Exonerations: From Wrongful Conviction to Release and Beyond

by Ed Lyon

A state-sponsored formal religion in the U.S. is forbidden by the nation’s Constitution. Regardless, one part of the country’s ethos closely approaches a level of worship. That part is freedom. Enshrined in the Pledge of Allegiance as “the land of the free,” the U.S. nonetheless incarcerates more of its citizens per capita than any other nation on the planet—both guilty, and in far too many cases, factually innocent as well.

Innocent convictees caught up in the criminal justice system who are fortunate enough to later be declared innocent of their crime or removed from all legal encumbrances associated with their conviction because, for whatever reason(s), evidence of their innocence was not produced at trial and required later reconsideration, are called ‘exonerees.’

Attention to the plight of innocent convictees in the U.S. began to gain real traction in 1932 with the publication of Edwin Borchard’s book Convicting the Innocent. The main causes of wrongful convictions were pinpointed as “eyewitness misidentification, witness perjury, false confessions, police and prosecutorial misconduct, inadequate defense counsel, etc.” Study after study for the next 85 years consistently identify these as the principal factors for wrongful convictions.

Beginning in the 1990s, DNA emerged as a major factor in exonerations.

Borchard’s book was followed by many other authors of note, one being Perry Mason’s Erle Stanley Gardner. They chronicled hundreds of horror stories about innocent convictees who spent decades in prison, some dying, some executed, and far too few becoming exonerees. This is all in spite of a criminal justice system that proclaims to ensure the fair administration of justice by affording criminal defendants with more constitutionally guaranteed rights and protections to prevent the innocent from being wrongfully convicted than any other legal system in the world ... supposedly. Despite the scholarly attention to this problem, most prosecutors, judges, and other criminal justice professionals remained firmly rooted in denial and treat wrongful convictions as rare, isolated occurrences when, and if, they were acknowledged at all.

Exoneration Types

Two categories of exonerations are group and individual.

The National Registry of Exonerations (“NRE”) does not track group exonerations (“GE”) as closely as individual exonerations (“IE”) because there is a general lack of specific data concerning each individual exoneree in a GE. The general catalyst leading to a GE is a corrupt police officer or police conspiracy. In its 2016 report, the NRE had records of 15 GEs comprised of 1,840 exonerees, as opposed to 1,900 IEs.

In some GE cases, a few of the exonerees cleared were actually guilty. Their involvement in the same type of criminal activity, at the same time as the exonerees, was all it took for them to reap the same benefit. For example, it was discovered in 1999 and 2000 that police officers within the Los Angeles Police Department’s Rampart Division had been planting drugs and guns on many people, even shooting them, then planting firearms on some of their victims. Of the 156 reversals in this GE, 38 met the NRE’s criteria as actual exonerations, 27 had “evidence of criminal culpability” with 22 being “too unclear to call.” So a little more than half of the Rampart GEs were totally innocent.

Although gross records of group exonerations are kept by the NRE, they are not heavily researched because of the lack of specific data on each exoneree as pointed out by the above example. Two exceptions to this practice are GEs that occurred in Tulia, Texas, and Houston, Texas.

A GE in Tulia occurred in 2003 for 39 convictees. Renegade sheriff’s deputy Tom Coleman, who had been indicted for theft, was nonetheless hired as an undercover narcotics officer by the Texas Department of Public Safety (“DPS”). Coleman lied and planted...
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**Exonerations (cont.)**

Drugs on 39 suspects from 1999 to 2000. This earned Coleman the honor of being named 1999 Outstanding Lawman of the Year by the DPS and later “the most devious ... law enforcement witness this court has ever witnessed ...” by the presiding judge who reviewed his perjured testimony in those 39 cases. In 2005, Coleman was fittingly given a new tide after his perjury conviction—prisoner. Of the 39 GE in Tulla, 37 met the NRE's criteria as actual exoneration.

As a result of the GE in Houston, hundreds of drug cases were reversed because of the Harris County Crime Lab's policy of testing suspected controlled substances even after convictions are obtained. This revealed many cases where cheap, inaccurate field tests rendered false positive readings on suspected controlled substances. In these two GEs, because detailed arrest and booking data were kept, personal data on each individual is available.

IES are closely tracked because of the large amounts of statistical data compiled on the exonerees on a case-by-case basis during the exoneration process. It is from these empirical data sets that patterns emerge that are useful in pinpointing other cases.

As of 2016, the Albany Law Review published, by percentage, the parties who played any significant role in obtaining IES: innocence projects, 34 percent; exonerees, 30 percent; subsequent defense attorneys, 21 percent; actual perpetrator, 12 percent; other individual or group, 11 percent; exoneree's family; 10 percent; police, 9 percent; subsequent prosecutor, 7 percent; federal law enforcement, journalist, 4 percent; state administrative office, original defense attorney, 3 percent; victim, witness, convicting prosecutor, law school professor, 2 percent; and, exonererees friend, 1 percent.

The Exonerees — Demographics

U.S. census statistics show 77 percent of the population is white with 13 percent black. White people make up 59 percent of the nation’s prisoners; black people comprise 38 percent. Exonerations of white prisoners account for 39 percent of the total, while exonerations of black prisoners account for 47 percent. The raw numbers indicate racial bias, which is confirmed when individual cases are examined.

In 1980, a Texas Ranger told two school janitors, one white and one black, who found the body of a rape and murder victim at the school what to expect: “One of you is going to hang for this.” The ranger then turned to Clarence Brandley, the black janitor, and said: “Since you’re the nigger, you’re elected.” Brandley was, in fact, found guilty and sentenced to die in 1991 but was exonerated in 1990.

In 1984, black half-brothers Henry Lee McCollum, 19, and Leon Brown, 15, were convicted of the rape and murder of an 11-year-old girl. Both teens were intellectually challenged and confessed under police coercion. There was no physical evidence linking them to the crime. They were exonerated in 2014 by the North Carolina Innocence Inquiry Commission and pardoned by the governor in 2015. The Commission found DNA from a known serial rapist and murderer on a cigarette butt at the murder scene and fingerprints on beer cans, along with proven false trial testimony from a witness. Nevertheless, the convicting prosecutor was quoted by The New York Times as saying: “No question about it, absolutely they are guilty.”

In 1987, Alabama police framed Walter McMillian for murdering a white woman. He had several alibi witnesses, all black, who vouched for his presence at a fish fry. McMillian had a white girlfriend. He was convicted and sentenced to die in 1988 but was exonerated in 1993.

Nor is racial prejudice by police endemic in just the South. In 1991, a black college student, Arthur Colbert, was arrested by Philadelphia, Pennsylvania, police. They questioned him for six hours, often calling him a “nigger,” took him to an abandoned house and beat him, then returned to the precinct and beat him again, threatened him with a loaded pistol, and then broke into his apartment and performed an illegal search. Finding no contraband in his home and unable to force him to confess to anything, police finally released Colbert with a threat to kill him if they saw him again. The investigation into this incident led to the first GE in Philadelphia.

Nearly half of all exonerees in the 28-year reporting period have been black people. The NRE points to several reasons for this: (1) the high murder rate in the black community, (2) risks of misidentification in cross-racial crimes, (3) race of victim disparities, (4) blacks are more often stopped, questioned, and searched by police than are whites, i.e., racial profiling, and (5) blacks are statistically more likely targets of police and prosecutorial misconduct.
In sum, regarding police and prosecutors’ motives for their disparate treatment of blacks, the NRE stated in wording similar to a familiar insurance commercial: “That’s what they [police and prosecutors] always do.” At a glance, this is seemingly a facetious statement, but it is in accord with cold, hard statistical data, tables, and incidents.

As of November 2018, general exoneree demographics, including all races, show that one in three were sentenced to 50 years in prison with 14 of those years elapsing before they were exonerated. Eighteen percent pleaded guilty in spite of their innocence, 19 percent were posthumously awarded, and 6 percent of exonerees came from death row.

Total numbers of IEs are rapidly approaching 2,300. [PLN, November 2018, p.17]

University of Michigan law professor Samuel Gross is a co-founder and senior editor of the NRE. In 2014, he conducted a study showing a statistically supported estimate that 4.1 percent of all death row prisoners are innocent, yet only 1.8 percent of them have been exonerated. The statistical model considers the number of capital prisoners who would have become exonerees had their sentences not been commuted, they not been executed, and had not died in prison awaiting execution. For the remaining non-capital prison population, Gross states the 2,000 individual exonerees at that time in the NRE database are but a tiny fraction of prisoners who are actually innocent.

