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The Inevitability of Central Bank Digital Currencies and Their Threat to Human Rights

by Anthony Accurso

Bitcoin is rapidly changing the way we function as individuals in a global and interconnected economy. Even though any individual person may not own or use it directly, it is reshaping economics across the planet. It is, in many ways, the best solution to a unique problem in banking enabled by the digital age.

The rise of Bitcoin and other cryptocurrencies has shaken many governments out of their complacent view with regards to the prevailing economic order, and they are reacting in varying ways to the threat. Many countries and economic zones are now considering creating their own digital currencies to compete, both with Bitcoin and each other.

The choices made by government producers of Central Bank Digital Currencies ("CBDCs"), in the forms these new monies will take, have the potential to irrevocably disrupt the relationship between governments and their citizens. To understand the implications of this seismic shift in technology and policy, we have to understand what purposes money serves in society and the conditions that led to the proliferation of cryptocurrencies.

Money as a Tool

Tools are things that people use to solve problems. Money is a tool, and understanding money requires understanding the problems it is meant to solve.

First, it serves as a *store of value*. You can save money until you have enough to buy something you need or want, or you can save enough so that you no longer need to work (much) to earn enough to be comfortable. Without this tool, we would have the problem of our resources being insufficient to meet our needs or desires at any given moment.

Second, money solves the "problem of *coincidence of wants*—what you want to acquire is produced by someone who doesn't want what you have to sell." When it solves this problem by standing in for bartered goods, it is functioning as a *medium of exchange*.

Third, once money is commonly used in place of barter, it solves the efficiency problems that arise when economies get larger than a small village by functioning as a *unit of account*. This means that goods are priced compared to denominations of the money rather than to each other. Instead of a cow costing 20 chickens, it instead costs 100 shekels.

Short of a magic lamp that grants infinite wishes, all tools are imperfect, and people constantly assess their usefulness while considering better alternatives. Money is like this as well. It has taken many forms throughout the history of mankind and continues to evolve to this day.

For instance, in West Africa for centuries prior to the massive influx of Europeans in the 1600s, Aggry beads (decorated glass bead) were used as a common form of money, employed by a diverse set of social groups. The origins of the beads are debated by historians—whether they were made from meteorite stones or passed on from Egyptian and Phoenician traders—but they were rare in an area where glass making technology was expensive and uncommon.

Aggry beads were easily transported in bags or sewn on to loops. They were mostly blue and uniform in shape. And though there were enough in circulation to function as money, they were difficult enough to make or obtain that the ratio of the stock of beads to the influx of beads in the market was high. This last factor changed after Europeans got involved in the West African market in the 1500s.

The Venice was the lone hub of glass making skill prior to the Renaissance; this changed after the Turks took Constantinople in 1453 CE. Venetian glassmakers then spread throughout Europe, setting up production shops in multiple areas simultaneously. This diaspora made glass production far more accessible to Europeans.

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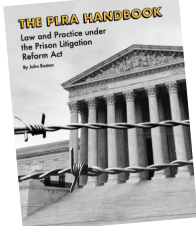

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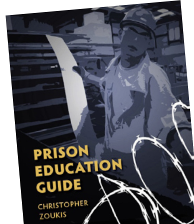

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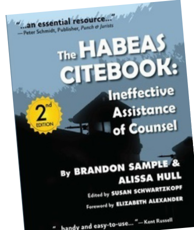

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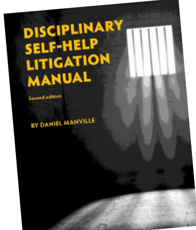

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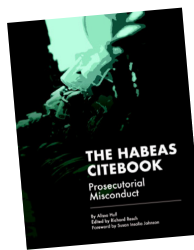

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CBDC a Threat to Human Rights (cont.)

Once Europeans traveling to Africa realized glass beads were used as money there, they began to have large quantities of beads produced. Before Africans understood what was happening, Europeans had purchased vast quantities of valuable land and goods with what was literally nothing more than glass beads to the Europeans, which were relatively cheap to produce.

Imagine if someone offered to buy your car for twice its listed value and wanted to pay in cash. A great many people would sell their car, go buy another one, and use the excess to go on vacation to celebrate their good luck. However, a drastic increase in the stock of a commodity in a market will lower the value of it. When the flow of a commodity being used for money drastically increases, the stock-to-flow (see below) ratio plummets, debasing the value of the money, meaning it takes more of the money to obtain the same quantity of goods than it did prior to the influx of the additional money.

The proliferation of cheaply produced European beads, indistinguishable from true Aggry beads, completely undermined the value of beads as a useful currency. And this lesson can be applied to nearly any commodity used as money; a change in politics or technology can completely reshape an economy dependent on one form of money.

For our purposes, the stock-to-flow ratio is simply a model that attempts to measure the scarcity or abundance of a commodity, especially something used as a form of money such as gold. The "stock" is the amount of the commodity that currently exists in the marketplace. The "flow" is the new supply of the commodity that is introduced into the marketplace each year. Comparing "stock" to "flow" helps determine a commodity's relative scarcity or abundance. Stock-to-flow is calculated by dividing the "stock" by the "flow," i.e., Stock / Flow = number of years it would take to produce the total amount of the commodity currently in the marketplace.

Throughout the history of money, gold has maintained the highest stock-to-flow ratio of any commodity. It's current stock-to-flow ratio is approximately 62.3 (about 187,000 metric tons of gold have been mined throughout history and about 3,000 tons mined each year). It is chemically stable such that it does not rust or decay, nor is it consumed by production or use. Thus, all the gold that has ever been mined from the ground is still available for collection, trade, or use. This large number dwarfs the annual influx of new gold supplies into the market.

Mining gold is difficult, involving ecological destruction and the use of chemicals that are toxic to most life. Even as technology evolves, we will continue to mine for the ever decreasing and finite amount of gold left in the ground. This will likely remain the situation until we wrangle gold comets back to Earth or devise a method of synthesizing gold using electricity alone.

Some of the first coins in recorded history were made of electrum—a naturally occurring mix of gold and silver—and gold was used as money in a great many areas of the world. While its stock-to-flow ratio makes it an excellent store of value, its current value makes it unsuitable for use in daily transactions. One troy ounce of gold is about the size of a six-sided die, but it is worth almost $1,800. Making change at a convenience store would thus involve handling gold flakes.

Traders faced a similar problem in 9th century China under the Tang Dynasty. Rather than carry around piles of valuable metals, they began writing IOUs on paper to each other in place of exchanging coins or other valuables. They traded these IOUs amongst themselves, largely trusting in the reputation of each traitor in the group.

Wherever paper printing technology flourished, people would eventually begin printing paper currencies. Like the IOUs of Tang Dynasty traders, these notes were issued by individuals or associations and, at least in theory, backed by deposits of gold or other valuable commodities. In the early days of paper money in Europe, a many unscrupulous persons would print money they could not support with goods of value. Some printed paper of such low quality that they intended it to degrade before it could be exchanged for gold at its source. Such shenanigans were so common that when the government of Sweden issued its first paper currency in 1661, the signatures of 16 persons adorned each note, attesting to its value and backing.

During the 1800s, countries and currency zones across North America, Europe, and Japan had adopted the gold standard such that every note of currency issued was redeemable for its value in gold. It seemed that the technology of money had reached its zenith. Paper currency was easy to carry and exchange, and since it was backed by gold, the commodity's use as a store of value could not

be surpassed—bearers of such currency could amass it in the same way dragons would hoard piles of gold in fantasy novels.

Fiat Currencies Inspire a New Money

The gold standard had its failings. "While the gold standard helped protect the currency from the vagaries of politicians, linking the quantity of money to a finite commodity meant the money supply did not adjust appropriately to the size of the economy and left it vulnerable to changes in gold supply," according to worldfinance.com. Inflation and deflation occurred as a result of changes in the stock of gold, leading to politically unpopular recessions.

In the U.S., war debt also posed a problem. The country sold U.S. dollars to other countries, like Great Britain, to finance wars. At any time, a representative of any one of these governments could show up at the "gold window" of the U.S. Treasury to demand gold in exchange for dollars. This was not a hypothetical: "in the second week of August 1971, the British ambassador turned up at the Treasury Department to request that $3 billion be converted into gold," according to pbs.org.

Exercising the power granted him by Congress, President Nixon ended the gold standard in the U.S. on August 15th, 1971, officially closing the gold window at the Treasury while simultaneously imposing wage and price controls in an attempt to slow inflation and rising unemployment.

At the time Nixon made his move, gold was trading at roughly $43 per troy ounce. Since that time, "the dollar has lost over 96% of its value to gold bullion to date," according to sdbullion.com.

Even though the switch from the gold standard to a so-called "fiat currency" lessened the constant roller-coaster of gold fluctuations, it has caused rapid deterioration of the value of the wealth of U.S. citizens. And though recessions may happen less often, they still occur with alarming frequency.

Citizens of some other countries have learned the hard way that their country mismanages its currency and have relied on a heterogeneous marketplace of money to protect their wealth.

"In Argentina … while the peso was used as a medium of exchange—for daily purchases—no one used it as a store of value. Keeping savings in the peso was equivalent to throwing away money. So, people exchanged any pesos they wanted to save for dollars, which kept their value better than the peso. Because the peso was so volatile, people usually remembered prices in dollars, which provided a more reliable unit of measure over time." Boyapati, V., *The Bullish Case for Bitcoin*.

It was during the great recession of 2007-2009 that people began rethinking our relationship to money. A person or persons who went by the pseudonym of Satoshi Nakamoto sent an email on October 31, 2008, to a cryptography mailing list announcing that he had produced a "new electronic cash system that's fully peer-to-peer, with no trusted third party." Though Nakamoto's identity has never been conclusively determined, it is clear that Bitcoin's creation was inspired by the mismanagement of fiat currencies. (Note: when referring to the Bitcoin protocol, it's capital "B," and when referring to a unit of account on the blockchain, it's lower case "b")

The genesis block is the first block in any blockchain, and the genesis block for Bitcoin contains the text, "The Times 03/Jan/2009 Chancellor on brink of second bailout for banks." This is a reference to an article in Britain's *The Times* newspaper announcing the possibility of further bank bailouts, an action often cited as an example of the government choosing to prop up a system that favors the transfer of value to corporations and the wealthy at the expense of wage earners.

This is, of course, a gross simplification of economics in general, and politics too. But to truly understand the purpose of Bitcoin, we have to look at its two most salient features: absolute scarcity and direct trustless transfers.

Bitcoin is a protocol run on millions of computers around the world. All are running essentially the same algorithm of code originally published by Nakamoto. Part of this algorithm mandates that only 21 million bitcoins will ever be created. No new technology will allow for the creation of more bitcoins. Also, only a portion of the 21 million are currently available, accounting for those that have been "mined" since its creation and not lost forever as several million have been.

The rate at which new bitcoins are mined is fixed and is reduced about every four years in what is commonly referred to as the "halving" when the reward for mining a block on the Bitcoin protocol is reduced by half. Bitcoin is the first absolutely scare commodity because no amount of extra effort or market demand will mine them faster or increase the total fixed supply of 21 million. The first halving occurred on November 28, 2012, and the block reward at that time was 50 bitcoins. The second halving occurred on July 9, 2016, with a reduced block reward of 25 bitcoins. The third halving took place on May 11, 2020, and the block reward was cut in half once again to 12.5 bitcoins per block reward. The fourth halving is projected to occur on May 9, 2024, with the block reward reduced to 6.25 bitcoins. Each subsequent halving will reduce the number of bitcoins issued as block rewards in half until the final bitcoin is mined some time in 2140.

Remember that gold has been a superior store of value due to its high stock-to-flow ratio. Bitcoin was designed to have an even higher, and more predictable, stock-to-flow ratio than gold, enforced by its algorithm's programming. The longer the network is in operation, the greater its utility as a store of value as its stock-to-flow ratio constantly increases over the years.

This design is reminiscent of the gold standard in its emulation of scarcity. No government can mandate the creation of new bitcoins to debase it, and attempting to purchase bitcoins, only makes them more scarce and therefore more valuable. This design allows people to trade-in fiat currencies for bitcoins, thus stabilizing the value of their wealth.

Direct payment is the second salient feature of the Bitcoin network. If Alice wants to pay Bob $1, she can give him a dollar bill. Alice can hand the bill directly to him without the assistance of a third party. However, if Alice and Bob are separated by some amount of physical distance, or if they don't want to have to carry cash on their person and prefer to conduct a digital transaction, they must depend on and trust a third party.

Before digital payments were possible, Alice would deposit her dollars into a bank, which would take those dollars and exchange them for their equivalent in bank money. She would then write a check to Bob and send it to him, usually by mail. Bob would take the check to his bank, which would confirm the funds with Alice's bank and (eventually) credit Bob's account with the appropriate amount of bank money, which could be exchanged by Bob for cash.

Digital payment networks have made such transactions quicker and more reliable, from Visa and MasterCard to systems like Zelle, Venmo, and Cash App, bank money

can be exchanged between the accounts of Alice and Bob practically instantaneously over any distance.

But all of these transactions depend on one or more trusted third parties between Alice and Bob. The banks and digital payment network providers involved in each transaction have their own policies, and all are beholden to government requirements such as know your customer ("KYC") laws and regulations ostensibly promulgated to prevent money laundering and to counter the funding of terrorism ("AML/CFT"). These regulations can also significantly increase the friction for international transfers, making them difficult and slow, even in our digital age.

Bitcoin disintermediates such transfers. Any two persons can operate their own network nodes, regardless of whether they choose to mine bitcoins. Alice can send Bob any number of bitcoins, or fractions thereof (called satoshis or "sats" with each whole bitcoin comprised of 100 million sats), she possesses, without any limits, verification, or charge-back risk, and can do so relatively quickly and inexpensively—ranging from about 10 minutes to a couple of hours depending on various network factors.

Further, Alice need not know Bob's true identity to make this transaction. She need only know his wallet address, a long set of letters and numbers that identifies his wallet. This does not mean that Bitcoin transactions are anonymous, as it is possible and sometimes trivially easy for third parties to establish with a reasonably high confidence the identity of a wallet holder. But it does mean that Alice does not need to know anything about Bob besides his wallet address.

Before Bitcoin, Bob had to reveal at least some physical characteristics to Alice to obtain funds from her. For indirect payments, she would need his name and maybe his physical address. More recently, she would need some of Bob's information such as a username or KYC verification.

This disintermediation means that Bitcoin behaves like cash, but it is superior in that it can be exchanged anonymously over great distances. Ideally, in conjunction with its true scarcity, Bitcoin is thus a better money tool than either gold or fiat currencies like the U.S. dollar. It is unsurprising then that governments have expressed concern over Bitcoin's rise in popularity and are considering issuing their own cryptocurrencies.

Bitcoin Is a Threat to Governments

All commodities used as money are valued beyond their utility value. Gold, for instance, costs more per ounce than can be justified in its superior utility over other metals for use in electronics or jewelry. Bitcoin is the same in that it is overvalued in relation to the costs necessary to obtain one bitcoin. Though bitcoins were originally priced at an amount that reflected the cost of the electricity required to mine one coin, their price has risen beyond this amount. This overvaluation is known as a *monetary premium*.

However, like all technologies, the value of a commodity used for money largely follows a repetitive S-curve known as a *Gartner hype cycle*, named after an American technology research firm. Bitcoin is no exception, though possibly due to its relatively young age, these curves have been fairly volatile.

The S-curve of a hype cycle has four features. It begins with the "innovation trigger," a rise in value which increases relative to its evangelism until it reaches a "peak of inflated expectations." Its value then descends, usually after some negative event, towards its nadir to the "trough of disillusionment." Its value will rise again, though more slowly as longer-term investors recognize its usefulness, in a "slope of enlightenment." The final stage involves a

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relatively stable valuation for a period known as the "plateau of productivity." The nature of this cycle is that the plateau will eventually give way to another sharp rise fueled by renewed expectations.

The value of each bitcoin has increased dramatically during its relatively short time in existence. The first recorded transaction giving monetary value to bitcoins occurred in October 2009, when a Finnish computer science student named Martti Malmi sold 5,050 bitcoins for $5.02, thus giving each bitcoin a value of $0.0009. In November 2021, it reached an all-time high of approximately $68,789, as reported by the U.S. cryptocurrency exchange Coinbase. Reflecting its volatility, the price has settled in the $27,000 to $28,000 range as this article is being finalized in early June 2023.

As government regulators begin supervising exchanges in a more active manner—as there have been calls to do following the collapse of several cryptocurrency exchanges and platforms in 2022 and 2023—expect institutional investors to have more confidence in Bitcoin as it matures as an asset and regulatory clarity emerges, which will drive the price up above the $60,000 range again. During some later cycle, governments may also purchase bitcoins like they currently purchase gold for reserves, driving the price even higher.

Should it reach such a valuation and remain relatively steady, it could possibly become useful as a de facto global reserve currency, a status currently held by the U.S. dollar but perhaps not for much longer. This means that other countries purchase dollars, usually in the form of government bonds, as an investment. It also means that international transactions and trade are denominated in dollars, which lowers the exchange risk for U.S. entities while also making such transactions cheaper. Were Bitcoin or some other digital currency to take the dollar's place as the dominant reserve currency, these benefits to the U.S. economy would be negated.

Even more threatening than eclipsing the dollar as the dominant reserve currency is the lack of control governments have over Bitcoin. The U.S. government has spent decades developing an infrastructure of national and international laws and regulations for the purpose of denying funding to individuals and entities it deems terrorists or criminals (or simply disfavored), which is made possible because of the dollar's status as the global reserve currency. These policies prevent expeditious international wire transfers and are used to seize any pile of cash government agents even suspect is being used for illicit purposes (known as civil asset forfeitures).

Following the attack on the U.S. on September 11, 2001, the U.S. government has forced financial institutions and any payment processor who handles more than a few thousand dollars to verify the identity of their customers, known as KYC laws. It has used its political clout to incentivize dozens of other countries to do the same. This results in persistent government surveillance of all transactions greater than a specified amount or meeting other triggering criteria.

But such measures have their critics, and not everyone agrees with them. Critics cite the lack of regulations on insider trading by politicians, massive wealth transfers to corporations, and the ineffectual punishments for corporate theft as reasons to view such regulations as only truly existing to hamper wealth collection and transfer by wage earners and laborers. They see such controls as a violation of privacy and individual sovereignty, or they disagree with classifying marijuana businesses in the same category as violent religious extremists.

Governments have attempted to impose these laws on Bitcoin users by linking individuals to their digital wallets and then tracking the flows of bitcoins to and from individuals suspected or convicted of criminal activity. Though the Bitcoin blockchain contains the record of billions of transactions, the distributed nature of its ledger means that any government or corporation with sufficient will and resources can track all transfers of bitcoins back to the very first coins.

Users have responded with various technologies to counter such blockchain analysis attempts. Some people run *mixing* services for bitcoins. Let's say Alice wants to conceal the provenance of bitcoins she receives from Bob. He sends those bitcoins to "Trent's Tumbler," which receives coins from Bob, Carol, and Dan and redistributes them after they have been mixed. Alice would then have the mixed bitcoins deposited in her wallet. With enough participants in any mixing, none of Bob's coins need actually make it into Alice's wallet, and the transfer to Alice would be complete (less Trent's fee for his service).

Other cryptocurrencies have implemented anti-analysis tools such as mixers as part of their original or adopted algorithms and may include other features such as one-time use sub-wallets and the need for additional cryptographic keys to view transactions on the blockchain. Well known cryptocurrencies which have implemented such tools include Zcash, Verge, Monero, Dash, and Desire.

In its technical report on the regulatory challenges present in the operation of a digital currency by a central bank, the International Telecommunications Union – a United Nations agency which proposes standards and publishes research – explained how the ecosystem of altcoins, each with their own anti-analysis features, might be used to launder bitcoins in defiance of government regulation. This largely involves some combination of mixing services as well as using bitcoins to buy other privacy-oriented altcoins such as Zcash and then buying bitcoins again, all while utilizing IP address obfuscation methods such as VPN services or TOR. These transactions can be made to look more like cryptocurrency speculation than money laundering.

The final reason why governments fear Bitcoin is its apparent durability. Bitcoin was the first digital currency that used proof of work calculations of cryptographic problems to achieve what is now commonly known as a cryptocurrency.

The Architecture of Big Brother

Governments and central bank administrators have been monitoring these developments with a mixture of fear, awe, and jealousy. On one hand, the wealthy and political classes have a vested interest in maintaining a

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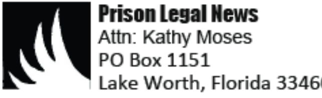

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system that preserves their power and wealth. On the other hand, government-sponsored digital currencies could have significant benefits for economically marginalized segments of the population, generally increase GDP by improving efficiency, and provide a long-awaited shakeup of the financial services industry.

One interesting development in this area is that, although "105 countries, representing 95% of global GDP" are exploring or have implemented some form of government digital money, the proposed or actual implementations are far from homogeneous. Understanding differences in implementations involves an explanation of terms.

Central bank digital currency ("CBDC"), digital base money, and digital fiat currency are the most common terms for government issued currencies, and "CBDC" is the one that will be used for the rest of this article.

Wholesale and *retail* CBDCs refer to two different purposes of a CBDC. Wholesale involves the use of a CBDC solely for the purposes of managing deposits and reserves of private banks that are held by a central bank. All banks in the U.S. and U.K. are required to hold some percentage of their deposits as reserves with the central bank system, and central banks facilitate transfers from one bank to another. According to the Atlantic Council's CBDC Tracker, at least eight countries are considering or have implemented wholesale CBDCs only. Such systems have the potential to improve efficiency for central bank accounting systems and are expected to provide efficiency returns in the long-term, lowering costs.

Retail CBDCs are what most people think about when they hear the term CBDC. Central banks, like the Federal Reserve in the U.S., print or mint money for use by the public for direct exchanges or in person payments. A retail CBDC would be issued by the same institution, have the same value as physical currency, and have the benefit of enabling exchanges digitally, similar to existing electronic payment systems.

Another distinction often made is between *account-based* and *tokenized* systems. Account-based models link a digital wallet to an account in a central bank's ledger, and the money is merely a number in the ledger. Tokenized systems mean that, although users may have accounts where token currency units are stored, these units can exist separately from an account in a mobile wallet. Though transactions from account wallets to mobile wallets are still reported on the blockchain (else they would eventually be double spent), they are not technologically linked to a particular account.

Distributed ledger technology ("DLT") is a term used to describe a system where multiple participants in a network each hold identical copies of the ledger, also known as the blockchain. In the vast majority of private cryptocurrencies, DLT is used in a way that enables all network participants to inspect and interact with the blockchain. This access, coupled with the availability of software that allows anyone to operate their own node, decentralizes control over the network.

However, simply because a blockchain uses DLT does not make it inherently democratic. In a hypothetical use case, each of the 12 Federal Reserve banks in the U.S. would participate in a digital dollar system, with each maintaining a copy of the ledger. Yet, private individuals would not be allowed to operate nodes and would have to instead clear all transactions on the blockchain through the 12 nodes operated by the central bank system. This would technically be a DLT system, but its limited access would make it centralized and decidedly less democratic.

Also, even in the unlikely scenario where

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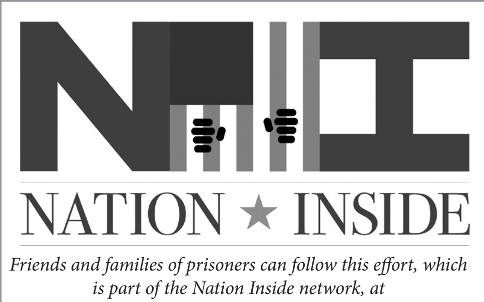
This effort is part of the Human Rights Defense Center's *Stop Prison Profiteering* campaign, aimed at exposing business practices that result in money being diverted away from the friends and family members of prisoners.



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a central bank used DLT and individuals outside the bank had access to the blockchain, that doesn't mean that all transactions would be visible to the public. Some blockchains, like Bitcoin, are *permissionless* systems, so that any interested party can inspect the record of transfers to and from all wallets, back to its inception.

Other systems, like Monero, are *permissioned*. This means that any one person can use the cryptographic key from their wallet to view any transactions to or from their own wallet but only their own wallet. To view the transactions from another person's wallet, that person would have to share their key. It is technically possible for a central bank to create a permissioned DLT system such that, while users cannot see the transactions of others, the central bank holds a "skeleton key" that allows the bank or government agents to view all transactions on the network.

When designing its digital currency and electronic payments system ("DC/EP") known as the digital yuan, China initially tested a DLT system but scrapped it in favor of a single, centrally operated traditional database system, because these are less resource-intensive and easier to mine for user data, which, despite protestations to the contrary by governments, is one of the primary motivations for adopting CBDCs.

Intermediated or *disintermediated* systems denote which institution a wallet holder interacts with when processing transactions. The Central Bank of Iceland is one of a few central banks seriously considering operating a disintermediated system to provide digital wallet services directly to its citizens. All other countries that have launched, or are considering, a retail CBDC have chosen to operate an intermediated system where private banks or financial technology (fintech) companies interact directly with citizens and operate the digital wallets, while the companies themselves interact with central banks.

While a disintermediated system might sound like the more simple and efficient choice, central banks have little experience (or interest) in interacting directly with the public for their daily transactional needs, and private banks already have such infrastructure in place (i.e., customer service call-centers). Also, central banks see intermediation as an opportunity for private banks and fintech companies to provide additional services, which ideally encourages competition and innovation.

With these terms in mind, let's look at how some currently implemented or proposed systems for CBDCs are constructed and the resulting implications for both monetary policy and especially human rights.

First, consider China's digital yuan, alternatively called the DC/EP or e-CNY. This system is centrally operated with no DLT, and it is intermediated by Chinese private banks. Any Chinese citizen can go into a bank and open an e-CNY account, or one can be created through an online fintech firm like Tencent, after verification of identity.

The Center for a New American Security published a report in January 2021 explaining "the concept of privacy for DC/EP as 'controlled anonymity,' which upon elaboration was explained as a 'front-end voluntary, back end real name' system." This means that though wallet-holders must provide their real identity to the Chinese government via the financial institution or fintech provider, they can transact anonymously amongst each other. Alice can send Bob money without Bob knowing it came from Alice, but Gary, a government agent, will know she sent the money. Whichever form any country's CBDC takes, there's no doubt that it will allow the government complete transparency to see everyone's transactions.

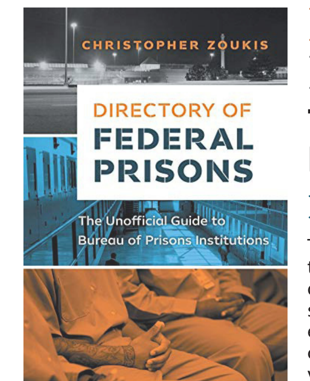
According to the Atlantic Council, by October 2021, "123 million individual wallets and 9.2 million corporate wallets had been opened with transaction volume of 142 million and transaction value of RMB fifty-six billion."

China also now allows tourists who provide their passport information (prove their identity) to create an e-CNY wallet. Visitors for the Olympic games in February 2022 "were able to use the software e-CNY application and the hardware e-CNY card, and daily transactions during the games were around 'a couple of million RMB.'"

The ease of use of the e-CNY is likely to eventually improve banking access to individuals who do not currently use banking services and instead only rely on physical money. Over time, as users prefer e-CNY to physical cash, costs inherent in maintaining physical cash will be reduced. According to Jonathan Dharmapalan, founder of e-currency company eCM, "minting and distributing digital currency would cost 10% of what it costs to print and distribute an equivalent physical currency note while allowing the government to retain the revenue it gets from issuing currency, known as seigniorage."

Having most of its population participating in the e-CNY system also provides more fine-grained control over a nation's money supply allowing for precision modifications.

"A CBDC could have several advantages from a central bank's perspective. One is winning back more direct control over money supply, to use as a monetary policy lever. In the fractional reserve banking system, banks make the money, and central banks control its supply only indirectly, through adjusting banks' incentives. In a CBDC system,



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the central bank could bypass banks and influence customers directly," explained Vili Lehdonvirta, a senior research fellow at the University of Oxford.

