressing even the smallest infraction within a crime-ridden area so to "keep up appearance" and to instill a sense of partnership between police and community. Along with constant vigilance, this policy, unfortunately, requires enforcement and arrest. In following with the "Broken Windows" initiative, police in New York have attempted to continue to execute low-level arrests in the midst of this global pandemic. One individual was approached for playing loud music, then subsequently arrested upon discovery of a 10-year-old warrant for spitting.

"In the wake of a global pandemic," "each arrest," Wong suggests, "puts any agency personnel involved, police and corrections officers, court staff, and other arrestees at risk because we don't know who has it and who doesn't."

Source: theintercept.com

COVID-19 Causing Some Pretrial Detainees to Spend More Time in Jail

by Douglas Ankney

In New York, persons accused of felonies are brought before a judge who decides whether to impose bail. Then prosecutors must present the evidence before a grand jury within six days and obtain an indictment. If the prosecutor fails in this process, the person can plead with the judge to go free. But Governor Andrew Cuomo suspended the six-day deadline in his March 22, 2020, stay-at-home order. New York court officials deemed grand jury hearings as non-essential while the COVID-19 outbreak is underway.

Appearing before a judge to set bail is relatively easy. It can be done via a video and a TV monitor. But convening a grand jury requires assembling a large number of people. And suspending the six-day deadline has resulted in those unable to make bail sitting in jail for longer periods. Only about one in four people charged with a felony in New York are indicted by a grand jury. Prosecutors often drop the charges within the six-day window if victims or witnesses refuse to testify or if the case appears too weak to lead to a conviction. With the suspension of grand juries, "people who could have their cases resolved, they are now sitting in jail," said Stan German, executive director of New York County Defender Services.

This is especially devastating to the sick and infirm. Curtis Holly told the judge in Manhattan criminal court that his immune disorder, asthma, and infected gunshot wound put him at risk of death if he were held at the Rikers Island jail complex where a COVID-19 outbreak rages. Holly burst into tears when the judge set his bail at $5,000. Even though the victim didn't want to press charges, Holly remained in jail eight days later without being indicted.

While New York, Florida, and Iowa have suspended grand juries and are keeping pretrial detainees in jail, California has taken an opposite approach during the coronavirus pandemic. There, judges have been ordered to free those accused of lower-level felonies on $0 bail.

Source: themarshallproject.org
The Supreme Court of California announced an extension of its prior rule of when to allow application of an amended sentencing statute, such that it may be applied to a defendant’s sentence still under appeal even though that sentence resulted when his probation was revoked.

In November 2014, Douglas Edward McKenzie pleaded guilty in Medera County district court to a number of drug-related offenses. Under Health and Safety Code, former § 11370.2, each of his four previous drug offenses qualified him for an extra three consecutive years in prison per offense. However, the district court imposed a five-year probationary period and a suspended imposition of sentence.

In March 2016, after several alleged probation violations, McKenzie’s probation was revoked, and the court imposed a prison sentence that included 12 years of enhancements for his priors. McKenzie then appealed. While awaiting review, California passed a bill that eliminated the enhanced penalties for drug-related priors. The California Supreme Court remanded to the Court of Appeal to determine if McKenzie qualified for the reduction, and it found he did. The People appealed, and the Supreme Court granted review.

The People argued that § 1237 of the Penal Code, subdivision (a), provides in relevant part that a defendant may appeal “from a final judgement of conviction” and that “an order granting probation ... shall be deemed to be a final judgement within the meaning of this section.” Thus, McKenzie’s sentence became final when he failed to appeal the original sentence of probation, which precluded him from being granted relief from the amended statute.

The Supreme Court noted from People v. Superior Court (Giran), 523 P.2d 636 (Cal. 1974), “If the amended statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used.” People v. McKenzie, 459 P.3d 25 (Cal. 2020).

NY Court of Appeals: Right to Review Suppression Decision When Decision Relates Solely to a Count Satisfied by Plea but Isn’t Count to Which Defendant Pled

The Court of Appeals of New York held that N.Y. Crim. Proc. Law (“CPL”) 710.70(2) grants a defendant the right to appellate review of a decision on a suppression motion when the decision relates solely to a count that was satisfied by a plea of guilty but was not the count to which the defendant had pleaded guilty.

David M. Holz was indicted on two counts of second-degree burglary. Count One involved the theft of a laptop computer, and Count Two related to stolen jewelry. Holz filed a motion to suppress the jewelry, which the trial court denied. Because Holz had prior convictions, he faced a maximum prison term of 30 years. He entered a plea of guilty to the laptop theft in Count One in satisfaction of the entire indictment in exchange for a sentence of six years of imprisonment, followed by five years of post-release supervision.

Holz appealed, contending that the trial court erred in denying his motion to suppress the jewelry. The Appellate Division affirmed without reaching the merits, holding that “[t]he judgment of conviction on appeal here did not ensue from the denial of the motion to suppress and the latter is, therefore, not reviewable pursuant to CPL 710.70(2).” Holz was granted leave to appeal to the New York Court of Appeals.

The Court observed that CPL 710.70(2) provides “[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.” A governing principle of statutory construction is that courts must attempt “to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used.” People v.
a word is not defined in the statute, dictionaries may be used to determine the common, ordinary meaning of the word because lawmakers employ words as they are commonly or ordinarily used. People v. Aleynikov, 104 N.E.3d 687 (N.Y. 2018).

The word “ensue” is not defined in CPL 710.70(2). But according to Oxford English Dictionary online it means: “To occur or arise subsequently,” or it may mean: “To follow as a result.” By choosing to use the word ‘ensuing’, the Legislature used the broadest of relational terms to convey the connection between the suppression order and the judgment of conviction.

If the legislature had intended to limit appellate review of suppression orders to those orders specifically pertaining to the evidence underlying the count to which the defendant pleaded guilty, it could have easily said so. Matter of Sinker, 678 N.E.2d 454 (N.Y. 1997).

More fundamentally, “the interplay between the evidence and the various related charges in an indictment cannot readily be traced.” Forte v. Supreme Ct. of State of N.Y., 397 N.E.2d 717 (N.Y. 1979). Ruling that an appellate court does not have jurisdiction to hear an appeal based on the supposition that an erroneous suppression order related to the evidence in one count could have no effect on the defendant’s decision to plead guilty to another count in the same indictment requires the court to make a “harmless error” determination without examining the merits of the claim. It also ignores the realities of plea bargaining, e.g., defendants often plead guilty to one count simply because it reduces the number of charges and ends the prosecution on multiple counts. But if an appellate court reversed the denial of a motion to suppress the evidence pertaining to those other counts, the defendant may no longer choose to plead guilty, the Court explained.

Finally, the Court’s statutory construction was supported by the legislative history of CPL 710.70(2). In 1962, the Legislature amended former Code of Criminal Procedure § 813-c to provide that: “If the [suppression] motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.” There was no narrow causal relationship between the order appealed from and the count to which the defendant pleaded guilty in the former Code of Criminal Procedure nor was one added when the former code was repealed and replaced in 1971 by the current Criminal Procedure Law, the Court stated.

The Court of Appeals concluded the decision of the Appellate Division was in error.

Accordingly, the Court reversed the decision and remitted the case to the Appellate Division with instructions to decide Holz’s appeal on the merits. See: People v. Holz, 2020 N.Y. LEXIS 870 (2020).

Writer’s note: In Footnote 3 of the opinion, the Court emphasized that this decision is limited to only those cases where all of the charges are contained in a single indictment.

Report: Cops Ill-Equipped to Handle Mental Illness Crisis in Hospitals

by Ed Lyon

The U.S. Department of Labor ranks hospitals as one of the most dangerous workplaces for a person to work. It seems that hospitals are even more dangerous a venue for a mentally ill person seeking treatment, particularly when police are involved.

“Cops are not trained in best practices to talk to or help someone suffering with mental health issues, let alone in an emergency room, and often arrest or hurt people they perceive as threatening—or worse,” according to Vice.com.

A report by the Treatment Advocacy Center titled “Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters,” reveals that mentally ill people “are 16 times more likely to be killed during a police encounter than other civilians approached or stopped by law enforcement,” and it urges lawmakers to enact public policies to reduce the number of lives lost. Many, if not most hospitals, have their own security personnel. Others employ off-duty cops or even contract with a police department or sheriff’s office if located in a rural area for security. The vast majority of cops are not trained in the methods needed to deal with mentally ill citizens, of which more will typically be found in hospitals than on city streets. Most techniques police officers use to restrain suspects—like handcuffs, Tasers, and tackling moves—are not considered medically appropriate for a person suffering from mental health problems,” notes Vice.com.

Vermont’s Department of Mental Health (“DMH”) characterizes cops and security officers working in hospitals as outside contractors who need specialized training and respond to hospital staff’s supervision when they handle a patient. There has been an increase in the use of cops at hospitals, at least in Vermont, since Hurricane Irene in 2011 damaged its state hospital so badly it had to be closed. This was Vermont’s only hospital with a dedicated psychiatric treatment facility. The state’s remaining hospital system, eight of which are rural and have only 25 beds or fewer, are now severely overtaxed trying to provide for the health needs of mentally ill patients.