Attorneys and Their Exonerated Clients: A Tie That Binds?


Another New Haven attorney, Sean McElligott, helped prove Vernon Horn’s innocence in connection with a murder conviction after Horn had spent 17 years in prison. Like Rosenthal, McElligott helped Horn obtain a residence, furniture, and a cellphone and to open a bank account. “The idea that you can represent a great human being like Vernon, who has been so completely wronged, is in the category of why I went to law school,” stated McElligott.

Henry McCollum and his half-brother Leon Brown were convicted of the rape and murder of an 11-year-old girl in 1983 North Carolina. Attorney Ken Rose stood by McCollum throughout 30 long years until the brothers were released. Rose, through his nonprofit law center, provided over $14,000 for the brothers to live on while Rose worked to obtain pardons and exoneree compensation for them. The brothers have IQs in the 50s. While their sister squandered the $14,000, predators moved in and conned the brothers into signing contracts for the predators’ services and a new lawyer. Even after obtaining their state statutory exoneree compensation, the brothers soon fell on hard times until a federal judge intervened, voiding the contracts, appointing a guardian ad litem for McCollum, and placing Brown in a group home. Rose continued to stand by McCollum through the final federal hearing. After testifying on McCollum’s behalf, Rose went to the table where McCollum was seated, shook his hand, and left the courtroom. The tie that bound in this instance finally stretched too far, now probably broken forever.

Exonerees: In Their Own Words

It is difficult to imagine what it must feel like to be imprisoned for a crime you did not commit. Try imagining how release from such circumstances must feel. Here’s how some exonerees explain it:

- Los Angeles, Californian Frank O’Connell stated: “This brings a sense of closure. It’s been a long road. It’ll be a new beginning for me, and I can’t really start my life over. I can’t make up for all the time that was stolen from me, but I can take positive action with what’s left. I’m a little disappointed I never got an apology, and I realize it may never happen, but I don’t carry it with me.”
- Riverside, Californian Horace Roberts simply stated: “I could not believe it was me walking out of prison.”
- Connecticut exoneree Mark Schand stated: “Believe me, the day they released me, I couldn’t find it — the anger. It wasn’t there. I was just happy I was out. And I figure, I just focus on that day forth.”
- Illinois exonerees Kristine Bunch and Juan Rivera, respectively, stated: “The moment you get out is incredible. Then the cameras
leave and you realize you don’t even have a toothbrush.” ... “No one can walk in our shoes or understand but us. We don’t know what normal is ... [after] having served so much time in prison.”

- Indiana exoneree Keith Cooper: “Horrible. It’s like a nightmare. To this day I still have bad dreams about what happened and how they got me.”
- Kansas exoneree Lamonte McIntyre: “I can [now] live a normal life, like everyone else,” after receiving his state statutory exoneree compensation award.
- Baltimore, Maryland, exoneree James Owens: I’d rather have the time [20 years in prison] back than the [$9 million settlement] money.
- Henry McCollum, after realizing predators had stripped him of his entire $750,000 state statutory exoneree compensation award, and he owed on loans of $130,000 and $65,000 at 19 percent and 38 percent interest rates: “I feel like I shouldn’t be out here.”

A member of your family is murdered. A person is tried and convicted, then imprisoned for the crime. Your family member is still gone, but you feel safe. There is closure of a sort. Years later, the convictee is exonerated and released. You feel: “Stunned,” stated Andrea Harrison after a chance meeting in a convenience store with exoneree Larry Peterson, who was wrongfully convicted of raping and murdering her mother over 20 years before. “I walked out of that store so fast,” she stated. “I still don’t have my mom, and now I don’t even have the satisfaction in knowing that whoever did kill her is [locked] away and they can’t hurt anybody else, they can’t hurt me.”

“It’s horrific enough to lose a family member, to add to that injury, finding out decades later that the wrong person has been convicted and the true assailant is left unapprehended,” stated Peterson’s attorney, Vanessa Potkin.

Retired New York City Police Department Sergeant Joe Giacalone points out: “Exoneration cases become, unfortunately, cold cases times two in many respects, because there are no other suspects.” As a former commander of the Bronx Cold Case Squad, he explained that older cases are more challenging — records are lost and witnesses die. “In many cases, the original investigators had ‘tunnel vision,’ focusing too early on a person or group and neglecting to pursue other leads. Wrongful conviction cases that involve DNA or other forensic evidence stand the best chance of seeing the crime solved. But the evidence that gets someone released from prison doesn’t always lead to another conviction.”

The Brooklyn Conviction Integrity Unit secured exoneration for Antonio Yarbough in 2014. He had spent almost 22 years in prison for the murders of his mother, sister, and a family friend. Unknown to Yarbough, his mother was a heroin addict. All of the victims had been bound, stabbed, and garroted.

DNA under his mother’s fingernails matched that of another rape that occurred after the son was imprisoned. That DNA remains unidentified. “I want him to get locked up, I want him to go to trial,” said Yarbough. “I wasn’t accused of killing somebody else,” he added. “I was accused of killing the most important people in my life.”

Flip sides of the same coin whether exoneree or victim’s survivor — either side comes up to reveal heart-wrenching pain and agony.

Exonerees and Recidivism

The proverbial axe that hangs over the neck of all former prisoners is a return trip to prison. Exonerees are no different in that aspect of post-release life than any other releasee. This is reflected in a 2014 study by...
Exonerations (cont.)

the Northwestern University School of Law.

At that time, there were 1,900 individual exonerees in the U.S. The study was confined to 118 cases in four states. Texas with 46 IEs, New York with 24 IEs, Illinois with 31 IEs, and Florida with 17 IEs all had the most complete data sets from which to work. The remaining three in the top seven exoneration states were California, Louisiana, and Massachusetts.

The study’s population sample size (n) consisted of 67 blacks (56.8 percent), 34 whites (28.8 percent), and 14 Hispanics (11.9 percent). The average amount of prison time served was 11 years, with the times elapsing from release to Post Exoneration Offense Recidivating ("PEOR") being 35.1 months. The commonly used benchmark in recidivism studies is 36 months. Ages of the exonerees ranged from the youngest at 19 to the oldest at 62, with the average being 39.

IE offenses were expunged for 79 of the population, and, of these, 25 (31.6 percent) fell into Post Exoneration Offense Recidivating. Of the 38 IE offenses that were not expunged, 19 (50 percent) were PEOR. Compensation was provided to 71 of the IEs (61.2 percent) while 45 (38.8 percent) received no compensation. No compensation data existed for two of the IEs.

Of the 38 IE offenses that were not expunged, 19 (50 percent) were PEOR. Compensation—are statutes enacted by the federal government, District of Columbia, and the individual states. In early 2018, Massachusetts and Kansas became the 32nd and 33rd states to enact

at below the threshold level PEOR'd at a higher rate than IEs who were not compensated at all.

A prior offense history was found to be a risk indicator of higher probable PEOR propensity in all categories of compensation.

Overall, PEOR rates for the study states are: Florida at 58.8 percent, Illinois at 38.7 percent, Texas at 45.7 percent, and New York at 8.3 percent. Recidivism rates for those states' total releases are: Florida at 33 percent, Illinois at 43.7 percent, Texas at 31.4 percent, and New York at 42 percent.

Texas and New York's prisons boast the nation's most advanced education systems in prison with recidivism rates of 10 percent for prisoners earning associate degrees while incarcerated, 5.6 percent for Texas, and 5.7 percent for New York prisoners earning bachelor's degrees while incarcerated, and a zero percent recidivism rate for prisoners earning master's degrees while incarcerated. PEOR rates are significantly higher than all other recidivism rates for prison releases.

Expungement of the exoneration offense reduced the likelihood of PEOR by 16.725 percent for exonerees with no prior criminal history. For exonerees with a prior criminal history, expungement of the exoneration offense was shown to reduce the likelihood of PEOR by only .66 percent.

The more generous the exoneration compensation package is, coupled with expungement of the exoneration offense, the lower the likelihood of recidivism for exonerees is. However, no group came anywhere near the tiny recidivism rates for prisoners who successfully earned college and university degrees during their incarceration, whether exoneree or parolee.