Such direct influence could involve a negative interest rate during economic downturns. While banks currently incentivize customers to make deposits by paying them interest on savings accounts, the Chinese Central Bank could "incentivize" consumers to spend their money using monetary penalties such as negative interest rates. Imagine an announcement by the government that mandates holders of the CBDC to spend at least 1% of their account balance within 30 days or have their digital wallets reduced by 1%. It should start to become clear why governments are so enamored with the idea of CBDCs – they provide the possibility of unprecedented control and surveillance over the population.

Lehdonvirta continued, "another advantage would be data, or to put it more bluntly, surveillance. If all citizens had an account with the central bank and used those accounts to pay for all kinds of purchases, then obviously the bank would have a lot of visibility into what goes on in the economy. This would be useful for economic research but also for law enforcement. In a country where the rule of law is less than perfect, this comes with concerns."

During times of political unrest, China could use its system to track dissident networks and temporarily disable their e-CNY accounts. Or a more precision approach might prevent known dissidents from using public transportation or taxis, hindering their ability to travel to or from protests.

An even more dystopian outcome could be envisioned where it concerns systemic oppression. China has been criticized for its systemic oppression of minority Muslim Uyhgers in its Xinjiang province. Further oppression could take the form of preventing the e-CNY accounts of Uyghers from functioning anywhere outside of Xinjiang or disallowing payments to businesses like restaurants or grocery stores where they are deemed unwelcome.

It is easy then to imagine how a central bank could implement a digital currency, increasing reliance on digital payments while decreasing the availability of physical money, and then deny access to accounts for any politically unpopular minority group for the purpose of making ethnic or ideological cleansing easier.

But there is nothing to limit such control measures to the political unpopular. They can be used against any disfavored group or individual based on any reason and certainly not limited political views and action. CBDCs' use as a tool for control and surveillance is literally limited only by the imagination of those in power.

Contrast the foregoing scenario with Sweden's pilot for its e-krona network. Swedish citizens currently conduct approximately 90% of a transaction digitally and only 10% using physical currency, the latter mostly by senior citizens who distrust digital technologies. This has the Riksbank (Sweden's central bank) concerned about the availability of physical cash during market downturns, and it is running pilot programs to test the viability of issuing a CBDC.

Though Sweden is part of the European Union—sharing its legal framework and many social values—Sweden does not use the euro for currency. The Riksbank is responsible for issuing its currency, the kronor, and would be responsible for any eventual CBDC issued in Sweden.

The Riksbank published a report in April 2022 about the second phase of its e-krona

CLASS ACTION LAWSUIT CHALLENGING THE HIGH PRICES OF PHONE CALLS WITH INCARCERATED PEOPLE

Several family members of incarcerated individuals have filed an important class action lawsuit in Maryland. The lawsuit alleges that three large corporations – GTL, Securus, and 3CI – have overcharged thousands of families for making phone calls to incarcerated loved ones. Specifically, the lawsuit alleges that the three companies secretly fixed the prices of those phone calls and, as a result, charged family members a whopping $14.99 or $9.99 per call. The lawsuit seeks to recover money for those who overpaid for phone calls with incarcerated loved ones.

If you paid $14.99 or $9.99 for a phone call with an incarcerated individual, you may be eligible to participate in this ongoing lawsuit.

Notably, you would not have to pay any money or expenses to participate in this important lawsuit. The law firms litigating this case—including the Human Rights Defense Center—will only be compensated if the case is successful and that compensation will come solely from monies obtained from the defendants.

If you are interested in joining or learning more about this case, please contact the Human Rights Defense Center at (561)-360-2523 or info@humanrightsdefensecenter.org.

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test network, including some technical aspects of the system, as well as its requirements for a fully functioning CBDC. Other than its use of a blockchain to enable offline payments, its system looks very much like the CBDC in use in China.

Like in China, it would be an intermediated retail system where citizens create digital wallets at their participating bank after passing KYC checks. Both individuals and businesses can operate wallets and interact with them using an app (for electronic payments or smart contracts) and a debit card.

Designs for the e-krona network include an alias service for anonymous transfers between wallet holders and businesses. This is in keeping with the EU's general data protection regulation ("GDPR"), and prevents individuals and businesses from obtaining private data about a person's spending habits.

Unlike China's e-CNY, the e-krona would utilize a distributed ledger, but the net effect would be no different than in China. Only the Riksbank and approved financial institutions would be permitted to operate nodes that maintain a copy of the whole blockchain, and individual users can only view transactions in which they themselves have participated, including any of their aliases (similar to a permissioned ledger like Monero's). The sole purpose of using a DLT-based system would be improved efficiency by operating redundant notary nodes on the network and allowing for a more resilient and efficient network than a monolithic system would be, mitigating risks from cyber and physical attacks on the network.

Also different from e-CNY so far is the ability to transfer e-krona offline between users. Smart phones running the e-krona app can hold digital tokens that represent kronor in a person's digital wallet, and these can be transferred to another person using NFC technology.

For example, Alice wants to give Bob 10 kronor but is outside of range of a cellular network. As long as Bob is nearby with his phone, she can make the transfer without the app first consulting the network. The next time that Alice or Bob is online, their app can sync the transfer with the network, updating both of their accounts.

The Riksbank identified the following questions and risks associated with offline use of e-krona: "How much money should one be allowed to store off-line? What size transactions should be accepted? Should there be different rules for different users (e.g., consumers and merchants)? How many consecutive step-by-step off-line transactions can be allowed before an on-line synchronization is needed? How long should a user be allowed to remain off-line? How should risks be shared when making off-line payments?"

Yet, offline payments are still linked to a wallet, as e-kronor cannot exist without being tied to an account verified to a user's identity. Thus, the only real difference between the CBDC systems in place or proposed in China and Sweden is the legal framework that prevents collection and analysis of user transaction data and the abuse of this information.

If the reports of trial projects published by the federal reserve banks in Boston and New York are any indication of the ultimate architecture of a U.S. CBDC, we can expect something very similar, if not practically identical to the Swedish and Chinese systems. In fact, according to Augustin Carstens, General Manager at the Bank for International Settlements, the "[l]ikelihood of CBDC issuance is increasing, with account-based access preferred."

For instance, Federal Reserve Bank of Boston published its Project Hamilton report in February 2022 and had this to say about the feasibility of using DLT: "Despite using ideas from blockchain technology, we found that a distributed ledger operating under the jurisdiction of different actors was not needed to achieve our goals. Specifically, a distributed ledger does not match the trust assumptions in Project Hamilton's approach, which assumes that the platform would be administered by a central actor. We found that even when run under the control of a single actor, a distributed ledger architecture has downsides. For example, it creates performance bottlenecks, and requires the central transaction processor to maintain transaction history, which one of our designs does not, resulting in significantly improved transaction throughout scalability properties."

The summary here is that any proposed U.S. CBDC is assumed to be centrally administered and will likely be account-based rather than tokenized. It will probably avoid using a distributed ledger the same way China has, or if DLT is utilized, it will be limited to federal reserve banks and participating financial institutions only, like Sweden's system is. While these systems might be more convenient than using cash or other current electronic payment systems, they will be subject to all of the AML/CFT policies which hinder transfers, infringe on privacy, and reduce individual monetary sovereignty.

CBDCs Versus Bitcoin

When CBDCs are more widely available, they will compete with other cryptocurrencies and forms of money in the same way that other commodities have competed in the past. As of June 2023, Bitcoin is the dominant cryptocurrency. Bitcoin was the first true cryptocurrency, and as such its popularity is partly due to the effect of *path dependence*. As long as there are no fatal flaws with the first implementation to market of a new technology, it will enjoy a competitive advantage simply for being the first.

Yet while Bitcoin was the first cryptocurrency, it was the newcomer compared to other types of money. Its market capitalization is, as of June 2023, approximately $525 billion dollars. Compare that to the total amount of U.S. dollars in circulation, which is approximately $2.337 trillion. The total market capitalization of gold is somewhere between $9.5 and $14.3 trillion (depending on who is doing the estimating).

Gold has been around as money and as a store of value since about 700 B.C., and the U.S. dollar has been in existence since 1792. In contrast, Bitcoin has been around only since 2009.

Like every money, Bitcoin has its pros and cons. It cannot be controlled by any central authority, provides for absolute scarcity, and enables direct transfers without the involvement of a trusted third party.

But it is also relatively slow, and many wallet apps and programs assume a level of education and sophistication beyond the average consumer. While it is resistant to censorship and control, governments have found ways to interfere with Bitcoin markets. For instance, many online exchanges that run custodial wallet services for the trading of cryptocurrencies pay blockchain analysis companies to rate the provenance of bitcoins. If Coinbase believes your bitcoins were once involved in illicit activities, they will refuse deposit or segregate them afterwards. Exchanges that do not employ analysis companies run the risk of being prosecuted and fined for knowingly enabling money laundering or terrorism.

A 2009 study showed that "90% of paper money circulating in U.S. cities contains traces of cocaine." The anonymity and tracking difficulty of physical dollars makes

it difficult, if not impossible, for governments to determine the flows of cash through illicit businesses and AML/CFT regulations on individual dollar bills in the way they are currently trying to do with bitcoins and will definitely be able to do with CBDCs.

Instead, most AML/CFT regulations are enforced on electronic payment systems involving bank money denominated in dollars. These regulations introduce significant friction into person-to-person exchanges and cross-border payments. These regulations are so onerous that many payment providers take extremely conservative actions in lieu of actual regulations to avoid the possibility of arbitrary agency enforcement actions.

In 2013, several banks and payment networks refused services for businesses which regulatory agencies had deemed "morally corrupt." Though these businesses were engaging in legal endeavors, they were denied payment and banking services including having their funds frozen. The Justice Department ended this program, known as Operation Chokepoint, in 2017 after pressure from Congress, but such controls would not have been possible to enforce on peer-to-peer Bitcoin users.

CBDCs, including a digital dollar, are likely to spur innovation in the fintech industry and make sending money between individuals, and payments to businesses, more convenient, especially over long distances. But these systems will have the obvious burdens of AML/CFT regulations, including KYC requirements, transfer limits, and arbitrary seizures.

In the longer term, the true cost of shifting most transactions to digital dollars will be hidden from its users until after they have been lulled into complacency. Many of the dystopian scenarios listed earlier when discussing China's CBDC are not the kind of events that would occur around the time of a CBDC debut. Such events would take place later, after citizens had largely divested themselves of physical cash.

Currently, when law enforcement wants to know where a person has been in the recent past, they subpoena that information from Google, the company that collects more data points on user location than nearly any other entity. When the U.S. Treasury can amass similar information and more on citizens in the country, there will be fewer hurdles to the abuse of this data.

Once digital dollars are commonplace and physical cash transactions drop below 10% of all transactions, we can reasonably expect to see law enforcement exacerbate the current trend of treating uncommon occurrences—such as cash transactions—with unwarranted suspicion. Expect to see law enforcement agents testifying in courts about how traders of cryptocurrencies are actually criminals attempting to circumvent banking regulations.

Many crypto exchanges like Binance and Coinbase voluntarily adhere to KYC laws to forestall the risk of facing sanctions, seizures, and investigations. E.U. regulators have proposed additions to AML/CFT rules to prevent exchanges from transacting privacy-respecting altcoins like Zcash and Monero.

China banned businesses from accepting cryptocurrency payments in 2013 and followed that in 2021 with a blanket ban on mining or transacting with all cryptocurrencies except the e-CNY. The Russian Federation has been considering banning the purchase of crypto assets but will still allow people to mine coins and sell them to non-Russians considering it's need to maintain exports of anything in the face of sanctions over its invasion of Ukraine. It is not a coincidence that Russia is on the verge of issuing its own CBDC, the digital ruble.

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likely shy away from total ban on crypto-asset competition for their own CBDCs and instead will continue to attempt to regulate away any altcoins they have difficulty tracking or that compete too well against their own eventual CBDCs.

Sadly, governments have the resources to create the most rights respecting, tokenized digital currency that could be backed by a robust largely free market, but they almost certainly never will. In order for it to be these things, they would have to relinquish control of a thing that undermines their own systems of control.

Conclusion

Keep in mind that with the implementation of a CBDC as a nation's official currency, the government has virtually complete control over you by literally being able to control what you spend your money on, when you can spend it, where you can spend it, how much of it you can spend, and with whom you can spend and receive it. The government will know every aspect of your life because it has complete transparency into how, where, and when you spend every cent as well as where each cent you receive comes from.

Couple that degree of granular information about you with advanced artificial intelligence capabilities, and one can only shudder at the "predictive" models the government will dream up. Additionally, the mechanism for total surveillance and control is complete when a CBDC is coupled with a social credit score system, especially if it includes a carbon credit and electronic "health passport" component.

Behaviors, or even views, that are not criminal but disfavored by those in charge can lead to draconian restrictions on your ability to use your own funds. Going to an out-of-town protest that's frowned upon by the government, and it can easily restrict the use of your funds for any form of transportation, lodging, and food as well as bar the use of your funds within, say, a 100-mile radius of the protest location. Similarly, maybe you've run your home's air conditioner "too much," so when you go to the gas station to fill up your car, you discover that your funds don't work anymore to buy gas because you've exceeded your allotted carbon credits. Or maybe you refused the latest vaccine rolled out to the public without going through the standard multi-year clinical trials and discover that your funds have been completely frozen until you comply.

Here's another "benefit" of a CBDC – it provides the government the ability to directly collect fines, fees, and taxes from your account. But obviously, that's not a benefit for you or the public.

The current messaging by the government, media collaborators, and various henchmen about why CBDCs are preferable to decentralized cryptos such as Bitcoin is but a trickle compared to the torrent of propaganda that will be unleashed in the near future to prepare the battlefield of public opinion in accepting the implementation of an official CBDC. The demonizing of Bitcoin has already begun in earnest with sitting members of Congress ridiculously and baselessly blaming it for the recent collapse of several regional banks, exacerbating the "climate crisis," serving as a critical funder of terrorism, and practically anything else they can conjure up that they believe may have traction as an accepted legitimate criticism of Bitcoin.

A CBDC is a wolf in sheep's clothing. It will be sold to the American public as an unmitigated benefit for the people, but in reality, the only ones who will genuinely benefit from a CBDC are those in power and their associates. Keep this in mind as you're bombarded with the inevitable exhaustive messaging of the many virtues of a CBDC and the many sins of Bitcoin.

There is a famous quote often attributed to Henry Kissinger that serves as an apropos final thought on this topic: "Who controls the food supply controls the people; who controls the energy can control whole continents; who controls money can control the world."

Sources: Ammous, Saifedean, The Bitcoin Standard: The Decentralized Alternative to Centralized Banking; International Telecommunications Union (ITU); Bitter, Lea, Banking Crises Under a Central Bank Digital Currency; Werner, Richard, Can Banks Individually Create Money Out of Nothing? Britannica.org; historycooperative.org; sdbullion.com; investopedia.com; worldfinance.com; pbs,org; nakamotoinstitute.org; news.bitcoin.com; vijayboyapati.medium.com; forbes.com; atlanticcouncil.org; wsj.com; riksbank.se; qz.com; bostonfed.org; companiesmarketcap.com; uscurrency.gov; cnn.com; politico.com; markets.businessinsider.com; worldcoin.org; fxstreet.com; breedlove22.medium.com; wikipedia.org; youtube.com; suerf.org; ecb.europa.eu; papers.ssrn.com; bis.org; bankofcanada.ca; federal reserve.gov; theguardian.com; bankofengland.co.uk.

Federal Habeas Corpus: The Procedures for Obtaining a COA

by Dale Chappell

While your right to federal habeas corpus is protected by the Constitution, your ability to appeal the denial of habeas relief is not. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress severely limited the ability of prisoners in appealing the denial of habeas relief. Let's take a closer look at the procedures for obtaining a certificate of appealability ("COA").

What Is a COA?

Ever since the early 1900s, a "certificate of probable cause" ("COPC") was required by state prisoners appealing denials of federal habeas relief. In the 1970s, some federal judges began urging Congress to extend the COPC requirement to federal prisoners. While federal prisoners at the time were not required to get approval to appeal through a COPC, they were subject to fines or other sanctions if their appeals were frivolous.

In 1972, Congress started exploring the idea of a COPC for federal prisoners, but it wasn't until the AEDPA was enacted in 1996 that the COPC requirement was renamed to "certificate of appealability" and applied to all prisoners appealing denials of federal habeas relief.

The COA is a jurisdictional prerequisite, so until it is issued, Courts of Appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners. Miller-El v. Cockrell, 537 U.S. 322 (2003).

The Standard for Issuance of a COA

Exactly what's required to meet the standard for obtaining a COA has taken much of the Supreme Court's time since the AEDPA revised the statutes governing COAs. And most of the time, the Court has held that the lower courts had used a standard that was too harsh in denying a COA to a habeas petitioner. Repeatedly in these cases,

the Court has said that the COA standard is only a "threshold" inquiry into whether a COA should be granted for an appeal. That is, it's not about the likelihood of petitioner being able to demonstrate entitlement to relief. Slack v. McDaniel, 529 U.S. 473 (2000).

The Court came up with the "debatable among reasonable jurists" standard in evaluating whether a COA should be granted for an appeal. *Miller-El*; *see also Barefoot v. Estelle*, 463 U.S. 880 (1983). That's the measuring stick a court should use in deciding whether to grant a COA. It's not a high bar. Under this standard, you don't have to prove that your claims would succeed on appeal or that you would be entitled to relief.

Obtaining a COA does not require a showing that the appeal will succeed, and a Court of Appeals should not decline the COA application merely because it believes the applicant will not demonstrate an entitlement to relief. *Welch v. United States*, 136 S. Ct. 1257 (2016).

One of the easiest ways to show a District Court's assessment of your claims would be debatable is to point to decisions in other courts that have granted similar claims as yours. Another way is by showing that your issue would be one of first impression in the applicable Court of Appeals or that courts are divided in other circuits over the same claim that you have. There's nothing like two judges coming to different conclusions to show that something is "debatable." *See United States v. Robinson*, 221 F. Supp. 3d 1088 (E.D. Ark. 2016).

The actual standard for granting a COA largely depends on the substance of your claims. A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has also defined this as a showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274 (2004).

The key word there is "constitutional." Your claims must have a constitutional basis to be granted a COA. Even if a claim has a mixed basis of statutory and constitutional concerns, that's enough to meet the constitutional requirement of the COA statute – § 2253(c)(2). *United States v. Mulay*, 805 F.3d 1263 (10th Cir. 2015).

However, this does not mean that the court can dig into the merits of your claims in deciding whether to grant or deny a COA. If the court does this, the Supreme Court said in *Miller-El* that this constitutes deciding an appeal without jurisdiction. If a court decides the merits of a claim to see if it's worthy of an appeal, it is effectively deciding the merits of the appeal without a COA. Since a COA is a jurisdictional bar, a Court of Appeals is prohibited from doing this. *Id.*

What if the District Court denies a COA not on the basis of the claims but on some procedural issue, such as the petition being filed too late? There is a two-step showing for obtaining a COA in this instance: (1) you must show that the court's procedural ruling would be debatable (i.e., that it's debatable your filing was too late) and (2) you must also show that the constitutional claim is "colorable." A claim is colorable when there is a "fair probability or a likelihood, but not certitude, of success on the merits." *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999).

With the court looking at your claims but not digging too deep in order to determine if a COA should be granted, things can get messy rather fast. Again, the Supreme Court has tried to clean this up, but the courts continue to make a mess of the COA standard.

Which Court Can Grant a COA?

Both the District Court and the

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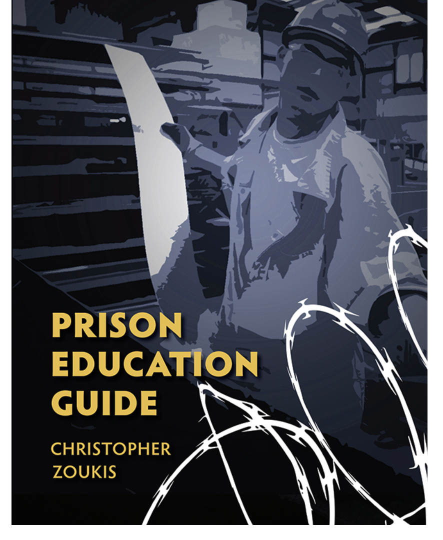

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Court of Appeals have the authority, under § 2253, to grant you a COA to appeal the denial of federal habeas relief. But there was much debate on this topic in the years leading up to the AEDPA. Some judges said that the District Court judge, whose judgment is being challenged in a federal criminal case, should be the one who decides whether an appeal could be filed if the judge denies habeas relief to a federal prisoner. Some judges took issue with a District Court granting permission to appeal for any habeas petitioner, when the Court of Appeals should be the one to make this decision in their opinion.

Ultimately, both District Courts and Courts of Appeals were authorized to grant or deny a COA under § 2253(c) and Federal Rule of Appellate Procedure ("FRAP") 22(b). This gives you two chances for a COA: one in the District Court and one in the Court of Appeals. You can even ask the Court of Appeals to "expand" the COA the District Court grants to include more issues for appeal.

Time Limits to Filing a Motion for a COA

The time to file your motion for a COA varies by circuit. For example, while the Ninth Circuit allows 35 days, the Third Circuit allows just 21. Some don't even have a set time limit, such as the Sixth Circuit's "as soon as possible" time limit. Whatever the time limit may be in your circuit, the clock starts when your notice of appeal is docketed in the Court of Appeals. Since a premature COA motion can be rejected by the clerk, it's best to ask the court clerk what the time limit is and when it starts in that court.

What Should a COA Motion Look Like?

A COA motion comes in many forms and sizes. The best way to request a COA is by way of a formal motion meeting all the court's rules. However, other filings can be construed as a motion for a COA, should you fail to file a motion asking for one. Even a notice of appeal can pull double duty as a motion for a COA, but you'd be "hard put" to meet the COA standard with just a bare notice of appeal, one court rightly observed. *West v. Schneiter*, 485 F.3d 393 (7th Cir. 2007).

While pro se filers are given leeway on style and formatting, they must still follow the court's rules. Page limits are strictly enforced in most courts for COA motions. Some courts refer to FRAP 32, which limits appellate briefs to 30 pages. Other courts refer to FRAP 27, which limits motions to just 20 pages. Since a court may strike any pages exceeding this limit or even the entire motion, it's best to confirm with the court what the limits are.

Dealing with Defects in the COA Order

The order granting a COA must be legally correct. If there are any problems with the District Court's order, you should urge the court to fix them. Why? Perhaps the Supreme Court said it best: "Habeas petitioners have every incentive to request that defects [in a COA order] be resolved, not only to defuse potential problems later in the litigation, but also to ensure that the issue on which they sought appeal is certified and will receive full briefing and consideration." *Gonzalez v. Thaler*, 565 U.S. 134 (2012).

The most common error by District Courts in granting a COA is the failure to specify what grounds are certified for an appeal. I've repeatedly seen where the COA order simply said a COA was granted, but then when the Court of Appeals asked for further clarification, the District Court changed course and denied a COA altogether. It may be better that you ask the District Court to clarify its order immediately, rather than wait for the Court of Appeals to do so after the case has been transferred there.

Reconsideration of the Denial of a COA

You can't appeal the denial of a COA by the District Court. Instead, you are authorized under Federal Habeas Rule 11(a) to ask the court to "reconsider" its denial of a COA. But note that this is not a motion for reconsideration under Federal Rule of Civil Procedure 59(e), as it would be in other instances. A motion to reconsider under Rule 11(a), unlike Rule 59(e), doesn't extend the time to file a notice of appeal, so be sure you meet the deadline for your notice while you're asking the District Court to reconsider a COA (currently, 30 days for state prisoners and 60 days for federal (See FRAP 4(a)(1)).

If the District Court still refuses to grant a COA, then you must file a COA motion in the Court of Appeals. If the Court of Appeals denies a COA, then there's no "reconsideration." Instead, you file for a "rehearing," which requires some specific procedures. A motion for rehearing must be filed within a certain time, and each circuit is different. The labeling of your filing matters in some circuits. For example, in the Eleventh Circuit, the court calls it a "petition" for a rehearing, which doesn't fall under any of the rules for a "motion" in that court. While a motion can be filed within 45 days there, a petition is limited to only 21 days. Be aware of these little differences in the circuits.

Conclusion

The standard for obtaining a COA is not a high bar, but the way to go about it can be daunting. Understanding the local rules and procedures will go a long way in helping you obtain a COA to properly appeal the denial of habeas relief.

Dale Chappell has hundreds of published articles on federal habeas corpus and is the author of the Insider's Guide series of postconviction books, including *Federal Habeas Corpus for State Prisoners* and *Habeas Corpus for Federal Prisoners*. Follow his blog at www.ZenLawGuy.com and at Twitter: @zenlawguy.com.

SCOTUS Announces 'Right-to-Control' Theory Not Valid Basis for Liability Under Federal Wire Fraud Statutes

by Richard Resch

The Supreme Court of the United States ("SCOTUS") held that the "right-to-control" theory of liability, which imposes liability for depriving the victim of "potentially valuable economic information … necessary to make discretionary economic decisions," is not a valid basis for liability under the federal wire fraud statutes because SCOTUS has previously held that the wire fraud statutes criminalize only schemes to deprive victims of "traditional property interests." *Cleveland v. United States*, 531 U.S. 12 (2000).

This case stems from former New York Governor Andrew Cuomo's "Buffalo Billion" initiative, which sought to invest $1 billion in development projects in upstate New York. It was administered by a nonprofit called Fort Schuyler Management Corporation ("Fort Schuyler"). Investigations into the project uncovered a scheme in which Louis Ciminelli's construction company LPCiminelli was virtually guaranteed to be awarded lucrative

development projects, including the $750 million Riverbend project in Buffalo. The scheme included the drafting of request for proposals in a manner that designated certain unique aspects of LPCiminelli as qualifications for "preferred-developer status."

Upon discovery of the scheme, Ciminelli and several others were indicted by a federal grand jury on numerous counts, including wire fraud in violation of 18 U.S.C. § 1343 and conspiracy to commit wire fraud in violation of § 1349.

Throughout all stages of the prosecution and appeal, the Government relied solely upon the "right-to-control" theory of liability sanctioned by the U.S. Court of Appeals for the Second Circuit. *See Cleveland v. United States*, 13 F.4th 158 (2d Cir. 2021). Under that theory, wire fraud can be established by showing that "the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions," the Court explained.

Consistent with that theory, the trial court instructed the jury that "property" under § 1343 "includes intangible interests such as the right to control the use of one's assets." Consequently, the jury could find that Ciminelli harmed Fort Schuyler's right to control its assets if it was "deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets," the trial court told the jury.

The jury convicted Ciminelli of wire fraud and conspiracy to commit wire fraud. The trial court sentenced him to 28 months in prison followed by two years of supervised release. He timely appealed, arguing that "property" for purposes of the wire fraud statutes does not include the right-to-control one's assets. The Second Circuit affirmed the convictions based on its "right-to-control" precedents, holding that the scheme "deprived Fort Schuyler of potentially valuable economic information."

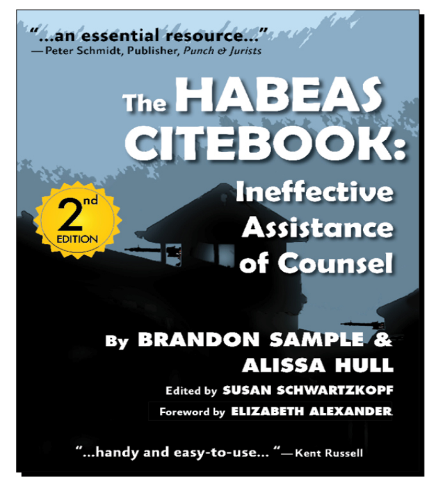
SCOTUS granted certiorari to answer the question of whether the "right-to-control" theory is a valid basis of liability for wire fraud under § 1343. The Court held that it is not.

The Court began its analysis by examining § 1343, which criminalizes schemes "to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The statute requires the Government to prove (1) the defendant "engaged in deception" and (2) that money or property was "an object of [the] fraud," the Court explained. *Kelly v. United States*, 140 S. Ct. 1565 (2020).