The bill for providing security services by police at city hospitals and sheriff’s deputies at rural hospitals has been paid by DMH. There has been little, if any, attention paid to expanding the skill sets cops already possess to include those needed to handle mentally ill patients. Regulatory agencies and federal regulators are hearing reports of cops mishandling mental patients at hospitals, and the problem has spread to Maryland, according to recent reports.

The Caledonia County, Vermont, Sheriff’s Department provides security for the Northeast Vermont Regional Hospital. Sheriff Dean Shatney stated his deputies primarily patrol the parking lot but have all been state-trained on how to respond to citizens undergoing a mental health crisis.

Some deputies have volunteered for an advanced level course. “When a crisis arises,” Shatney stated the responding deputies’ primary mission is “to keep everyone safe.”

Training, training, and more training is likely the best answer to the way average cops handle situations involving a mental health patient in crisis.

Source: vice.com
Plenty of Practice Prevents Poor Police Performance

by Ed Lyon

It is a rare week to pass without a report of an accidental shooting by police. The reason for better than 99 percent of these accidental weapon discharges is the lack of ongoing firearm training after a law enforcement officer completes initial academy training.

Most firearms training instructors agree the average police officer is at his or her most proficient level of firearms familiarity upon training academy graduation. This finding leads to yet another surprising fact — there is no unified standard for academy firearms training for cadets at federal and most state levels — or subsequent ongoing training programs either.

At Washington state’s Law Enforcement Training Center (“LETC”), cadets undergo 90 hours of firearms training. According to LETC firearms instructor Sean Hendrickson, “Those skills that they receive here at the academy, firearms skills, degrade pretty rapidly after they leave the academy if they’re not practicing or getting more training.”

According to an Associated Press report on December 9, 2019; Washington state’s required 90 hours of academy training topped the list of states that responded to queries about training standards. Amounts reported by other states varied, with Florida at 80 hours, Missouri at 66 hours, Utah at 52 hours and Georgia, Illinois, and Indiana at only 40 hours.

With less and less initial training, firearms skills will degrade even more quickly. This was found to be especially true for the “block and silo” methodology of firearms instruction employed by most police academies.

LETC firearms program manager Doug Tangen put it bluntly, stating that accidental shootings by cops “are all caused by a degree of negligence because at some point the officer violated one or more of the four universal firearms safety rules: Assume all guns are loaded, always point the muzzle in a safe direction, keep your finger off the trigger, and be sure of your target and what it beyond it. Guns don’t go off by themselves.”

There are over 3,000 law enforcement agencies at all levels of government in the U.S. Not all of them responded to the AP’s inquiries. Compiled from those that did respond, media reports and public records requests showed a total of 1,422 accidental shootings were identified from 2012 to present. These incidents were from only 258 agencies, leaving about 2,750 law enforcement agencies unreported on and those who did most likely the proverbial tip of the iceberg concerning accidental police shootings.

Jason Wuestenberg is the executive director of the National Law Enforcement Firearms Instructors Association. He advocates scenario-based exercises that mirror high stress situations both at the academy and throughout every officer’s career. He believes that “Usually when something bad happens, it’s due to a lack of training or leadership.”

Anyone familiar with the military is aware that accidents involving firearms there are rare, few and far between. The military’s “six Ps” are “Prior Practice and Planning Prevent Poor Performance.”

Perhaps law enforcement agencies should add two more Ps to that for ‘Plenty of Prior Planning and Practice Prevents Poor Police Performance’ with respect to its officers and their firearms.

Source: apnews.com

Fifth Circuit Clarifies How ‘Pronouncement Requirement’ Applies to Supervision Conditions

by Douglas Ankney

The U.S. Court of Appeals for the Fifth Circuit clarified how the requirement that a district court pronounce its sentence in the presence of the defendant applies to conditions of supervised release.

After Rosie, Walter, and Anita Diggles were convicted by a jury of fraud in connection with their receipt of hurricane-relief funds, the U.S. District Court for the Eastern District of Texas imposed conditions of supervised release in addition to terms of imprisonment. The court confirmed that the Diggles had reviewed the Presentence Report (“PSR”) with their attorneys and then stated: “Looking at the Revised Presentence Investigation Report, those conditions are found [under the heading] ‘Supervision Conditions Recommendation.’ Those are no longer just a recommendation; those are the conditions and special instructions that I have adopted.”

Under the heading referred to by the district court were two subheadings labeled “Mandatory Conditions” and “Special Conditions.” The Special Conditions read, in part:

“You must pay any financial penalty that is imposed by the judgment.

“You must provide the probation officer with access to requested financial information....

“You must not incur new credit charges or open additional lines of credit....

“You must not participate in any form of gambling....”

The Diggles appealed, arguing, inter alia, that the district court failed to pronounce the conditions of their supervised release.

The Court agreed to hear the appeal en banc because the Circuit’s caselaw was confusing and created “a granular distinction at best and a backwards one at worst.”

For example, in United States v. Rivas-Estrada, 906 F.3d 346 (5th Cir. 2018), the Court vacated supervised release conditions because the sentencing judge told the defendant that the conditions recommended in the PSR would be imposed but did not recite them one-by-one. But in United States v. Rouland, 726 F.3d 728 (5th Cir. 2013), the Court upheld conditions when the district court merely admitted a Probation Office memo recommending the conditions but did not address them further.

Additionally, the Fifth Circuit had held that pronouncement was not required for what the Sentencing Guidelines called “mandatory” and “standard” conditions. United States v. Torres-Aguilar, 352 F.3d 934 (5th Cir. 2003), but pronouncement was required for “discretionary” and “special” conditions. United States v. Vega, 332 F.3d 849 (5th Cir. 2003).

Yet a condition might be labeled “special,” but the circumstances may make it tantamount to a “standard” condition and obviate the need for an oral pronouncement. Torres-Aguilar. To complicate matters even further, the Fifth Circuit had held that sometimes when a condition that is labeled “special” was made “standard” by the circumstances, it may again be made “special” when the judgment labels it as such. United States v. Ramos, 765 F. App’x 70 (5th Cir. 2019).
The Court acknowledged that the case law on the issue is confusing and stated “We can do better.” In providing much-needed clarity on the issue, the Court began with the source of the pronouncement requirement that emanates from a defendant’s due process right to be present at sentencing. United States v. Huff, 512 F.2d 66 (5th Cir. 1975). It is inherent in the right and opportunity to defend. Snyder v. Massachusetts, 291 U.S. 97 (1934).

In the context of conditions of supervised release, a defendant may defend by objecting to discretionary conditions, but there was little a defendant could do to defend against mandatory conditions. So the Court concluded that the confusion could be eliminated by tethering the pronouncement requirement to 18 U.S.C. § 3583(d) — the statute that distinguishes between required and discretionary conditions.

The Court announced the following rule: If a condition is one of those listed in 18 U.S.C. § 3583(d) that the district court “shall” impose, then oral pronouncement of the condition by the court is not required. Any other conditions are discretionary and require oral pronouncement in the presence of the defendant.

Having clarified the standard for application of the pronouncement requirement to conditions of supervised release, the Court turned to the instant appeal. The Court determined that the latter three of the Special Conditions imposed upon the Diggles were discretionary and required pronouncement. But there was no error because the district court had orally adopted the contents of the PSR. The Diggles had confirmed they had reviewed the PSR. When the district court orally adopted the PSR, the Diggles had opportunity to object to the conditions.

Accordingly, finding no error, the Court affirmed. See: United States v. Diggles, 957 F.3d 551 (5th Cir. 2020).


by Douglas Ankney

The U.S. Court of Appeals for the First Circuit held that a conviction for violation of 21 U.S.C. § 841(a)(1) is a "covered offense" under § 404 of the First Step Act where the defendant was sentenced under 21 U.S.C. § 841(b)(1)(c).

In January 2007, Carl Smith was found guilty of two counts of distributing crack cocaine and one count of distributing powder cocaine, all in violation of 21 U.S.C. § 841(a)(1). The presentence investigation report attributed to Smith a total of 1.69 grams of crack cocaine and 3.36 grams of powder cocaine. Because these amounts were below what was required for a mandatory minimum sentence, Smith was sentenced under subsection (b)(1)(c). However, the U.S. District Court in New Hampshire determined Smith was a "career offender" and sentenced him to 210 months.

In August 2010, President Obama signed into law the Fair Sentencing Act, which raised the crack-cocaine threshold quantities for triggering mandatory-minimum sentences. Prior to the passage of the Fair Sentencing Act, § 841(b)(1)(A)(iii) imposed a minimum sentence of 10 years imprisonment if the defendant was convicted of an offense involving 50 grams or more of crack-cocaine (aka cocaine base). The Fair Sentencing Act increased the minimum threshold amount to 280 grams. Similarly, the Fair Sentencing Act increased the threshold amount of crack-cocaine from 5 grams to 28 grams before a mandatory minimum sentence of five years had to be imposed under § 841(b)(1)(B)(ii). But none of these modifications applied to sentences imposed before President Obama signed the Fair Sentencing Act into law. Dorsey v. United States, 567 U.S. 260 (2012).