Oklahoma death row exoneree Yancy L. Douglas recidivated, drawing a 10-year prison sentence for assaulting a police officer during a traffic stop. His $1 million conviction lawsuit settlement awaits him upon his release. [PLN, October 2018, p.38]

Exoneree Compensation

The overwhelming majority of states provide assistance for parolees. This is not usually the case for exonerees. Exonerees wind up in a double daymare: the first is false imprisonment — sometimes for decades, the second is the shock of being released and having nothing with which to rebuild their shattered lives and stolen years.

There are three methods of obtaining compensation for those years stolen from an exoneree by the government.

The least successful method is for the exoneree to petition the government's legislature for a private bill of compensation. Florida exoneree Wilton Dedge began efforts to have a private bill passed for him in 2004. Initially refusing, the legislature finally passed a bill for Dedge, probably as a result of the public hue and cry over the injustice of Florida imprisoning him for 22 years for a rape and burglary he did not commit. In 2008, the legislature enacted a common compensation bill for exonerees.

A second alternative for exoneree compensation is to sue. Possible outcomes include a return of nothing, a settlement of indeterminate range according to a jury's whim, or, in some cases, a large sum. Exoneree Juan Rivera won the largest individual jury award for wrongful incarceration to date of $20 million.

The third—and rapidly becoming the most viable alternative for exoneree compensation—are statutes enacted by the federal government, District of Columbia, and the individual states.

In early 2018, Massachusetts and Kansas became the 32nd and 33rd states to enact

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who were compensated

Post Conviction State and Federal Habeas Corpus petitions

Penalties and State and Federal Habeas Corpus petitions

IEs compensated at the threshold level $500,000 or more PEOR'd at significantly lower levels than those compensated at below the threshold or not at all. IEs in this group with no prior criminal histories offended at the same percentage rate as first offenders to the general prison population.

Surprisingly, IEs who were compensated

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In early 2018, Massachusetts and Kansas became the 32nd and 33rd states to enact

Penalties and State and Federal Habeas Corpus petitions
laws to compensate exonerees. The states with no exoneree compensation statutes are Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Kentucky, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming. Indiana became the 34th state to adopt an exoneree compensation law, signed into law May 1, 2019.

States with the lowest rates of exoneree compensation are Illinois, Iowa, Louisiana, Missouri, and New Hampshire.

Compensation by State

States with the highest rates of exoneree compensation are Texas, awarding $80,000 per each year of imprisonment, plus $25,000 per year spent as a registered sex offender or on parole; Colorado, awarding $70,000 per each year of imprisonment, adding $50,000 per year if the exoneree was on death row, with $25,000 per year for each year an exoneree spent on parole if exoneration occurred after release; Kansas, awarding $65,000 per each year of imprisonment, adding $25,000 per each year spent on parole if exoneration occurred after release; and Vermont, awarding from $30,000 to $60,000 per each year of imprisonment that may include lost wages, costs, and attorney fees. Exoneree compensation amounts averaged $50,000 across that offered by these 33 states.

The District of Columbia’s compensation package far outstrips any state, awarding $200,000 per each year spent in prison, adding $40,000 per each year spent on parole if exoneration occurred after release from prison.

“At the other end of the spectrum, New Hampshire caps total compensation at $20,000, no matter how long a person was incarcerated,” npr.org reports. ‘Montana offers educational aid but no money.’

The federal system is more in line with the state system average, awarding $50,000 per each year of imprisonment, with $100,000 per each year spent on death row.

State Services

Money is not everything, as the old saying goes. Most innocence projects rightly insist that states should offer, in addition to monetary awards, reintegration services and assistance similar to that provided to Texas exonerees. That state pays for counseling, child support arrearages, tuition, and all associated fees at any state college or university for 120 credit hours, development of a thorough and comprehensive plan for the exoneree’s successful reintegration into society to include life and job skills training, documentation acquisition, and group health-benefits coverage through the prison system’s plan—the same as if the exoneree were an employee of the Texas Department of Criminal Justice. That agency is the state’s largest and as such, sports the best health-care insurance package and rates of any state agency. Few other states come close to matching this exoneree compensation package, and none exceeds it.

Michigan caps monetary exoneree compensation at a maximum of $50,000 per each year in prison. The Michigan Court of Claims (“MCC”) decides the award amounts. Michiganan Edward George Carter was convicted of rape, despite non-DNA evidence that was collected at the crime scene exculpating him from the offense. He spent 35 years in prison prior to his exoneration and was awarded $1,761,506.85 by the MCC, $14,770 short of the maximum yearly amount set by statute. [PLN, August 2018, p.45]

Austin, Texas, couple Dan and Fran Keller spent 21 years in prison, convicted in 1992 of sexually assaulting a three-year-old girl at their day-care center. This was one of the last cases of “Satanic Panic” involving small children that swept the U.S. in the 1980s and early ’90s. Their convictions were vacated in 2015, and they were formally exonerated in 2017. They received initial exoneree compensation payments of $3.4 million each with $80,000 in lifetime annuities and the same excellent health-care coverage enjoyed by state prison employees under the Texas wrongful conviction statute. [PLN, November 2018, pp.26-27]

Until 2015, exoneree compensation awards were subject to federal income tax. The Wrong-
ful Convictions Tax Relief Act of that year ended that practice. The bill’s provisions were made retroactive, making prior exoneree compensation awards that had already been taxed refundable to the exoneree. The retroactivity clause set a time limit for claiming any refunds due to one year, expiring at the end of 2016.

Settlements

Other exonerees do quite well in litigating settlements for wrongful convictions.

The largest court settlement award went to Illinois exoneree Rivera (see above). He was convicted three times for a 1992 rape and murder of an 11-year-old girl — despite the inconvenient fact that DNA evidence existed excluding Rivera from the offense. Taking advantage of his low IQ, police coerced Rivera into signing a confession after a three-day-long marathon questioning session. The Illinois Appeal Court reversed his third conviction in 2011, and prosecutors dismissed the charges against him a year later. Erroneously informed that Illinois had no compensation statute, Rivera sued and won a $20 million settlement. From his $11.4 million share after legal and attorney fees, he donated $300,000 to start a barber college for low-income citizens. [CLN, November 2018, p.17]

California caps monetary exoneree compensation at $140 per each day of imprisonment. One exoneree, Frank O’Connell, spent 27 years in prison on a murder conviction. Prosecutors coerced a half-blind neighbor of the victim to testify that the victim made a deathbed statement of being shot by a man driving a car like O’Connell’s. The witness later recanted. Centurion Ministries spearheaded the drive to prove O’Connell’s innocence. In November 2017, O’Connell finalized a lawsuit for $15 million, including attorney and legal fees. [PLN, August 2018, p.50]

Nebraska, meanwhile, caps monetary exoneree compensation at $500,000 total. Exonerees James Dean, Kathleen Gonzalez, Deborah Sheldon, Jo Ann Taylor, Joseph White and Thomas Winslow were convicted of a 1985 rape and murder case and chose to bypass the state’s statutory compensation because of the extremely egregious circumstances of their convictions. They sued Gage County, its sheriff, and some deputies in federal court. A jury agreed with the exonerees, awarding them a collective $28.1 million in damages, which the U.S. Court of Appeals for the Eighth Circuit affirmed. [CLN, October 2018, p.23]

Oklahoma caps monetary exoneree compensation at $175,000 total. Death row exonerees Yancy L. Douglas and Paris Lapriest Powell had their convictions reversed by the U.S. Court of Appeals for the Tenth Circuit based upon especially outrageous prosecutorial misconduct. The two were awarded $1 million and $2.15 million settlements in August and September 2017 resulting from their federal lawsuits. [PLN, October 2018, p.38]

Maryland has no monetary exoneree compensation cap, but it does allow awards for actual damages. Baltimore resident James Owens was wrongfully involved as a murder suspect by a friend trying to collect a $1,000 information award. Both men were convicted and sentenced to life after police and prosecutors had their way with them. In 2006, a DNA test excluded Owens, resulting in his exoneration. Baltimore attorney Charles Corlett took over Owens’ faltering legal battle, winning him a $9 million settlement from the city. [CLN, November 2018, p.29]

North Carolina caps monetary exoneree compensation at $750,000 total, pro-rated at $50,000 per each year in prison. McCollum and Brown (mentioned above) spent 30 years in prison before they were released and later exonerated. They each collected the maximum statutory award of $750,000 and later settled wrongful conviction lawsuits against three other entities for undisclosed amounts pursuant to a court ordered seal. [PLN, August 2017, p.58; February 2018, p.54; September 2018, pp.40-41]

Punishment Incidental to the Exoneration

Some exonerees step out of their imprisonment thinking that their long, grueling ordeals are finally over only to be shocked at the hell on Earth awaiting them as their lives seemingly go from bad to worse.