The Court observed that despite the reference to "money or property" in the statute, lower courts had for decades "interpreted the mail and wire fraud statutes to protect intangible interests unconnected to traditional property rights." *See Skilling v. United States*, 561 U.S. 358 (2010) (recounting how "the Courts of Appeals, one after another, interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights"). However, in *McNally v. United States*, 483 U.S. 350 (1987), SCOTUS put a stop to the growing trend among lower federal courts of permitting federal fraud convictions based on harms to intangible interests not connected to property, rather than traditional property rights. After *McNally* dispensed with intangible interests as a basis for fraud convictions, Congress amended the fraud statutes to expressly include a single intangible right – that of honest services. *Cleveland*.

The Court recounted that the right-to-control theory arose after *McNally* and holds that since "a defining feature of most property is the right to control the asset in question … the property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets." *United States v. Lebedev*, 932 F.3d 40 (2d Cir. 2019). As a result, the wire fraud statute is violated when a defendant's scheme "denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015).

Turning to the present case, the Court



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stated that the right-to-control was not an interest traditionally recognized as property when the fraud statute was enacted. *Carpenter v. United States*, 484 U.S. 19 (1987). In fact, when the Second Circuit first recognized the theory in 1991, it was unable to cite a single authority to support its position that "potentially valuable economic information" constitutes a traditionally recognized property interest, according to the Court. *See United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991).

In addition, the theory is not consistent with the structure and history of the federal fraud statutes, the Court stated, explaining that after *McNally* rejected the principle that intangible rights could serve as a basis for fraud convictions, Congress revived "only the intangible right of honest services." *Cleveland*.

Finally, the right-to-control theory inappropriately expands federal jurisdiction. The Court explained that because the theory treats information itself as the protected interest virtually any deceptive behavior could be criminal. *See, e.g., United States v. Viloski*, 557 Fed. Appx. 28 (2d Cir. 2014) (affirming right to control conviction based on an employee's undisclosed conflict of interest). The Court declared that the "theory thus criminalizes traditionally civil matters and federalizes traditionally state matters."

The Court clarified in no uncertain terms that only traditional property interests are covered by the wire fraud statutes and that the "right to valuable economic information" is not a traditional property interest. Thus, the Court held that the right-to-control theory "cannot form the basis for a conviction under the federal fraud statutes."

Accordingly, the Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with its opinion. See: *Ciminelli v. United States*, 2023 U.S. LEXIS 1888 (2023).

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Texas Court of Criminal Appeals: Trial Court Deprived Defendant of Opportunity to Present Complete Defense

by Douglas Ankney

The Court of Criminal Appeals of Texas held that the trial court erred when it prohibited William Rogers from presenting evidence to support his claim of self-defense and also when it refused to instruct the jury on self-defense.

Rogers was tried by jury on charges of Burglary of a Habitation with the underlying commission of Aggravated Assault and Aggravated Assault with a Deadly Weapon. Prior to jury selection, the State filed a motion in limine seeking to prevent Rogers from presenting over 70,000 text messages he exchanged with Sandra Watson while the two were engaged in a lengthy affair from July 2011 until the date of the offense on February 14, 2013. The motion also sought to prevent Rogers from making any mention of self-defense during voir dire, opening statements, cross-examination, and even his own testimony if he were to testify in his own defense at trial. It also sought to bar any evidence that Watson's husband ("Complainant") had become aware of the affair shortly before the date of the offense. The trial court granted the motion without any testimony to support it.

Rogers testified at his trial that he had been in a lengthy affair with Sandra Watson, and during this relationship, Watson had given him a key to her family home and had provided the passcode to the alarm system. On the date of the alleged offenses, Rogers entered her family home using the key and passcode to feed her cats, pursuant to her request.

After feeding them, Rogers observed Complainant approaching the house. Rogers could not open the back door, so he entered a room Watson had described to him on a previous occasion as her "sanctuary room." Unable to escape through a window, Rogers hid in the closet of the sanctuary room where Complainant kept many firearms in a safe (one firearm was on top of the safe).

Complainant entered the house and eventually appeared at the closet door in a crouched-knee "linebacker stance." Complainant held a knife in his hand, moving it up and down, and shouted "YOU" in a booming voice as he approached Rogers. Rogers stepped further back into the closet, and as Complainant stood face-to-face with him, Rogers grabbed the pistol from the safe. The two men struggled over the gun, which discharged below the Complainant's waist.

During Rogers' direct testimony, he was asked about his state of mind at that moment. Although the trial court had stated pretrial that "if it gets to where we have an instruction on self-defense, I will give you adequate time to explain that to the panel," the judge instead ordered the examination of Rogers to cease, excused the jury, and admonished both Rogers and his counsel by stating: "you may not venture off into anything that alludes to or invades the province of self-defense."

Rogers was ultimately convicted of Burglary of a Habitation with the underlying Aggravated Assault and Aggravated Assault with a Deadly Weapon and sentenced to 40 years on the former with a concurrent term of 20 years on the latter. On appeal, Rogers argued that the trial court prevented him from presenting a complete defense and that the trial court erred in refusing to instruct on any defensive issues. The Court of Appeals ("COA") – without deciding whether error occurred – concluded that any failure to instruct on defensive issues was harmless. The Court granted review, ruled that if error existed it was harmful, and remanded to the COA to decide whether the trial court erred in refusing to instruct the jury on any defensive issues. The COA then concluded there was no error because Rogers had failed to provide any evidence that would entitle him to a jury instruction on self-defense or necessity. The Court granted review a second time.

The Court observed "[t]he Fifth, Sixth, and Fourteenth Amendments to the United States constitution guarantee the accused in a criminal prosecution the right to 'a meaningful opportunity to present a complete

defense.'" *Holmes v. South Carolina*, 547 U.S. 319 (2006). It then recited the main principles of the governing rules of law on the issue. "Texas law provides that a judge must provide the jury with 'a written charge distinctly setting forth the law applicable to the case....'" *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007). "[T]his law requires the trial judge to instruct the jury on statutory defenses, affirmative defenses, and justifications whenever they are raised by the evidence." *Id.* "A defendant is entitled to an instruction on every defensive issue raised by the evidence, regardless of whether the evidence is strong, feeble, unimpeached, or contradicted, and even when the trial court thinks that the testimony is not worthy of belief." *Id.* "The defendant's testimony alone may be sufficient to raise a defensive theory requiring a charge." *Warren v. State*, 565 S.W.2d 931 (Tex. Crim. App. 1978). "Even a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Shaw v. State*, 243 S.W.3d 647 (Tex. Crim. App. 2007). A defensive instruction is to be given when "that defense is a rational alternative to the defendant's criminal liability." *Id.*

Rogers' testimony alone was enough to warrant an instruction on self-defense, according to the Court. To convict Rogers, the State had to prove that (1) Rogers entered the home of Complainant without consent, and (2) Rogers completed the commission of Aggravated Assault on Complainant. Rogers' testimony, if believed, negated the first element and defeated the burglary charge. Consequently, the Court explained: "if [Rogers] presented any evidence that tended to defend against the second element of burglary via completed commission of Aggravated Assault, his 'defense [would be] a rational alternative to [his] criminal liability.' This is because, if believed, it would have independently defeated the offense charged in addition to the lesser-included offense of Aggravated Assault."

In Texas, "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." Tex. Penal Code § 9.31. "A person is justified in using deadly force against another: (1) if the actor would be justified in using force against the other under section 9.31; and (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary: (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, robbery, or aggravated robbery." § 9.32. Of importance for the present case, "[a] person who has a right to be present at the location where deadly force is used, who has not provoked the person against whom deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section." § 9.32(c).

According to Rogers' testimony, he had a right to be in Watson's house because he had the key and the passcode provided to him by Sandra; she had asked him to stop by and feed her cats; and he had done so numerous times in the past and knew the cats' names and where their food and food bowls were located. In fact, the Court stated that the evidence raises questions about whether Complainant's own actions were justified under § 9.31. Rogers used potentially deadly force while defending himself against Complainant's unprovoked actions of approaching Rogers aggressively with a raised knife. As the Court pointed out, Rogers presented evidence that he had valid consent provided by Watson to be in

the home, despite the fact Complainant did not consent to Rogers accessing the family home. Moreover, even assuming Rogers were a trespasser for the sake of argument, Texas law "does not blanket authorize the use of deadly force against trespassers – especially in the middle of the afternoon," the Court stated. *See* § 9.42.

Applying the governing law to the record, the Court concluded that Rogers was entitled to the defensive charges requested under the standards provided in § 9.32(a)(2)(B) and § 9.32(c). It explained that Rogers' testimony entitled him to a self-defense jury instruction and that it for the jury to decide whether he had permission to be in the home and whether he used deadly force to protect himself to prevent his imminent murder, not the prosecution or trial judge. Thus, the Court held that both the trial court and the COA erred in this case.

Accordingly, the Court reversed the decision of the COA and remanded to the trial court for further proceedings consistent with its opinion. See: *Rogers v. State*, 2022 Tex. Crim. App. LEXIS 742 (2022).

SCOTUS: Honest-Services Fraud Jury Instructions Regarding Private Citizen Too Vague

by Richard Resch

The Supreme Court of the United States held that a trial court's jury instructions on the standard as to whether a private citizen owes a fiduciary duty to the public and a breach thereof may serve as the basis for a conviction for honest-services fraud were too vague.

From 2011 to 2016, Joseph Percoco served as the Executive Deputy Secretary to former New York Governor Andrew Cuomo. His position afforded him a great deal of influence over official government decision-making. For an eight-month period in 2014, he resigned his government position to manage Cuomo's reelection campaign.

During his break from government service, he accepted payments totaling $35,000 from a real-estate development company to persuade Empire State Development, a state agency, to drop the requirement for a costly "Labor Peace Agreement" with local unions as a precondition for being awarded a lucrative state project. After Percoco urged a senior official with the agency to drop the requirement, it did so and advised the real-estate company of its decision the next day.

The U.S. Justice Department discovered the arrangement and indicted Percoco and others in connection with several allegedly illegal schemes. He was charged with several crimes, including conspiracy to commit honest-services wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 1349. The Government alleged that the conspiracy occurred from 2014 to 2015, which included his tenure as a government official as well as his time as a private citizen working on the reelection campaign.

Prior to trial, Percoco moved for dismissal, arguing that a private citizen cannot commit or conspire to commit honest-services wire fraud predicated on one's duty of honest services to the public. The trial court denied the motion. When the case was submitted to the jury, the trial court instructed that the jury could find Percoco owed a duty to provide honest services to the public while a private citizen if (1) "he dominated and controlled any governmental business and (2) that "people working in the government actually relied on him because of a special relationship he had with the government." The jury convicted him, and he was sentenced to 72 months' imprisonment. He timely appealed.

The U.S. Court of Appeals for the Second Circuit affirmed, explaining that the jury instruction provided by the trial court accurately reflects the Second Circuit's position on honest-services fraud adopted in *United States v. Margiotta*, 688 F.2d 108 (1982). Percoco sought review by SCOTUS to answer the question of whether a private citizen who "has informal political or other influence over governmental decision making" can be convicted of honest-service fraud. SCOTUS granted certiorari.

The Court began its analysis by recounting the history of federal wire fraud statutes, treatment of honest services by the lower courts, and *Margiotta*. In that case, Joseph Margiotta served as chair of the Republican Party Committees for Nassau County as well as the town of Hempstead. He used the considerable influence that came with those positions to engage in a kickback scheme. Despite holding no elective office, he was indicted for honest-services mail fraud. The prosecution argued that his party positions "afforded him sufficient power and prestige to exert substantial control over public officials."

On appeal, a divided panel of the Second Circuit agreed, explaining that "there is no precise litmus paper test" for determining when a private citizen "owes a fiduciary duty to the general citizenry" but that "two-time tested measures of fiduciary status [were] helpful." The tests are (1) whether "others [relied] upon [the accused] because of [his] special relationship in the government and (2) whether the accused exercised "de facto control" over "governmental decisions." *Margiotta*. The *Margiotta* Court concluded that a private citizen could commit honest-services fraud if he "dominate[d] government."

About five years later, SCOTUS rejected the concept of honest-services fraud and held that the mail fraud statute was "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350 (1987). However, Congress quickly responded by enacting 18 U.S.C. § 1346, which provides that "scheme or artifice to defraud" (which appears in both § 1341 and § 1343) includes the deprivation of "the intangible right of honest services." *Skilling v. United States*, 561 U.S. 358 (2010) (quoting § 1346).

The Court explained that *Skilling* instructed the intangible right of honest services "must be defined with the clarity typical of criminal statutes and should not be held to reach an illdefined category of circumstances simply because of a smattering of pre-*McNally* decisions."

In the present case, the Second Circuit concluded that Congress effectively reinstated the far-reaching coverage of intangible rights of honest services of the *Margiotta*-theory cases. However, the Court rejected that interpretation, explaining that "*Skilling* was careful to avoid giving § 1346 an indeterminate breath that would sweep in any conception of 'intangible rights of honest services' recognized by some courts prior to *McNally*."

With the foregoing principles in mind, the Court turned to the issue of whether the theory endorsed by the lower courts in this

case results in the uncertainty of § 1346's coverage that implicates "the due process concerns underlying the vagueness doctrine." *Skilling*. First, the Court rejected Percoco's argument for a per se rule that a private citizen can never have the requisite fiduciary duty to the public to support a conviction for honest-services fraud. It explained that individuals who are not formally employed by a government entity may nevertheless enter into agreements that authorize them to act as actual agent of the government, and such an agent owes a fiduciary duty to the government (the agent's principal) and the public it serves.

But rejecting the adoption of a per se rule that private citizens can never owe a fiduciary duty to the public is insufficient to sustain Percoco's convictions, the Court stated. To decide that issue, the Court must determine whether the trial court's jury instructions based on the *Margiotta* theory are correct.

The Court held that they are not, because the standard articulated in *Margiotta* is too vague. For example, the standard could apply to well-connected lobbyists, but the public has no right to disinterested services from them. The Court explained that *Margiotta* fails to define "the intangible right of honest services … with sufficient definiteness that ordinary people can understand what conduct is prohibited [or] in a manner that does not encourage arbitrary and discriminatory enforcement." *McDonnell v. United States*, 579 U.S. 550 (2016). Thus, the Court held that the *Margiotta*-based jury instructions are too vague to serve as the legal standard for concluding that a private citizen owes a fiduciary duty to the public.

Accordingly, the Court reversed the judgment of the Second Circuit and remanded the case for further proceedings consistent with its opinion. See: *Percoco v. United States*, 2023 U.S. LEXIS 1889 (2023).

New Commission in Georgia Will Discipline and Remove Prosecutors Who Are Seen as Not Tough Enough on Crime

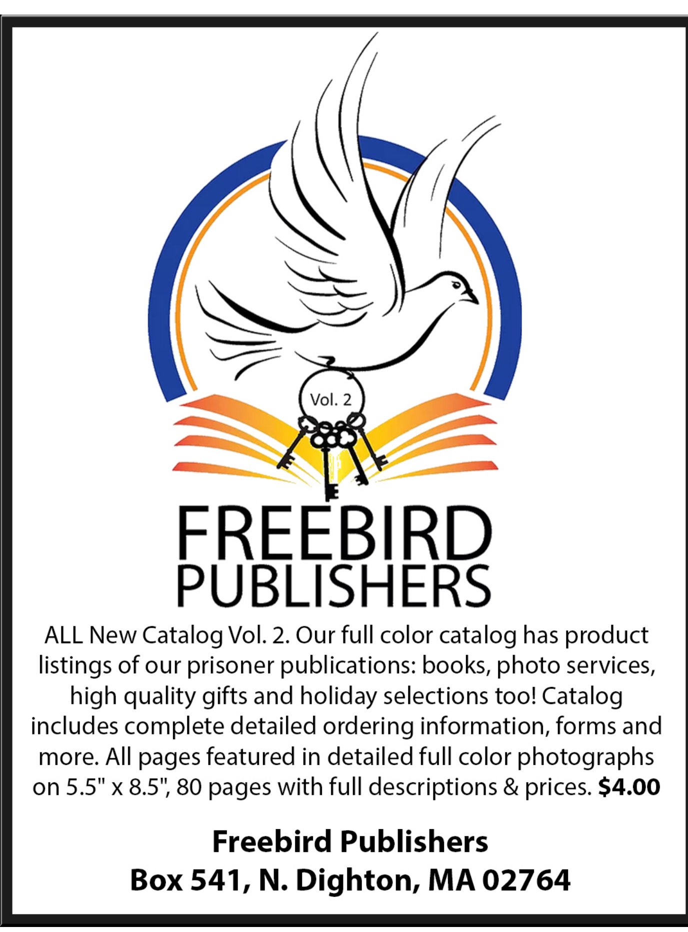
by Jo Ellen Nott

Republican Governor Brian Kemp of Georgia signed into law Senate Bill 92 ("SB 92") on May 5, 2023, creating the Prosecuting Attorneys Qualifications Commission ("PAQC"). The new oversight group is tasked with disciplining and removing "far-left prosecutors" who make Georgia communities "less safe," according to the Peach State governor.

Senate Bill 92 also requires that prosecutors review every case for which probable cause exists and make a prosecutorial decision for each one. Under the new mandate, prosecutors will not be permitted to exclude categories of cases from prosecution such as low-level drug offenses or access to reproductive health care.

It is widely held by legal experts that considering every case individually is unrealistic because prosecutors decline to prosecute much more often than they decide to charge. It remains to be seen if the new legislation will change prosecutors' behavior or prompt them to avoid publicizing charging decisions.

The PAQC will launch on July 1 and begin taking complaints on October 1. The commission will include six current or former prosecutors and two other lawyers. It will oversee district attorneys and solicitors general — elected prosecutors who handle



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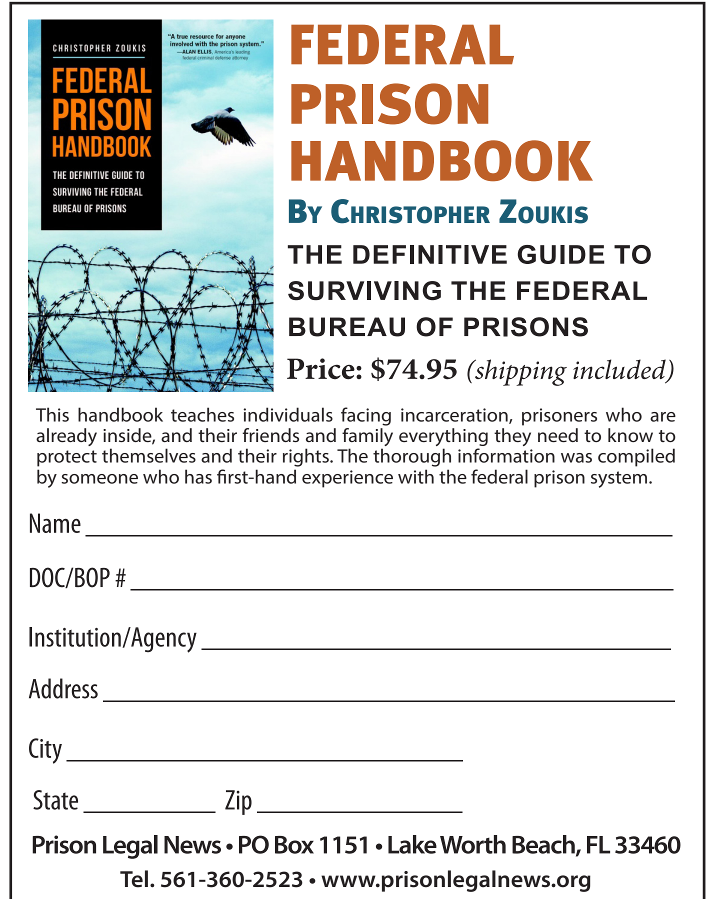

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lower-level crimes in some counties, according to Governor Kemp's press secretary.

Georgia's SB 92 joins a nationwide legislative movement to remove prosecutors in various states and dispute how certain criminal offenses should be charged. Colorado, California, Florida, Indiana, Missouri, North Carolina, New York, and Pennsylvania have instituted measures to remove prosecutors for misconduct in recent years.

Deborah Gonzalez, Democratic district attorney for Athens-Clarke and Oconee counties, and extremely controversial in Kemp's hometown of Athens, is a top target of SB 92. Gonzalez chooses not to prosecute cases of minor drug possession, truancy, and other low-level offenses. She is widely criticized for her management style, her staffing issues, and her progressive politics which are critical of the criminal justice system.

Measures to limit or remove prosecutors nationwide have had varying degrees of success. In Missouri, Republicans maneuvered to limit Democrat Circuit Attorney Kim Gardner until she announced she would resign on June 1, 2023. In Indiana, a bill to allow an oversight board to appoint a special prosecutor to replace a "noncompliant" prosecutor who refused to charge certain crimes has not gained traction. In Pennsylvania, Republican efforts to impeach Philly District Attorney Larry Krasner are stalled on appeal. In Florida, Governor Ron DeSantis (R) suspended State Attorney Andrew Warren for his stance on abortion and transgender rights. A federal judge found that DeSantis illegally targeted Warren because of his politics. That suspension is now under appeal to the state Supreme Court.

Sources: *Courthouse News, Governor Brian P. Kemp, Office of the Governor*

Fifth Circuit: Placing Jacket Within Fenced-In Area of Home in Presence of Police Evidences Clear Intent Not to Abandon It, Warrantless Search Violates Fourth Amendment Rights

by Richard Resch

The U.S. Court of Appeals for the Fifth Circuit held that police violated a defendant's Fourth Amendment rights by conducting a warrantless search of his jacket that he tossed over the fence at his mother's home as police were initiating contact because he did not "abandon" his jacket under either *Katz*'s expectation of privacy test or *Jones*' trespassory test.

San Antonio Police Department Officer Christopher Copeland was on the lookout for a truck registered to the mother of Albert Ramos Ramirez, Jr. He observed Ramirez driving the truck, rolling through a stop sign and pulling into his mother's driveway. Copeland attempted to initiate a traffic stop, but Ramirez had already exited the truck and tossed his jacket over the fence around his mother's home, landing on top of a closed trash bin.

Copeland pat-frisked him, placed him in handcuffs, and detained him in the backseat of his patrol vehicle. While patting him down, Copeland asked if he had any weapons. Ramirez stated that he did not and gave his consent to search the truck. No contraband was found in it.

Without asking for consent to enter the property or search the jacket, Officer Craig Pair retrieved Ramirez's jacket by reaching over the fence and searched it, finding a gun in one of the pockets.

Ramirez was charged with being a felon in possession of a firearm. He filed a motion to suppress the gun, arguing that he did not abandon his jacket by tossing it over the fence and that the warrantless search violated his Fourth Amendment rights. During the suppression hearing, evidence showed that Ramirez lived at his mother's house for most of his life, he visited daily to prepare meals for her, and he received mail there.

The U.S. District Court for the Western District of Texas denied the motion, ruling that Ramirez abandoned the jacket. He pleaded guilty and was sentenced to 46 months' imprisonment. He timely appealed.

The Court began its analysis by noting that until quite recently, Fourth Amendment analysis focused exclusively on the "reasonable expectation of privacy" framework from Justice Harlan's concurrence in the landmark case of *Katz v. United States*, 389 U.S. 347 (1967). In fact, this was the approach used by the District Court, according to the Court.

A criminal suspect can forfeit his reasonable expectation of privacy – and by extension, Fourth Amendment protections – through abandonment. *See United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973). The Court stated that the textbook example of abandonment is when a fleeing suspect tosses contraband to the ground as he runs from the police. By tossing the property, the fleeing suspect signals to the world that it does not belong to him, the Court explained. In determining whether abandonment occurred, courts examine all "relevant circumstance existing at the time" to determine "whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question." *Colbert*.

The Court rejected the District Court's determination that Ramirez abandoned his jacket by tossing it over his mother's fence, stating "we do not think it can fairly be said that Ramirez manifested an intent to disclaim ownership in his jacket simply by placing it on the private side of his mother's fenced-in property line." It explained that this is a markedly different situation than if he had dropped his jacket on a public sidewalk and ran away or insisted the jacket did not belong to him before police searched it.

The Court declined to adopt the Government's proposed blanket rule that a "defendant abandons an object when he throws it to the ground as officers approach." It stated that the case law relied upon by the Government for its blanket rule involves suspects discarding evidence in a public place while fleeing from police. In contrast, the operative facts are materially distinguishable in the present case because Ramirez did not discard his jacket in a public place nor was he fleeing from Copeland when he tossed it onto his mother's private property, the Court explained. Therefore, the Court concluded that Ramirez did not abandon his jacket and thus retained his reasonable expectation of privacy in both the jacket and its contents, so Copeland's search of it was subject to Fourth Amendment protections, which Copeland violated by conducting a warrantless search.

The Court did not end its discussion there; rather, it continued by also analyzing the case within the trespassory framework of Fourth Amendment analysis clarified and reiterated in *United States v. Jones*, 565 U.S. 400 (2012), which instructs that the Fourth Amendment protects against "government

trespass upon the areas ('persons, houses, papers, and effects') it enumerates."

After *Katz* but prior to *Jones*, it was thought that *Katz*'s expectation of privacy test supplanted the common law physical trespass test for Fourth Amendment analysis. But *Jones* teaches that is not correct, holding that, separate and distinct from *Katz*'s expectation of privacy, the Fourth Amendment restricts physical intrusions that would have been considered a "search" within the meaning of the Fourth Amendment at the time it was adopted. Consequently, after *Jones*, courts can utilize either the test in *Katz* or *Jones* or both. *See Florida v. Jardines*, 569 U.S. 1 (2013).

The Court stated that it is unaware of any cases examining the "interplay between abandonment and *Jones*'s property-rights rubric," so it turned to secondary sources that stated the owner's intent was the central question for abandonment claims under the common law. *See* 2 William Blackstone, Commentaries 6. Under common law abandonment jurisprudence, where a disputed item was left was dispositive evidence of intent, according to the Court. *See Livermore v. White*, 74 Me. 452 (1883). The Court cited *McLaughlin v. Waite*, 5 Wend. 404 (N.Y. 1830), which held that if personal property is "secreted in the earth, or elsewhere, the common law presumes the owner placed them there for safety, intending to reclaim them," and so, there is no intent to abandon the property.

Applying the foregoing property-rights rule of abandonment to the present case, the Court concluded that Ramirez did not abandon his property interest in his jacket because placing it within the fenced-in area of his mother's property "excludes the very idea of abandonment." It explained that he placed it there for safekeeping with the clear intent of retrieving it later. Thus, the Court held Ramirez did not abandon his jacket, so it was subject to Fourth Amendment protections under *Jones*' property-rights analysis as well as *Katz*'s expectation of privacy framework.

Accordingly, the Court vacated the denial of Ramirez's motion to suppress as well as his conviction and sentence. See: *United States v. Ramirez*, 2023 U.S. App. 11496 (5th Cir. 2023).

California Court of Appeal Reiterates 'Three Strikes' Law Does Not Limit 'Presentence' Custody Credits, Defendant Entitled to Credits Calculated Under Penal Code § 4019

by Douglas Ankney

The Court of Appeal of California, Second Appellate District, ruled that assault with a firearm is not a violent felony for purposes of the state's Three Strikes Law (Penal Code § 667); consequently, Rasheed Malcolm Jones was entitled to the amount of custody credits calculated under the default provision in §4019. (Note: All statutory references are to the California Penal Code.)

Jones pleaded no contest to one count of assault with a firearm and admitted having suffered a prior conviction for assault with a firearm in 2012. Jones was sentenced to four years in prison. At sentencing, defense counsel expressly requested the court to order "day-for-day" custody credits pursuant to § 4019

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because while the charge of assault with a firearm qualifies as a serious felony, it is not a disqualifying violent felony. The sentencing court rejected the request, ruling Jones was not entitled to day-for-day credits because he had admitted the prior strike. The court awarded Jones presentence custody credits in the amount of 596 days (497 actual, plus 99 conduct). Jones timely appealed.

The Court of Appeal observed "[o]rdinarily, presentence custody credits are calculated according to Penal Code section 4019." *People v. Thomas*, 988 P.2d 563 (Cal. 1999). Pursuant to the relevant parts of § 2900.5(a), defendants "[i]n all felony and misdemeanor convictions, either by plea or by verdict" shall be given presentence credits "pursuant to Section 4019." However, § 2933.1(c) creates an exception to the general rule for a defendant convicted of a "violent felony" within the meaning of the Three Strikes Law, providing in relevant part that "[n]otwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement ... following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)." And § 2933.1(a) provides that "any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit as defined in Section 2933."