The Government opposed the motion, arguing that Smith’s crimes did not involve a quantity of drugs that met the threshold requirements of either § 841(b)(1)(A)(iii) or § 841(b)(1)(B)(ii). Consequently, he was sentenced under § 841(b)(1)(c), which is not a "covered offense" as defined by § 404. The district court agreed and denied Smith’s motion. Smith appealed.

The First Circuit observed § 404 provides that: "(a) DEFINITION OF COVERED OFFENSE. — In this section the term ‘covered offense’ means a violation of a Federal criminal statute, the statutory penalties for which were modified by a section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010."

The Fourth, Fifth, Sixth, and Eighth Circuits have determined the phrase “the statutory penalties for which were modified” in § 404(a) apply to the term “Federal criminal statute” and not to the term “violation.” (See opinion for listing of authorities cited from those Circuits.) The First Circuit concurred, explaining: “With no hint of an argument by the government or the district court that we should hold otherwise, we will assume that this case law [of the foregoing Circuits] is correct.” This meant eligibility for relief is determined by the defendant’s statute of conviction and not by the defendant’s “violation” or “actions” that transgressed the statute.

The Court then determined that “Federal criminal statute” encompassed all of § 841 and not merely particular subsections of § 841. The headings to § 841 support this determination. Section 841(a)’s heading reads: "Unlawful acts." Section 841(b)(1)’s heading reads: "Penalties." Section 841(a) is the "Federal criminal statute" Congress had in mind when writing § 404(a), and § 841(b)(1)’s "Penalties" are what Congress had in mind when writing "statutory penalties for which were modified," the Court concluded.

Section 841(b)(1)(c) provides a penalty not to exceed 20 years’ imprisonment for convictions involving a quantity of drugs less than the minimum amounts for triggering mandatory sentences in other subsections of § 841. At the time of Smith’s conviction, the minimum amount of crack-cocaine required to trigger a mandatory minimum sentence was 5 grams. But the Fair Sentencing Act raised that to 28 grams. Consequently, Smith was convicted of violating a "Federal criminal statute, the statutory penalties for which were modified by … the Fair Sentencing Act" or a "covered offense."

Accordingly, the Court reversed the order of the district court and remanded for proceedings consistent with the Court’s opinion. See: United States v. Smith, 954 F.3d 446 (1st Cir. 2020).
Sixth Circuit: Courts May Consider Good Prison Conduct in Sentence Reduction Under First Step Act

by Dale Chappell

The U.S. Court of Appeals for the Sixth Circuit held on April 14, 2020, that a sentencing court may consider a prisoner’s good conduct in fashioning a lower sentence in light of the First Step Act.

The ruling came after John Allen filed under the First Step Act to reduce his federal drug sentence imposed in 2007, but the district court denied his request. While the court praised Allen for his “commendable” prison conduct, it stopped short of considering such conduct to reduce his sentence.

“The court’s authority to reduce defendant’s sentence is strictly limited to statutory authority,” District Judge Christopher Boyko of the U.S. District Court for the Northern District of Ohio said. He reasoned that “the First Step Act in this instance limits the court’s review to the time defendant committed the covered offense. Thus, any good behavior that occurred after the covered offense is immaterial.”

On appeal, the Sixth Circuit rejected this interpretation. Under 18 U.S.C. § 3582(c) (1)(B), a court may modify a sentence where such modification “is expressly permitted by statute,” the Court noted. While §§ 3582(c) (1)(A) and (c)(2) have “constraints” on what a court may consider in modifying a sentence after it’s been imposed, the Court concluded that § 3582(c)(1)(B) depends on the statute authorizing the reduction, as there are no limitations per se under § 3582(c)(1)(B).

Does the First Step Act then authorize a sentencing court to consider post-sentencing conduct in reducing a sentence? The Sixth Circuit identified four reasons in concluding that it does. First, and most important, “the First Step Act does not prohibit courts from considering the factors outlined in § 3553(a),” the Court said. The factors under 18 U.S.C. § 3553(a) require a sentencing court to consider several factors in crafting a sentence, which includes information about the person’s history and conduct. “Section 404’s silence regarding the standard the courts should use in determining whether to reduce a defendant’s sentence cannot be read to limit the information that courts may consider,” the Court said.

Second, the Court reasoned that “it would be inappropriate to impute the substantive standards contained in §§ 3582(c) (1)(A) and (c)(2) to § 3582(a)(1)(B) or to draw a negative inference from the fact that §§ 3582(c)(1)(B) does not contain any substantive standard.” In other words, just because § 3582(c)(1)(B) doesn’t say that courts can use the § 3553(a) factors, does not mean a court cannot do so.

Third, the Court considered some policy concerns addressed by the First Step Act. “The judges considering First Step Act motions will frequently not be the original sentencing judges because of the length of sentences in crack-cocaine and cocaine-base cases,” the Court explained. And the First Step Act expressly says a court may reduce a sentence as though the Fair Sentencing Act “were in effect at the time the covered offense was committed.” “Thus, prohibiting courts from assessing the § 3553(a) factors would require the courts to exercise their discretion based on a record that was not created with the current statutory framework in mind.”

Fourth, the Court cited the Supreme Court’s decision in Pepper v. United States, 562 U.S. 476 (2011), which held that courts may consider post-sentencing conduct under the § 3553(a) factors when resentencing. While Pepper dealt mainly with plenary resentencing, the Sixth Circuit said that “such a distinction does not logically prevent courts from considering post-sentencing conduct in assessing the § 3553(a) factors during a § 3582(c)(1)(B) sentence-modification proceeding.”

Accordingly, the Sixth Circuit reversed the district court’s denial and remanded to reconsider Allen’s First Step Act motion consistent with this opinion. See: United States v. Allen, 956 F.3d 355 (6th Cir. 2020).

Minnesota Supreme Court: Hotel Guests Have Reasonable Expectation of Privacy in Registry Information

by Douglas Ankney

In a case of first impression in the Supreme Court of Minnesota, the Court held that hotel guests have a reasonable expectation of privacy in the sensitive location information found in hotels’ guest registries, and police must have a reasonable, articulable suspicion of wrongdoing to search those registries.

Police arrived at a Bloomington hotel for a “hotel interdiction” — a law enforcement strategy where officers coordinate with hotel operators to target guests who use hotels for purposes of sex trafficking or to sell/use illegal drugs. The officers requested to examine the hotel guest registry and asked the clerk for the names of any guests who had paid in cash.

Minnesota law requires all lodging establishments to collect in a registry each guest’s name and address, vehicle information, and the names and addresses of any travel companions. Minn. Stat. §§ 327.10–13. Guests must provide this information and hotel operators must make this information available to law enforcement. Id. Failure to comply is subject to misdemeanor prosecution. Id.

The clerk provided the registry and told them the room number of a man who had paid in cash. Using the registry to identify the man as John Thomas Leonard, the officers then requested a background check that revealed Leonard had prior arrests for drugs, firearms, and fraud. Based on this information, the officers decided to conduct a “knock and talk” at the door of Leonard’s room. Leonard opened the door after the officers knocked and gave them limited consent to search the room. When Leonard attempted to flee, officers arrested him. They then secured a search warrant and discovered over $2,000 worth of suspicious checks payable to “Spencer Alan Hill,” over $5,000 in cash, and check-printing paper.

Leonard was charged with two counts of check forgery. Before trial, he moved to suppress the evidence found in his hotel room. Applying the “third party doctrine” from United States v. Miller, 425 U.S. 435 (1976), the district court denied the motion, reasoning that because guests disclosed the registry information to hotel employees, the guests...
held no reasonable expectation of privacy in the information. Leonard proceeded with a bench trial on stipulated evidence consisting of the items found in his hotel room. The district court found Leonard guilty, and he appealed, arguing the court erred in denying his suppression motion. The court of appeals affirmed, and the Minnesota Supreme Court granted review.

The Court observed that it has “a responsibility to safeguard for the people of Minnesota the protections embodied in our constitution.” State v. Akerood, 681 N.W.2d 353 (Minn. 2004). Article I, Section 10 of the Minnesota Constitution requires law enforcement officers to have an objective individualized articulable suspicion of criminal wrongdoing before conducting warrantless searches. State v. Carter, 697 N.W.2d 199 (Minn. 2005). The same standard applies to investigative traffic stops. Ascher v. Commissioner of Public Safety, 519 N.W.2d 183 (Minn. 1994).