In the 1990s, Mexican immigrants Gabriel Solache and Arturo Reyes came to the U.S. seeking the American dream in Chicago, Illinois. Neither man spoke English, but both were willing to begin their new lives as laborers. In 2000, the men were convicted of a 1988 murder they did not commit based upon their confessions to police as a result of beatings. They were both eventually exonerated of the murder and released — to the not-so-tender mercies of the U.S. Immigration and Customs Enforcement agency (“ICE”). ICE is seeking to deport Solache and Reyes back to Mexico. [PLN, September 2018, pp.44-45]

In 1981, Haiti was in a state of utter chaos caused by economic turmoil and political unrest. Haitian Jules Letemps was granted a “humanitarian parole” to the U.S. because of that country’s problems. In 1986, Letemps was arrested for trying to sell a miniscule amount of cocaine in order to have money to buy food for himself and his girlfriend. He was sentenced to the five months in jail it took to get him to court. ICE paid no attention to this minor offense then. In 1989, he was wrongfully convicted of rape based on the victim’s misidentification. DNA excluding Letemps from the rape existed the entire time, but an ineffective, court-appointed lawyer could not read the results. Centurion Ministries began working on Letemps’ behalf in 2010. They managed to have his conviction reversed in July 2016 in a federal district court, and prosecutors dropped all charges against him in 2016. Again, ICE stepped in to save the day for the good-ole U.S. of A., protecting the homeland from Letemps, who is now labeled as an “arriving alien” in immigration court proceedings due to his parole status when he arrived in the U.S. “Based on Mr. Letemps’ criminal past, ICE determined that his detention is warranted,” ICE spokesperson Spicer reported in an email statement.

The hospitality not shown to the exonerated aliens among us positively pales in comparison to the mistreatments and abuses visited upon some native-born exonerees by friends, families, and especially strangers.

Predators

Henry Lee McCollum was reading at second-grade level when he dropped out of high school. His half-brother Leon Brown could just barely read and write when he dropped out of school. Their IQs were in the 50s. The two New Jersey natives were visiting
relatives in North Carolina when 11-year-old Sabrina Buie was raped, murdered, and abandoned in a soybean field. With such limited mental faculties, it wasn’t difficult for police and prosecutors to coerce confessions from them to the rape and murder, then obtain death penalty convictions. After retrials ordered by the U.S. Supreme Court, McCollum returned to death row while Brown drew a life sentence and entered prison as the lowest of the low, a child rapist and murderer.

Ken Rose, McCollum’s original trial attorney, hung on for the entire three decades, never abandoning his client. In 2014, the North Carolina Innocence Inquiry Commission announced a DNA finding from the crime scene that excluded the brothers, with their innocence being declared by a judge the following September. The men went to live with Leon’s full sister, Geraldine, who had visited Leon in prison exactly once and Henry exactly never. Attorney Rose, through his nonprofit law center, fronted the men $14,000 to get them on their feet and allow them to receive, even if and after Megaro may be fired. This percentage exceeded the limits imposed on attorney fees by the state bar. Megaro then approved a $100,000 loan for each man at a mere 41.6 percent interest rate and a $5,000 fee. Of course, agents Weekes and Pointer each realized their 20 percent, or $20,000 apiece. During this period, Megaro promptly squandered the $14,000, and social workers began to take the men shopping for clothing and food rather than trust their sister with any money.

After several months elapsed with no state compensation, a cousin contacted Kimberly Weekes, a self-styled advocate from Atlanta, Georgia. After meeting Geraldine, Weekes brought in a “business partner” from New York, Deborah Pointer, and together they drew up a contract to “help” the exonerees in return for 10 percent of any loans to the men, 5 percent of any state compensations, and 1 percent of any lawsuit settlements. The predatory partnership of Weekes & Pointer soon found a like-minded lawyer from Orlando, Florida, to edge out the hard-working, well-meaning legal team already laboring on the brothers’ behalf.

Lawyer Patrick Megaro cut himself in for a full third of all awards the exonerees would receive, even if and after Megaro may be fired. This percentage exceeded the limits imposed on attorney fees by the state bar. Megaro then approved a $100,000 loan for each man at a mere 41.6 percent interest rate and a $5,000 fee. Of course, agents Weekes and Pointer each realized their 20 percent, or $20,000 apiece. During this period, Weekes made as many trips to North Carolina on the exonerees’ behalf as Geraldine made to prison to visit her brother — exactly once. By September 2015, the men were pardoned as Leon continued a slide into the dark abyss of mental illness brought on by years of prison abuse, beatings, and rapes, finding himself in a mental hospital for the seventh time since his release from prison. The men would later realize less than half of their $750,000 state exoneree compensation awards, thanks to the machinations of lawyer Megaro. “I like these guys,” Megaro said in 2017. Megaro gave the men no financial advice and did not set up trusts for their future needs. He did arrange for more high interest, predatory loans for them. Geraldine continued to squander Leon’s money, buying herself a Lexus, a BMW, a Mustang sports car, and a van, along with jewelry for herself with toys and diapers for her children, despite legal prohibitions to keep guardians from spending their charges’ funds for personal use.

By 2017, Megaro announced a negotiated settlement with the Red Springs Police Department wherein each man would be paid $500,000. By that time, however, the honorable U.S. District Judge Terrance Boyle had

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taken charge, appointing new guardians for each exoneree and demanding accountings from all parties while putting the Red Springs settlement on hold.

Megaro found himself encountering a federal judge’s wrath when he continually refused to answer Judge Boyles’ questions about Megaro’s financial dealings with the exonerees. Judge Boyles divested Geraldine of her guardianship over Leon and ordered her to be jailed. “Why you would take advantage of a poor soul like that, I don’t know,” stated Judge Boyles. “I’m sorry you feel that way,” Geraldine responded. Adding that she should never have been appointed Leon’s guardian to begin with because ‘I’m incompetent, too. I ain’t gonna lie.”

Judge Boyles ultimately approved the Red Springs settlement, severed lawyer Megaro from anything else concerning the exonerees with help from attorney Rose’s testimony, and appointed new guardians for both men. Settlements from the North Carolina Bureau of Investigation and Robeson County Sheriff were eventually reached, but the amounts were sealed by court order. [PLN, August 2017, p.581 February 2018, p.54: September 2018, pp.40-41]

For some exonerees, the punishment received incidental to their wrongful convictions and incarcerations has turned out to be as bad, if not worse in some cases, than the original state-originated torts themselves.

**Important Post-Exoneration Concerns, Noteworthy Successes**

**Fresh out of prison, exonerees must have food, shelter, clothing, and medical care, just like all people. Not all exonerees have longtime attorneys or innocence project personnel to assist. Many states do not have the programs or infrastructure available to help exonerees assimilate back into society that are available to parolees.**

Many states do not automatically expunge an exoneree’s records in order to ease their ability to land a job, rent an apartment, or gain access to services like food stamp programs. Where expungement does exist, the process may take years, even decades in some cases, to complete. One problem is a criminal justice system that reflects an implicit message that exonerees may not be guilty—but they are not innocent, either.

One employment avenue might be “transition jobs.” While often menial, these jobs nonetheless allow new prison releases — exonerees, especially — to prove they are dependable and reliable, build an employment history, learn diversity in the workplace, and regain feelings of self-respect, pride, and accomplishment that being imprisoned causes a person to lose.

Entry-level food-service positions like dishwasher can lead to food preparation jobs, from fry and short-order cook to eventually chef, as a person’s experience in that field broadens.

Warehouse laborers jobs lead to forklift operator, transportation specialists, dispatchers, and managerial positions.