Jones' current and prior convictions for assault with a firearm were not violent felonies as defined by § 667.5(c). Therefore, the limitation on presentence credits in § 2933.1 did not apply to him. But because his assault charge and prior strike qualified as a serious felony under § 1192.7(c)(31), the People contended Jones' prior strike meant his presentence credits were limited by §§ 667 and 1170.12.

The Court flatly rejected that argument, declaring "the Three Strikes law has no effect on the calculation of *presentence* conduct credits." It stated that the California Supreme Court explained in *People v. Buckhalter*, 25 P.3d 1103 (Cal. 2001), that "restrictions on the rights of Three Strikes prisoners to earn term-shortening credits do not apply to confinement in a local facility prior to sentencing." The Three Strikes law, §§ 667(c)(5) and 1170.12(a)(5), expressly refer only to "*post*sentence ... credits," not presentence credits. *Id.* Thus, the Court held that Jones' presentence credits should have been calculated according to §4019.

Accordingly, the Court modified the judgment of conviction to reflect 993 days of presentence custody credits (497 actual, 496 conduct), affirmed the judgment as modified, and instructed that on issuance of the remittitur, the superior court is to prepare and transmit a modified abstract of judgment to the Department of Corrections and Rehabilitation. See: *People v. Jones*, 2023 Cal. App. LEXIS 131 (2023).

Ninth Circuit: Government's Inflammatory Arguments in Sentencing Memorandum and at Sentencing Hearing Implicitly Breached Plea Agreement Promise Not to Recommend Sentence in Excess of Low-End Guidelines Range

by Douglas Ankney

The U.S. Court of Appeals for the Ninth Circuit ruled that the Government's inflammatory arguments in its sentencing memorandum and at the sentencing hearing implicitly breached the plea agreement because the sole effect of the arguments was to increase the defendant's sentence beyond the low-end of the U.S. Sentencing Guidelines range – something the Government had promised not to do in the plea agreement.

In 2020, Gerardo Farias-Contreras agreed to plead guilty to conspiracy to distribute 500 grams or more of methamphetamine or heroin pursuant to a plea agreement that included the proviso that the "United States agrees not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." According to the presentence report ("PSR"), Farias-Contreras's adjusted advisory Guidelines range was 151-188 months in prison.

In its six-page sentencing memorandum, the Government devoted just two sentences to the recommended 151-month term of imprisonment. The remainder of the memorandum focused on the overwhelming harm drug trafficking does to families and communities; on Farias-Contreras's long history of drug trafficking; and on information already contained in the PSR.

The memorandum argued: "Drug trafficking is nothing less than pumping pure poison into our community. The effects of drug trafficking are massive, and in some respects, incalculable, especially when all the collateral consequences are considered. The damage the drugs this Defendant were [sic] peddling cause irreparable harm to the community in general as well as to families whose members are addicted to controlled substances."

The memorandum included nationwide statistics from the Center for Disease Control showing 67,367 deaths from drug overdose in 2018 and a record high of 79,980 deaths in 2019. And the memorandum quoted from the book *Dreamland* by Sam Quinones, describing in detail the horrors parents of addicted children experience.

The memorandum also quoted extensively from *Terrebonne v. Butler*, 820 F.2d 156 (5th Cir. 1987), wherein a sentence of life without parole imposed on a small-time drug dealer was upheld: "Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image – others who create others still, across our land and down our generations, sparing not even the unborn." *Terrebonne*.

The Government then argued in the memorandum that Farias-Contreras was at "the top of criminal culpability in this case," citing information already contained in the PSR, characterizing his criminal conduct as a "dedicated lifestyle," with his drug trafficking going back to 1990, and his prior contacts with law enforcement doing nothing to dissuade him from drug trafficking.

At the sentencing hearing, the Government never once stated affirmatively that it recommended a sentence at the low-end of the Guideline ranges. Instead, Government counsel informed the U.S. District Court for the Eastern District of Washington that Farias-Contreras' sentence was the subject of much debate in the U.S. Attorney's Office,

with some arguing for a sentence above the low-end.

Government counsel told the judge that the attorneys were unanimous only in that "a long period of incarceration is going to be necessary to protect the public from the defendant, to protect society." And Government counsel argued that Farias-Contreras' codefendant had been sentenced to 240 months in prison, even though the codefendant had been involved for only one year compared with Farias-Contreras' dealing multiple pound-level quantities "since 2008."

The sentencing court stated it was "concerned about protection of the public" and that Farias-Contreras' entire adult life "has been dedicated to dealing drugs…." The district judge observed that Government counsel "in her brief and in her oral presentation" indicated Farias-Contreras was at the top of the chain in drug distribution.

And the sentencing judge opined that "the damage that can be done and was done to the citizens of our community by making available those drugs in our area can't be quantified. It's impossible to tell. Lives are lost. Lives are ruined. Families broken up, jobs lost, health deteriorated. Children become – it becomes available for children. Addicts are fed. So it's serious, very serious." The District Court then sentenced Farias-Contreras to 188 months in prison.

He appealed, contending that the Government's inflammatory arguments were designed to obtain a sentence greater than the low-end of the Guidelines range, which was a breach of the plea agreement. Because defense counsel failed to timely object, the issue was reviewed for plain error. The Court could grant relief only "if there has been (1) error; (2) that was plain; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Whitney*, 673 F.3d 965 (9th Cir. 2012).

The Court observed "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257 (1971). Plea agreements are contracts between the government and the defendant and "are measured by contract law standards." *United States v. Franco-Lopez*, 312 F.3d 984 (9th Cir. 2002).

In the present case, the Government agreed "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." This type of promise may be broken "either explicitly or implicitly." *United States v. Heredia*, 768 F.3d 1220 (9th Cir. 2014). "The government is under no obligation to make an agreed-upon recommendation enthusiastically. However, it may not superficially abide by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one." *Id.* "[T]he government may not purport to make the bargained-for recommendation while 'winking at the district court' to impliedly request a different outcome." *United States v. Has No Horses*, 261 F.3d 744 (8th Cir. 2001).

The Court stated: "The government implicitly breaches an agreement to recommend a sentence at the low-end of the guideline range or the functional equivalent – here, not to recommend a sentence in excess of the low-end of the guideline range – if it then makes inflammatory comments about the defendant's past offenses that do not provide the district judge with any new information or correct factual inaccuracies." *See Heredia*. "Given the clear, binding, and longstanding precedent governing a prosecutor's promise not to recommend a sentence exceeding the low-end of the guideline range, the government

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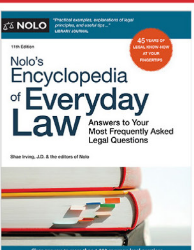

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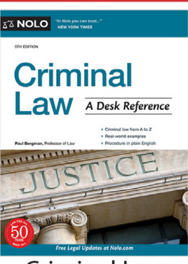

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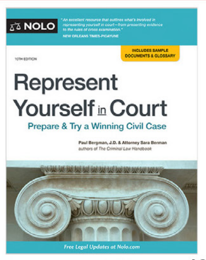

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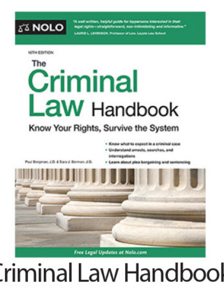

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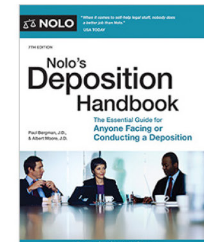

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here implicitly breached the plea agreement, a breach that amounted to plain error," the Court determined.

The Court also concluded that Farias-Contreras' substantial rights were affected. The reasons the District Court gave for imposing a sentence at the high-end of the Guidelines range were quotes and paraphrases of the prosecutor's arguments made in the memorandum and made during her presentation at sentencing.

And with regard to the final requirement of plain error – integrity of the judiciary – "[t]he integrity of the criminal justice system depends upon the government's strict compliance with the terms of the plea agreements into which it freely enters." *Heredia*. When it is determined that the Government breached a plea agreement, remand to a different judge for sentencing is required. *Whitney*.

Accordingly, the Court vacated Farias-Contreras' sentence and remanded to the District Court for the Clerk of the Court to reassign the case for resentencing. See: *United States v. Farias-Contreras*, 60 F.4th 534 (9th Cir. 2023).

Georgia Supreme Court Announces Overruling Longstanding Rule That Anything Filed by Defendant While Represented by Counsel Is Always a 'Legal Nullity'

by Douglas Ankney

The Supreme Court of Georgia unanimously held that courts maintain discretion to consider "hybrid motions," i.e., motions filed pro se by defendants who are also represented by counsel, expressly overruling precedents that held to the contrary.

Garry Deyon Johnson was convicted of malice murder and robbery and sentenced to life in prison without parole and a term of 20 years running consecutively. The judgment of conviction was entered November 17, 2000. Johnson's lead trial counsel was granted permission to withdraw on December 12, 2000, but his other appointed counsel never moved to withdraw. The following day, Johnson filed a pro se "Extraordinary Motion for New Trial." In January 2001, Johnson wrote the trial court clerk for copies of his transcript, stating he was appealing pro se, and the clerk supplied the transcript in response.

But in September 2001, the clerk responded to Johnson's further requests by informing him that attorney Paul David had been appointed for the appeal and that Johnson must seek copies of any additional filings from David. However, David never entered an appearance in the case nor responded to any of Johnson's letters.

Johnson continued corresponding with the clerk until August 2004. Then after more than a 12-year gap, Johnson wrote the clerk again, requesting various filings, stating he had never received a ruling on his filings and that his trial attorneys were dead or not practicing law. Johnson was appointed new counsel, and the trial court entered a consent order granting Johnson leave to file an "out of time motion for new trial and appeal." After hearings on the motion, the trial court denied it on January 28, 2022. By counsel, Johnson filed a notice of appeal.

The Georgia Supreme Court initially dismissed the appeal, reasoning that pursuant to *White v. State*, 806 S.E.2d 489 (Ga. 2017), Johnson's December 13, 2000, motion for new trial was a legal nullity because it was filed pro se while Johnson was presumably represented by counsel. Further, the motion later filed by newly appointed counsel in 2018 was untimely, and the remedies of out-of-time motions for new trial or appeal were no longer cognizable pursuant to *Cook v. State*, 870 S.E.2d 758 (Ga. 2022) (eliminated judge-made "motion for out-of-time appeal). But on reconsideration, the Court vacated the dismissal order and reinstated the appeal, asking the parties and amici curiae to address whether "a pro se filing made by a defendant who is actually or presumptively represented by counsel [is] always a nullity." The Court began with the concept of "hybrid representation."

"Speaking generally, hybrid representation refers to when a defendant acts on his or her own behalf in court while he is at the same time represented by counsel." *Cargill v. State*, 340 S.E.2d 891 (Ga. 1986). There is no right to hybrid representation under the U.S. Constitution because asserting the right to be represented by counsel is deemed a waiver of the Sixth Amendment right of self-representation. *McKaskle v. Wiggins*, 465 U.S. 168 (1984). And while under the former Georgia Constitution a state defendant in a criminal trial had a right to hybrid representation, *Burney v. State*, 257 S.E.2d 543 (Ga. 1979), the elimination of pertinent language from Art. I, § I, Par. XII of the current Constitution means that "a person no longer has the right to represent himself and also be represented by an attorney, i.e., the right to act as co-counsel." *Cargill*. Under the former Georgia Constitution of 1976, a person had "the right to prosecute or defend his own cause in any of the courts of this state, in person, by attorney, or both." But in the current Georgia Constitution of 1983, the words "or both" were stricken, and the clause reads: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."

Soon after, the Georgia Supreme Court recognized that defendants no longer had the right of hybrid representation, the Supreme Court made clear that the change to the Constitution left unaffected the trial courts' discretion to allow hybrid representation. "[A]lthough a defendant may not insist on acting as co-counsel, the trial court may ... allow him to do so." *Hance v. Kemp*, 373 S.E.2d 184 (Ga. 1988). The Supreme Court consistently maintained this position, allowing counseled defendants to act as co-counsel at the discretion of the trial courts and allowing trial courts to limit the role counseled defendants could personally inject into the trial when acting as co-counsel. (See opinion for listing of supporting citations.)

But in *Eagle v. State*, 440 S.E.2d 2 (Ga. 1994), the Supreme Court declined to consider a pro se brief filed by the defendant. After noting that Eagle was represented by counsel and that he had no right to hybrid representation, the Supreme Court simply said "the additional claims raised in Eagle's pro se brief will not be considered." However, it did not say Eagle was prohibited from filing the pro se brief.

In the current case, the Court acknowledged that the Supreme Court "lost the thread" starting in *Johnson v. State*, 470 S.E.2d 637 (Ga. 1996). The *Johnson* Court held that the trial court erred in addressing a pro se motion for new trial alleging ineffective assistance of counsel while the counsel complained of was still representing the defendant. In short, *Johnson* stood for the narrow proposition that

a trial court cannot address a pro se claim of ineffective trial counsel while the defendant is still represented by that same trial counsel.

Unfortunately, the Supreme Court began citing *Johnson* for the much broader proposition of an absolute rule that pro se filings made while a defendant is represented by counsel are "invalid," *Ware v. State*, 480 S.E.2d 599 (Ga. 1997); "unauthorized and without effect," *Cotton v. State*, 613 S.E.2d (Ga. 2005); and "legal nullities," *Sims v. State*, 862 S.E.2d 507 (Ga. 2021). The absolute rule applied in these cases, viz., a pro se filing by a counseled defendant is always a legal nullity, was not only in conflict with the Supreme Court's earlier decisions recognizing a court's discretion to allow hybrid representation, but also, the absolute rule was based on a cursory explanation that was obviously wrong.

In *Lopez v. State*, 852 S E.2d 547 (Ga. 2020), the support offered for this absolute rule was: "[A] criminal defendant does not have the right to represent himself and also be represented by an attorney. Thus, a pro se filing by a represented party is a legal nullity without effect." While it was absolutely correct that a defendant represented by counsel does not have the *right* to represent himself, it does not follow that anything he files pro se is a legal nullity or *prohibited*, the Court explained. Said another way, just because a person does not have the right to do something does not necessarily mean he or she is prohibited from doing it.

And this wrong turn in the Supreme Court's jurisprudence was not without harmful effect, the Court noted. In the important period right after entry of a defendant's final judgment of conviction and sentence, the defendant faces tight deadlines for pursuing postconviction review or an appeal. Sometimes, a defendant wishes to appeal, move for a new trial, or withdraw a guilty plea, but counsel fails to timely file the proper papers. In those cases, a timely pro se filing could preserve the defendant's right to these important kinds of review, the Court stated. Formerly, when counsel missed these deadlines, defendants could "seek an out-of-time appeal in the trial court or in habeas corpus." *Dos Santos v. State*, 834 S.E.2d 733 (Ga. 2019). But in *Cook*, the Supreme Court held that the motion for out-of-time appeal was "not a legally cognizable vehicle for a convicted defendant to seek relief for alleged constitutional violations" in the court of conviction. And habeas corpus is an inadequate remedy in these circumstances because defendants are limited to raising only constitutional issues; they have no right to counsel; and they are subject to a four-year statute of limitations. *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999).

Consequently, with the absolute legal nullity rule and elimination of the possibility of an "out-of-time appeal," the Court explained: "when a defendant has been abandoned by counsel during the critical post-conviction period, these rules … prevent even an attentive and diligent defendant from preserving his right to appeal." *See, e.g., Jones v. State*, 840 S.E.2d 357 (Ga. 2020). Thus, the Court announced that "we overrule our past decisions to the extent that they hold that pro se filings by counseled defendants are *always* legal nullities." (emphasis in original)

Now that the legal nullity rule has been overruled, the Court stated "we are left with our past decisions that correctly recognized that courts retain discretion to allow hybrid representation." *See Rivera v. State*, 647 S.E.2d 70 (Ga. 2007); *Colwell v. State*, 544 S.E.2d 120 (Ga. 2001); *see also Eagle*. The Court instructed that the exercise of this discretion should be used "sparingly," but any concerns about problems created by hybrid representation "may give way when recognizing a pro se filing would preserve a right of appeal that would otherwise be lost through no fault of the defendant."

The Court stated that it is not undoing "what has been done" regarding "any pro se filings in cases that have already been adjudicated through direct appeal." *See Cook*. It instructed that "our holding here applies to future cases and those pending cases whose direct appeals have not yet been adjudicated."

Accordingly, the Court vacated the trial court's order denying Johnson's counseled motion for out-of-time appeal and remanded with instructions for the trial court to dismiss that motion and to exercise its discretion to determine whether to recognize and rule on any of the pro se postconviction motions Johnson filed. See: *Johnson v. State*, 885 S.W.2d 725 (Ga. 2023).

Writer's note: The Court's opinion also contains an in-depth discussion of the doctrine of stare decisis and the Georgia Supreme Court's framework for overruling precedents.

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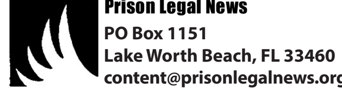

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Fourth Circuit: Denial of Motion for Compassionate Release Abuse of Discretion Where District Court Failed to Properly Address Numerous Health Issues, Advanced Age, and Relevant § 3553(a) Factors

by Douglas Ankney

The U.S. Court of Appeals for the Fourth Circuit held that a District Court's denial of a motion for compassionate release was an abuse of discretion where the District Court concluded that Lonnie Edward Malone's numerous health conditions did not provide extraordinary and compelling reasons for release and where the District Court did not recognize that the relevant factors of 18 U.S.C. § 3553(a) favor release.

In May 2008, Malone was sentenced to 330 months in prison for possession of a short-barreled shotgun in furtherance of a drug-trafficking offense and for conspiracy to distribute 50 grams or more of a mixture containing methamphetamine. In 2019, the almost-69-year-old Malone moved, pro se, for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).

Malone explained his extraordinary and compelling reasons were his health conditions, viz., he had colon-rectal cancer, that a surgery sewed his rectum shut, and he now lived with a colostomy bag permanently affixed to his body. His medical records revealed he had cystic kidney disease, hernia, malignant neoplasm of rectum, hypertension, morbid obesity, neoplasm of uncertain behavior, hyperlipidemia, and other specified disorders of the liver.

He recounted countless issues with the colostomy bag, five surgeries to remove and reinstall it, and an instance where the bag blew off from its port, spraying himself and his room with feces. The bag and its foul smell relegated him to pariah status among other prisoners. Additionally, Malone's medical records revealed he suffers from nocturia, the removal of a mass from his left chest wall, Type II Diabetes, a dysfunction in his heart ventricle, pulmonary regurgitation, abnormal Q waves, obstructive sleep apnea, chronic rhinitis, dyslipidemia, other respiratory diseases, dental decay and loss, tingly legs, burning sensations, and swollen feet.

The U.S. District Court for the Western District of Virginia denied Malone's motion, reasoning that pursuant to the "helpful guidance" of U.S.S.G. § 1B.1.13 cmt. n. 1 (A-B), "it [did] not appear that the defendant's grounds for compassionate release complies with any of these categories ... [that] qualif[y] [him] for such extraordinary relief."

However, in May 2020, the Bureau of Prisons ("BOP") determined Malone's health conditions and advanced age made him "highly susceptible to death or serious illness from COVID-19" and transferred him to his brother's home to continue serving his sentence. (Malone was subsequently transferred to his own home.) Malone moved again for compassionate release in December 2020, requesting time served. He again pointed to his advanced age and severe medical conditions. He also argued that the § 3553(a) factors weighed in favor of his release.

Additionally, he argued that if the BOP were to reimprison him, the odds of contracting COVID-19 would be high and potentially deadly. Malone included in his pleadings a Notice of Office of Legal Counsel letter that explained that after the COVID-19 emergency period expired, Malone would be required to return to prison at the BOP's discretion unless his motion for compassionate release was granted. The District Court, relying on its reasons for denial of Malone's first motion for compassionate release, denied the second motion. Malone appealed.

The Court observed "[i]n analyzing a motion for compassionate release, district courts must determine: (1) whether extraordinary and compelling reasons warrant such a reduction; and (2) that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582. "Only after this analysis may the district court grant the motion if (3) the relevant 18 U.S.C. § 3553(a) factors, to the extent they are applicable, favor release." *Id.* As to factor (2)'s applicable policy statements, the Court formerly looked to U.S.S.G. 1B1.13, but the Court had since joined the Second, Sixth, and Seventh Circuits in holding that U.S.S.G. 1B1.13 is inapplicable to motions for compassionate release filed by the defendants (versus those filed by the BOP). *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). "Though the outdated policy remains helpful guidance, a district court must not entirely rely upon Section 1B1.13 when considering a motion for compassionate release." *United States v. Kibble*, 992 F.3d 326 (4th Cir. 2021). "Ultimately, district courts are encouraged to 'consider any extraordinary and compelling reason[s] for release that a defendant might raise.'" *McCoy*.

The Court stated "[i]n denying [Malone's first motion for compassionate release], the district court recognized § 1B1.13's inapplicability but failed to step outside the policy statement's four corners." Since the District Court relied on its decision denying the first motion when denying Malone's second motion, it followed that the flawed analysis from the first denial flowed into the second denial. "As a result, the district court did not present a sufficient or accurate legal framework when it rejected Malone's extraordinary and compelling reasons unrelated to COVID-19."

The Court determined that Malone's numerous health conditions "undoubtedly establish extraordinary and compelling reasons for release." And even if the District Court were bound by § 1B1.13's "Age" provision, Malone qualified, i.e., (1) he is at least 65 years old, (2) he is experiencing a serious deterioration in physical or mental health because of the aging process, and (3) he has served at least 10 years of his term of imprisonment. § 1B1.13 cmt. n.1(B). Further, the fact that the BOP found Malone was at severe risk of contracting COVID-19 due to his health and advanced age was a factor the District Court was required to consider but failed to do so. *United States v. Gamboa*, 467 F. Supp. 3d 1092 (D.N.M. 2020).

With regard to the § 3553(a) factors, the District Court is to weigh those factors against sentence reduction in light of new extraordinary and compelling reasons. When Malone was initially sentenced, the District Court explained that the sentence length was necessary to protect the public. But Malone's deteriorated health now renders him incapable of posing a danger to the community. This conclusion is bolstered by the fact that the BOP had transferred him to home confine-

ment, the Court observed. *See United States v. Calhoun*, 539 F. Supp. 3d 613 (S.D. Miss. 2021). Therefore, the Court concluded that the relevant § 3553(a) factors favor release and that the District Court abused its discretion in denying Malone's second motion for compassionate release.

Accordingly, the Court reversed and remanded with instructions to grant Malone's motion for compassionate release. See: *United States v. Malone*, 57 F.4th 167 (4th Cir. 2023).

Fourth Circuit Declines to Enforce Appeal Waiver and Procedural Default Excused by 'Cause and Actual Prejudice,' Reverses Denial of § 2255 Motion to Vacate § 924(c) Conviction Based on Hobbs Act Conspiracy

by Douglas Ankney

The U.S. Court of Appeals for the Fourth Circuit declined to enforce an appeal waiver where the defendant stood convicted and imprisoned for conduct that, due to developments in the law after he pleaded guilty, did not violate 18 U.S.C. § 924(c) and was not criminal, and the Court determined that his procedural default was excused by a showing of cause and actual prejudice.

Donzell Ali McKinney was charged with substantive Hobbs Act robbery, Hobbs Act conspiracy, and a violation of § 924(c) predicated on the substantive Hobbs Act robbery. After McKinney had consistently refused to plead guilty to the substantive Hobbs Act robbery, he agreed to plead guilty to Hobbs Act conspiracy and a single § 924(c) count with the Hobbs Act conspiracy as the sole predicate offense in exchange for the Government's agreement to dismiss the remaining charges. The plea agreement also included a waiver of the right to contest his conviction and sentence except on grounds of ineffective assistance of counsel or prosecutorial misconduct.

McKinney was sentenced in 2012 to 70 months' imprisonment on the Hobbs Act conspiracy and a consecutive sentence of 120 months' imprisonment on the § 924(c) conviction predicated on the Hobbs Act conspiracy. The remaining charges were dismissed.

In 2016, McKinney filed a 28 U.S.C. § 2255 motion, arguing that his § 924(c) conviction should be vacated because the U.S. Supreme Court had struck down the residual clause of the Armed Career Criminal Act ("ACCA") as unconstitutionally vague in *Johnson v. United States*, 576 U.S. 591 (2015), and the ACCA's residual clause is "functionally indistinguishable" from § 924(c)'s residual clause.

The U.S. District Court for the Western District of North Carolina stayed the matter due to decisions pending before the U.S. Supreme Court and in the Fourth Circuit. When the U.S. Supreme Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019), that § 924(c)'s residual clause is also unconstitutionally vague, McKinney supplemented his motion and argued that *Davis* requires vacatur. The District Court, although acknowledging that McKinney's § 924(c) conviction is likely invalid, denied his § 2255 motion because the appeal waiver barred McKinney's challenge and because McKinney failed to show either cause and prejudice or actual innocence. The Fourth Circuit granted McKinney a certificate of appealability.

On appeal, the Government conceded that McKinney's § 924(c) conviction predicated on Hobbs Act conspiracy is invalid following *Davis*.

The Court concurred, noting that since the U.S. Supreme Court's holding in *Davis* had struck down § 924(c)'s residual clause for vagueness, a Hobbs Act conspiracy could violate § 924(c) only if it is a "crime of violence" under the elements clause of § 924(c). But in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019), the Fourth Circuit held that Hobbs Act conspiracy does not constitute a crime

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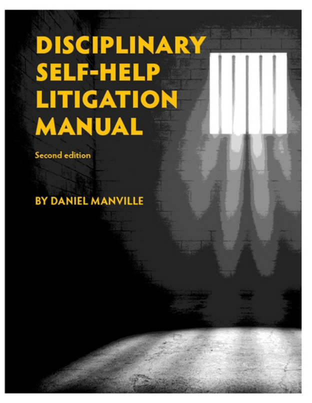

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of violence under the elements clause of § 924(c). Additionally, the Fourth Circuit held that *Davis* applies retroactively to cases on collateral review. *In re Thomas*, 988 F.3d 783 (4th Cir. 2021). The Court concluded that "[b]ecause Hobbs Act conspiracy does not constitute a predicate 'crime of violence' for a § 924(c) violation, McKinney stands convicted of a crime that no longer exists. Ordinarily, that alone would entitle him to relief on his § 2255 motion."

But the Government argued that the appeal waiver precludes McKinney's claim because he does not raise either ineffectiveness of counsel or prosecutorial misconduct, which are the only two grounds for challenging his conviction under the terms of the appeal waiver. McKinney countered that the Court should not enforce the waiver, which it can do under specific limited circumstances.

The Court observed that it would refuse to enforce an appeal waiver when a sentence imposed was in excess of the statutory maximum or was based on a constitutionally impermissible factor. *See United States v. Marin*, 961 F.2d 493 (4th Cir. 1992). Among those factors is the most fundamental reason, i.e., if enforcing the waiver results in a miscarriage of justice. *See United States v. Adams*, 814 F.3d 178 (4th Cir. 2016).

To establish a miscarriage of justice, a defendant need only make "a cognizable claim of actual innocence." *Adams*. In *Adams* – as in the present case – there was a waiver of the right to challenge the conviction except on grounds of ineffective assistance of counsel or prosecutorial misconduct. The *Adams* Court declined to enforce the waiver because intervening precedent invalidated a § 922(g) conviction (because it was no longer based on a valid predicate). The *Adams* Court concluded that the defendant made "a cognizable claim of actual innocence," so enforcing the waiver would constitute a miscarriage of justice. Further, in *United States v. Sweeney*, 833 F. App'x 395 (4th Cir. 2021) (unpublished), the Fourth Circuit declined to enforce an appeal waiver and vacated a § 924(c) conviction because attempted Hobbs Act robbery and Hobbs Act conspiracy are no longer valid predicates.

Under *Davis* and *Simms*, Hobbs Act conspiracy no longer qualifies as a predicate offense supporting McKinney's § 924(c) conviction. As such, the rationale of *Adams* similarly applies to McKinney, the Court stated. Therefore, the Court concluded that McKinney made a cognizable claim of actual innocence and satisfies the miscarriage of justice requirement.