Minnesota’s constitution provides greater protection than the federal constitution. For example, the Minnesota Supreme Court ruled in Carter that a suspicionless search outside of a self-storage unit with a dog-detection dog constituted a prohibited search under the state constitution but acknowledged that it didn’t constitute a search under the Fourth Amendment and thus did not implicate legitimate privacy interests under the federal constitution as per Illinois v. Caballes, 543 U.S. 405 (2005). Similarly, the U.S. Supreme Court has ruled that temporary roadblocks stopping all drivers to catch those driving under the influence of alcohol do not violate the Fourth Amendment. Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990). In contrast, the Minnesota Supreme Court ruled that such suspicionless seizures by police were prohibited by the state constitution. Ascher.

The Court in the present case explained that “Carter and Ascher demonstrate without a doubt that Article I, Section 10 of the Minnesota Constitution provides greater protection against suspicionless law enforcement conduct than the Fourth Amendment to the United States Constitution.” The Court further explained that under state law a search occurs when law enforcement intrudes upon an individual’s subjective expectation of privacy that society is prepared to recognize as reasonable. State v. Gail, 713 N.W.2d 851 (Minn. 2006).

Whether hotel guests have a reasonable expectation of privacy under Article I, Section 10 in the location information found in the hotel registry was an issue of first impression in Minnesota, so the Court turned to the Washington Supreme Court’s decision in State v. Jorden, 156 P.3d 893 (Wash. 2007), for guidance. The Washington court determined that there was a privacy interest because hotels provide necessary space for people engaged in consensual — but deeply private — relationships; for confidential business negotiations; for celebrities; and for people hiding from an abuser in situations involving domestic violence. The Minnesota Supreme Court, persuaded by the reasoning of Jorden, held that hotel guests have an expectation of privacy in the location information.

The Court further determined that Minnesotans were prepared to recognize that privacy interest as reasonable, reasoning that ‘most Minnesotans would be surprised and alarmed if the sensitive location information found in the guest registries at hotels ... was readily available to law enforcement without any particularized suspicion of criminal activity.’ Therefore, the examination of the registry was an unlawful search because the police did not have reasonable, articulable suspicion that Leonard was engaged in criminal activity before examining the guest registry.

Consequently, the district court erred when it denied the motion to suppress because the evidence from the room should have been suppressed as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471 (1963). Since Leonard could not have been convicted without the evidence, the error wasn’t harmless. State v. Horst, 880 N.W.2d 24 (Minn. 2016).

Accordingly, the Court reversed the decision of the court of appeals and remanded to the district court for further proceedings consistent with its opinion. See: State v. Leonard, 2020 Minn. LEXIS 284 (2020).

DNA Database of NYC’s Chief Medical Examiner Plagued with Errors

by Douglas Ankney

Darrell Harris was arrested for a home burglary that occurred in December 2018.

A detective from the New York Police Department (“NYPD”) told Harris his DNA had been recovered from a window of the home. Even though the arrest cost Harris his job at the John F. Kennedy Airport, he paid $25,000 for a lawyer and provided an alibi placing him in New Jersey when the burglary was committed. Then, in June 2019, police dropped the charges.

An investigation revealed that a lab technician from New York City’s Office of Chief Medical Examiner (“OCME”) had cross-contaminated the DNA sample from the window with a sample Harris had earlier provided in a sexual misconduct investigation.

“Errors like these, and the lab’s inability to detect them, should concern the public,” said Terri Rosenblatt, staff attorney for the Legal Aid Society (“Society”). “More and more often, criminal cases rise and fall on DNA evidence.”

The Society filed a Freedom of Information Law request and learned of other errors at the OCME’s DNA lab, including:

• a man who was wrongfully arrested for rape based on a confirmed DNA match from the lab (the man provided an iron clad alibi — he was in prison when the rape occurred);
• DNA profiles in the database taken from witnesses and victims (these are prohibited by law);
• DNA profiles in the database that were taken from minors without parental consent (again, prohibited by law); and
• DNA profiles in the database from deceased persons and victims of homicide.

The Society, along with NYPD Commissioner Dermot Shea, are insisting the City Council impose tougher regulations on the OCME lab. “These changes are common sense and incorporate feedback we have gathered without compromising the ability for officers to successfully identify criminals, build strong cases and bring justice for victims,” Shea said in a New York Times article. Currently, the OCME is required to disclose errors to the City Council only if one or more of the following occurred: (1) intentional analyst misconduct leading to fabricated results; (2) significant errors affecting the accuracy of a report; (3) a failure to follow protocols that affected a report’s accuracy; or (4) misleading statements in testimony by laboratory employees.

Source: theappeal.org

Criminal Legal News 43 July 2020
The Supreme Court of Pennsylvania described the contours of “breach of the peace” and held that operation of a motor vehicle with an expired registration sticker is a traffic violation that does not qualify as a breach of the peace justifying a traffic stop.

Victor Lee Copenhaver was convicted of driving under the influence after being arrested during a traffic stop. Prior to trial, Copenhaver filed a motion to suppress all evidence, asserting that the deputy sheriff lacked authority to conduct the traffic stop. He argued that the deputy may arrest for violations of the Vehicle Code only when he witnesses a violation that involves a breach of the peace, but an expired registration is not a breach of the peace.

In lieu of testimony at the suppression hearing, the parties stipulated that (1) the deputy observed that the registration on the truck was expired, (2) the registration number was identified as belonging to a vehicle other than the pickup truck, and (3) the deputy had training and qualifications equivalent to that of a police officer.

The common pleas court denied the motion on the grounds that the registration sticker, belonging to a different vehicle, meant the vehicle could have been stolen. This gave the deputy authority to conduct the traffic stop because theft of a vehicle is a violation that constitutes a breach of the peace.

Copenhaver was convicted at the ensuing bench trial, and he appealed, arguing that the deputy did not know prior to the traffic stop that the registration belonged to a different vehicle. The Superior Court affirmed, holding that driving with an expired registration — regardless of whether the registration belonged to another vehicle — was a breach of the peace. The Supreme Court of Pennsylvania granted Copenhaver’s petition for further review. Importantly, the Court expressly limited the question under review to “whether operating a vehicle with an expired registration, standing alone, amounts to a breach of the peace, and hence, that is the only question we will resolve.”

The Court observed that deputies who have received the same training required of police officers have residual common law authority to enforce the Vehicle Code when they witness a violation that comprises a breach of the peace. Commonwealth v. Marconi, 64 A.3d 1036 (Penn. 2013). A breach of the peace “generally manifests [itself] by some outward, visible, audible or violent demonstration; not from quiet, orderly, and peaceable acts secretly done...” Commonwealth v. Sherman, 14 Pa. D.&C. 4 (C.P. Phila. 1930). Legal scholars agree that “both the major common law treatises and the immediate post-framing American sources indicated that ‘breach of the peace’ was understood to refer to violent or potentially violent public tumults or disturbances.” Thomas Y. Davies, The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239 (2002). “A breach of the peace is ... a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community,” People v. Perry, 193 N.E. 175 (N.Y. 1934). The Court announced: “we now hold that—for purposes of a deputy sheriff’s common law authority to enforce the Vehicle Code—a breach of the peace arises from an act or circumstance that causes harm to persons or property, or has a reasonable potential to cause such harm, or otherwise to provoke violence, danger, or disruption to public order.”

The Court then concluded that a vehicle’s registration tag expires with the passage of time and is passive in nature. It does not tend to incite violence, disorder, or public or private insecurity. Thus, it does not comprise a breach of the peace and does not justify a traffic stop.

Accordingly, the Court vacated the Superior Court’s order insofar as it had held that operating a vehicle with an expired registration tag is a breach of the peace. But the Court remanded for the Superior Court to determine if the deputy’s understanding that the registration sticker belonged to another vehicle occurred before the traffic stop. See: Commonwealth v. Copenhaver, 2020 Pa. LEXIS 2201 (2020).

The Supreme Court of South Carolina rejected the U.S. Supreme Court’s ruling in Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019), to the extent that Mitchell shifts to the defendant the burden to prove the absence of exigent circumstances to justify a warrantless blood draw.

Kathryn Martin Key drove her vehicle across the center line, struck an oncoming vehicle, drove off the road, and hit a tree. Trooper Aaron Campbell arrived within 15 minutes of the accident. Key was transported to the hospital while Campbell stayed on the scene to investigate. In Key’s glove compartment, Campbell found an almost-empty mini bottle of Jack Daniel’s whiskey. Campbell decided to charge Key with DUI and open container, but when he arrived at the hospital, he found Key in the emergency trauma bay — intubated and unconscious from her injuries. Campbell arrested the unconscious Key for DUI. Without seeking a search warrant, Campbell asked a nurse to draw Key’s blood and subsequent testing revealed Key’s blood alcohol concentration (“BAC”) was .213%.

Key moved pretrial in summary court to have the BAC evidence suppressed on the grounds that Campbell’s failure to obtain a warrant violated the Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the South Carolina Constitution. Key con-
The State responded that under S.C. Code Ann. § 56-5-2950(A) (2018) (the “implied consent statute”) Key had consented to the blood draw. The State further argued, “Judge, this is not a case where we have to look for exigent circumstances. We are not looking for an exception to the warrant requirement.” The summary court denied the motion to suppress and, after a bench trial, found Key guilty.