**House of Renewed Hope**

Mark Schand was wrongfully convicted of murder in 1987 in Springfield, Massachusetts. The state did absolutely nothing to assist his transition into society despite exoneration and declaring him innocent of the murder after his 27 years in prison.

Door after door slammed shut to him as he applied for job after job. Schand had a transition job nights for United Parcel Service, as he applied for job after job. Schand had a transition job nights for United Parcel Service, loading those dark brown vans with boxes. In 2018, however, he rebooted the career that was stolen from him at age 19. He opened a business, Sweetwater smoothie cafe in New Britain, Conn.

Texas exonerees Christopher Scott, Johnnie Lindsey, and Steven Phillips took the bull by the horns after their release from prison and exoneration. Having been there, done that, and learned the pitfalls, back alleyways of the criminal justice streets, and dirty tricks of police and prosecutors, plus the many mistakes made by inept defense lawyers, the trio started the House of Renewed Hope. While Lindsey died in 2018, the work of the House of Renewed Hope, a nonprofit detective agency, continues. Its mission is to pursue and investigate claims of actual innocence. The House also advocates for criminal justice system changes on the legislative level.

It’s a grand entrepreneurial start, one that will hopefully never finish for as long as an innocent convictee is dying a little bit each day in a 9-by-6-foot barred closet.

**Sources:** Albany Law Review, November 2015; cresourcecenter.org, scholarlycommons. law.northwestern.edu, thecrimereport.org, trib.com, https://why.org, californiainnocenceproject.org, careerwise.minnstate.edu, earlcarl.org, innocenceproject.org, ktuu.com, law.com, law.umich.edu, nytimes.org, prisoneducation.org, seattletimes.com, texascoalitionforcriminaljustice.com, theatlantic.com, themindychannel.org, themarsballproject.org, wnpr.org, wsj.org, npr.org, United States Department of Justice Bureau of Justice Statistics

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**Massachusetts Supreme Judicial Court: Consent to Search Does Not Attenuate Seized Evidence From Taint of Illegal Search of CSLI**

**by Douglas Ankney**

**The Supreme Judicial Court of Massachusetts suppressed illegally obtained CSLI, ruling that the Commonwealth failed to meet its burden under the Fourth Amendment of proving police did not exploit the illegally obtained evidence to obtain the defendant’s consent to search.**

After Josener Dorisca was indicted for murder, Detective Kenneth Williams attempted to locate him via his best friend, Cassio Vertil. On July 2, 2008, Kennel Vertil (Cassio’s brother) gave Cassio’s cellphone number to Williams and told Williams that Cassio was traveling to New York in a brown Toyota with two men named Stephen Allonce and Stanley Fredericq. Williams also learned from a confidential informant that Cassio was going to Florida in a brown Toyota to purchase narcotics.

The Commonwealth obtained a court order pursuant to 18 U.S.C. § 2703(d) to require the cellular service provider (“CSP”) to produce records for the period of July 1 through July 8 that included, among other things, “updates on the phone’s location every fifteen ... minutes.”

The CSP used “ping” technology to send radio signals to the cellphone and record the location of the cell sites (towers) with which the phone had communicated. These records (known as Cell Site Locator Information or “CSLI”) were sent by email to Williams...
every 15 minutes. The records tracked the phone as it traveled to Sunrise, Florida. Local police observed Cassio, Allonce, and Fredericq staying at a motel, but Dorisca was not with them.

Then, on July 7, 2008, the CSLI records tracked the phone as it made its way back to Massachusetts, arriving at Fredericq’s apartment building the next day. Police observed Cassio outside the apartment speaking with a man who matched the description of Dorisca. After Cassio and Allonce left the apartment building in the brown Toyota, State Police entered the building to search for Dorisca and the narcotics. On the third floor, Trooper Eric Telford told Fredericq they had information that Fredericq “had just gone down to Florida and purchased a large amount of narcotics and ... [was] probably storing it there.” Fredericq denied possessing narcotics and signed a “consent-to-search” form. In an attic crawl space across from Fredericq’s apartment, police recovered two “bricks” of cocaine. After Fredericq was indicted, he moved to suppress the fruits of the search. The case went from the superior court to the county court twice, where it was remanded each time to a different judge in the superior court. Finally, the third judge granted the suppression motion. The Commonwealth appealed, and the Appeals Court reversed. The Supreme Court granted Fredericq’s motion for further review.

The Court observed that Article 14 of the Massachusetts Declaration of Rights allows police to use CSLI for no more than six hours to track a cellphone unless authorized by a search warrant based on probable cause. Commonwealth v. Estabrook, 38 N.E.3d 231 (Mass. 2015). Also, government acquisition of CSLI records is “a search within the meaning of the Fourth Amendment.” Carpenter v. United States, 138 S. Ct. 2206 (2018). The Commonwealth conceded that the CSLI tracking of the cellphone was illegal because no warrant was obtained. But the Commonwealth argued, inter alia, that evidence obtained during the search was sufficiently attenuated from the illegal tracking by Fredericq’s consent.

The Court agreed that in certain circumstances a defendant’s consent to search may be an intervening event that constitutes adequate attenuation, thus allowing illegally seized evidence to be admitted. Commonwealth v. Damiano, 828 N.E.2d 510 (Mass. 2005). But if the consent itself is tainted by the illegal search, it is not adequate attenuation because the consent was obtained through exploitation of the fruits of the illegal search. Commonwealth v. Midi, 708 N.E. 2d 124 (Mass. App. Ct. 1999).

To determine if the Commonwealth has met its burden of proving Fredericq’s consent was not tainted by evidence from the illegal CSLI search, the Court examines the consent in light of: (1) the time that elapsed between the defendant being confronted with the illegally obtained CSLI evidence and his grant of consent; (2) the presence of any intervening circumstances during that time; and (3) purpose and flagrancy of the official misconduct. Damiano, citing Kaupp v. Texas, 538 U.S. 626 (2003).

As to factors (1) and (2), the Court observed that the consent was obtained immediately after Telford’s statement that police had information that Fredericq had returned from Florida with narcotics and was storing them. The Court determined the close proximity between Telford’s statement (which was information gained from the illegal CSLI search) and Fredericq’s consent – along with the absence of any intervening event – weighed heavily against the Commonwealth’s attenuation argument. Estabrook. As for the third factor, the Court recognized the police misconduct was neither purposeful nor flagrant. The police obtained a court order pursuant to 18 U.S.C. § 2703(d) back in 2008 to obtain the CSLI records, which was several years before the Court announced a “new rule” requiring a search warrant based on probable cause to obtain the records. Commonwealth v. Augustine, 4 N.E.3d 846 (Mass. 2014). But even though the police acted in good faith based on the court order, Massachusetts doesn’t recognize a good-faith exception to the exclusionary rule or the attenuation doctrine. Commonwealth v. Hernandez, 924 N.E.2d 709 (Mass. 2010).

Thus, the Court agreed with the superior court that the Commonwealth failed to prove the seized evidence was sufficiently attenuated from the illegal search of the CSLI records.

Accordingly, the Court affirmed the judgment of the superior court granting the motion to suppress. See: Commonwealth v. Fredericq, 121 N.E.3d 166 (Mass. 2019).

Writer’s note: The Court also provides citations to several cases from other jurisdictions ruling that evidence seized from an illegal search is still inadmissible even if the defendant did not have a reasonable expectation of privacy in the area illegally searched. ☩
In announcing the end of 18 U.S.C. § 924(c)’s residual clause in defining certain “crimes of violence” while using or possessing a firearm for purposes of sentence enhancement, the Supreme Court of the United States (“SCOTUS”) begins its opinion by explaining: “In our constitutional order, a vague law is no law at all…. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.” That’s precisely what Justice Gorsuch does, writing the opinion for a 5-4 majority (joined by Justices Breyer, Ginsburg, Kagan, and Sotomayor) in United States v. Davis, 2019 U.S. LEXIS 4210 (2019).

In light of SCOTUS’ opinions in Johnson v. United States, 135 S. Ct. 2551 (2015) (invalidated the residual clause of the Armed Career Criminal Act, the text of which is materially similar to § 924(c), as being unconstitutionally vague), and Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (invalidated the residual clause of 18 U.S.C. § 16(b), the text of which is nearly identical to that of the residual clause in § 924(c), as being unconstitutionally vague), it has been widely expected that SCOTUS would similarly strike the residual clause in § 924(c) as unconstitutionally void for vagueness when presented with the opportunity. Davis presents that opportunity.