Ordinarily, that would be the end of the matter. However, the Government asserts the affirmative defense of procedural default bars consideration of McKinney's claim on the merits. This doctrine contends that the defendant did not raise the claim at issue during the initial criminal proceedings or on direct appeal. *See United States v. Harris*, 991 F.3d 552 (4th Cir. 2021). Without a recognized excuse for the failure, the procedural default doctrine bars a defendant from arguing the claim on collateral review, the Court stated.

There are two showings that excuse a procedural default: the defendant establishing "either cause and actual prejudice or that he is actually innocent." *Bousley v. United States*, 523 U.S. 614 (1998). The U.S. Supreme Court instructs reviewing courts to address cause and prejudice first. *See Dretke v. Haley*, 541 U.S. 386 (2004). The Court stated that because it finds McKinney satisfies the cause and prejudice excuse, it does not need to address actual innocence.

The Court addressed "cause," stating cause exists for purposes of procedural default analysis if "some objective factor external to the defense" prevented the defendant from arguing the claim on direct appeal. *See Murray v. Carrier*, 477 U.S. 478 (1986). For example, if a claim "is so novel that its legal basis is not reasonably available" to defendant may constitute cause. *Reed v. Ross*, 468 U.S. 1 (1984).

The *Reed* Court listed three categories in which the novelty of the claim could constitute cause: "First, a decision of [the Supreme] Court may explicitly overrule one of [its] precedents. Second, a decision may 'overtur[n] a longstanding and widespread practice to which [the Supreme] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.' And, finally, a decision may 'disapprov[e] a practice [the Supreme] Court arguably has sanctioned in prior cases.'" Quoting *United States v. Johnson*, 457 U.S. 537 (1982). With respect to finding cause for cases falling into the third category, the *Reed* Court instructed it depends on "how direct [the Supreme] Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it, and how strong the available support is from sources opposing the prevailing practice."

Turning to the present case, the Court stated that the third *Reed* category "contemplates precisely the type of novel claim McKinney advances here." It explained that at the time he pleaded guilty in 2012 and was sentence a year later, the U.S. Supreme Court had upheld the constitutionality of residual clauses similar to the one at issue in this case. *See, e.g., Sykes v. United States*, 564 U.S. 1 (2011); *James v. United States*, 550 U.S. 192 (2007). Consequently, when McKinney was sentenced in 2013, the U.S. Supreme Court had foreclosed the very claim he now asserts, the Court explained. In 2015, the U.S. Supreme Court struck down a vague residual clause in *Johnson*. It was only then that McKinney's claim became "reasonably available," and then in 2019, "*Davis* dealt the final blow to § 924(c)'s residual clause," the Court further explained. Thus, the Court concluded that "McKinney's case falls squarely within *Reed*'s 'novelty' framework" and ruled that he has shown "cause" for his procedural default.

The Court then addressed the prejudice prong, stating that a defendant must show the error "worked to his *actual* and substantial disadvantage." *United States v. Frady*, 456 U.S. 152 (1982). It noted, though, that the U.S. Supreme Court has not yet articulated the "exact contours of the prejudice standard in the § 2255 procedural-default context." *See id.* Nevertheless, the Court reasoned that McKinney's § 924(c) conviction subjects him to imprisonment for conduct that is not criminal, so he has shown prejudice and is entitled to relief. *See Davis* (conviction and punishment for an act that the law does not make criminal "inherently results in a complete miscarriage of justice" and presents "exceptional circumstances that justify collateral relief under § 2255"). Thus, the Court held that the District Court erred by denying McKinney's § 2255 motion.

Accordingly, the Court reversed the judgment of the District Court and remanded the case with instructions to vacate his § 924(c) conviction predicated on Hobbs Act conspiracy. See: *United States v. McKinney*, 60 F.4th 188 (4th Cir. 2023).

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Ninth Circuit: Removing Key From Beltloop During *Terry* Stop Unlawful, Denying Vehicle Ownership Not Abandonment, and Have Standing to Assert Fourth Amendment Violation

by Douglas Ankney

The U.S. Court of Appeals for the Ninth Circuit held that the removal of a car key from a suspect's belt loop without his consent exceeded the scope of a *Terry* stop and that the subsequent warrantless search of a car located as the result of the unlawfully seized key was illegal, and thus, the gun recovered from the car should have been suppressed. The Court also held that the suspect's flight from officers did not attenuate the gun from the officer's misconduct, and the suspect's denial of ownership of a vehicle did not divest him of possessory interest in the key under the theory of abandoned property.

One week after an armed robbery of a Sprint store, Los Angeles Police Department ("LAPD") officers Byun and Salas observed Terrance Douglas Baker standing in front of the Nickerson Gardens housing complex. The officers later testified they believed Baker was trespassing.

As the officers approached, Baker lifted his shirt to demonstrate he was unarmed. After Byun conducted a pat-down search of Baker that revealed no weapons or contraband, Byun removed a car key attached to Baker's belt loop. As Byun walked away with the key toward an adjacent parking lot, Salas asked Baker if he had driven a car to the location. Baker answered, "I don't have a car." Byun pressed the car lock on the key and observed flashing headlights from a red Buick parked on the street. Byun signaled to Salas to handcuff Baker, who took off running. After a short foot chase, he was apprehended.

LAPD officer Ceballos arrived at the scene to investigate the vehicle and later testified at trial that when he peered into the Buick, he "was able to see underneath the front seat what appeared to be the butt of a handgun." Officers recovered a handgun with a black frame and silver slide from the car.

Prior to Baker's trial related to the robbery of the Sprint store, he moved to suppress the handgun seized from the Buick. The U.S. District Court for the Central District of California denied his motion. The gun was admitted at trial along with surveillance video of the robbery. Government expert witnesses also testified that the gun was a real firearm and that its distinctive color scheme matched the gun used by the robber in the surveillance video.

The jury found Baker guilty of Hobbs Act robbery and conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and brandishing of a firearm in violation of 18 U.S.C. § 924(c)(1)(A)(ii). He was sentenced to 125-month concurrent terms of imprisonment on each of the Hobbs Act counts and a consecutive 84-month term for the § 924(c) count. Baker appealed, arguing that the handgun should have been suppressed.

The Court observed "[t]he Fourth Amendment guarantees 'the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches.'" U.S. Const. amend. IV. A "search" involves governmental infringement on "an expectation of privacy that society is prepared to consider reasonable," while a "seizure" of property involves "some meaningful interference [by the government] with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109 (1984).

The Court recited the bedrock principle that warrantless searches and seizures "are per se unreasonable under the Fourth Amendment – subject only to a few established and well – delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366 (1993). "One of these exceptions is the *Terry* stop, which permits an officer with reasonable suspicion that an individual is engaged in a crime to briefly detain the individual and make 'reasonable inquiries' aimed at confirming or dispelling the officer's suspicions." *Terry v. Ohio*, 392 U.S. 1 (1968). A *Terry* stop involves both a seizure of the person (stopping them) and a search (pat down of outer clothing). *See id.*

If the officer has reasonable suspicion that the detained individual is "armed and presently dangerous," the officer may conduct a limited frisk, a protective pat down search of the individual for weapons. *Id.* A *Terry* stop must be "confined in scope" to a "carefully limited search of the outer clothing ... in an attempt to discover weapons." *Id.* Officers may seize nonthreatening contraband detected during a protective pat down search as long as the officers' search stays within the bounds marked by *Terry*. *Dickerson*.

Turning to the present case, the Court stated: "Assuming officers reasonably suspected that Baker was trespassing and armed, they were authorized to briefly detain him to ask him questions related to trespassing and to pat him down for weapons. But after officers confirmed that Baker did not possess weapons or contraband, they turned to other purposes."

That's when they went beyond the bounds marked by *Terry*. The Court continued: "Officer Byun removed a key visibly hanging from Baker's belt loop and searched for a car that corresponded to it. Officers continued to detain Baker, not for the purpose of inquiring about trespass, but to ask him questions about whether he owned a car. Officer Byun made no claim that he suspected the car key was a weapon or contraband."

The Court concluded that because "[t]he Government was unable to explain how the officers' post-pat down detention and search for the car was intended to confirm or dispel their suspicions about a crime being committed or to secure the safety of anyone on the scene," Baker had "shown that the handgun was discovered as a result of police conduct that violated his Fourth Amendment rights." *See Terry*.

The Government conceded during oral argument that the officers should not have seized the key from Baker during the *Terry* stop. But the Government argued that Baker abandoned the car key when he told Salas he did not have a car. The District Court had accepted the position that Baker lacked standing to challenge the seizure of the key "because of his statements that he did not have a possessory or any interest in the car prior to the seizure."

The Ninth Circuit observed "[b]ecause warrantless searches or seizures of abandoned property do not violate the Fourth Amendment, persons who voluntarily abandon property lack standing to complain of its search or seizure." *United States v. Nordling*, 804 F.2d 1466 (9th Cir. 1986). However, "[b]ecause abandonment is 'a question of intent,' [the Court] must consider the totality of the circumstances to determine whether an

individual, by their words, actions, or other objective circumstances, so relinquished their interest in the property that they no longer retain a reasonable expectation of privacy in the property at the time of its search or seizure." *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012).

The Court noted that none of the Ninth Circuit's "abandonment" cases has held that disavowal of ownership, without more, constitutes abandonment of a person's reasonable expectation of privacy in the property. *See United States v. Lopez-Cruz*, 730 F.3d 803 (9th Cir. 2013). Further, Baker never disclaimed ownership or possessory interest in the key itself. The Government identified no precedent supporting the proposition that a person abandons an item in his possession by stating he does not own a different, related item, according to the Court.

The Court concluded the handgun was the product of illegal police conduct. "Where evidence is obtained from an unlawful search or seizure, the exclusionary rule renders inadmissible both 'primary evidence obtained as a direct result of an illegal search or seizure' and 'evidence later discovered and found to be a derivative of an illegality' known as 'fruit of the poisonous tree.'" *Utah v. Strieff*, 579 U.S. 232 (2016). The exclusionary rule required suppression of the handgun at Baker's trial unless an exception applied, the Court determined.

The Government contended that the attenuation exception applies, arguing that Baker's flight from police attenuated the handgun from the officers' illegal conduct. "Under the attenuation doctrine, '[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence.'" *Strieff*.

Courts determining whether attenuation applies consider three factors: (1) temporal proximity between the conduct and the discovery of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S. 590 (1975). The Court concluded the first and third factors favored suppression. The parties agreed that very little time elapsed between the seizure of the key and the discovery of the gun. And while the Court could not conclude extraction of the key from Baker's belt was flagrant disregard for the law, the Court also could not conclude it was done with Baker's consent. *See Strieff*. Suppression is favored where an officer violates the law "with the purpose of extracting evidence against the defendant." *United States v. Washington*, 387 F.3d 1060 (9th Cir. 2004).

Baker's flight from police did not qualify as an intervening circumstance because the red Buick was discovered as a result of the officers' misconduct before he fled from officers, the Court explained. Furthermore, Baker's fleeing from the police "played no role in the identification of the red Buick or its eventual search and therefore could not purge the taint of the prior illegal conduct." Thus, the Court ruled that the Government failed to satisfy its burden to show attenuation between the illegal search and seizure and finding the handgun evidence.

Consequently, the handgun should have been inadmissible at Baker's trial. Because the Court could not conclude beyond a reasonable doubt that its admission did not affect the jury's finding of Baker's guilt as to the brandishing of a firearm in violation of § 924(c), the Court concluded that the error was not harmless and the conviction must be reversed. *See Chapman v. California*, 386 U.S. 18 (1967). However, the Court concluded the error was harmless as to the Hobbs Act convictions because there was a substantial amount of evidence of guilty other than the unlawfully obtained handgun.

Accordingly, the Court remanded to the District Court for a reduction in sentence or retrial on the § 924(c) count. See: *United States v. Baker*, 58 F.4th 1109 (9th Cir. 2023).

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When the Psychology/Law dialogue was shaken awake in the 1970's by Brooklyn College professor (and provocateur) Robert Buckhout's polemics about eyewitness errors, Saul Kassin was right there on the scene—in fact, was drafted as a Brooklyn College undergraduate to be an unwitting subject in one of Buckhout's demonstration experiments.

Kassin's next research played an impor tant role in planting channel markers that guided controversies over science-based eyewitness evidence reforms into productive avenues.

Then, with Lawrence Wrightsman, his postdoctoral mentor, Kassin undertook an examination of interrogation practices that he continues today, subjecting the folk wisdom of

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the practitioners to rigorous empirical testing.

What Kassin saw through the social psychologist's lens was disturbing.

Solutions Causing Problems

The interrogation landscape that Kassin encountered when he first turned his attention to interrogations exemplified the axiom "The cause of problems is solutions."

The nearly universal "best practice" in American policing had coalesced around an interrogation method developed and publicized by Northwestern University Law Professor Fred Inbau and former Chicago detective John Reid. Both men had backgrounds in polygraph examinations. They saw themselves as reformers.

The problem that Inbau and Reid had set out to address with their "Reid Method" was the widespread use by contemporary cops of the physical "third degree" as their primary tool for eliciting confessions. The only "best practices" required for that approach were things like using a telephone book rather than your fists to beat admissions out of suspects. (A telephone book won't leave marks.)

Inbau, Reid, and their colleagues developed an effective interrogation method for eliciting confessions from the guilty. And although it was developed from practical experience and did not explicitly reference the social science literature, it could have. Its nine steps harnessed the power of isolation and stress, and linked it to providing suspects with opportunities to minimize their moral guilt while admitting legal guilt.

The danger that leaped out at social psychologists like Kassin from Reid manuals was that these same methods would extract confessions from the innocent too.

Reid and Inbau themselves seemed to recognize this danger.

Their materials were always explicit: the Reid Method was to be aimed only at the guilty. And today the training materials of their corporate successors continue to insist that "We don't use this against the innocent." The first phase in a Reid interrogation is to eliminate the innocent.

But it hasn't worked out that way in practice.

As the National Registry of Exonerations reported last year, 365 (12 percent) of the 3060 wrongful convictions tallied by the Registry had involved false confessions.

"Duped" anatomizes numerous cases—celebrated examples such as those of the Central Park Five and Amanda Knox, among many others—in which faulty application of the Reid method wrecked innocent lives and left the factually guilty free.

Why Are We Doing This?

Lurking under the surface of these narratives is a question that combatants in decades of Psychology/Law controversies have never resolved: Are we doing this interrogation (or showing this photo array) to elicit information to guide our investigation, or are we trying to produce proof that will be admissible and persuasive in court?

Those are two different goals, and they can often conflict.

If gathering the largest quantity and highest quality of information is your aim, you will obtain more by avoiding the focused, coercive Reid method, and using (for example) the "Cognitive Interview" approach. You would avoid asking photo lineup witnesses to make a categorical choice, and retrieve the confidence level for each lineup member instead.

On the other hand, if you want courtroom proof, not simply information, you will choose the conventional lineup or the psychologically focused Reid method to extract it.

There is a critical built-in tension underlying these decisions.

The more you need the confession to fill a gap in your courtroom proof—in other words, the shakier your legal case—the more attractive (but also the more dangerous) mobilizing the Reid method during the interrogation in the police station will become.

There is a zone on the Venn diagram where innocence and the Reid method inevitably overlap. Ironically, as Kassin shows, the innocent men and women trapped in that zone are peculiarly vulnerable to Reid method pressures and more likely to offer a confession because they can tend to believe that their innocence will eventually be discovered. They are tired and frightened—so, they "confess", believing that they will straighten it all out tomorrow.

And that danger zone inexorably expands.

Practical Drift

Kassin's case histories all describe investigators who were operating in systems under pressure.

That pressure can have many sources. The media may be howling for a conviction. The crime may be particularly vicious; the suspect's record particularly long; the victim especially sympathetic. You may have no

neutral witnesses. The crime scene work and forensic lab capability may be so feeble that you have no hope of developing physical evidence—a confession may be your only hope.

Your agency's case closure rate could be down. Your training may have persuaded you—erroneously since the idea is a myth—that you and your fellow cops are qualified "human lie detectors" who have seen through protestations of innocence.

Or, all of the above.

It shouldn't be surprising that the "guilt presumptive" Reid method will be mobilized in many borderline cases.

And it shouldn't be surprising when the border itself then shifts. Since every confession seems to provide its own justification, today's confession provides the starting point from which to depart (just a little further) when considering whether and how relentlessly to deploy the Reid method tomorrow. "Practical drift" sets in; the deviations are "normalized."

Eventually, the local system becomes more confession-dependent. Forensics capacity, investigative skepticism and the will to employ them all wither. ("Who needs DNA? He'll confess.") Safety degrades over time.

Systemic Disasters

Kassin sets out a solid psychological basis in Duped for adopting a number of improvements in this situation. Avoid interrogations of the young and the cognitively challenged: they have been shown to be particularly vulnerable. Video record both preliminary interactions and interrogations: create the capacity to evaluate the full encounter, not just replay its final outcome. Ban the use of "minimization" techniques that dangle false promises of leniency in front of suspects and the "false evidence" ploy that bluffs them into believing the cops have catastrophically damning evidence of guilt.

He makes a solid case for comprehensive reform: adopting the non-accusatory P.E.A.C.E. interrogation method developed by police and psychologists in the United Kingdom. He explains why the legal system needs to investigate its own architecture with a new awareness of the psychological futility of its current protections against false confessions.

Nuance, Not Silver Bullet Solutions

Kassin is distinguished from most criminal justice critics by his steady awareness that he is dealing with a complex system—with humans trying to make sense of swirling conditions and influences that bend the probabilities—rather than with a Newtonian, mechanical system of "causes" with inevitable automatic effects.

Kassin doesn't offer "silver bullets." He accepts that things are not neatly linear and sequential: for example, he sees that while "upstream" interrogations are affecting the "downstream" courtroom performance, the courtroom exigencies are shaping the "upstream" police station decisions too. He sees that forensic lab weaknesses can motivate interrogations, but that interrogation products can infect lab processes too.

The special value of "Duped"—at least in my opinion—is that it doesn't offer a prescription for an illusory perfection in criminal justice; it exemplifies an approach based on resilience: a continuous practice of learning about vulnerabilities and working to limit them and deflect the harms they can produce.

Even while Dean Wigmore was decapitating Hugo Munsterberg he was also advocating that psychologists and practitioners should join together in "A friendly and energetic alliance in the noble cause of justice."

In "Duped" Professor Kassin shows what that alliance can achieve, and he models how an ally can contribute. This story was originally published on The Crime Report - https://thecrimereport.org/republish/

Fourth Circuit: Counsel Ineffective for Failing to Raise Change in Sentencing Precedent Following Remand

by David M. Reutter

The U.S. Court of Appeals for the Fourth Circuit held a federal defendant was denied the effective assistance of counsel by failing to object to his designation as a career offender on the ground the conspiracy under 21 U.S.C. § 846 is broader than generic conspiracy and thus does not constitute a controlled substance offense under the Sentencing Guidelines.

The Court's opinion was issued in an appeal brought by Germaine Cannady after his 28 U.S.C. § 2255 petition was denied by the U.S. District Court for the District of Maryland. Cannady was found guilty by a jury of one count of conspiracy to distribute and possess with intent to distribute cocaine and heroin and one count of attempted possession with intent to distribute cocaine and heroin in violation of § 846.

A Presentencing Investigation Report ("PSR") presented at the June 2015 sentencing hearing calculated Cannady's base offense level as 34 and his criminal history as VI, making his Sentencing Guidelines range 262 to 327 months in prison with application of the career offender enhancement. The District Court found the nature of the instant offenses and the prior criminal history triggered the Guidelines' career offender enhancement. Without the enhancement, Cannady's offense level would have been 24, his criminal history category IV, and Guidelines range 77 to 96 months. The District Court imposed a 192-month sentence. Cannady appealed.

While the appeal was pending, the District Court granted Cannady's motion for new trial based on a *Brady* violation. The Government appealed, and the District Court's order was reversed, with the case remanded for further proceedings. Mandate was issued on April 2, 2018.

Almost two weeks before the mandate issued, the Fourth Circuit decided *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018). The *McCollum* Court reasoned that, under the career offender provision, murder in aid of racketeering "criminalizes a broader range of conduct than that covered by generic conspiracy" and thus cannot trigger the career offender enhancement.

On remand of his *Brady* claim, Cannady's counsel consented to reinstatement of his convictions and the 192-month sentence. Cannady's appeal was affirmed. He then moved to vacate, set aside, or correct his sentence under § 2255. He alleged his attorney rendered ineffective assistance of counsel by failing to challenge his designation as a career offender while his case was on remand in 2018. The District Court denied the motion and a certificate of appealability. Cannady was granted a certificate by the Fourth Circuit.

That Court found counsel was ineffective. The mandate rule governs what a lower court may consider on remand. There are, however, three exceptions to that rule: "(1) a

showing that controlling legal authority has changed dramatically; (2) that significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; or (3) that a blatant error in the prior decision will, if uncorrected, result in a serious injustice." See: *United States v. Bell*, 5 F.3d 64 (4th Cir. 1993).

When Cannady was sentenced in 2105, the Fourth Circuit "had long treated § 846 conspiracy offenses as controlled substance offenses under the Guidelines." The legal landscape changed in 2018 with the issuance of *McCollum*, which addressed whether conspiracy to murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) categorically qualifies as a "crime of violence" for purposes of the career offender enhancement. It explained that under the career offender provision, generic conspiracy requires an overt act, but § 1959(a)(5) does not, meaning it criminalizes a range of conduct that is broader than that covered by generic conspiracy and thus cannot trigger the Guidelines enhancement.

On remand from the reversal of the District Court's *Brady* decision, the Government moved to reinstate Cannady's conviction and 192-month sentence. His counsel consented and did not object to the reinstatement of the sentence on the ground that conspiracy under § 846, like § 1959(a)(5), does not require the establishment of an overt act and thus, again like § 1959(a)(5), cannot trigger the career offender enhancement. *See United States v. Shabani*, 513 U.S. 10 (1994).

Turning to the present case, the Court explained that McCollum directly applied and undermined the District Court's rationale in applying the enhancement, so Cannady's counsel could and should have objected to the reinstatement of the sentence with the enhancement. Thus, the Court ruled that counsel's performance was deficient under the performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

The parties do not dispute that without the career offender enhancement, Cannady's Guidelines range would have been 77 to 96 months rather than 262 to 327 months with the enhancement, and the District Court imposed a sentence of 192 months. the Court noted. The actual sentence imposed was 96 months longer than the high end of the correct Guidelines range, stated the Court. Thus, the Court ruled that Cannady also satisfied the prejudice prong of *Strickland* and that he was provided constitutionally deficient assistance of counsel.

Accordingly, the Court vacated the judgment of the District Court and remanded for resentencing. See: *United States v. Cannady*, 63 F.4th 259 (4th Cir. 2023).

Fourth Circuit Holds Ineligibility for First Step Act Safety Valve Relief Requires Proof of All Three Listed Criminal History Characteristics Satisfied, Widening Circuit Split

by David M. Reutter

The U.S. Court of Appeals for the Fourth Circuit held that the plain text of 18 U.S.C. § 3553(f)(1) "requires a sentencing court to find that a defendant has all three of the listed criminal history characteristics before excluding a defendant from a safety valve eligibility" under the First Step Act.

Cassity Danielle Jones pleaded guilty to possession with intent to distribute 50 or more grams of methamphetamine, which carries a 10-year mandatory minimum sentence of imprisonment. At sentencing, Jones argued that she was entitled to relief under the First Step Act's ("Act") safety valve provision in § 3553(f)(1).

The safety value provision provides that a sentencing court may impose a sentence without regard to the applicable mandatory minimum if it finds that: "(1) the defendant does not have – more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense … a prior 3-point offense … ; *and* a prior 2-point violent offense…." § 3553(f)(1) (emphasis supplied).

There was no dispute that Jones had more than four criminal history points, satisfying subsection (A). However, she argued that because she did not have a prior 3-point offense or prior 2-point violent offense she was eligible for safety valve relief under the Act. She argued that only defendants who satisfy all three subsections (A) through (C) are ineligible for safety valve relief. The Government disagreed.

The U.S. District Court for the Western District of North Carolina adopted Jones' interpretation, applied the safety valve provision, and sentenced her to 100 months' imprisonment. The Government timely appealed.

The Court explained that resolution of the appeal hinges on the meaning of "and" in § 3553(f)(1), i.e., whether the "and" is disjunctive or conjunctive. Jones argued the "and" is purely conjunctive, meaning a defendant must satisfy all three subsections in order to be disqualified for safety valve relief – that is, the defendant must satisfy subsections (A), (B), *and*, not *or*, (C). The Government ostensibly agreed "and" is conjunctive, but it asserted that having any one of the criminal characteristics listed in the subsections renders a defendant ineligible for the safety valve – in essence, treating the "and" as "or," meaning any defendant who satisfies subsection (A), (B), *or* (C) is ineligible for safety valve relief.

The Court noted that when interpreting a statute, courts consider "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute." *Ignacio v. United States*, 674 F.3d 252 (4th Cir. 2012). It concluded that the plain language of § 3553(f)(1) is "unambiguous." The plain meaning of "and" means "along with or together with." *Webster's New International Dictionary* 80 (3d ed. 1961). The Court stated that dictionaries and statutory-construction treatises instruct that when the word "and" joins a list of conditions, "it requires not one or the other, but *all* of the conditions." *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021).

Applying the foregoing principles, the Court concluded that "a criminal defendant is ineligible for safety valve relief only if she has all three criminal history characteristics." The Court reasoned: "If Congress wanted any one of the criminal history characteristics to disqualify a defendant, it would have used the word 'or,' which it clearly knows how and when to do as reflected elsewhere in § 3553(f)."

At this point, the Court declared that its "judicial inquiry is complete" because the words used in the statute at issue are clear and

unambiguous. *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011).

However, the Court did not end its opinion there because "the Government and some courts which have considered this issue" have come to the opposite conclusion. It went on to address and reject each of the arguments put forth by the Government and courts that have treated the "and" as the disjunctive "or." In doing so, the Court joined the Ninth and Eleventh Circuits. *See United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022); *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021). On the other side of the circuit split are the Fifth, Sixth, Seventh, and Eighth Circuits. *See United States v. Palomares*, 52 F.4th 640 (5th Cir. 2022) (concluding that having any one of the criminal history characteristics renders a defendant ineligible for safety valve relief); *United States v. Pace*, 48 F.4th 741 (7th Cir. 2022); *United States v. Pulsifer*, 39 F.4th 1018 (8th Cir. 2022); *United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022).

The Court concluded by holding "we are persuaded that the plain text of § 3553(f)(1) requires a sentencing court to find that a defendant has all three of the listed criminal history characteristics before excluding a defendant from safety valve eligibility."

Accordingly, the Court affirmed Jones' sentence. See: *United States v. Jones*, 60 F.4th 230 (4th Cir. 2023).

First Circuit: Plain Error Where District Court Based Upward Variant From Sentencing Guidelines Range on New Information Not Already in the Record at the Time of Sentencing

by Douglas Ankney

The U.S. Court of Appeals for the First Circuit found plain error where the U.S. District Court for the District of Puerto Rico based an upward variance from the Guidelines range on new information not already in the record at the time of sentencing.