Key appealed to the circuit court where the State urged affirmance not only on the consent argument, but also argued that the record was “replete with evidence of exigent circumstances.” The circuit court rejected the State’s position that the implied consent statute permitted a warrantless blood draw, reversed Key’s conviction, and remanded for a new trial. The circuit court did not address the State’s exigent-circumstances argument. The State appealed, ultimately relying solely on its exigent-circumstances argument in the South Carolina Supreme Court.

The Court observed “[i]t is settled that the collection of a person’s blood for BAC testing is a search and seizure under the Fourth Amendment.” Schmerber v. California, 384 U.S. 757 (1966). The Fourth Amendment prohibits unreasonable searches and seizures, and evidence seized in violation thereof must be excluded from trial. State v. Khingratsaiphon, 572 S.E.2d 456 (S.C. 2002). Searches conducted without a warrant are per se unreasonable. Kentucky v. King, 563 U.S. 452 (2011). But the warrant requirement may be overcome in certain situations where the search was reasonable in the absence of a warrant. Id. Consent and exigent circumstances are two of the recognized exceptions to the warrant requirement. State v. Brown, 736 S.E.2d 263 (S.C. 2012). The burden is on the State to justify a warrantless search. State v. Peters, 248 S.E.2d 475 (S.C. 1978). The Court recognized that the U.S. Supreme Court, all state, and lower federal courts had consistently held that the State bears the burden of establishing exigent circumstances.

However, Mitchell seemed to be an exception. In Mitchell, a DUI defendant argued that a warrantless blood draw was unconstitutional. Justice Alito and three additional justices ruled that when a DUI suspect is unconscious, it “almost always” satisfies the exigent circumstances exception to permit a warrantless blood draw. Justice Thomas provided the necessary fifth vote — concurring in judgment but explaining that he would impose a more expansive rule that created an exigent circumstance in every DUI case “regardless of whether the driver is conscious.”

Justice Alito’s opinion also stated that there may be situations where police encountering an unconscious DUI suspect won’t give rise to exigent circumstances. Because Mitchell had not been given an opportunity to prove an absence of exigent circumstances, the case was remanded to give Mitchell an opportunity to do so. But because Mitchell was decided by a fragmented U.S. Supreme Court, only the position that had the consent of at least five justices can be said to be the true “holding.” Marks v. United States, 430 U.S. 188 (1977). The ruling that Mitchell was to prove the absence of exigent circumstances did not have the support of at least five justices.

Because a defendant enjoys constitutional protection from unreasonable searches, the South Carolina Supreme Court opined it “must ... part company with the Mitchell Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances. We have consistently held the prosecution has the sole burden of proving the existence of an exception to the warrant requirement.”

The Court concluded that in Key’s case the question of exigent circumstances was not litigated. Accordingly, the Court reversed the circuit court’s decision and remanded to the summary court with the burden upon the State to establish the existence of exigent circumstances. If the State fails to meet its burden, Key would receive a new trial with the BAC evidence suppressed. If the State establishes exigent circumstances, Key’s conviction will stand. See: State v. Key, 2020 S.C. LEXIS 71(2020).

Report: Risk Assessment Tools not Effective, Especially When not Used

by Kevin Bliss

Risk assessment tools are not effectively reducing pretrial detention or prejudicial profiling practices in determining bail. In addition, few counties concern themselves with the effectiveness of such programs, not even bothering to monitor their results.

Two organizations looking to make the government more transparent, Media Mobilizing Project and MediaJustice, have collected information from more than 1,000 counties across 46 of the country’s states and the District of Columbia. They have built the database dubbed Mapping Pretrial Injustice (“MPI”). It was released in February 2020, along with video of in-depth interviews with 56 pretrial service agencies and detention officials. The video alleges that these tools are rarely monitored to compare with their intended goal of increasing pretrial release and decreasing missed court appearances and recidivism.

Arnold Ventures created a Public Safety Assessment to use for bail evaluation in 2012. Its intended goal is to reduce inherent biases that come into play when human judges make decisions and identify candidates for bondless pretrial release. MPI found only nine jurisdictions showing a decrease in pretrial incarceration since the addition of risk-assessment tools. Most have remained the same if not increased. Fresno County, California, adopted the Virginia Pretrial Risk Assessment Instrument in 2012, and within two years, its pretrial population has increased 125 percent.

George Mason University law professor Megan Stevenson published a research paper last year that states judges regularly ignore the risk-assessment recommendation and impose harsher conditions. While risk assessment tools determine that in 90 percent of cases an individual is eligible for a no-bail release, only 29 percent are actually granted.

Data scientist Cathy O’Neill stated that databases are not built off of crime, but off of arrests. The number of arrests far exceeds the number of convictions, and previous practices of racial profiling are automatically perpetuated when that data are included in the database.

Lola Rainey, founder of the Tucson Second Chance Community Bail Fund, said, “Caging people in pretrial detention does not make us safe. We need to ask ourselves why, as a community, why, as a society, we think some people are entitled to freedoms and liberties and some are not. And most of the people we’re denying those liberties to are people of color or people who are otherwise marginalized. That’s the real conversation.”

Source: theappeal.org
**Sixth Circuit: District Court’s Refusal to Reduce Crack Sentence Under First Step Act Requires Justification**

*by Dale Chappell*

The U.S. Court of Appeals for the Sixth Circuit held on May 15, 2020, that the refusal by the U.S. District Court for the Eastern District of Kentucky to reduce a crack cocaine sentence under the First Step Act required the court to justify why it wouldn’t reduce the sentence, especially where the old guideline range was more than double the new guideline range under the First Step Act.

After the First Step Act was passed in 2018, Marty Smith filed a pro se letter to his sentencing court asking for counsel to be appointed to see if he would be eligible for a reduced sentence under the Act. Instead of appointing counsel, the court construed his letter as a motion under 18 U.S.C. § 3582(c)(1)(B) and denied relief. The court acknowledged Smith was eligible for relief but refused to lower his sentence, citing the “need to protect the public” because statistics showed people like Smith are at high risk for recidivism.

In 2006, Smith pleaded guilty to conspiracy to distribute more than 50 grams of crack cocaine. His guideline sentencing range ("GSR") was 168 to 210 months, but because of a prior conviction, the Government filed a notice under 21 U.S.C. § 851 requiring the court to impose a mandatory minimum of 20 years in federal prison. And that’s the sentence the court imposed.

The First Step Act, however, retroactively applies the Fair Sentencing Act ("FSA") to people like Smith, which bumps up the amount of crack needed to trigger harsh sentences. It allows a court to resentence someone as if the FSA were in effect at the time of their original sentencing. But it’s not automatic, and a district court has “discretion” in granting relief under the Act.

On appeal, the Sixth Circuit acknowledged as much but reiterated that discretion doesn’t mean just whatever the judge wants to do: The judge must still follow established legal standards in justifying his decision to grant or deny relief.

Smith’s GSR after application of the FSA was cut to just 77 to 96 months. Under 18 U.S.C. § 3553(a), a district court must consider several factors when deciding to reduce a sentence. This includes any policy concerns about the sentencing guidelines and whether the sentence is greater than necessary.

While a court can sentence outside the GSR, it “must ensure that the justification is sufficiently compelling to support the degree of the variance,” the Sixth Circuit explained. “The variance in this case is certainly a major one. It is twice the maximum of the guideline range set by the statute, and two-and-a-half times what the guideline would otherwise be.”

The justification the district court gave — that Smith’s risk for reoffending required a need to protect the public — was already accounted for in the amended guidelines after the FSA. This was not “sufficient justification for maintaining a sentence that is twice the maximum of the guideline range set by Congress,” the Court said. This was “especially true” when the district court found a within-guideline sentence reasonable the first time.

Accordingly, the Sixth Circuit vacated the district court’s denial of Smith’s First Step Act motion and remanded to the district court.


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**Florida Supreme Court Abandons Circumstantial Evidence Review Standard**

*by David M. Reutter*

In affirming the conviction and death sentence of Sean Alonzo Bush, the Supreme Court of Florida announced it is abandoning the different standard for reviewing wholly circumstantial evidence cases.

Bush was convicted of the brutal attack on his estranged wife Nicole Bush. The couple was separated when Bush allegedly disarmed the alarm panel to Nicole’s home in the early morning hours of May 31, 2011. The medical examiner testified that Nicole was shot six times with a .22-caliber weapon, five times in the head and once in the elbow. She also sustained blunt force injuries from a baseball bat. At least three of the blows were to the top of her head, splitting her skull and bruising her brain. She also was stabbed in the left breast and right arm. She was able to call for help but died hours later from her injuries at the hospital.

Bush was arrested in September 2011. A jury returned a verdict on August 2, 2017, finding him guilty of first-degree premeditated murder, felony murder, and burglary of a dwelling with an assault. It unanimously recommended the death penalty, and the trial court imposed a death sentence for the murder and a life sentence for the burglary.