Maurice Davis and Andre Glover robbed several gas stations in Texas. They were charged and convicted of multiple counts of robbery affecting interstate commerce under the Hobbs Act, 18 U.S.C. § 1951(a). The convictions authorized the court to sentence Davis up to 70 years in prison and Glover up to 100 years. The Government also charged both men with two separate violations of § 924(c), viz., robbery and conspiracy as predicate crimes of violence, and the jury convicted them on those counts. As a result, they each faced a mandatory minimum sentence of 35 years to run consecutively to the sentences for the robbery convictions. Ultimately, the court sentenced Davis to more than 50 years in prison and Glover to more than 41 years.

They appealed, arguing that § 924(c)’s residual clause is unconstitutionally vague. Initially, the Fifth Circuit rejected that argument, but the Supreme Court vacated the judgment and remanded for further consideration in light of Dimaya. Upon reconsideration, the Fifth Circuit held the § 924(c) count for robbery as the predicate crime of violence could be sustained under the elements clause. However, the § 924(c) count for conspiracy as the predicate offense relied upon the residual clause, so the court vacated their convictions and sentences on that count. SCOTUS granted certiorari to resolve the dispute among lower courts regarding the constitutionality of § 924(c)’s residual clause.

To summarize the statutory provision at issue in Davis, § 924(c) authorizes enhanced prison sentences for using, carrying, or possessing a firearm in connection with any federal “crime of violence or drug trafficking crime.” § 924(c)(1)(A). The statute defines “crime of violence” in two subparts commonly referred to as the elements clause, § 924(c)(3)(A), and the residual clause, § 924(c)(3)(B). The latter clause is at issue in Davis.

The residual clause defines a crime of violence as a felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Violation of § 924(c) results in a mandatory minimum sentence of five years in prison, in addition to any sentence imposed for the underlying crime of violence or drug trafficking crime. The mandatory minimum increases to seven years if the firearm is branded and to ten years if discharged. Specific types of weapons also trigger enhanced sentences, e.g., short-barreled shotgun triggers a 10-year minimum sentence. Additionally, multiple violations of § 924(c) result in a 25-year minimum sentence.

The Court begins its analysis by explaining that the prohibition against enforcement of “vague laws rests on the twin constitutional pillars of due process and separation of powers.” Criminal statutes must give people “of common intelligence” fair notice of what conduct is prohibited; vague laws violate this “first essential of due process of law.” Connally v. General Constr. Co., 269 U.S. 385 (1926). In addition, vague laws undermine the principle of separation of powers by threatening “to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges,” but only those elected to the legislature are authorized to criminalize particular acts, explains the Court.

The Court briefly recaps the vagueness analysis discussed in Johnson and Dimaya to invalidate materially similar residual clauses contained in the ACCA and 18 U.S.C. § 16, respectively. It then states that those decisions “teach that the imposition of criminal punishment can’t be made to depend on a judge’s estimation of the degree of risk posed by a crime’s imagined ordinary case.”

Based upon the near universal understanding of lower courts, the Government’s concession on this issue, and its discussion on various tools of statutory interpretation contained in Part III. A, B, and C of the opinion, the Court concludes that that is precisely what § 924(c)(3)(B) requires, i.e., the categorical approach in defining a crime of violence. Consequently, since § 924(c)(3)(B) requires application of the categorical approach, it “must be held unconstitutional too,” the Court announces.

The remainder of the opinion is basically devoted to rejecting various arguments put forth by the Government as well as the dissent as to why § 924(c)(3)(B) is constitutional. Of particular note, the Government argues that application of the case-specific approach would satisfactorily address the vagueness issue, so that’s the approach the Court should adopt. The Court agrees that adoption of the case-specific approach would eliminate constitutional vagueness problems, but it declines the Government’s invitation to do so. The Court notes that “while the consequences in this case may be of constitutional dimension, the real question before us turns out to be one of pure statutory interpretation.” Upon examination of “the statute’s text, context, and history [in Part III. A, B, and C],” the Court concludes “that the statute simply cannot support the government’s newly minted case-specific theory.”

Despite the statutory evidence arrayed against the case-specific approach, the Government nevertheless argues that approach should be adopted anyway because of the canon of constitutional avoidance, which, the Government asserts, dictates that even though the case-specific approach doesn’t represent the best interpretation of the statute, it should still be adopted because it is a “fairly possible” interpretation and thus saves the statute from being held unconstitutional.
The Court flatly rejects that argument. It isn’t convinced that the case-specific approach is even a “possible” interpretation of the statute, but even if it were, it doesn’t believe the canon is even a “possible” interpretation of the statute, isn’t convinced that the case-specific approach which this Court has invoked the canon to reach “of constitutional avoidance is applicable in this case because its application would "expand the reach" of the statute. And the Court declares and vacated in part the Fifth Circuit’s judgment and doctrine itself rests.”

The Court flatly rejects that argument. It undoubtedly represents a major victory for many federal prisoners. But the scope of that victory is unclear because of the many technical and procedural questions that remain in its wake. For example, some potential hurdles to Davis relief to consider include the doctrine of retroactivity, procedural default, and statute of limitations. None of these will likely bar relief for diligent and conscientious movants, but they nonetheless pose potential obstacles of which movants should be aware.

A potentially more problematic obstacle to relief lies in the structure of § 924(c) itself with its dual definitions of “crime of violence.” That is, Davis invalidates the residual clause’s definition, but the elements clause’s definition in § 924(c)(3)(A) remains valid. As has been the case for those seeking Johnson relief, the issue for many seeking Davis relief will be whether a conviction or sentence was based upon the invalid definition or the valid definition.

The Courts of Appeals are divided on how to answer this question when the sentencing court was silent or unclear on the issue. One camp is of the opinion that defendants may only be resentenced if the sentencing court expressly relied on the invalid definition, but sentencing courts typically didn’t identify which provision sentencing decisions were based upon in these types of cases with the specificity demanded of those Courts of Appeals in this camp necessary for relief. Clearly, this position significantly restricts the number of prisoners eligible for Davis relief.

Other Courts of Appeals take the opposite view and permit a claim for relief if the sentencing court didn’t expressly base the conviction or sentence on the still valid definition. Still other courts ask only whether the conviction or sentence at issue can stand under the remaining valid definition. This issue will surely be a hotly contested battlefield in the coming months. To help readers affected by Davis kick-start their research, the following is a list of noteworthy cases in which various Courts of Appeals discuss this issue: Dimott v. United States, 881 F.3d 232 (1st Cir. 2018); United States v. Pappers, 899 F.3d 211 (3d Cir. 2018); United States v. Winston, 850 F.3d 677 (4th Cir. 2017); United States v. Clay, 921 F.3d 550 (5th Cir. 2019); Potter v. United States, 887 F.3d 785 (6th Cir. 2018); Walker v. United States, 900 F.3d 1012 (8th Cir. 2018); United States v. Geozos, 870 F.3d 890 (9th Cir. 2017); United States v. Washington, 890 F.3d 891 (10th Cir. 2018); Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017). In addition, the Sixth Circuit in Williams v. United States, 2019 U.S. App. LEXIS 17386 (6th Cir. 2019), does a thorough job of discussing the five common sources of evidence courts consider when determining whether a sentencing judge relied on the residual clause. In doing so, the Court cites and discusses several opinions from other circuits as well as SCOTUS. Hopefully, this information will aid affected readers to gather relevant evidence in preparing their § 2255 petitions. The sources are: (1) the sentencing record; (2) the legal background, i.e., controlling law at time of sentencing; (3) informed decision makers, i.e., if the judge considering the § 2255 petition is the same judge who sentenced the defendant, then that judge presumably knows whether he or she relied on residual clause; (4) the nature of the predicate offense; and (5) later legal developments, i.e., some circuits allow after-the-fact case law to be consulted.

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Criminal Legal News 13 August 2019
Sixth Circuit Holds Chalking Car Tires for Parking Enforcement Constitutes a Search Under Fourth Amendment

by Matt Clarke

The U.S. Court of Appeals for the Sixth Circuit held that chalking the tires of parked vehicles to gather information about whether they have committed a parking violation constitutes a search for Fourth Amendment purposes and that, at the pleading stage of the current case, neither the motor vehicle nor the community caretaker exception applies to the warrantless search.