In 2011, Angel Ramos-Carreras received a five-year prison sentence and eight years of supervised release for drug-related offenses. In 2020, while serving his time of supervised release, he was arrested "for an investigation on lewd acts" and charged with violating Article 133 of the Puerto Rico Penal Code, which classifies as a third-degree felony the conduct of: "Any person who without the intention to consummate the crime of sexual assault submits another person to an act that tends to awaken, excite or satisfy the sexual passion or desire of the accused, under any [one of six enumerated circumstances - including the age of the victim being less than 16 years]." The U.S. Probation Office promptly filed a motion in the District Court to notify it that Ramos had violated the "shall not commit another

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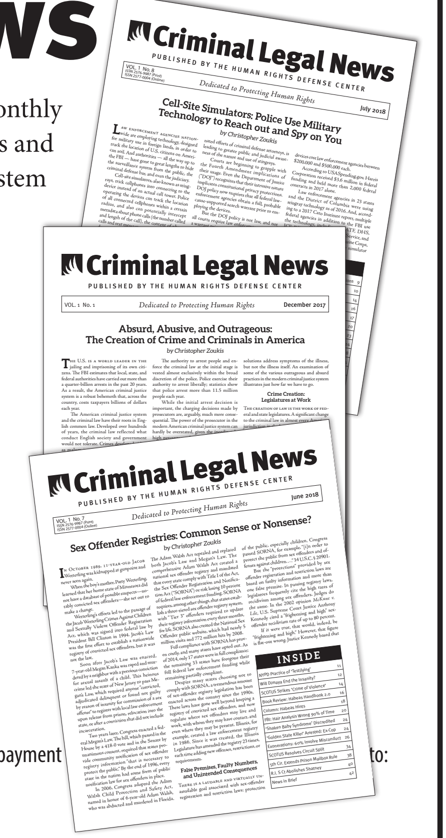

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federal, state, or local crime" condition of his supervised release.

At sentencing before the District Court judge, all agreed the Guidelines range for this supervised-release-condition violation was 4 to 10 months. Ramos requested 9 months, arguing his initial charge had been reduced to an attempt for "one incident with a 15-year-old step daughter, touching over her clothes." The Government requested three years (the maximum sentence allowed under 18 U.S.C. § 3583(e)(3)) because Ramos had perpetrated a "crime against nature."

The District Court judge acknowledged that Ramos had signed a plea agreement in the Commonwealth Court for attempting to commit lewd acts in violation of Article 133 and that Ramos had been sentenced to five years' imprisonment to be served consecutively to any other sentence. The judge stated just before pronouncing the sentence: "[t]he attempt was against his own 15-year-old daughter whom he registered as his daughter when she was born. He touched and sucked on her left breast and then touched and squeezed her vagina over clothing." The judge then revoked Ramos's supervised release and imposed a sentence of three years' imprisonment to be followed by a three-year term of supervised release.

On appeal, Ramos argued that the upwardly variant sentence was procedurally and substantially unreasonable, based primarily on the judge's statement and use of graphic allegations of the offense from the Commonwealth Court's record when those asserted details were not part of the record before Ramos. Because Ramos had failed to object on these grounds in the District Court, the First Circuit reviewed for plain error, which required Ramos to show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *United States v. Soto-Soto*, 855 F.3d 445 (1st Cir. 2017).

The Court observed "a district court has broad discretion at sentencing to consider information pertaining to the defendant and the defendant's offense conduct." *United States v. Millan-Isaac*, 749 F.3d 57 (1st Cir. 2014). But "it is axiomatic 'that a convicted defendant has the right to be sentenced on the basis of accurate and reliable information, and that implicit in this right is the opportunity to rebut the ... evidence and the information' to be considered by the court." *United States v. Rivera-Rodriguez*, 489 F.3d 48 (1st Cir. 2007).

"A district court's use of new information (meaning information not already found in the district court's record) that is significant (meaning 'materially relied on' by the district court in determining a sentence) can be reversible error." *Millan-Isaac*. The Court concluded: "Reciting extraneous non-record avowals without identifying the source or providing notice to Ramos that these asserted details would be considered in determining his sentence for the condition at issue was clear error." *See Millan-Isaac*.

Determining whether the clear error affected Ramos' substantial rights required deciding whether the "error was prejudicial in the sense that it must have affected the outcome of the district court proceedings." *United States v. Gilman*, 478 F.3d 440 (1st Cir. 2007). The Court concluded that "the inflammatory details about Ramos' alleged conduct affected the district judge's sentencing decision because it is clear he did not ignore this provocative, extra-record characterization of the incident when he imposed the 26-month upward variance from the high end of the undisputed guidelines range. That he articulated these specific, vivid allegations immediately before imposing the sentence shows they were clearly at the front of his mind and indicates he was justifying the upward variance at least in part (if not completely) with them." *See Millan-Isaac*.

Finally, "the disregard for a defendant's right to notice of the information on which the district court will base a sentence imposed 'cannot help but have a denigrating effect on the fairness, integrity, and public reputation of judicial proceedings.'" *Millan-Isaac*. Thus, the Court concluded that the District Court's use of the extraneous material when sentencing Ramos was plain error.

Accordingly, the Court vacated the sentence and remanded with directions to the Clerk of the District Court to assign the case to a different judge for resentencing. See: *United States v. Ramos-Carreras*, 2023 U.S. App. LEXIS 2069 (1st Cir. 2023).

Indiana Supreme Court: Petitioner Entitled to File Belated Appeal More Than 21 Years After Conviction, Holding He Acted 'Promptly'

by Douglas Ankney

The Supreme Court of Indiana held that Charlie D. Leshore, Jr., was entitled to file a belated appeal more than 21 years after his conviction because the trial court and Leshore's attorneys failed to advise him of his right to appeal his sentence and because he promptly filed notice upon learning of his right to appeal from a fellow prisoner.

In 1999, Leshore pleaded guilty to numerous felonies. During its colloquy with Leshore, the trial court informed him that by pleading guilty he was giving up his right to appeal his conviction. The court sentenced Leshore to 70 years in the Indiana Department of Corrections. Neither the court nor Leshore's public defender informed him of his right to appeal his sentence.

In 2001, Leshore argued in a petition for postconviction relief under Indiana Post-Conviction Rule 1 that his sentence was inappropriate due to the nature of the offense and the character of the offender. The State Public Defender's Office reviewed Leshore's petition, concluded the "trial court advised Leshore of all necessary rights," and withdrew its representation. Leshore abandoned his efforts in 2005.

Then on December 20, 2021, Leshore petitioned for postconviction relief to file a belated notice of appeal under Rule 2, alleging he "signed his guilty plea" but "there was no advisement that he had the right to appeal his sentence." According to Leshore, it was not until December 1, 2021, that he learned from another prisoner that he could appeal his sentence. The trial court denied Leshore's petition without a hearing, and Leshore appealed pro se.

A divided Court of Appeals ("COA") affirmed, holding that Leshore was "unable to show that he was diligent in his pursuit of permission to file a belated appeal." The Indiana Supreme Court granted Leshore's petition for transfer.

The Court observed "Indiana Post-Conviction Rule 2(1)(a) establishes the requisite for filing a belated notice of appeal." Under Rule 2(1)(a), "[t]he defendant bears

the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing" and was "diligent in pursuing permission to file a belated motion to appeal." *Moshenek v. State*, 868 N.E.2d 419 (Ind. 2007). "These inquiries are fact-sensitive because '[t]here is substantial room for debate as to what constitutes diligence and lack of fault on the part of the defendant.'" *Id.* There are no assigned "standards of fault or diligence." *Id.* Instead, courts analyze a range of factors that include "the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay." *Id.*

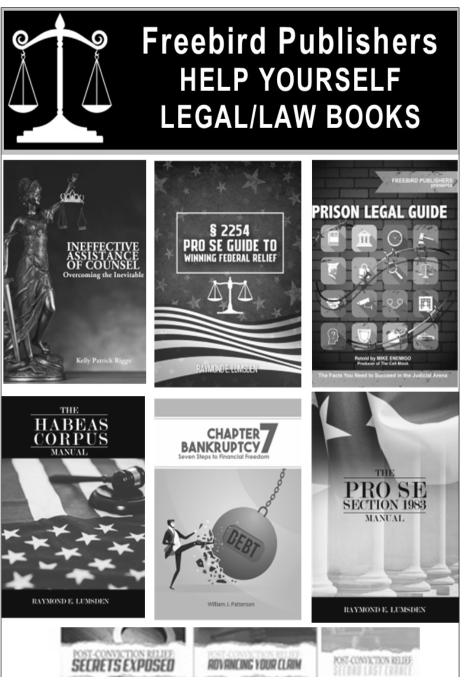
The Court stated: "A public defender has distinct obligations under Indiana Post-Conviction Rule 1(9)(c). That rule requires the public defender to consult with Leshore and 'ascertain all grounds for relief under this rule, amending the petition if necessary to include any grounds not included by petitioner in the original petition.' Further, '[i]n the event that counsel determines the proceeding is not meritorious or in the interests of justice, ... counsel shall [certify] that ... the petitioner has been consulted regarding grounds for relief in his pro se petition and any other possible grounds....'"

In the present case, Leshore's public defender did none of the above, the Court noted. Instead, the public defender shared mistaken legal advice with Leshore about available post-conviction relief and failed to inform Leshore of his right to appeal his sentence. Lack of appellate advisement may constitute grounds for satisfying the no-fault requirement of Rule 2(1)(a)(2). *Moshenek*.

In *Baysinger v. State*, 835 N.E.2d 223 (Ind. Ct. App. 2005), the trial court failed to inform the defendant of his right to appeal his sentence and "instead informed him that by pleading guilty he was giving up 'most' of his grounds for appeal." The COA decided this advice was "insufficient guidance to a defendant who is pleading guilty as to what claims may or may not be available for appeal." *Id.* The defendant in *Baysinger* asserted that his attorney did not inform him of his right to appeal, and the COA concluded the defendant was not at fault for his failure to file a timely notice of appeal. The Court in the present case similarly concluded Leshore was not at fault for the delayed notice because the mistaken legal advice he received left him unaware of his right to appeal.

As for Leshore's diligence, in *Johnson v. State*, 898 N.E.2d 290 (Ind. 2008), the Supreme Court held that "[p]rompt efforts to pursue [challenges to sentences] through P-C.R. 2 were allowed to proceed." Leshore learned of his right to appeal on December 1, 2021, and filed his notice on December 20, 2021. The Court concluded that Leshore filing his notice 19 days after learning of his right to appeal was indeed "prompt." The Court explained that the correct starting point for determining whether he acted promptly was not 21 years ago when he was sentenced but rather on December 1, 2021, when he first learned of his right to appeal. Viewed in that context, the Court had no trouble concluding that he acted promptly. Thus, the Court ruled he satisfied Rule 2(1)(a) for filing a belated notice of appeal.

Accordingly, the Court vacated the COA's opinion and remanded to the trial court with instructions to grant the petition to allow Leshore's appeal to proceed. See: *Leshore v. State*, 20 N.E.3d 474 (Ind. 2023).



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Fourth Circuit Announces *Rehaif* Applies to All § 922(g) Firearms-Possession Offenses and Applies Retroactively to Initial § 2255 Motions

by Douglas Ankney

The U.S. Court of Appeals for the Fourth Circuit held that the holding of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), applies retroactively to cases on collateral review and applies to convictions for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

In 2015, Thomas Bradford Waters was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At his trial, the U.S. District Court for the District of South Carolina instructed the jury that "it is not necessary for the government to prove that the defendant knew he was a convicted felon," despite the fact § 922(g)(1) contains a mens rea requirement of "knowingly" violating it. Waters was sentenced to 10 years' imprisonment, and his conviction was affirmed on appeal.

In 2019, Waters filed a pro se 28 U.S.C. § 2255 motion to vacate his conviction. While his motion was pending, the U.S. Supreme Court decided *Rehaif*, holding "that in a prosecution under 18 U.S.C. § 922(g) and 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing

a firearm." Waters subsequently moved for appointment of counsel to assist him in preparing a *Rehaif* claim.

The District Court denied both the motion for appointment of counsel and the § 2255 motion in its entirety, reasoning that *Rehaif*'s holding is inapplicable because Waters had been convicted of being a felon in possession of a firearm under § 922(g)(1); whereas, the defendant in *Rehaif* had been convicted of possession of a firearm by an unlawful alien under § 922(g)(5). The District Court also found "no indication" that the Supreme Court made *Rehaif* retroactively applicable on collateral review. Waters appealed.

The Court observed that in *Greer v. United States*, 141 S. Ct. 2090 (2021), the Supreme Court made it clear that "*Rehaif*'s knowledge-of prohibited-status mens rea requirement applies to all firearms-possession offenses under 18 U.S.C. § 922(g)." The *Greer* Court explained that in "felon-in-possession cases after *Rehaif*, the Government must prove not only that the defendant knew he possessed a firearm, but also that he knew he was a felon when he possessed the firearm." In light of *Greer*, the District Court erred in ruling that *Rehaif* is inapplicable to felon-in-possession convictions under § 922(g)(1), the Court held.

The Court also held that the District Court erred in concluding that *Rehaif* does not apply retroactively to initial § 2255 motions. It observed "[w]hether a new rule announced by the Supreme Court applies retroactively depends on whether the rule is substantive or procedural. '[N]ew procedural rules do not apply retroactively on federal collateral review' because they 'alter only the manner of determining the defendant's culpability.'" *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (overruling the "watershed-rules-of-criminal-procedure" exception of *Teague v. Lane*, 489 U.S. 288 (1989)).

In contrast, new substantive rules do apply retroactively, the Court stated. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348 (2004). "Generally, applying rules that were 'not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" *Teague*. "But retroactive application of substantive rules is justified because 'they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.'" *Summerlin*.

The Court concluded that *Rehaif* announced a new substantive rule that applies retroactively on collateral review because *Rehaif* "narrowed the scope of a criminal statute" by requiring the Government to prove that a defendant knew "he belonged to the relevant category of persons barred from possessing a firearm" which "altered the range of conduct or the class of persons that the law punishes" by exempting from punishment persons who unlawfully possessed a firearm but did not know they belonged to the class prohibited from doing so. Thus, the Court held *Rehaif* applies retroactively to initial § 2255 motions and that the District Court erred in denying Waters' motions.

Accordingly, the Court vacated the District Court's order denying Waters' motion and remanded for further proceedings consistent with its opinion. See: *United States v. Waters*, 64 F.4th 199 (4th Cir. 2023).

Editor's note: In holding that *Rehaif* applies retroactively on collateral review, the Fourth Circuit joins the Fifth, Sixth, and Eleventh Circuits that have all reached the same conclusion. *See Seabrooks v. United States*, 32 F.4th 1375 (11th Cir. 2022) (per curiam); *United States v. Kelley*, 40 F.4th 250 (5th Cir. 2022); *Baker v. United States*, 848 F. App'x 188 (6th Cir. 2021).

Arkansas Supreme Court Reverses 11 Counts of Possession of Child Pornography Because CGI Images Do Not Depict Image of a Child

by Douglas Ankney

The Supreme Court of Arkansas reversed the convictions against Jeremey Lewis on 11 counts of "distributing, possessing or viewing matter depicting sexually explicit conduct involving a child" because the images were computer-generated imagery ("CGI") and did not depict or incorporate the image of a child.

Lewis was tried by jury on 30 counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child in violation of Arkansas Code Annotated § 5-27-602. At trial, the State's expert, Arkansas State Police Special Agent Corwin Battle, testified that he categorized images 1 and 23 to be "comparison images" and that 23 appeared to be CGI. ("Comparative image" simply means the image was comparative to other images recovered from Lewis' electronic devices.) Battle testified that he categorized images 15, 16, and 23-30 as CGI.

Lewis moved for a directed verdict on Counts 1, 15, 16, and 23-30, arguing the images did not contain a real person. Apparently, his motions were denied. The jury convicted Lewis of 25 counts, acquitted him of five counts, and sentenced him to a total of 42 years in the Arkansas Division of Correction. Lewis appealed, arguing that the State presented no evidence that the images underlying Counts 1, 15, 16, and 23-30 depicted or incorporated the image of a child.

The Arkansas Supreme Court observed "[a] person violates § 5-27-602(a)(2) if he or she 'possesses through any means, including on the Internet, any photograph, film, videotape, computer program or file, computer-generated image, video game, or any other reproduction that depicts or incorporates the image of a child engaging in sexually explicit conduct.'" A "child" is defined as "[a] person under seventeen (17) years of age[.]" Ark. Code Ann. § 5-27-601(1).

For purposes of the issues in the instant opinion, a "person" is "[a] natural person." § 5-1-102(13)(A)(i) (Repl. 2013). The Court explained: "Thus, although § 5-27-602(a)(2) includes possession of CGI, the criminal act is limited to possession of imagery depicting or incorporating the image of a child – a natural person under seventeen years of age – engaging in sexually explicit conduct. Section 5-27-602(a)(2) necessarily excludes CGI that does not depict or incorporate the image of a child under the statutory definition.

The Court's reading of § 5-27-602(a)(2) is consistent with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), in which the U.S. Supreme Court "declared unconstitutional as violative of the First Amendment § 2256(8)(B) of the Child Pornography Prevention Act of 1996 ("CPPA"), which prohibited 'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture that is, or appears to be, of a minor engaging in

sexually explicit conduct.'"

While *New York v. Ferber*, 458 U.S. 747 (1982), held that child pornography is deemed speech outside the protection of the First Amendment, it is based on the fact that child pornography is "intrinsically linked" to the sexual abuse of children, i.e., production of child pornography could be accomplished only by recording the crime of sexually abusing children. But the CPPA's proscription of computer-generated imagery or "virtual imagery" went too far because it recorded no crime, and it created no victims by its production.

In the present case, the Court agreed with Lewis that the State failed to present evidence that the images identified as CGI by the State's expert in Counts 1, 15, 16, and 23-30 depicted or incorporated the image of a child. The Court conducted its own independent examination of the image in Count 1 and concluded it did not depict or incorporate the image of a child. The Court concluded "[t]his constitutes a failure of proof sufficient to sustain Lewis's convictions."

Accordingly, the Court reversed and dismissed on Counts 1, 15, 16, and 22-30. See: *Lewis v. State*, 2023 Ark. 12 (Ark. 2023).

Specialized Police Units Hunt People for ICE

by Keith Sanders

On February 22, 2023, a Teller County District Judge in Colorado ruled that the county Sheriff's Office legally entered into an agreement with U.S. Immigration and Customs Enforcement ("ICE") that gives the Sheriff's Office the authority to detain prisoners after they post bond on behalf of ICE. The ruling stemmed from a lawsuit brought by the American Civil Liberties Union ("ALCU") against Jason Mikesell, Teller County Sheriff.

The suit centers around an agreement between the Teller County Sheriff's Office ("TCSO") and U.S. Immigration and Customs Enforcement. Called the 287(g) Agreement of the Immigration and Nationality Act ("INA"), it allows TCSO deputies to act as ICE officials after a period of training, certification, and authorization by ICE. As such, the TCSO deputies, called 287(g) deputies, or Designated Immigration Officers ("DIO"), are "certified to perform immigration functions" with the purpose of identifying and processing prisoners "at the Jail on state or local charges who may be subject to removal under ICE's civil immigration enforcement priorities." Essentially, when TCSO deputies act as DIOs, they are acting as federal agents rather than county deputies.

According to the suit, that authority granted to TCSO deputies by the 287(g) Agreement violates Colorado's Constitution and state statutes. The claims in the suit stem from this alleged violation, specifically the DIOs' presumed authority to detain individuals after they posted bond for pending criminal charges using ICE forms that were not signed by a judge. The ACLU of Colorado asserted the TCSO does not have legal authority to detain individuals, arguing that the 287(g) Agreement itself is not binding because it allows deputies to perform duties that violate state statutes and the state Constitution.

In the Court's ruling, District Court Judge Scott Sells first addressed the legality of TCSO's agreement with ICE, which went into effect in 2019. Referring to INA, 8 U.S.C. §1357(g)(1), the judge noted that the provision explicitly states the "Attorney General may enter into written agreement with a State, or any political subdivision of a State, who is determined to be qualified to perform a function of an Immigration officer ... may carry out such function at the expense of the State." Thus, Judge Sells ruled the agreement between ICE and Teller County is legally valid, as is the authority delegated to TCSO deputies to act as ICE agents or DIOs that is contained in the agreement.

Next, the judge turned to the illegal detention claims. He noted that Colorado statutes allow a prisoner with multiple Colorado criminal warrants from multiple countries to post bond. For instance, once a prisoner with a warrant from another county posts bond for a case in Teller County, the jail would notify the other county to make arrangements for the prisoner's transfer, which means the prisoner would remain incarcerated after posting bond. The Court pointed out that the 287(g) process is similar.

That process consists of the DIO filling out an I-247A and I-203 form. The former is merely a tracking document and "has nothing to do with an arrest or for a reason the detain," the Court observed. The Court also found that the I-203 form is not the "basis for a 287(g) hold of any of the involved inmates in this case." Form I-203, an Order to Detain or Release Alien, is also placed in the prisoner's file. The DIO involved acknowledged that none of those forms were signed by a judge.

However, the relevant form, I-200, which is a U.S. Homeland Security warrant, forms the basis for detaining the prisoners. The Court pointed out that the I-200, issued by an ICE official, is a "valid arrest warrant authorized by federal law under 8 U.S.C. §1357(a) and C.F.R. §236.1." *See also* 8 U.S.C. §1226(a) and *Abel v. United States*, 362 U.S. 217 (1960); *Lopez v. INS* 758 F.2d 1390 (10th Cir. 1985), which states that under federal law an ICE warrant signed by an Immigration Officer is a valid warrant.

Because the Court ruled that TCSO deputies acting as DIOs are in effect de facto federal immigration officers under 287(g), the I-200 warrant is valid, and the TCSO deputies have the authority to issue the I-200 and hold the prisoners. *See City of El Cenzio, Texas v. Texas*, 890 F.3d 164 (5th Cir. 2018); *Chavez v. McFadden*, 843 S.E.2d 139 (N.C. 2020).

The ACLU asserted that Colorado statutes regarding state enforcement of civil immigration law does not authorize such an authority when a detainer is based on a request rather than an order (C.R.S. § 26-76.6-102(2) and § 26-76.6-101). While acknowledging the Colorado Legislature could have articulated the statute more clearly, the Court nevertheless concluded that the I-200 is not a request, and therefore, the TCSO deputies' functions as DIOs are not "prohibited by Colorado law."

Also, the Court noted that the TCSO Sheriff has "express authority under C.R.S. § 30-10-516 to serve process in civil or criminal cases, which is not limited to service of process of Colorado state cases." Under federal law (8 C.F.R. §287.5(e)) and Colorado law, TCSO deputies are authorized to serve I-200 warrants.

The Court concluded by stating that since the I-200 is a valid federal arrest warrant by virtue of being signed by supervising ICE officials and issued by TCSO deputies acting as de facto federal agents, it does not need to be signed by a judge. The Court pointed out that "Colorado law does not and cannot invalidate federal arrest warrants."

Sources: *denverpost.com; Nash, et al. v. Mikesell, Case No. 2019CV30051*

Banishment: Using an Ancient Solution to Address a Modern Problem

by Benjamin Tschirhart

The old has become new again in the city of Saint Louis. For several years now, police have been issuing "neighborhood orders of protection," which forbid a cited person from entering a specific municipal area for a certain amount of time. Those found in violation of the order may be arrested and criminally charged. The gap between the haves and the have-nots is growing.

Ancient Origins

Ostracism is one of the oldest forms of democratic discipline, first appearing in the historical record around 500 BCE in ancient Greece. Each year, the voting citizens of Athens had the chance to banish one person from the city for a period of 10 years. Each man in the assembly would scratch the name of his candidate on a clay pot shard or ostrakon. The person whose name appeared the most was forced to leave the city for a period of 10 years. If he returned before that time, the penalty was death. However, his property and estate were not forfeit, and he could reclaim them, stepping back into social life upon his return.

Ostracism was used in ancient Greece as a preemptive measure. In this way, it bears some resemblance to its modern usage. A person was sent away from the city when the populace feared that he might become a problem but before he could make trouble politically. The difference is that those who were banished from Athens were usually wealthy citizens with the potential to exert influence over the assembly and the city-state. They had independent means and wealth. Our modern incarnation is a good deal pettier and more sordid. In our time, those being banished are mostly the poor, the homeless, vagrants, and addicts.

In 2003, the St. Louis Board of Aldermen unanimously passed an ordinance that spelled out penalties for violating the orders of protection. It is not clear, though, whether the orders had existed prior to that date. Of all the bill's sponsors, four are still living: Jay Ozier, Dionne Flowers, James Shrewsbury, and Craig Schmid. When approached, three of the four said they could not remember the reason for passing the bill. This is odd, considering that the measure must have garnered wide support among the Board members, especially given its unanimous passage. The bill itself contains clues to its origin, in language alluding to drug offenders:

"Whereas, the illegal distribution, possession, sale and manufacture of controlled substances continues to plague our neighborhoods.…"

The application of the measure has been a good deal broader than was likely intended by those who wrote and passed it. One board member, Ozier (who served from 2002-2003), spoke candidly about the implementation of the ordinance, saying "If you're talking about … panhandling or something like that, I don't see how I could have been in favor of it."

The Orders in Action

So exactly what *are* we talking about? First, it should be mentioned that St. Louis is not the only city using some form of banishment as preventative policing. Other U.S. cities (like Seattle and Cincinnati) have used "exclusion zones" to the outrage of civil rights activists. Also noteworthy is the fact that a court ruled the practice unconstitutional in Cincinnati. The case made it to the Supreme Court, where the ruling was upheld.

Beyond this however, it is not well known how common the practice is across the country. It is not often addressed publicly, much less subjected to open debate. The severity of the orders varies widely, with some lasting only a year or two, while others will not expire until 2099. Violation of the orders can result in fines up to $500 or jail time – sometimes as long as 90 days.

According to University of Washington professors Katherine Beckett and Steve Herbert, the secrecy surrounding the practice is not an accident. These measures are "largely deployed without much fanfare … part of the problem is that these legal tools are very much under the radar"

From the available information, it seems that the exclusion orders are often sought and enforced by private security companies working in wealthy and upscale neighborhoods. Circuit courts have not issued exclusion orders since Kimberly M. Gardner became prosecutor; now, the orders are often given by judges in municipal courts, where defendants usually have no counsel and where the proceedings are unlikely to attract much public attention.

Alvin Cooper was homeless, sleeping on a vent grate outside the Enterprise Center while a hockey game was being played inside. The temperature was 38° Fahrenheit. The St. Louis police told him to move, and he refused. They then arrested him, using "knee thrusts" to his leg, and "nerve pressure points" behind his jaw and ear. Although the city prosecutor dropped the "resisting arrest" charge, he pleaded guilty to trespassing and signed an order of protection, which banned him from the 1.2 square mile area downtown where he was arrested. This area also happens to be where many social services are located.

The People Disagree

Assistant professor of criminology Victor St. John of St. Louis University believes that the potential benefits of such bans are outweighed by their harms, particularly "in terms of individuals not being able to engage with family members or friends.… It's a restriction on resources that are freely available to everyone else." Public Defender Mary Fox thinks that "It reeks of redlining.… It reeks of everything that happened before the Civil Rights Act went through – just allowing them to keep certain people out of their neighborhoods."

The picture doesn't improve when one finds that much of the leg work to enforce these bans is done by private security firms, hired by wealthy neighborhood residents to protect their property (at the expense of others' civil rights if necessary).

This raises an interesting question. Are the people being banned even fully aware of what is being done to them? A neighborhood ban must be signed (and thus consented to) by the person who is banned. Police and courts use this presumed "consent" to bypass questions of constitutionality. But defense attorney Maureen Hanlon doesn't buy it. "I don't think the actual terms of the neighborhood orders of protection were clear to my client.… It states that he consented to it, but he was unrepresented at the time."

Megan Green, recently elected president of the city Board of Aldermen, is inclined to agree. "If you are banning somebody from downtown from the area where services are, that makes it that much harder to address the needs … if you're just banning somebody from a certain area, and never addressing the behavior, chances are that behavior just moves

to another block or another neighborhood." She questions the fundamental efficacy of the entire concept. "So, I'm not sure how effective something like this is at achieving what folks are going for…."

But it might simply be the case that what Missouri is "going for" is something altogether more sinister and bleaker than Ms. Green imagines. In June of 2022, Missouri Gov. Mike Parson signed legislation making it illegal for homeless people to sleep on state-owned land.

Jim Whyte manages "The City's Finest," a private policing initiative in the Central West End of the city, an affluent, upscale neighborhood. He defends the use of these orders, citing their usefulness in dealing with "these very problematic people." He frequently calls police when he witnesses a panhandler who he believes is violating a neighborhood order, expressing frustration when police aren't available to enforce them. He has been aggressive and persistent in pursuing orders against panhandlers, addicts, and those he deems "mentally unstable" and "disruptive at local businesses." He supports the orders as a final resort when warnings from police fail to solve problems of drug addiction or homelessness. "They wouldn't heed any other warnings by the police, they wouldn't confirm, their behavior was antisocial."