As required by the Florida Constitution, a direct appeal was brought in the Florida Supreme Court. Bush challenged the sufficiency of the evidence, arguing the evidence was wholly circumstantial and requested it apply the special standard it has applied to such cases. The Court agreed that “the State’s case is based on entirely circumstantial evidence,” but it found the special standard is unwarranted.

“For many years, Florida has been an outlier in that we have used a different standard to evaluate evidence on appeal in a wholly circumstantial case than in a case with some direct evidence,” the Court wrote. “[W]e will join all federal courts and the vast majority of state courts for the same reason that Florida abandoned the special circumstantial evidence standard for use in instructing juries in 1981.”

Florida’s history of using a special standard of review for circumstantial evidence cases is fully explained in *Knight v. State*, 107 So.3d 449 (5th Cir. 2013). That case articulated the standard this way: “Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.”

The U.S. Supreme Court called that standard into question, opining “where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.” *Holland v. United States*, 348 U.S. 121 (1954). All federal courts and most state courts abandoned that special standard in the wake of *Holland*. The Florida Supreme Court cited *Holland* when abandoning the circumstantial evidence jury instruction in 1981, but
Attorney Kim Gardner, who now heads the Johnson sits in prison where he's been for a half-dozen people were exonerated by the Integrity Unit (“CIU”) in Detroit. At least a prosecutor’s office opened a Conviction but also to acknowledge mistakes of the past. has emerged across the U.S., seeking not only wrongfully convicted.

Forcing prosecutors to waste valuable
efforts to uncover additional cases of the now be used in all cases where the sufficiency of the evidence is analyzed.” Applying that standard to Bush’s appeal, the Court found the evidence presented supported the conviction. To hold otherwise would be contrary to the jury’s instructions that inform it to not entertain “a mere possible doubt, a speculative, imaginary, or forced doubt,” explained the Court.


O ver the past 10 years, a growing number of reform-minded prosecutors has emerged across the U.S., seeking not only to reform current tough-on-crime practices but also to acknowledge mistakes of the past. For example, in 2018, the Wayne County prosecutor’s office opened a Conviction Integrity Unit (“CIU”) in Detroit. At least a half-dozen people were exonerated by the CIU in less than a year.

But in St. Louis, 45-year-old Lamar Johnson sits in prison where he’s been for the past 25 years for a murder he has always maintained he didn’t commit. And Circuit Attorney Kim Gardner, who now heads the office that prosecuted Johnson in 1995, uncovered evidence that prosecutors knowingly presented false testimony at Johnson’s trial and paid $4,000 to the only eyewitness in the case. That witness later recanted the testimony. But St. Louis Circuit Judge Elizabeth Hogan rejected Gardner’s motion seeking a new trial for Johnson, finding the motion was untimely by “approximately 24 years.” The issue is now bound for the state Supreme Court, as agreed to by the Missouri Court of Appeals, usatoday.com reports.

In March 2019, Philadelphia District Attorney Larry Krasner attempted to resentence a death row prisoner to life because Krasner concluded the death sentence wasn’t justified on legal grounds. But a federal judge blocked it. In September 2019, a Boston judge refused to allow Suffolk County District Attorney Rachael Rollins to dismiss charges against a nonviolent political protester.

These battles with the courts do damage. Forcing prosecutors to waste valuable resources defending the truth risks dampening efforts to uncover additional cases of the wrongfully convicted.

The Appeal.org has said, “If we want to restore public confidence in our legal system, it’s essential that prosecutors be given the same authority to undo flawed convictions and sentences as their predecessors were given to pursue them.”

Source: theappeal.org,usatoday.com

Courts Oppose Prosecutors’ Attempts to Right Past Wrongs

by Douglas Ankney

Further, it’s often the local prosecutors who have access to key evidence, but these feuds often end up in appellate courts where the state’s attorney general handles the case.

As an author of a news story from theappeal.org has said, “If we want to restore public confidence in our legal system, it’s essential that prosecutors be given the same authority to undo flawed convictions and sentences as their predecessors were given to pursue them.”

No Trust Between Police and Communities They Patrol

by Kevin Bliss

The $14 billion invested in police equipment and community policing in the U.S. has not helped instill trust and camaraderie between the police and black communities, says writer and activist Philip McHarris, in an article published in The Appeal.

In fact, it only offers more opportunity for police violence and legitimizes their propensity for punishment and control.

McHarris said proponents for a more active police force in black communities stated that it built trust and partnership.

He mentioned Bill Clinton signing the Violent Crime Control and Law Enforcement Act (1994 crime bill) when he was President establishing the Community Oriented Policing Services, which increased police presence and resources in minority communities. Coincidently, it was not the first time someone attempted to increase police presence as a means of promoting community relations. It usually followed some police action of negative impact.

The Kerner Commission of 1968 reported that almost half the urban uprisings in the preceding three years were a response to some act of excessive force by police. It advocated for more jobs, improved housing, and better education instead of a greater police presence, a recommendation President Johnson ignored.

To many, more police presence is simply a greater level of surveillance, arrest, and violence. McHarris pointed out that the NYPD’s website stated: “Neighborhood Policing greatly increases connectivity and engagement with the community without diminishing, and, in fact, improving the NYPD’s crime-fighting capabilities. The NYPD has long encouraged officers to strengthen bonds with the communities they patrol.” Instead, they come across more as an occupying force looking for criminal activity in every resident.

McHarris suggested that the money invested in police presence could instead be used in programs that foster safety and wellness, drug treatment, schools, hospitals, rapid response teams, and violence interruption initiatives.

“For many people that I know, their relationship with the police is irreparable,” McHarris said. “No amount of conversations or events will fix the relationship, or make them comfortable calling 911 in an emergency. Divesting from policing and investing in communities will ultimately make people far safer than policing ever will.”

Source: theappeal.org
A unanimous Supreme Court of North Carolina held on May 1, 2020, that waving the middle finger at the police was not disorderly conduct to justify a traffic stop and subsequent charges stemming from that stop.

Trooper Paul Stevens of the North Carolina Highway Patrol was assisting a stalled vehicle in Stanly County in January 2017, when Shawn Ellis went by in a vehicle with his arm out the window. He waved at Trooper Stevens and then gave him the finger. Stevens then pursued Ellis for about a half-mile until the vehicle stopped. When Stevens asked him for identification, Ellis initially refused. He was cited for resisting, delaying, or obstructing an officer.

In the trial court, Ellis moved to suppress the evidence, arguing there was no reasonable suspicion to justify the stop. In other words, he wasn’t committing a crime to justify the stop. That motion was denied, and he pleaded guilty, reserving his right to appeal the denial of his motion to suppress.

On appeal, the State argued the community caretaking exception to the warrant requirement under the Fourth Amendment was the basis for the stop, so Trooper Stevens didn’t need reasonable suspicion to stop Ellis. But the court of appeals rejected that argument and instead found that Ellis giving the police the finger was enough for reasonable suspicion. Ellis took his case to the North Carolina Supreme Court.

The question before the high court was whether the stop was valid. If not, Ellis’ conviction for obstruction could not stand. If so, Ellis’ suspicion that defendant intended to or was plainly likely to provoke violent retaliation and thereby cause a breach of the peace.

The Supreme Court found that, under the facts known at the time, Trooper Stevens did not have reasonable suspicion to suspect Ellis was engaged in disorderly conduct. Those facts were: (1) Ellis gestured with his middle finger; (2) Trooper Stevens didn’t know if his gesture was directed at him or someone else; and (3) after pursuing the vehicle for half a mile, Trooper Stevens did not observe any traffic violations or other suspicious behavior.

“We conclude that these facts alone are insufficient to provide reasonable suspicion that defendant was engaged in disorderly conduct,” the Court said. And even if Ellis was giving the finger to another person, that “does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another driver” to suspect disorderly conduct, the Court explained.

Accordingly, the Supreme Court reversed Ellis’ conviction and remanded the case. See: State v. Ellis, 841 S.E.2d 247 (N.C. 2020).

COVID-19 May Ring in a New Era of High-Tech Private Policing

by Michael Fortino, Ph.D.

And Corporation, a prominent think tank known for its ability to forecast future trends, describes a post-COVID-19 era where police departments experience reduced, if not curtailed power, and are rendered nearly obsolete as a protectorate of the public from risk of a coronavirus outbreak.

Retired Police Chief Bob Harrison, in describing life in America in 2030, envisions a post-apocalyptic existence 10 years from now where our economy has all but collapsed, where we are forced to avoid any and all social interactions, and where our daily routines consist of monitoring devices that track our every move to keep us compliant. We will soon fall under the watchful eye of a newly coined law enforcement known as, “COVID Cops.”

In this post-COVID-19 world, schooling has moved online, entertainment is now experienced through compartmentalization, which may include spectator enjoyment from the protection of a viewing bubble. Brick-and-mortar stores, and our ability to touch merchandise before we purchase it, will become a thing of the past. Home theaters will be as commonplace as kitchens, and houses of worship will be experienced virtually.