Alison Patricia Taylor received a lot of parking tickets from the City of Saginaw, Michigan. Between 2014 and 2017, Tabitha Hoskins chalked Taylor’s tires 15 times, and each time, she issued a parking citation that included the date and time the chalk was placed on the tires. Citations cost $15 and upward. Taylor filed a civil rights action under 42 U.S.C. § 1983 against the city and Hoskins. She argued that chalking her tires without a warrant or her consent violates her Fourth Amendment right to be free of unreasonable searches. The district court granted defendants’ motion to dismiss after finding that chalking was a search but is reasonable because of the lesser expectation of privacy in a motor vehicle and because it was subject to the community caretaker exception to the warrant requirement. Taylor appealed.

The Sixth Circuit held that chalking tires for parking enforcement constitutes a search for purposes of the Fourth Amendment. In doing so, it noted that the issue was lower tech, but very similar to that of United States v. Jones, 565 U.S. 400 (2012), in which the Supreme Court held that placing a GPS tracker on a vehicle is a search because the government trespassed upon a constitutionally protected area to obtain information. Under the definition of “trespass” in the Restatement (Second) of Torts, a common-law trespass occurs when an actor causes chattel to come into contact with some other object. Undoubtedly, the defendants “made physical contact with Taylor’s vehicle,” and therefore, chalking is a trespass, concluded the Court.

There was no dispute that the object of the trespass was to obtain information (about how long the car remained parked in one place). Therefore, chalking constitutes a search, so the next question is: “Was it reasonable?”

The Court rejected the defendants’ contention that the lesser expectation of privacy enjoyed by a motor vehicle, by itself, renders the search reasonable. The Court explained that the lesser expectation of privacy allows a law enforcement officer to conduct a warrantless search of a vehicle where there is “probable cause to believe that the vehicle contains evidence of a crime…. No such probable cause existed here. Thus: the automobile exception is inapplicable.”

The Court noted that the tires are marked with chalk before any parking violation has occurred or there is any reason to believe that one will occur. To accept the defendants’ argument that this is permissible would dispense with the requirement of probable cause or even an “individualized suspicion of wrongdoing”—the touchstone of the reasonableness standard, the Court admonished.

Finally, the Court also rejected defendants’ argument that chalking falls under the community caretaker exception. It observed that the exception only applies to activities “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” Such might be the case if the vehicle impeded traffic, the Court mused. But “Taylor’s vehicle was lawfully parked in a proper parking location, imposing no safety risk whatsoever. Because the purpose of chalking is to raise revenue, and not to mitigate public hazard, the City was not acting in its role as a community caretaker,” concluded the Court.

“The City does not demonstrate, in law or logic, that the need to deter drivers from exceeding the time permitted for parking—before they have even done so—is sufficient to justify a warrantless search under the community caretaker rationale.” Therefore, the Court decided it would “chalk this practice up to a regulatory exercise, rather than a community-caretaking function.”

Accordingly, the Court reversed the district court’s order granting the City’s motion to dismiss, remanding the case for further proceedings. The Court cautioned that its decision “does not mean, however, that chalking violates the Fourth Amendment. Rather, we hold, based on the pleading stage of this litigation, that the community caretaking exception and the motor-vehicle exception—do not apply here.” See: Taylor v. City of Saginaw, 922 F.3d 328 (6th Cir. 2019). _succinctly overrides nearly all other evidence in a criminal case has become a deep-seated one over the 35 years since the inception of DNA profiling. Often, though, such views are not founded upon even a basic understanding of how this powerful forensic tool is used to turn the most microscopic materials into some of the most reliable evidence.

Less DNA Can Mean More Evidence

In the early days of DNA profiling, only substantial quantities of blood, semen or hair could suffice to produce a useful evidentiary result. But just about every cell in (or, as will be noted, on) the human body contains DNA, and over time, the science has evolved to take advantage of this fact. Today, not only is it possible to run tests on very small samples, but the practice of using software to sift “irrelevant” information from the materials under analysis, while retaining enough fidelity to hold up in court, has expanded DNA profiling far beyond its early boundaries.

One of the most impactful advances in the field has been experts’ ability to work with “trace” amounts of genetic material. And because testing methods have grown so sensitive as to allow for analysis of minute amounts of DNA, forensic experts have been able to make increasing use of what is known as “touch DNA.”

Throughout the course of a day, our skin is constantly renewing itself—and as old skin cells are replaced by newer layers,
these cells (and the DNA they contain) are left behind when any of us touch a doorknob, use a keypad, or lean against a wall. The barest smattering of such cells can be developed into robust evidence of an individual’s physical presence, if conditions are suitable.

That “if,” however, is a big one, and as usual, the devil is in the details. What does it mean to say that a given person’s DNA has been identified at a specific location or on a particular object?

Your DNA Can Go Places You’ve Never Been

One big issue with this new technique is known as “secondary transfer.” As already mentioned, people shed cells all the time, including just by coughing, sneezing—even talking. We leave identifiable bits of ourselves everywhere we go; yet, counterintuitively, our DNA ends up in places we’ve never been, as well.

For example, if you grip a door handle to enter a building right before someone else does the same, and that person goes on to use the same hand to touch things at the scene of a crime, the DNA you left on the doorknob may well end up as forensic evidence because of “secondary transfer”: the skin cells you left behind, in this example, were picked up from the door and transferred to the second person’s hand, who then left your DNA somewhere you had never been.

For that matter, a sample collected for DNA analysis may contain genetic material from more than one person. In the past, when large quantities of such material were necessary to produce a forensic report, the smaller “blips” in the data caused by phenomena like secondary transfer wouldn’t have been very noticeable—or at least were so plainly distinguishable, by size, from the bulk of the evidence as to be easily and confidently excluded from the results as nuisance interference.

But now that smaller amounts of DNA can form a complete analytic profile, to the extent that a given sample does contain material from multiple sources, it is imperative that forensic experts be able to “separate out” each contributor’s DNA “signature” from such “complex DNA mixtures.”

Whose DNA Is It Anyway?

One fact that makes this possible is that labs only concern themselves with about 40 short segments of human DNA. That is extremely unlikely that two different people will share all 40 of these “genetic markers.”

Unfortunately, the way DNA samples are presently analyzed means that just because a particular set of alleles is present in the final results does not demonstrate that a given person having all of those alleles contributed to the sample: There could have been two (or more) people, each having some of the indicated alleles, who supplied material for the sample. (Imagine two contributors, each having alleles 1, 2, 3, 4 and 5, 6, 7, 8, respectively—the results would include the set 3, 4, 5, 6 ... but that doesn’t mean that someone having the distinct makeup 3, 4, 5, 6 contributed to the sample.)

That’s why experts use probabilistic genotyping software (“PGS”) to assist in the interpretation of complex DNA mixtures. These programs use statistical and biological models to determine the probability that the information revealed by testing evidences the presence of a known person’s DNA.

The software accounts for aberrations commonly encountered in DNA analysis, and comes up with a “likelihood ratio.” This number takes into consideration the frequency with which each allele (in partnership with other alleles) appears in the general population, and is an estimate of how likely it is that the particular set of alleles arising from the test of the sample came from the specified human subject.

Developing Evidence From DNA

The application of PGS may be the point in DNA forensics at which it is most vulnerable. In many instances, PGS assists in improving the reliability of interpretations of complex DNA mixtures—but only to the extent that the analyst is fully informed as to the assumptions and mathematics involved.

On the other hand, the fine-tuning inherent in experts’ use of PGS can dramatically affect the results of DNA analyses. Based on the use of different settings and other factors controlled by the person operating the software, different labs might produce different answers from the same sample. Those differences can sometimes call into question the reproducibility of the test results. It seems that, as with many high-precision tools, the finer the resolution of the question asked, the more uncertain the answer returned.

This caveat remains especially serious when dealing with ‘trace’ amounts of DNA. Due to the extremely high value placed on DNA forensics, it is important to remember that just because a person’s DNA may be associated with a particular object or location does not necessarily mean that the person had anything to do with it.