ACLU Missouri abandoned an attempt to challenge the orders in court 10 years ago; they lacked sufficient information and did not have regular contact with a potential plaintiff for the case. Their position is clear, though:

"City courts violate the constitutional rights of Missourians when they issue broad, arbitrary banishment orders untied to any legitimate governmental purpose … the fact that such orders are used against people who have committed harmless, petty crimes only makes plain that the orders are about inconveniencing the vulnerable, and not about public safety…."

Sources: *propublica.org; Williams, Kipling D. (2002). Ostracism: the power of silence. New York: Guilford Press. ISBN 1-57230-689-0. OCLC 47443948; Missouri Independent*

Police Can Get More From Your Phone Than You May Believe

by Michael Dean Thompson

Few of us would not feel violated to learn that our spouse or partner has been digging through our phone. Imagine if they were to use that data to analyze where we've been and who we've been near, and then, they were to gain access to our cloud services to examine long forgotten backups, images, and documents. Insatiably, they move on to access our social media accounts and peek into every post we and our friends have made. Most people would shudder in horror at such an intrusive sifting of our lives, even if we believed we had nothing to hide.

Emma Well, policy analyst at the technology research and advocacy organization Upturn, asserts, "At no point in human history have we collected and stored so much information about our lives in one place."

The New York State Police, along with thousands of other agencies in the U.S., wants to dig through your digital devices in just such a nightmarish manner described above. New York's Gov. Kathy Hochul has announced a $20 million expansion on top of the tens of millions already quietly eased into 2022's budget. Five-point-three million dollars of that set aside to modernize investigations by "linking digital devices to crimes." Experts assumed that was a reference to a technology toolset known collectively as Mobile Device Forensic Tools ("MDFT"). One such MDFT comes from the Israeli company Cellebrite, whose product is capable of breaking into phones many have been led to believe are highly secure.

From a technology perspective, some of the tools available from Cellebrite are impressive. The tools include software and devices with the ability to automatically crack highly secure phones, devices, and SIM cards without the need to send them to Cellebrite for processing. Once cracked, the software can access search and web histories as well as spoof the user's identity to download social media, email, and cloud services.

Information from a single cracked phone can be analyzed and cross-referenced with information drawn from other cracked phones. They have artificial intelligence to analyze images for content, including identifying faces, tattoos, drugs, weapons, and more. Other tools can then rifle through the collective data and create new leads without human assistance. Yet another AI aggregates the data and builds court-ready documents.

Like most states, New York's search warrant statute was written long before we collectively digitized our lives and focused their access into small mobile devices. That single point-of-failure creates a significant problem with consent searches, which may not truly be consensual when you consider that most people simply are not aware of how invasive an MDFT can be during a consent search.

Weil of Upturn describes the use of MDFTs as "an escalator" because it lifts the probe far beyond the original investigation. A Wisconsin suspect in a hit-and-run case told investigators they could search his text messages and signed a general consent. The MDFT the investigators used in the search pulled across, and stored, all of his phone's data. That data was later shared with another police department for a separate investigation without warrant or consent.

This is not analogous to investigators serving a warrant for one crime within a home and happening on evidence of another crime. The use of an MDFT is more like investigators being given consent to search a home then using that consent to make copies of that home's contents – down to the molecule – and sharing it with any interested parties. It is far beyond the scope of anything possible 50 years ago.

There is no consistency, either, when it comes to the various law enforcement agencies, MDFTs, and how the data is acquired and used. Almost half of the 81 agencies Upturn studied admitted to having no policies concerning MDFT searches. Upturn used the phrase "remarkably vague" to describe the policies of most of the rest.

Unfortunately, the courts are in no position to provide leadership on solutions as they can only address the problems in front of them. By the time a given problem can be rectified with a solution, the technologies have already evolved. Jerome Greco, the supervising attorney at the Legal Aid Society's digital forensics unit, noted, "Technology moves so much faster than anything in law or politics."

As in the Wisconsin case, neither are there clear delineations regarding with whom the pilfered data can be shared or how it might be used. Emma Well summed it up the current uncharted territory, "This is unprecedented law enforcement power."

Sources: *The State Police Want to Crack Your Phone, http:/nysfocus.com/2022/11/23/new-york-state-police-phone-surveillance-cellebrite*

Cops Aren't Just Murdering People With Impunity – They Also Conduct Bogus Traffic Stops

by Anthony W. Accurso

Police are tasked with upholding the law, but current case law has created a system where officers are actually incentivized to break the law by making bogus traffic stops.

The Fourth Amendment to the U.S. Constitution provides that citizens will be free from unreasonable searches and seizures. The Supreme Court has found it reasonable for a police officer to initiate a traffic stop for even the most minor of traffic infractions and has provided police with the presumption of truthfulness such that their testimony can only be undermined by clear evidence that contradicts their testimony (such as video footage).

Though the Court has attempted to place limitations on police authority by requiring probable cause or consent for searches and limiting traffic stops to their essential purpose, too many officers abuse this authority too often.

Perversely, there are social and financial incentives for doing so. When an officer concocts a pretext for initiating a traffic stop that results in the seizure of narcotics, weapons, or a wanted person, they are rewarded for protecting the community. Further, law enforcement agencies conduct large-scale operations where officers are encouraged to identify as many traffic violations as possible in a short period of time as a means of raising money for the agency or the municipality.

For instance, Spartanburg County in South Carolina annually stages "Operation Rolling Thunder," which netted the seizure of nearly $1 million by searching 144 vehicles in 2022. More than 350 cars were pulled over for the campaign, mostly for minor or entirely subjective violations.

Most drivers, pulled over on highways or in remote areas and small towns, simply capitulate, paying small fines and hoping any individual encounter doesn't result in too much hassle. Drivers don't collectively realize the scale of the problem nor act in concert the way police do.

Sometimes though, police go too far and oppress a driver who is willing to fight. Mario Rosales was ticketed by police in Alexandria, Louisiana, for failing to signal a turn. Officers pulled him over, had him exit the vehicle, and frisked him. Through a series of questions, they determined that he had recently moved to Louisiana from New Mexico but had not updated his driver's license quickly enough. In the meanwhile, they directed dispatch to search law enforcement databases for outstanding warrants or prior drug convictions that could be used to justify a drug dog search of his vehicle. He had neither, and the obviously frustrated officers released him and his passenger with the aforementioned citations.

Rather than just paying the fines, however, Rosales found a business near where he was stopped which had a security camera that recorded him properly signaling the turn.

He then fought the citations in court, resulting in the release of the dash and bodycam footage from the officers, which showed both that he had signaled the turn and that the officers had fabricated the infraction for the sole purpose of searching for narcotics. Rosales then engaged lawyers at The Institute for Justice ("IJ") to file a civil rights action against the officers and the Alexandria Police Department.

"The Fourth Amendment promises that police will not detain us on a whim to search for crimes," said IJ attorney Marie Miller. "They have to reasonably suspect a person of a crime to stop and interrogate them about it. The Constitution is the highest law in the land and officers can't violate it in pursuit of a crime."

Too many people find themselves in a situation like the one Rosales faced, yet without corroborating evidence like the security footage he obtained, officers who lie prevail in court by relying on the court's deference of taking them at their word, despite the fact police officers aren't any more truthful than the average person.

"I did nothing wrong, but still found myself standing on the side of the road wondering whether I'd be arrested," said Rosales. "What happened to me was wrong and I'm trying to hold the police and the city accountable because they are certainly treating other people the same way. Police have an important job to do, but they have to follow the Constitution."

Sources: *jalopnik.com*, *Forbes.com*

Civilian Police With Military Equipment

by Ed Lyon

During late May through the first of June 1989, citizens peacefully demonstrated for freedom in China's Tiananmen Square. On June 4, the government's response was to authorize a bloody rout of these peaceful protesters using soldiers, tanks, and other military resources resulting in thousands of dead citizens. Today, China refers to this as an incident.

Three years and eight months later, on February 28, 1993, agents of the Bureau of Alcohol, Tobacco and Firearms and Explosives ("ATF") laid siege to the Mount Carmel group of buildings belonging to the Branch Davidian Church, just east of Waco, Texas. According to survivor Thomas Cook, ATF agents driving M-60 tanks buzzed the area, running over the church members' cars, knocking down trees, and actually "mooning" the church members.

This ended on April 19, 1993, when ATF agents rammed the 155-millimeter gun barrels of the M-60 tanks into two places of the main building and Chapel to allegedly pump tear gas into it. The "tear gas" ignited, the building burned, and scores of church members died in the conflagration. So, instead of using soldiers, ATF agents, driving weapons of war, executed a "law enforcement" action against civilians.

Twenty-seven years and one month later, four Minneapolis, Minnesota, police officers brutally murdered Black citizen George Floyd, knowing full well they were being videoed by citizens and seemingly unconcerned by it. Citizens across the U.S., finally fed up with police murdering them at will and with impunity, began protesting.

Combining pages from the Chinese Communists and ATF playbooks, camouflage-clad, body armor-wearing, military hardware-toting "law enforcement" personnel with armored military vehicles confronted protesting citizens in such ways as to make

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the Chinese Communist People's Liberation Army and ATF chests swell with pride.

Where and how are civilian police departments coming into possession of military hardware they use in the course of their duties? Beginning in the 1990s, a federal initiative titled Program 1033 began. Its purpose is to transfer surplus military equipment to civilian law enforcement agencies. Unfortunately for the American people, there is an enormous surplus of military equipment that can and is being repurposed for use against us.

Despite massively upgrading civilian police departments with military equipment and hardware, it has been proven that militarizing law enforcement agencies does nothing to enhance officer safety or lower crime rates. [See *CLN*, February 2019, p. 21]

The states with the largest appetite for militarizing their police are Alabama, population 5.04 million; Florida, population 21.78 million; Georgia, population 10.8 million; South Carolina, population 5.19 million; Tennessee, population 6.97 million; Texas, population 29.53 million; and North Dakota, population 774,948.

With the exception of North Dakota, these states comprise the majority of what is known as the nation's Bible Belt. One would think that states with a label like that would be known for compassion, forgiveness, and love instead of gearing up for Armageddon like armies of Christian soldiers.

There are some surprising outliers. The town of Buckeye, Arizona, population 105,315, received two Mine-Resistant Ambush Protected Vehicles for its police department. These massive military monsters are needed for responding to active shooter incidents, serving search warrants and setting up barricades according to a police department spokesperson.

By comparison, the village of Jamestown, North Dakota, population 16,000 or so, applied for and received more than $3 million dollars' worth of military might to include an armored Humvee. It is a real stretch of a person's imagination to envision an active shooter or need for barricading in a jurisdiction that tiny.

At the rate the federal government is supplying military equipment and hardware to cities, towns, and villages, it may not be long until prowling tanks will be a common sight on many U.S. streets.

Source: *247wallst.com, ABC Nightly News, personal interview with Branch Davidian Thomas Cook*

Inspector General Report: FBI Routinely Abused Access to Private Communications

by Eike Blohm, MD

A recent Department of Justice ("DOJ") Inspector General report found that the Federal Bureau of Investigation ("FBI") routinely sidesteps regulations of electronic surveillance and essentially deliberately misinterprets DOJ guidelines.

Edgar Hoover was the first director of the FBI and was notorious for amassing personal and private information of U.S. persons without their knowledge or consent and certainly not with court approval. This culture appears to be unchanged in 2022 as the FBI continues to engage in the practice.

Electronic surveillance is omnipresent in the U.S. The National Security Agency ("NSA") stores vast amounts of raw communication data in so-called "haystacks" under the Foreign Intelligence Surveillance Act ("FISA") of 1978 (50 U.S.C. § 180). Law enforcement agencies such as the FBI may query those haystacks under specific rules.

Under 50 U.S.C. § 1805(c) part of FISA, the government has to submit an individualized application for surveillance identifying the target, type of information sought, and procedures to be used. As regulated by § 1805(a)(2)(A), a Foreign Surveillance Court ("FISC") then has to find probable cause that the target is a "foreign power" or agent thereof. Continued compliance was intended to be assured by § 1805(d)(3), which provided for ongoing judicial review of the surveillance process.

All such constraints went out the window with § 101(a)(2) of the FISA Amendment Act of 2008. As long as the target is "reasonably believed" to be outside of the U.S., the government no longer needs to submit an individual application for surveillance. Nor does the FISC need to find probable cause. Instead, the FISC simply verifies that the government certifies it believes probable cause exists. Surveillance orders can also be significantly broader, such as all communication to a foreign country – including communication to and from U.S. persons. Worst of all, the FISC may no longer monitor compliance with FISA rules. Instead, the Attorney General and Director of National Intelligence are entrusted with self-policing law enforcement and intelligence agencies.

With such lax rules and oversight, it is unsurprising that the DOJ's Inspector General found the FBI routinely sidestepped regulations. Guidelines of the DOJ state that "haystacks" may be accessed if such query is "reasonably likely to return foreign intelligence information or evidence of a crime." But the FBI made its own guidelines, which simply require that "to the extent reasonably feasible, authorized users [...] must design such queries to find and extract foreign intelligence information or evidence of a crime."

Apparently, it wasn't "reasonably feasible" when the FBI routinely queried "haystacks" to check the backgrounds of potential confidential human sources ("CHS"). Many of the prospective CHS were U.S. persons, which the FISA Amendment Act of 2008 specifically excluded from the released authorization requirements.

The Inspector General further found that the FISC was not informed of potential FISA violations by the FBI. It appears the FBI had a different interpretation of "materiality" when it certified it had probable cause to access FISA "haystacks." It only considered facts material if they determined the outcome of a probable cause determination. This is contrary to the DOJ's interpretation of materiality, which deems pertinent any facts that *might influence* determination of probable cause.

What is concerning is that the FBI has sidestepped regulations and misinterpreted DOJ guidelines not occasionally but consistently over the past 15 years. Clearly, more oversight and stricter regulations are needed to protect U.S. persons from living in an Orwellian dystopia.

Source: *techdirt.com*

New Orleans Authorizes Facial Recognition to Identity Suspects

by Michael Dean Thompson

The use of facial recognition systems was banned by the New Orleans City Council in 2020, only to be overturned in July of 2022 in response to fears of rising crime despite concerns within the affected communities about civil rights, privacy, and accuracy.

Facial recognition systems are known to have a high error rate. Much of its success depends on the quality of the image, the availability of multiple source images, and the color of the subject's skin. Black faces are misidentified at higher rates than white faces. Since most facial recognition systems measure relative distances between cheekbones, eyes, etc., they can look over features that a human eye might find prominent.

In an effort to separate themselves, companies that make the systems each have somewhat different methods of attacking the challenges of facial identification. Those differences can lead to biases that are hidden from the user and the public, resulting in some biases that may only become apparent after millions of runs. The requirement for multiple source images creates additional Fourth Amendment issues for forensic systems with regard to both known-person images (e.g., Facebook, Instagram, etc.) and unknown-person images (e.g., surveillance of protestors, abortion seekers, or crime witnesses which might come from any of the 500 cameras routed through the city's Real Time Crime Center).

New Orleans has a plan to help prevent abuse, misidentification, and false arrests, negating the fears of civil rights groups like the American Civil Liberties Union of Louisiana, whose advocacy director worries New Orleans may have acted too quickly to their crime fears. "People in this city are rightly concerned about violence, but the fact is we want to get it right and use tools that will actually help bring a resolution to that, but this just isn't one of them."

New Orleans Police Department Sgt. David Barnes said that its use will be limited in scope to prevent potential abuses, according to Fox News Digital. It is not for probable cause, he says. "We cannot make an arrest or get a

search warrant or anything based on a facial recognition match. The only thing it does is provide us with the possible ID of someone to see if they are a viable subject." He added that several layers of review have been created to prevent misidentification.

In an effort to prevent abuse, some additional criteria were added. Fox News Digital reports that only violent crimes may be investigated using facial recognition.

Randall Reid, 28, of Georgia must find that very comforting. New Orleans is the seat for Jefferson Parish, which called for Reid's arrest in November, just four months after the rule was changed, when the facial recognition system named him for the theft of designer purses from a consignment shop. Reid told reporters, "I have never been to Louisiana a day in my life. Then they told me it was for theft. So, not only have I never been to Louisiana, I don't steal."

Unlike the thief, Reid has a mole on his face. There is also an estimated 40-pound difference in weight between him and the thief. These were discovered after his arrest, prompting the Jefferson Sheriff to rescind the warrant.

Sgt. Barnes said, "[Facial recognition] can't be the first step you go to.... In my opinion, that's just absolutely, 100%, bad police work and is a misuse of software."

Sources: *foxnews.com*, *AP News*

Financial Pressure Finally Brings Police Reform

by Jayson Hawkins

Their names became litanies on streets across America: Trayvon Martin, Freddie Gray, Breonna Taylor, George Floyd. Yet protests, relentless media coverage, and the promises of politicians failed to move the needle on police violence or impunity. At last, as protests has faded from the headlines, a player has come to the table with enough clout to demand cops change their ways —insurance companies.

Away from public scrutiny and the media circus that follows court settlements, every police agency (or government agency, for that matter) has a relationship with an insurer or risk pool. These insurers act much like a liability policy for a vehicle — if the agency gets into a metaphorical wreck for which it is at fault, the insurer covers the cost of the subsequent lawsuit or settlement. Many of these insurance companies grew out of municipal risk pools formed by big cities that eventually offered coverage to smaller towns. Most of these pools were privatized in the aftermath of the Reagan-era zeal for limited government, but some are still owned and operated as government agencies.

Those insurers that are private, for-profit enterprises are managed within the same business model as any other insurance company. They turn a profit by maximizing the collection of premiums (payments for coverage) and minimizing the payment of benefits (money awarded for a tort liability incurred by the policy holder). For most of these pools' history, premiums were modest, deductibles (the out-of-pocket costs a policy holder pays before benefits kick in) were low, and payouts of benefits were exceptionally rare.

Up until 10 years ago, the largest category of benefit payouts was that provided to government employees injured on the job. The last decade, however, has brought about a sea change in the potential liabilities of police departments and the cities that employ them. Massive settlements in high-profile police killings grab all the headlines, which is understandable considering that lawsuits stemming from the deaths of George Floyd and Breonna Taylor resulted in payouts of $27 million and $12 million, respectively. It is the smaller (but more numerous), less publicized jury awards and settlements, however, that are driving change at many departments across the country.

The changes were rapid and drastic in St. Ann, Missouri. The small police department of 48 officers outside St. Louis had a no-nonsense policy when it came to vehicle pursuits, even for minor traffic violations. Chief of Police Aaron Jimenez proudly told reporters the department's motto was "St. Ann will chase you until the wheels fall off." Then in 2017 when officers were chasing a van with an expired license plate, the van struck another vehicle, leaving the driver permanently disabled. This crash was one of 20 in the two years leading up to 2017, and these accidents had left a dozen people injured.

Chief Jimenez was undeterred by the subsequent media attention and lawsuits, but when the St. Louis Area Insurance Trust threatened to cancel coverage if the department did not change its ways, Jimenez quickly, if grudgingly, relented. In 2019, St. Ann's police chief banned high-speed pursuits far traffic infractions and minor, non-violent crimes.

"I didn't really have a choice," Jimenez lamented. "If I didn't do it, the insurance rates were going to go way up. I was going to have to lose ten officers to pay for it."

John Chasnoff, a local social justice activist who agitated for years against St. Ann's chase policy, was happy about the change but disappointed that the decisive impetus was financial after the department had ignored the injuries they caused for so long. "It's an indictment of St. Ann Police and their priorities that the voice of the insurers spoke louder than human lives," he said.

Since the changes have taken effect, the number of pursuits has increased slightly, but crashes and injures are down. St. Ann officers are using technology like GPS sticky darts shot at the back of vehicles to nab motorists who run away, though overall arrests in the town have fallen by about 30%.

The St. Ann's changes are part of a larger trend. Police in Vallejo, California, saw deductibles increase from $500,000 to $2.5 million per claim, and the department was forced to join a high-risk pool and institute a series of internal reforms. The biggest police risk pool in New Mexico has had to shrink coverage while increasing premiums by 60% since 2022 because of use-of-force claims. The pool also had to hire an instructor to conduct mandatory de-escalation training throughout the state. The risk pool that covers 30 of 33 sheriff's departments saw rates rise 50% since 2019.

Big departments are often shielded from this type of pressure because they can draw from a large tax base to cover liability costs. But even the largest agencies have begun to feel the pain of ever-increasing settlements and jury awards. *The Washington Post* reported that over the past 10 years, $3.2 billion has been spent at the nation's 25 largest police and sheriff's departments to resolve some 40,000 claims. The trend towards larger pay-outs is likely to continue or even accelerate as police and their lawyers face jurors who are increasingly skeptical of cops and their sometimes questionable tactics. This shift has led to an unprecedented rise in pre-trial settlements.

"It's been such a shift, and it's happened so quickly," said Izaak Schweiger, an attorney specializing in civil rights cases against police. "The last time I went to a settlement conference, the city basically told me they were going to capitulate to what I demanded. That never used to happen before."

It is unclear how far the new trends will go, or how lasting the effects will be, but there have already been a few remarkable developments. In Springfield, Oregon, multiple complaints and settlements stemming from excessive force by police led to an impasse that ended in the city's insurance risk pool assuming a direct oversight role of the police. In 2019, the shooting at an unarmed motorist marked the culminating crisis point after five years during which the city paid $8.5 million for misconduct. The insurance deductible for the city was set to jump from $100,000 to $250,000, and when the city could not find another insurer, they were forced to come to the table and negotiate change.

The department agreed to mandatory de-escalation training, a new review process for use-of-force incidents, and an awards program for officers who lead the way in conflict resolution that does not involve violence. The track record of the department since the reforms were put in piece in 2019 has been mixed, but compared to the general treads of resistance to reform in most departments, there is significant cause for optimism.

More than a little exasperation exists on all sides with how these changes are coming about. Activists are frustrated that insurance costs moved the needle when the cost in human lives barely made it budge, and police are unhappy that their discretion has been so severely curtailed.

It is, however, the results that matter, as even St. Ann Police Chief Jimenez has had to recognize. "One of the things I've had to come to terms with is, since we changed our pursuits, our accidents are way down," he admitted. "We are doing a better job of keeping the public and our officers safe."

Source: *washingtonpost.com*

The ACLU Calls for a Moratorium on Blanket Recording of ALPR Footage

by Kevin W. Bliss

The American Civil Liberties Union ("ACLU") has published an appeal to the general public asking for organized opposition to the encroaching blanket surveillance company, Flock Safety. Concerns continue to be expressed regarding the company's desire to catalog the movement of every citizen, and make that data available not only on a nationwide scale but worldwide.

Flock Safety is the nation's first comprehensive mass surveillance data storage company. It installs unregulated automatic license plate recognition ("ALPR") software driven cameras around a contracted city and captures images of every vehicle passing the area for storage. That database can then be searched any time in the future by law enforcement agencies who have secured the company's services. This includes foreign law enforcement agencies.

Captured plates are automatically run against watch lists at the local, state, and national levels as well as the FBI's National Crime Information Center ("NCIC"), AMBER alerts, and traffic violations. Homeowners, business owners, and others with access to independent camera footage can add their files to the already expansive database. In return, owners can create their own hit lists that will generate a cellphone alarm when the target vehicle enters their neighborhood. Already, over 2,000 cities in 42 states across America participate in this program.

Information is being gathered for no other reason than the collection of the information itself in what the ACLU is calling an "Orwellian scope." Moreover, other companies such as Motorola Solutions are entering the market with their own versions of the nationwide database.

The ACLU released this plea on February 13, 2023, urging everyone to oppose this invasion of privacy. It stated the mass recording violates citizens' civil liberties. The Fourth Amendment of the U.S. Constitution says citizens shall be free from unreasonable searches and seizures by the government. Retention of information in pursuit of a crime is permissible. Retention of the same data for the possibility of investigating some future crime is not, especially when law enforcement has unfettered access to that data.

The ACLU recommended people contact their local councilpersons or elected representatives to demand that they block any proposed agreements with Flock Safety or any other company attempting to mass record data. If unable to prevent companies from recording all traffic captured into a nationwide database, at least regulate the time of retention of this information. Prohibit recording data except in pursuit of a crime, or allow for its retention to be for three minutes or less, argues the ACLU.

The ACLU said it is imperative this issue be fought for protection of citizens' right to privacy. It encouraged the public to raise the issue in newspapers' op-ed sections, attend public meetings addressing adoption of these databases, highlight the issue on social media, and engage directly with the local police department.

The important thing is to speak out against it. Some communities' police departments are sympathetic to the opposition of the acquisition of nationwide databases of this scope. But the majority of law enforcement agencies encourage contractual agreements with these companies.

Critics are concerned that ALPR systems will perpetuate the inherent problems already persistent with respect to the NCIC. The federal crime database has been criticized for its failure to comply with the 1974 United States Privacy Act's basic accuracy, reliability, and completeness requirements. Running Flock Safety's footage against the NCIC will result in a higher rate of unlawful arrests and detention.

"We don't find every use of ALPRs objectionable," the ACLU wrote. "[P]rovided they are deployed and used fairly and subject to proper checks and balances, such as ensuring devices are not disproportionately deployed in low-income communities of color, and that the hit lists they are run against are legitimate and up to date."

Collected data available to any for the right price could be used to enforce anti-abortion or anti-immigration laws for alternate jurisdictions, allow foreign powers to track political dissidents, or discourage freedom of expression in the form of political gatherings. The ACLU said the risks are not worth allowing captured data to be arbitrarily

recorded, retained forever, and provided to law enforcement without a warrant.

Law enforcement has already shown itself to have repeatedly abused and breached the public's trust. The ACLU urged everyone to oppose nationwide databases. If not completely, it gave three recommendations the public should follow: (1) restrict data retention to under three minutes for non-criminal hits, (2) restrict data access to local users only, and (3) ensure the accuracy, reliability, and completeness of the database.

Source: *aclu.org*

Police Sketch Bot Arrives

by Carlos Difundo

It is one of those things that seems to be a great idea at first. Once in place though, it becomes something very different. That happened when two coders created Forensic Sketch AI-rtist. The tool was simple enough given the skills of OpenAI's DALL-E2 image generation model. All they needed to do was collect a list of facial features from a witness, just as sketch artists have done for ages, and pass them on to the AI that would convert them into an image in moments rather than hours. It would save the police time and would provide "hyper-realistic" images at the crime scene.

As it turns out, the project is rife with problems. The first revolves around AI biases. Ask DALL-E2 to draw a CEO, and more often than not, the CEO is white. Biases such as that are not always easy to discover, yet they clearly exist and remain an important problem in AI research. It may take thousands of iterations for a researcher to notice that certain combinations of facial features are typically drawn with a frown, increasing the sense of menace.

No doubt, the perpetrator of a violent crime is menacing. Researchers have found that people remember faces holistically, not by individual features. A frown, or seemingly angry face, could draw a witness into a misidentification since it is the emotion that most sticks out. People's memories have been repeatedly shown to be easily influenced, especially during emotional moments. Meanwhile, nearly 25% of wrongful convictions that have been overturned by DNA were due to bad forensics, including misleading police sketches. Jennifer Lynch, the Surveillance Litigation Director of the Electronic Frontier Foundation said, "The problem with traditional forensic sketches is not that they take time to produce (which seems to be the only problem that this AI forensic sketch program is trying to solve). The problem is that any forensic sketch is already subject to human biases and the frailty of human memory."

In a report on facial recognition, the Center on Privacy and Technology said, "Since faces contain inherently biasing information such as demographics, expressions, and assumed behavioral traits, it may be impossible to remove the risk of bias and mistake."

Source: *vice.com*

Police Study Shows That Reform and Effectiveness Are Not Mutually Exclusive

by Benjamin Tschirhart

Following the murder of George Floyd by Minneapolis police officers, a new social movement has emerged and is growing in popularity. The burgeoning movement is calling for police reform along with the reduction of police budgets and tighter reigns on police training and tactics. Their demand (shocking many conservative thinkers) is to "Defund the Police!"