Human life, as we knew it, has moved out of neighborhoods and communities and into the cozy corners of cyberspace.

Unfortunately, municipalities may not have the skill set or resources to police this new and unbridled high-tech wild west. By 2030, Harrison believes revenue for police departments from traffic fines will have decreased sharply. This will result from far fewer travelers on our highways due to an impending and continual fear of travel in the wake of a contagion.

Harrison predicts that the traffic we do see will be predominantly made up of self-driving vehicles designed to entirely eliminate human error and folly, thus reducing the number of citations.

With decreased revenue from traffic fines, police departments will soon be strapped economically. Compounded with less revenue, investigative costs will increase as a result of more complex caseload involving identity theft and cybercrime. Because local police departments are typically deficient in this area of expertise, municipalities, Harrison theorizes, will be required to contract these services from the private sector, which will greatly increase budgetary obligations.

Harrison imagines that small police departments will merge into regional conglomerates to save money and to pool resources. Though he does not believe in the sci-fi fantasy of RoboCops patrolling cities backed up by swarms of laser-armed drones, he does believe there will be automated crime reporting and robo-dispatchers, many originating from the private sector. “By 2030,” he predicts, “virtual call-takers [will screen] public queries so efficiently that people [won’t] notice the difference from talking to a human.”

Others see a future where cellphone tracking apps via GPS will become pervasive. In many countries including the U.S., authorities have already begun the use of cellphone technology to assist in controlling the spread of the pandemic through contact tracing, a po-
New Technique Separates Mixed DNA Evidence to Tell Suspects from Victims

by Dale Chappell

WHEN 17-YEAR-OLD BARBARA BLATNIK was found dead in December 1987, Cleveland police found DNA under her fingernails, but it was a mixture of hers and her killer’s. At the time, DNA techniques couldn’t separate mixed DNA, and the case went cold.

However, a new technique used by Identifiers International separated the DNA in the mixture and then excluded the DNA from Blatnik. The result was a DNA sequence of the suspect. But who?

Porchlight Project, a nonprofit that helps families of the missing and murdered in Ohio, teamed up with Identifiers International to get that answer. “Using CODIS, [it’s] very difficult to separate mixtures with a clear major and minor contributor” of DNA, Colleen Fitzpatrick, Identifiers International’s founder, said. Using today’s genealogy techniques is a “game-changer,” she proclaimed. “It opens the door for so many other sexual assault cases that otherwise may never be solved.”

Fitzpatrick uploaded the suspect’s DNA data to GEDmatch and got a match for James Zastawnik. He was then arrested for Blatnik’s murder. This was the first case for Porchlight Project, and it was a success.

“They have done an incredible service to the Blatnik family and our police department,” Cuyahoga Falls Mayor Don Walters said. Porchlight Project intends to take three or four cases a year. They provide free private investigation services, funding for DNA testing, and media support.

“We hope to see many other sexual assault cases coming in that have mixtures that have defied resolution,” Fitzpatrick said. “We want to extend the applicability of genetic genealogy to more and more challenging cases that, even given the availability of genetic genealogy, are currently considered and unsolvable.”

Source: forensicmag.com

Feds Ramp up Purchase of Riot Gear in Wake of COVID-19 Pandemic

by Douglas Ankney

IN PREPARATION FOR WHAT MAY APTLY BE described as “Mad Max Meets COVID-19,” the federal government has submitted “expedited purchase orders” for disposable cuffs, gas masks, ballistic helmets, riot gloves, and other protective equipment for the federal police assigned to guard Veterans Affairs ("VA") facilities.

According to a May 17, 2020, report from theintercept.com, the special purchases were “in response to Covid-19 outbreak.”

The VA police officers were not armed until 2011 — when the Pentagon began providing military equipment to police forces around the country.

Since then, those officers have “acquired millions of dollars’ worth of body armor, chemical agents, night vision equipment, and other weapons and tactical gear,” according to a 2019 report from The Intercept.

The VA, which manages nearly 1,500 health-care facilities around the U.S., has also extended special contracts for coronavirus-related security services. More than $1.6 million in contracts has been awarded to Redcon Solutions Group (a private security company founded by Iraq War veterans) to provide guards for “Covid-19 screening security guard services.” Similar contracts have been awarded to other private security firms to guard VA facilities in San Francisco, Des Moines, Fayetteville, and elsewhere.

Additionally, the $2.2 trillion CARES Act stimulus package that was passed in March 2020 included $850 million for the Coronavirus Emergency Supplemental Funding Program. These funds are used by local governments to pay for police overtime and medical personal protective equipment, unmanned aerial aircraft, security cameras, command center software, video analytics systems, training, and supplies for detention centers.

Ironically, during this same period of time, the U.S. has experienced a historic drop in violent crime. Apparently, the Feds believe this is the proverbial calm before the storm.
Sixth Circuit Vacates Firearms Possession Conviction; Government Showed Jury Unauthenticated Prejudicial Facebook Video Not Admitted as Evidence

by Matt Clarke

On March 27, 2020, the U.S. Court of Appeals for the Sixth Circuit vacated a firearms possession conviction from the U.S. District Court for the Northern District of Ohio because the Government showed the jury a social-media video of a masked person it alleged was the defendant holding a firearm, without authenticating the video or seeking its admission as evidence.

Terrance Craig was a passenger in an SUV involved in an exchange of gunfire with another vehicle. Police saw Craig toss something into the backseat and recovered a 9 mm handgun with an extended magazine on which they later discovered Craig’s DNA. When arrested, Craig was wearing a shoulder holster. On the way to the police station, an arresting officer said he had seen a Facebook rap video of Craig holding a similar extended-magazine handgun.

Craig was charged with one count of possession of a firearm and ammunition after a felony conviction in violation of 18 U.S.C. § 922(g).

During the trial, both arresting officers told the jury about the rap video, saying it was Craig, and he was wearing the jacket from the video when arrested.

Craig admitted that he was a felon and possessed the firearm. His defense was that he possessed the firearm only long enough to defend himself. He testified he was a backseat passenger when the SUV came under fire. The driver had passed him a holstered gun and told him to defend them. He then put on the holster and fired the handgun over his head out the shoot-out rear window.

On cross-examination, the Government announced it would show the video to impeach Craig. Defense counsel objected that the video was unauthenticated, the person wearing the mask in the video was unidentifiable, and it was more prejudicial than probative. The objection was overruled, and both the jury and Craig were shown the video.

Craig testified that he was not the person in the video. He maintained that the jacket differed in features and zipper placement from the one he wore when arrested. The Government never attempted to have the video authenticated or admitted into evidence but referred to it in closing arguments as proving Craig possessed the handgun. During deliberations, the jury sent out a note requesting to see the video again. The judge told them to use their memory.

Craig was convicted, and the conviction enhanced because the possession occurred while he was discharging a firearm over a public road, a felony violation of Ohio Revised Code § 2923.162(A)(3) and (C)(2). He was sentenced to 110 months in prison consecutive to two state sentences.

With the assistance of Cleveland Federal Public Defender Christian J. Grostic, Craig appealed, arguing that the Government had failed to introduce evidence that Craig was the masked person in the video or that it was the same video the officers had testified about.

The Government maintained it could use the video to cross-examine Craig under Federal Rule of Evidence 608(b). The Court rejected this argument, noting that Rule 608(b) permits questioning about an extrinsic document, not publishing a document or video to the jury without authentication. Likewise, evidence used to impeach a witness under Rule 613 still must be authenticated. Further, the Government did not limit its use to impeachment but "doubled down" when it argued to the jury that the video proved prior possession of the firearm. The district court gave no limiting instruction. Thus, the district court abused its discretion by allowing the Government to play the video for the jury, the Court ruled.

Turning to the issue of whether the error was harmless, the Court stated "We find that the error was not harmless." The Court explained that the video "was extremely prejudicial" and "was also extremely damaging to Craig's testimony." In rejecting the Government's argument that the error was harmless because there was enough evidence to convict without the video, the Court corrected the Government's misunderstanding of the law by explaining that the analysis focuses on "whether the error itself had substantial influence.”

Smith v. Smith, 166 F.3d 1215 (6th Cir. 1998). The Court observed that during deliberations "the jury's only question was a request to see the rap video," which prompted the Court to declare that it's rare an appellate court has "such a clear indication that one specific piece of evidence likely influenced the jury.”

Accordingly, the Court vacated Craig's conviction and remanded for a new trial. See: United States v. Craig, 953 F.3d 898 (6th Cir. 2020).

Army Veteran Serving Life Without Parole for Taking $9

by Douglas Ankney

Willie Simmons became addicted to drugs while in the Army and stationed abroad. In 1982, he was in Alabama and “in need of a quick fix.”

Simmons wrestled a man to the ground and took his wallet that contained nine dollars. Police arrested him a few blocks away. Simmons was charged with robbery. His trial lasted 25 minutes, and his court-appointed attorney called no witnesses. No plea deal was offered.

Because Simmons had three prior convictions — all nonviolent felonies — he was sentenced to life without parole under Alabama’s Habitual Offender Law. He was 25 years old.

Today he is studying for his GED at Holman, one of the most violent prisons in the U.S. There had been drugs all around him, but he still tries “to stay away from the wild bunch,” Beth Shelburne tweeted. Simmons got sober in prison 18 years ago.

“I just talked to God about it,” he said. Simmons’ sister died in 2005, and he hasn’t had a visitor since. “In a place like this, it can feel like you’re standing all alone,” he told WBRC-TV News, Birmingham. “Sometimes I feel like I’m lost in outer space.”

Source: blackenterprise.com
News in Brief

**California:** The death of David Glen Ward of Petaluma was declared a homicide by the Marin County coroner in May 2020, followed by a lawsuit from David’s mother, Ernestine Ward, alleging wrongful death, excessive force and negligent supervision by Sonoma County sheriff’s deputies. Leading up to the fatal encounter, Ward was the victim of a carjacking and theft on November 24, 2019, which he reported to law enforcement, sonomawest.com reports. After Ward recovered his car, a green Honda Civic, he did not tell officers so when an off-duty deputy saw him on the road in the car three days later, police mistook him for the carjacker and pursued him. Ward ended up dead during the traffic stop — even though Ward’s face was still bruised from the carjacking. Then cops “beat, tasered, and choked” him “for nearly a minute. Ward’s body had succumbed to the abuse and he became unresponsive,” the-freethoughtproject.com reports. “As he lay on the ground, completely unconscious, only then did the cops realize Ward was the owner of the vehicle and the victim, not the perpetrator of the carjacking.” An officer said: “This is, this is the owner of the car. This is David Ward. He’s the, he’s the victim.” Sheriff’s Deputy Charlie Blount had attempted to pull Ward out of the car through the driver’s side window, during which he slammed Ward’s head several times against the side of the car and used a carotid restraint on Ward, a body-cam video released by the Sonoma County Sheriff’s Office shows, after which he became unresponsive. At that point, sonomawest.com reports “an unidentified officer” saying, “He’s not breathing anymore.”

The investigative report is now in the hands of the district attorney.

**Florida:** In August 2015, plainclothes deputies grabbed Mary Ellis DeRossett in a nighttime prostitution sting at her home. When she screamed, her uncle John DeRossett responded with gunfire. The Brevard County deputies did not identify themselves, claims DeRossett, and says he shot in self-defense, wounding Deputy John “Casey” Smith in the gunfire. A Fifth District Court of Appeals ruling in April 2020 agreed, citing Florida’s Stand Your Ground law. Said John DeRossett’s attorney Michael Panella: “This order means that John is innocent [on the attempted premeditated first-degree murder of a law enforcement officer], that his actions were justified, and that he never should have been arrested in the first place. It’s a total vindication.” DeRossett and Ellis “were shot and injured in the exchange of over 40 rounds,” floridatoday.com reports. Brevard County Sheriff Wayne Ivey disputed the ruling. “I do respect the judge’s ruling in this case. I don’t agree with it in any capacity. I want to be very clear,” he said.

**Illinois:** Former Chicago police Officer Glenn Lewellen was granted compassionate early release from a Florida prison because of concerns over COVID-19, chicago.suntimes.com reports. “U.S. District Judge Joan Gottschall modified Lewellen’s 18-year sentence to time served for his role in a drug conspiracy, citing the disgraced former cop’s severe obesity, hypertension, and a heart condition,” the news site reports. “The COVID-19 pandemic, combined with Lewellen’s risk factors, constitute extraordinary and compelling circumstances that the court did not and could not have foreseen at sentencing,” Gottschall wrote.

**Illinois:** A drop in some types of crime is making headlines during the pandemic. For starters, a decrease in traffic has meant fewer traffic stops, according to the May 20 Chicago Tribune. In addition, arrests for homicides, sex offenses, robberies and aggravated assaults have dipped by 35 percent when comparing the first four months of 2019 to the first four months of 2020. In the city of Vernon Hills in Lake County, for example, the crime rate decreased by 50%, including a 54% decrease in the serious crimes listed above. “Traffic violations have declined by about 67% during those months and retail theft dropped by 52%,” the Tribune reports. On the other hand, the county Sheriff’s Office notes that motor vehicle burglaries soared “178% from March 2019 to March 2020, and 233% from April 2019 to April 2020. Domestic disturbances also increased by 21% from March last year, and 3% in April. Landlord and tenant disputes went up by 50% in both March and April from last year.”

**Kentucky:** Protests in Louisville the night of May 30 focused on the fatal “police shooting [in March 2020] of Breonna Taylor, an African American who was unarmed when police executed a ‘no-knock’ search warrant at her apartment and returned fire when her boyfriend fired on them,” courier-journal.com reports. “He has said he thought they were intruders.” The protesters had reportedlystockpiled milk and water to use for relief in case they were exposed to pepper spray or tear gas. Amid the protests ’two masked men in plain clothes immediately got out and began to smash the milk and water onto the ground in what appeared to be organized by law enforcement.” A bystander captured the incident on video. Another person began to cry. “That’s our water! We are being peaceful,” said a protester. Louisville Mayor Greg Fischer said there were “Mason jars full of flammable materials included in the protesters’ pile of supplies.”

**Minnesota:** Journalists were injured the weekend of May 29, 2020, following the May 25 death of police suspect George Floyd. Dozens endured pepper spray, rubber bullets and tear gas at Black Lives Matter protests in metro areas. Linda Tirado, a photographer, “was permanently blinded in her left eye” after being struck by a police projectile in Minneapolis, reports theinsider.com, which posted tweets with photos and video of several who were injured around the country. Meanwhile, Tim Walz, the Minnesota governor, denounced the arrests of CNN journalists and gave a public apology.

**Mississippi:** Madison County prosecuting attorney Pamela “Pammi” Hancock has drawn fiery criticism for wishing ill on protesters. She "said in a now deleted Facebook reply that she can only hope the deadly strain of COVID-19 spreads in riots," clarionledger.com reports June 2, 2020. “One of the attorneys in Hancock’s law firm posted the following Facebook message over the weekend: ‘Does covid spread during massive street riots or just in bars and restaurants? Asking for a friend?’ Hancock replied on Facebook: ‘We can only hope the deadly strain spreads in riots.’ While Hancock insists she was not ‘serious about anyone dying,’ other social media commenters were upset. ‘One commenter, Monique Harrison Henderson, said this woman makes decisions about which black people to prosecute. Her words matter. People shouldn’t wish death on anyone. But we aren’t talking about other instances here. We are talking about this,’” clarionledger.com reports.

**New York:** A New York Police Department officer in Queens was captured on video May 30 pulling the mask off of a peaceful protester and pepper spraying him in the face. New York Media report. “The video was taken during a protest in Queens over the Minneapolis police [May 25, 2020] killing of George Floyd,” pix11.com reports. “The man can be seen with his hands in the air as several police officers order protesters to back up off the street. An officer then walks up to the man, pulls his mask down and sprays him directly in the face while the man’s hands are in the air, the video shows.” Other video in New York City revealed that “police officers, in two separate vehicles, rammed a crowd in a street,” theverge.com reports. Separately, a moving police vehicle slammed someone with a car door and drove away.”
Oklahoma: Oklahoma is “one of at least 26 states that treats domestic violence as a nonviolent offense,” cherokeephoenix.org reports. But that could soon change as a bill lands on Gov. Kevin Stitt’s desk: “criminals likely to be added as [violent offenses] are domestic abuse by strangulation, domestic assault with a dangerous weapon, domestic assault and battery with a dangerous weapon and domestic assault and battery with a deadly weapon.” If signed into law, “convicted offenders could serve more time and would receive more scrutiny when they’re up for parole.” Looking at the big picture, however, Stitt touts reform: “We must invest in diversion and treatment programs,” he told tulsaworld.com, citing the need to spend $10 million to break the incarceration cycle, address mental health needs and help with reintegration. “We must release nonviolent offenders from prison who were sentenced on drug charges under old laws.” We will continue to work to clear people convicted solely on the word of a police officer who we can no longer trust,” Harris County, Texas, District Attorney Kim Ogg announced via press release. “We are committed to making sure the criminal justice system is fair and just for everyone.”

Texas: Fallout continues after a former Houston narcotics officer Gerald Goines lied to justify a deadly no-knock drug raid at the home of Dennis Tuttle and Rhogena Nicholas, and who faces state murder charges and federal civil rights charges. Cases involving search warrants with Goines name are being questioned, a total of “at least 91” defendants. “We will continue to work to clear people convicted solely on the word of a police officer who we can no longer trust,” Harris County, Texas, District Attorney Kim Ogg announced via press release. “We are committed to making sure the criminal justice system is fair and just for everyone.”

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**7/2020**

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**Criminal Legal News**
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

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