An opposing viewpoint insists that whatever the measures required for the reform of police culture, a reduction of police power and funding must necessarily lead to a decline in their institutional effectiveness. This, they insist, will lead in turn to predictable (and terrible) social outcomes: more crime and the destabilization of society. In the U.S. there exists a "law–and-order" tradition which places a premium on authority and values conformity to social norms and rules. Under this predominantly conservative paradigm, failure to comply with the exercise of official authority is interpreted as "defiance." The authoritarian institutional culture which pervades much of law enforcement is preoccupied with control and punishment; perceived defiance is often answered with immediate and overwhelming force.

It is against this social backdrop that the Center for Evidence-Based Crime Policy at George Mason University published a study in the Fall 2022 edition of *Translational Criminology*, exploring potential ways to effect reform while still preserving the effectiveness of police. A group of researchers from several law enforcement and criminology institutions – including the Metropolitan Police Department in Washington, D.C., and the National Policing Institute – conducted a three-city randomized trial to examine the effects of "hot-spot policing" combined with the use of "Procedural Justice" during interactions with the public. They sought to answer the following questions: Is it possible for police to improve their transparency, accountability, and rapport with the community they serve without sacrificing their effectiveness? Does effective law enforcement fundamentally preclude positive social interactions?

Previous studies have demonstrated the effectiveness of hot-spot policing; this particular trial was not intended to address that question again. Standard hot-spot policing emphasizes regular, visible police presence in high-crime areas. Although the effectiveness of hot-spot policing for reducing crime is not in dispute, it has also been shown to create hostility in communities that perceive themselves as receiving undue or excessive attention from law enforcement. As the researchers put it, "While there is evidence that proactive policing can effectively reduce crime in hot spots, there are concerns that intensive crime-fighting strategies could have negative effects on police trust."

In this study, both sample groups used hot-spot policing; the difference between them was the emphasis on "Procedural Justice," defined by the research team as a focus on "fair treatment in interactions with the public (giving voice, showing neutrality, treating people with dignity and respect, and demonstrating trustworthy motives)."

The trial was conducted with groups of 8 or 12 patrol officers from the cities of Tucson,

Cambridge, and Houston. The officers of each city were divided into two groups. The researchers chose 40 "high crime residential street segments" and assigned 20 of these hot spots to each group of officers. One group was instructed to reduce crime in these areas using standard hot-spot policing tactics. The other group was given 40 hours of Procedural Justice training and instructed to incorporate these methods into their efforts within their assigned hot spots.

While the Procedural Justice instructions did not have specific requirements, they emphasized the importance of incorporating the concept into every interaction that took place within the assigned hot spots. The study was conducted over a nine-month period and revealed "significantly" different behaviors from the police teams in the Procedural Justice groups. They "were significantly more likely to give citizens a voice, demonstrate neutrality, and treat people with dignity and respect. They were also significantly less likely to be disrespectful."

These changes yielded an improvement in community-police rapport and interactions. Residents of the Procedural Justice areas were less likely to complain about police harassment or excessive force. Meanwhile, the Procedural Justice hot spots saw a roughly 14% reduction of crime incidents, despite the fact that the police in these areas made 60% fewer arrests than the officers in the standard hot spot areas.

For decades, many tens of millions of dollars have been siphoned out of socially beneficial causes and programs and lavished on police departments for military equipment and dubious "training," which teach a violent and aggressive philosophy of policing – the so-called warrior mentality. For many years now, programs with names like "Warrior Training" and "Killology" have been standard for law enforcement agencies across the country. Yet, never have these confrontational and contemptuous approaches yielded such reduction in crime rates while also slowing the staggering rates of incarceration, which have shamefully characterized the U.S. for many years.

Unfortunately, most law enforcement agencies "do not regularly survey the public" and lack a feedback mechanism to make them responsive to the people they are meant to protect and serve. But the news is not all bad. This study demonstrates, in the words of the researchers, that "police fairness and effectiveness are not competing goals."

Sources: *National Policing Institute - Incorporating Procedural Justice into Hot Spots Policing: Lessons from a Multicity Randomized Trial, thecrimereport.org - Study Finds Hot-Spot Policing More Effective When Officers Show Respect*

'Contagion Effect' Spreads Brutality Among Police Officers

by Eike Blohm

The case of Tyre Nichols, beaten to death by five police officers during two encounters, has raised the question of how law enforcement officers could possibly commit such a brutal and heinous act. Laurence Miller, researcher and author of the 2020 book "The Psychology of Police Deadly Force Encounters," believes the "contagion effect" gives rise to such instances of excessive force.

Most police officers are not bad people. While a small minority may fit the term "criminals in uniform," using it as an explanation for incidents such as the murder of Tyre Nichols in Memphis is both simplistic and reductivist. Attribution of the cause of the officers' behavior to their malicious character fails to consider the plethora of cultural and psychological factors which enable acts that end in the death of unarmed civilians and the hands of police officers.

Not every killing of an unarmed person constitutes excessive force by legal definition, although it may by ethical standards. If a police officer reasonably believes that a suspect presents an imminent threat to them or others, the law permits the use of deadly force. Application of force is only considered excessive if it surpasses the level necessary to control the specific situation, such as a kick in the ribs after the suspect has already been subdued.

Excessive use of force tends to occur when a group of officers face a single suspect. The response of multiple officers to a scene is meant to reduce the risk of violence by establishing superiority in numbers but may paradoxically increase the use of excessive force based on police training and culture: when one officer escalates the level of force, the others immediately follow suit in order to back them up. Excessive force is thus contagious from one officer to the next.

The reason why an officer administers a disproportionate level of force can be multifactorial. They could be upset or annoyed with a suspect who forced a chase or was particularly verbally abusive. That is by no means justification. Police are to arrest suspects and deliver them to the courts, not dole out gratuitous, extra-judicial punishment.

Officers may also simply be biased as to how much force is required. Tests that have an officer decide whether to shoot while viewing images of persons holding either a gun or a harmless item (e.g., cell phone) show that officers are more likely to inappropriately opt to fire their weapon if the person shown is Black.

According to the contagion effect, it then only takes a single biased or angry officer to administer excessive force to create a Tyre Nichols scenario in which a group of police officers beat a civilian to death. But it's important to note that the race of the suspect seems to be the critical factor, not necessarily the race of the officers because the officers involved in the savage beating of Nichols are Black.

The problem is compounded by police culture which is eerily similar to the culture among prisoners. There is an expectation of loyalty and secrecy. This precludes transparency which the medical and aerospace sectors utilize to perform root cause analyses in order to prevent recurrence of adverse events. Without this transparency, police cannot solve their excessive force problem. It was thought that wearable body cameras would pierce the veil of silence and prevent officers from committing atrocious acts by knowing they will be

recorded. This does not appear to work as intended as evidenced by the ubiquitous amount of body camera footage of Tyre Nichols' death and other prominent incidents captured on police body cameras. The officers knew they were being recorded, yet they continued the merciless beating.

According to Laurence Miller, the law enforcement adage of "better to be judged by 12 than carried by six" provides an explanation. When faced with a (perceived) danger, the immediate consequence (death) supersedes the concern for the delayed consequence (prosecution), thus resulting in a tendency for overreaction rather than measured application

of force. Additionally, some officers – especially those in task forces – feel untouchable due to their protection under qualified immunity and believe their desired ends justify the means. In the moment, the officers may actually believe their actions to be justified. There is no simple solution to this problem.

Training that addresses police bias has no lasting effect, and the contagion effect directly arises from the necessary police tactic of backing up a colleague. Laurence Miller proposes a model of delayed transparency: after the trial has concluded and the legal aspect of the issue is settled, an event such as the death of Tyre Nichols should be transparently dissected in the service of preventing recurrence. The court will only attempt to determine which person is responsible, but a root cause analysis tries to find the factors that made such an event possible and aims to correct them, such as the contagion effect.

Source: *grid.news*

America's Latest "War on" … Protestors

by Casey J. Bastian

For decades, American law enforcement apparatuses have embraced an ideology of going to "war" against the American people. Under the guise of being "tough on crime," addressing societal issues has instead become an opportunity to offend individual liberty and rights. This country has chosen to go to war on drugs, crime, terror – take your pick. All have been failures. Now there appears to be a war on peaceful protests.

Since George Floyd died under the knee of a Minneapolis police officer, several people have been killed while protesting. On June 1, 2020, the National Guard killed David McAtee in Louisville, Kentucky. The next day, undercover police in Vallejo, California, gunned down Sean Monterrosa. The U.S. Marshals "hunted down" and "neutralized" both Michael Reinoehl and Winston Smith, Jr. The year 2022 "was the most lethal year on record for police-civilian encounters."

This year, police have killed Tyree Nichols, Keenan Anderson, and Manuel Esteban Paez Teran. Teran was killed in Atlanta's South River Forest protesting the construction of the Atlanta Public Safety Training Center ("APSTC"), infamously referred to as "Cop City." For two years, Teran was one of hundreds living in tents and treehouses hoping to block the APSTC's development. It is clear the citizens support these protestors. When the public comment period was open "nearly 70 percent of the 1,166 responders expressed opposition" to Cop City's construction.

Clearly, the politicians forgot whose interests they represent. It is more important to make the public accept the will of the Atlanta Police Foundation ("APF"). The APF is a "veritable who's who of corporate power and inherited wealth." In 2022, the APF provided large sums of money to lobby for Cop City. The politicians appear to listen to the APF.

On January 18, 2023, agents from nine agencies, including the FBI and the Georgia Bureau of Investigation, descended on the unarmed activists. The agencies orders were clear: "eliminate the future [APSTC] of criminal activity." The disturbing view of law enforcement is one of civilian will, unarmed activism, and peaceful protest as radical criminal activity. This action could be construed as the first training exercise at the APSTC in the war on protesting, which does not bode well for the future.

The Georgia Governor has upped the ante, vowing to "bring the full force of state and local law enforcement down on those trying to bring about a radical agenda" while demanding "swift and exact justice" with the goal of "ending their activities." And the police have now forever ended Teran's activities. Governor Kemp can consider it mission accomplished. Kemp has also given 1,000 members of the National Guard "the same powers of arrest and apprehension" as law enforcement. An act similar to that which resulted in McAtee being killed.

We may never know why law enforcement opened fire on Teran and the others. There is no body camera footage and no desire to conduct an after-action investigation either. No rational person needs an inquiry to see what went wrong. America has a hyper-aggressive, militarized law enforcement apparatus. These apparatuses (of which the federal government has become the puppet-master) revel in a "military-style chain of command" that operates as if "at war with enemies foreign and domestic." Americans exercising their First Amendment rights are increasingly viewed as the enemy by militarized law enforcement.

As agencies like Homeland Security conflate tree-sits with terrorist acts and the courts continue to provide a license to kill they call qualified immunity, more citizens will die. As militarization increases, so too does the loss of life. There is "no observable effect on measures of crime or safety." The law enforcement systems in place today are supplemented by the "tools, tactics, technologies, and advanced weaponry" from "America's counterinsurgency wars overseas." These things are then "imported, requisitioned, and reinvented" to be used on American citizens.

Programs like the Pentagon's 1033 Program, Homeland Security's Urban Areas Security Initiative, the Federal Law Enforcement Training Center, and the private-sector Law Enforcement Charitable Foundation all work towards creating systems of war within the borders of the country. Until we demand an end to any type of "war" against the citizens law enforcement is supposed to be protecting, tragedies like the killing of Teran will continue. And make no mistake about what Teran's killing was: "an extrajudicial execution, carried out by hired men armed with military assault weapons, paramilitary training, and qualified immunity from prosecution – in other words, a death squad in all but the name."

Source: *thenation.com*

Memphis Police Beat Man to Death

by Kevin W. Bliss

Five Memphis police officers have been charged with second degree murder, aggravated assault, aggravated kidnapping, official misconduct, and official oppression in the death of the 29-year-old Black motorist Tyre Nichols.

Ex-Memphis police Tadarrius Bean, Demetrius Haley, Desmond Mills, Jr., Emmitt Martin III, and Justin Smith pulled Nichols over in a routine traffic stop January 7, 2023. The stop quickly escalated into an incident of extreme violence. The police report states that Nichols and the five ex-police got into a confrontation when they first pulled Nichols

over during the initial stop and then again once he was placed under arrest. At this point, Nichols endured a beating so brutal that it ultimately resulted in his death.

The Guardian reported that the five ex-police beat Nichols continuously for three solid minutes. When firefighter paramedics later arrived on the scene, they were forced to give Nichols preliminary treatment for his injuries and then rush him to the hospital for more extensive care. Nichols died three days later from complications.

An independent autopsy authorized by Nichols' family revealed that Nichols died from the extensive bleeding caused by the beating. "He was a human piñata for those police officers," said the Nichols family attorney Antonio Romanucci. "Not only was it violent, it was savage."

Bean, Haley, Mills, Jr., Martin III, and Smith were immediately fired following the incident. Officials stated the five flouted departmental policy, including excessive use of force, duty to intervene, and duty to render aid. The five have since been arrested and charged with the murder.

Additionally, the two firefighter paramedics are also being investigated for possible policy violations committed during the initial care given Nichols. The two have been placed on administrative leave pending the outcome of the investigation.

Source: *The Guardian*

Louisiana Jury Selection Illegal According to Recently Passed Bill

by Kevin W. Bliss

January 23, 2023, the Orleans Parish criminal court system halted all active jury trials until further information concerning the summons prices for jury selection could be supplied to the Fourth Circuit Court of Appeals in response to allegations that the system precluded people with felony convictions from serving in violation of the Sixth Amendment right to a jury of one's peers.

The Louisiana Legislature passed a bill in 2021 which allowed ex-offenders to serve on juries as long as it has been at least five years since the completion of their sentence including any probation or parole associated with the commitment, and the individual was not currently under indictment. The bill was signed into law by Governor John Bel Edwards and became effective August 1, 2021.

Yet to date, summonses sent to prospective jurors still read that felony convictions are grounds for being barred from serving on juries. And, that online questionnaires discussed felony convictions but not sentence or probation/parole completion dates.

Emily Posner, lawyer for the Voice of the Experienced ("VOTE") received a letter from Orleans Parish Chief Judge Robin Pittman stating all venires for jury selection through February would be deferred, allowing the Fourth Circuit Court of Appeals the opportunity to work through the issues surrounding the process.

VOTE is an advocacy group primarily composed of ex-offenders who have raised concerns over this unfairness of the jury selection process. "What the court did today was recognize an oversight," said VOTE founder and executive director, Norris Henderson. "It is not about who's right, but what's right, and they need to get these juries right so people can get truly fair trials for once in the state of Louisiana."

Recent filings have brought the issue to the forefront of the courts. Murder suspect Samuel Preston filed a motion earlier this month stating his jury had been improperly empaneled because ex-offenders had been excluded from the pool. Michael Shorts filed a similar motion concerning his second-degree murder conviction of July, 2022. He has requested his conviction be overturned and a new trial set empaneling an impartial jury.

Preston also argued that many people with felony convictions have been permanently purged from venire selection, and simply changing the language on the summonses or the online questionnaire would not rectify the problem.

The District Attorney's Office said its primary concern was to the victims and witnesses it represented. "Our office will continue to do all we can to bring justice to families with all due speed throughout this temporary pause," stated its spokesperson.

Source: *thelensnola.org*

Minnesota Abolishes Life Without Parole for Juveniles

by Jordan Arizmendi

On May 19, 2023, Minnesota Governor Walz (D) signed omnibus public safety bill – SF 209, which abolishes life imprisonment without parole for minors. Under the bill, juvenile life-without-parole sentences will be retroactively eliminated. In addition, all minors who were sentenced in adult court will be eligible for supervised release after at least 15 years served in prison.

Executive director of the Minnesota Justice Research Center, Justine Terrell, told the *Star Tribune* that "Too often, the criminal legal system just focuses on punishment. But expanding restorative outcomes and making it a priority for the system means that you're addressing the harm that's been caused and that people can actually move on from that harm and that helps create safe communities."

Ninety-seven Minnesotans are serving sentences of 15 years or more for crimes committed as minors. Now, most of them are eligible for a sentencing review.

Sources: *cfsy.org; eji.org*

News in Brief

California: A former police officer with the LAPD, Paul Razo, 46, was arrested in early May 2023, accused of sexually assaulting at least four minor boys over the course of more than a decade. Weeks after his arrest, Razo died of medical complications while in custody. KNBC in Los Angeles reported that some of the boys Razo was accused of assaulting were his own relatives. Razo, who had been awarded the Medal of Valor in 2018 for rescuing a man from a burning car while off-duty, was accused of assaulting two boys, both between the ages 11 and 13 at the time of the assaults. He was also accused of assaulting the sons, between the ages of 9 and 12, of a woman he was dating. All the assaults were said to have taken place at his home between 2006 and 2017, and investigators suspected that there could be more victims. Razo was charged with eight counts of "lewd acts upon a child" in connection with his alleged actions.

Colorado: On May 1, 2023, a former police officer in Log Lane Village was sentenced for forgery and felony theft, having continued on active duty even after the initial charges were filed. KUSA in Denver reported that the former officer, Dawn Fliszar, had been found guilty of taking for her own profit over $30,000 worth of fees for vehicle inspections in the Town of Morrison. KUSA had previously reported in Nov. 2022, that Fliszar was still on duty even after being charged with felonies, which is something a majority of jurisdictions don't allow. She failed to reveal to Log Lane Village, where she later worked, that she was facing felony counts. During this time, she was allowed to own a gun, though due to her conviction, will not be, and her law enforcement certification in the state will be taken away. She eventually resigned from the Log Lane Village police. For her offenses, Fliszer was sentenced to 14 days of jailtime, 3 years of probation, and will be forced to pay $35,600.

District of Columbia: It was announced on May 19, 2023, that a Metropolitan police officer was charged with having improper communication with the former leader of Proud Boys extremist group around the time of Jan. 6, 2021, insurrection at the U.S. Capitol. *NBC News* reported that the officer, Shane Lamond, 47, in charge of the intelligence arm of the Metropolitan police was accused of warning former Proud Boys leader Enrique Tarrio of his arrest warrant before the insurrection began. Tarrio was indeed arrested before the insurrection and barred from Washington, D.C. by a judge. He has since been convicted of seditious conspiracy along with other members of the group. Lamond was charged with obstruction of justice and making false statements. He was accused of trying to get in the way of the investigation into the Proud Boys' burning of a Black Lives Matter banner in D.C. at an event in support of then-President Donald J. Trump on Dec. 20, 2020. Tarrio and Lamond were in communication from July 2019 to January 2021 via various messaging services. [See: CLN, Oct. 2022, p. 1]

Florida: WFLA in Tampa reported on May 10, 2023, that a police officer in St. Cloud was accused of using the credit card of a deceased person. The officer, Dianne Ferreira, was investigating a death when she found the credit card of the deceased and loaded the card information into her phone. She then used the card to buy things for herself.

Idaho: A police officer in Eagle was pulled over on May 15, 2023. KTVB reported that the officer, Casey Hancuff, was pulled over by police on Highway 44 for driving erratically in the early hours of the morning. He had been driving his personal vehicle at the time of the incident and was off-duty. The responding police officer could smell alcohol, and Hancuff was accused of failing a sobriety test at the scene of the traffic stop, measuring in at a blood alcohol level of 0.111. Hancuff was known for his work addressing DUIs as a police officer, having made thousands of DUI arrests during his 20-year career. He now faces his own DUI charge. Hancuff had also previously received an award by Mothers Against Drunk Driving ("MADD"). The responding officer that morning decided not to arrest Hancuff, instead taking him to his home, which is technically within adherence to policy, but very rare for DUIs.

Indiana: On May 15, 2023, a police officer in Indianapolis pleaded guilty to deprivation of rights under color of law for physically assaulting an arrestee in Sep. 2021. The *Associated Press* reported that the officer, Eric Huxley, admitted to kicking Jermaine Vaughn in the face while Vaughn was handcuffed. Body camera footage of the incident showed an officer getting Vaughn down to the ground in handcuffs and then Huxley forcing his foot down on his head. Vaughn's lawyer claimed that the victim was homeless at the time of the arrest. He was later charged with disorderly conduct and resisting law enforcement. But these charges against him were dropped. Huxley was suspended by the Indianapolis Metro PD after the assault, and he was indicted in Oct. 2022. On the federal charge, he could face up to 10 years in prison, and 3 years of probation for the attack, as well as a fine of up to $250,000. He has also been charged by both Marion County and the state.

Iowa: KCRG in Cedar Rapids reported on April 7, 2023, that a former reserve police officer with the Marion Sheriff's Office sentenced for possessing a horde of child pornography. The former officer, Gordon Grabau, 51, had previously been found guilty of using "peer-to-peer" technology to gather a substantial amount of the illicit material between 2014 and 2021 before his home was searched by law enforcement in July 2021. He was fired that same day and investigators found some 168,780 files with child pornography on devices found in his residence. The horde included infant pornography. Grabau was federally sentenced to 144 months in prison and 5 years of supervised release.

Iowa: A former police officer in Buchanan County was sentenced for asking a woman to expose herself during a traffic stop, KCGR in Cedar Rapids reported on May 16, 2023. The former officer, Klint Bentley had previously been charged with and pleaded guilty to "non-felonious misconduct while in office." He admitted to telling the victim he would not write her a ticket if she showed him her chest during a traffic stop on Feb. 4, 2022. He also admitted to messaging her afterward, the state DPS reported, requesting images. The victim recorded the traffic stop. Bentley was fired four days after the incident and was soon arrested. As part of his plea agreement, charges of bribery and extortion were dropped. He was sentenced to 15 days in jail for the offense and 1 – 2 years of supervised probation.

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Massachusetts: The former head of the Massachusetts State Police union was sentenced to prison on May 10, 2023, after being found guilty of racketeering and fraud. WBUR in Boston reported that Dana Pullman, 61, the one-time president of the union had previously been convicted of accepting a $20,000 kickback from lobbyist, Anne Lynch, 71, and working with her to defraud two companies who were looking to work with the state police. Pullman did so by hiding the fact that he was being paid by Lynch to send vendors to do business with her. Pullman was also found to have used the union credit card for thousands of dollars of his own personal expenses. Pullman and Lynch had been charged with and convicted of obstruction of justice, tax fraud crimes, racketeering, and wire fraud in Nov. 2022. For her part, Lynch was sentenced to 2 years of prison, 2 years of probation, and to pay restitution. For his part, Pullman was sentenced to 2 ½ in prison, 3 years of probation, and to pay restitution. He had been president of union from 2012 to 2018 and had been a state police officer since 1987.

Michigan: The Kalamazoo County prosecutor announced on April 6, 2023, that the sheriff of St. Joseph County was charged with various offenses relating to his DUI car crash earlier in the year. WOODTV reported that the sheriff, Mark Lillywhite, 47, had been charged with counts of "carrying a concealed weapon while under the influence of alcohol" and "operating while intoxicated." The misdemeanor charges were authorized on April 5 and related to accusations that Lillywhite smashed his SUV into another car on Feb. 26, 2023, in the early hours of the morning, sending both vehicles off the road. The other vehicle went into a roll from the impact, yet no one was "seriously" harmed. Passengers in the vehicle that was struck, reported no headlights from Lillywhite's SUV, which, according to the vehicle's data, was going 100 mph and hadn't braked. There were also two pistols, a rifle, and ammunition in the SUV. Lillywhite appeared drunk to the responding officers and told them that he had not been driving the car. They claimed he was the only one in it during the incident.

New York: The *New York Post* reported that a former Briarcliff Manor police officer was convicted of quadruple murder on April 6, 2023. The former officer, Nicholas Tartaglione, was found guilty by a jury of killing Urbano Santiago, Hector Gutierrez, Martin Luna, and Miguel Luna in 2015. Tartaglione, who shared a jail cell with Jeffrey Epstein before his death, turned to drug trafficking during his career in law enforcement. He was convicted of bringing Martin Luna to a Chester bar called the Likquid Lounge, thinking that the man stole his money. Luna brought his nephews, Miguel Luna and Urbano Santiago, as well as a family friend, Gutierrez. Upon the group's arrival, Tartaglione proceeded to make the nephews watch as he strangled Luna to death with a zip tie. He and two others then took the surviving three deep into the woods, had them kneel down, and then executed them with gunshots to the head. He buried all four bodies in a mass grave nearby. He faces potential life in prison for the brutal murders.

North Carolina: WITN in Washington reported that a police officer in Richlands was arrested on May 11, 2023, on suspicion of possessing child porn. The officer, Gabrial Luciano, 39, was taken into custody and handed 10 felonious second-degree counts of "sexual exploitation of a minor." Luciano was found in possession of numerous images of minor girls, some as young as 7-years-old. He was caught up in an North Carolina SBI investigation, which was launched in response to a tip from the National Center of Missing and Exploited Children.

Oregon: The *ABA Journal* reported that the former number one administrative judge in Washington County was sentenced on May 11, 2023, for child pornography. The former judge, John Michael Mann, had previously pleaded guilty to possessing child pornography that he knew involved the abuse of minors. He had originally been arrested in March 2022, went on leave from his judgeship, and was eventually placed on interim suspension from the bar. He entered into a plea agreement on the 10 counts in March 2023. For his offenses, Mann was handed 38 months in prison for two of the counts and five years of probation for the other eight. To meet probation, he will have to undergo sex-offender treatment, register as a sex-offender, and he will be barred from access to the internet and computers.

South Carolina: *The Post and Courier Greenville* reported that a former police officer in Traveler's Rest was charged with sexually assaulting a woman after luring her to a remote area. The details of the misconduct in office and third-degree criminal sexual conduct charges against Gerard James Hildebrandt were released to the public on May 12, 2023. He was accused of being the responding officer to a call at a local residence on July 3, 2022, where he found the victim. She was drunk and trying to get things out of her boyfriend's residence. Hildebrandt told the woman to follow him to a high school nearby to sober up, framing it as a way to avoid being charged with a DUI. When they arrived at the high school, he forced her to engage in sex acts and took her clothes off by force. He was in uniform and armed during the abuse. Hildebrandt was fired the same day, and it was later reported that he'd previously been fired from another department for choking a handcuffed man in Aug. 2021.

West Virginia: The DOJ reported that a former state regional director of parole was sentenced on April 27, 2023, for witness tampering. The man was former parole officer with the WV Division of Corrections and Rehabilitation, David Jones, 51, and he had previously acknowledged he had lied to and withheld information from federal and state investigators about a case of alleged sexual misconduct by a parole officer he was supervising, Anthony DeMetro. He also acknowledged that he had directed a witness in the case to lie and destroy evidence numerous times in 2020. Jones had directed the witness to discard recordings she had of the officer at the center of the investigation sexually harassing her. He was found to have told the witness to get rid of evidence that they had been messaging as well. For his part in the attempted cover up of the misconduct, Jones was sentenced to 87 months in prison and 3 years of supervised release.

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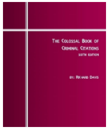

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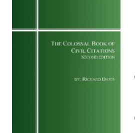

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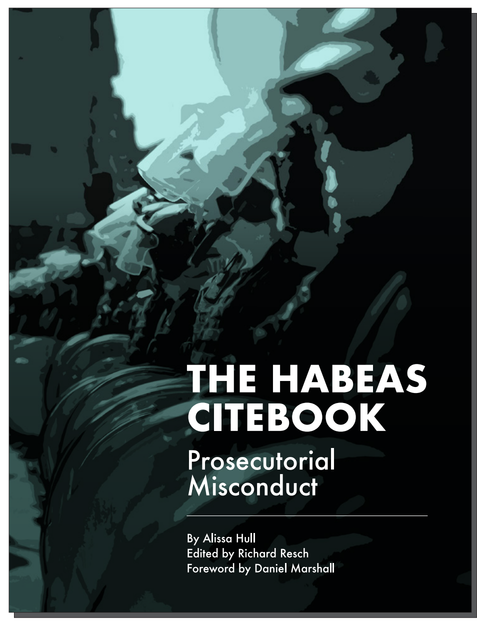

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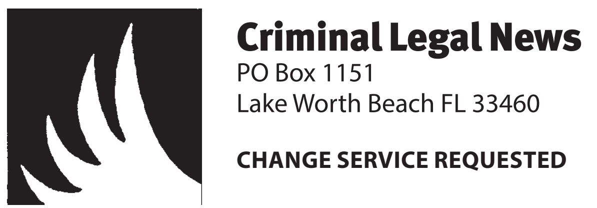

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