The responsibility to effectively interpret DNA evidence, as any evidence, resides with the finders of fact in each case. Perhaps now more than ever before, thinking critically about the meaning of DNA forensic reports, in conjunction with other available evidence, and thoroughly understanding the methods, limitations, and factors inherent in DNA profiling, are crucial components of ensuring sound outcomes in criminal justice.

Source: forensicmag.com
In 1991, Steve Vic Parker was convicted in a state court in Texas for unauthorized use of a motor vehicle (“UUMV”) and sentenced to 20 years’ imprisonment. Parker was eventually released from prison on mandatory supervision and returned to prison for violating that supervision.

In 2010, Parker was convicted of two charges related to theft of less than $1,500.00 while on mandatory supervision. Those charges resulted in two seven-year terms of imprisonment to run consecutively to the 20-year term on the UUMV sentence.

Parker in 2013 filed a habeas petition pursuant to 28 U.S.C. § 2254. In that petition, he argued that he had served enough time on the 20-year term for it to expire, which would then allow his new seven-year sentence to start. He raised an additional argument that the State violated the Ex Post Facto Clause by refusing to release him from custody for the 20-year term. The district court only considered the Ex Post Facto argument denying relief and a COA.

Shortly thereafter, the Texas Department of Criminal Justice (“TDCJ”) miscalculated Parker’s sentence running the seven-year term concurrently with the 20-year term and released him from prison. That release was short lived when a few months later the error was corrected, and Parker was returned to TDCJ custody.

Again in 2015, Parker filed a habeas petition. This time, he argued his two seven-year sentences should have begun as soon as he returned to prison in 2010. The district court denied that petition, finding that the petition was successive and denied a COA. The Fifth Circuit granted a COA as to whether or not Parker’s § 2254 application was successive as to the judgments underlying the seven-year theft sentences.

The Fifth Circuit ruled that Parker’s 2013 habeas petition challenged only his 20-year sentence and that his current petition challenging his seven-year sentences concerns a new judgment and is therefore not successive.

The Court, in ruling in favor of Parker, explained that an application for relief pursuant to 28 U.S.C. § 2254 is not a second or successive petition simply because it follows an earlier petition, Crone v. Cockrell, 324 F.3d 833 (5th Cir. 2003). Additionally, the Court relied on Magwood v. Patterson, 561 U.S. 320 (2010), which made clear that the “phrase ‘second or successive’ must be interpreted with respect to the judgment challenged,” not the stretch of confinement being served by the challenger.

The Court also explained it has previously rejected the position that “the prohibition against successive § 2254 petitions requires a prisoner to challenge all judgments from a single court in a single habeas petition.” Hardemon v. Quarterman, 516 F.3d 272 (5th Cir. 2008). The Court instructed in Hardemon that a prisoner is “permitted, but not required, to challenge his separate convictions in a single § 2254 petition.”

Accordingly, the Court reversed the judgment of the district court and remanded for proceedings consistent with this opinion. See: Parker v. Davis, 914 F.3d 996 (5th Cir. 2019).

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The Supreme Court of Minnesota held that Minn. Stat. § 609.749(2) (6) (“stalking by mail”) and Minn. Stat. § 609.695(1)(3) (“mail harassment”) are facially overbroad. Juvenile defendant “A.J.B.” was convicted of stalking by mail and mail harassment stemming from a series of vicious “tweets” he simultaneously sent to “M.B.” and other individuals. M.B. was the object of the tweets. A.J.B. argued to the court of appeals that the statutes are unconstitutional. That court rejected his arguments, and the Supreme Court granted further review.

The Court observed, “The First Amendment to the United States Constitution states that ‘Congress shall make no law ... abridging the freedom of speech.’ The First Amendment applies to the states through its face, i.e., when the statute substantially ‘prohibits constitutionally protected activity in addition to activity that may be prohibited without offending constitutional rights.’ State v. Machholz, 574 N.W.2d 415 (Minn. 1998).

But the courts may ‘save’ an overbroad statute by applying a narrow construction or by severing problematic language. Hensel. Because of the fear of a “chilling effect” on speech, the traditional rules of standing have been altered in the context of the First Amendment to allow litigants to argue statutes are facially overbroad even when their own conduct could be lawfully prohibited. Broadrick v. Oklahoma, 413 U.S. 601 (1973). Stalking is defined as engaging ‘in conduct which the actor knows
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or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim ...." Minn. Stat. § 609.749(1). It is stalking by mail when the defendant "repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, messages, packages through assistive devices for people with vision impairments or hearing loss, or any communication made through any available technologies or other objects[.]" Minn. Stat. § 609.749, subd. 2(6).

The Minnesota Supreme Court stated the statute would criminalize a citizen sending letters to a local council person saying, "I hate your position on gun control and I will organize a campaign to unseat you" because the letters would cause the council person to feel frightened, threatened, oppressed, etc. The statute would also prohibit a group picketing a bakery that refuses to sell wedding cakes to a gay couple because the picketing would cause the baker to feel the same effects. Since both of those actions are protected speech, the statute is overbroad — thus unconstitutional.

The mail harassment statute prohibits anyone who "with the intent to abuse, disturb, or cause distress, repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, or packages." The Supreme Court stated the two above examples would "disturb and distress" the council person and the baker but would not "abuse" either person. Therefore, the statute is overbroad but can be saved by omitting the words 'disturb, or cause distress.' The statute would then only prohibit conduct that intended to "abuse" the victim, which is unprotected conduct. But the Court couldn't determine from the juvenile court's decision whether A.J.B. was convicted for intending to abuse, disturb, or distress M.B.

Accordingly, the Court reversed the stalking by mail conviction but remanded for further proceedings on the mail harassment under the narrowed statute. See: In re Welfare of A.J.B., 2019 Minn. LEXIS 318 (2019).

Parole a Detriment to Rehabilitation; ‘Less Is More’ Reform Sensible

by Kevin Bliss

Prison reform advocates contend that parole does more to perpetuate recidivism than it does to monitor positive rehabilitation into society. Columbia University’s Justice Lab prepared a report in 2017 that stated that New York City’s jail population had more people being held for parole violations than the total population of any other jail in the state except Rikers Island.

The report stated that in the past four years the total number of pretrial detainees in New York City had decreased due to reformation initiatives, except parole violators, which have increased in percentage by double digits in that same time period.

New York’s parole system requires that parolees do regular check-ins, respond to all communications from their parole officer in a timely fashion, allow their parole officers to search their homes or places of employment at any time, and refrain from contact with anyone known to have a criminal record. Some conditions also require a parolee to live in a certain area, abide by a curfew, or enroll in a substance abuse program.

When a parolee is in violation of any aspect of his or her conditions, officers are encouraged to lock them up first. There are few alternatives open otherwise. This in itself is a violation of the parolee’s conditions. Even if all other charges that led to the initial arrest are dropped, the parolee is still susceptible to revocation simply because he or she was detained.

Katal Center for Health, Equity, and Justice Co-Founder/Co-Director Gabriel Sayegh stated, “The resources that we have made available to deal with some of these issues, we have invested in the carceral state, not in the community programs that these folks need. That just limits what the parole officers have available to them in terms of providing resources to these people.”

Sayegh, the Legal Aid Society, and New York State Senator Brian Benjamin, along with others, have begun the Less Is More campaign, which has introduced legislation to change the way the state handles parole. The Less Is More: Community Supervision Revocation Reform Act, awaiting committee approval, would require a bond hearing for each detainee for release until his or her revocation hearing is held. It would end incarceration for certain technical violations. It would also allow a parolee to earn time off his or her supervision for every 30 days that they have maintained positive parole supervision.

As it stands, parole violations make up 29.9 percent of incoming prisoners in New York's corrections system. Technical violations have increased 15 percent within the last four years. Moreover, one-third of the prisoners released within the past three years have come back on technical violations.

"It ends up having all these other impacts. People lose their housing, they lose their jobs, they get taken from their kids. Jail, let alone prison, are these super traumatic institutions, structures to put people inside of. It’s like we've created a system that makes it practically impossible for anybody to succeed," stated Sayegh.

Source: theappeal.org

Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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

Please contact Kathy Moses at kmoses@humanrightdefensecenter.org, or call (561) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth, FL 33460.
From the Editor: Compassionate Release for Extraordinary and Compelling Reasons

by Richard Resch

As our regular readers know, there has been a relative flurry of activity recently involving the Compassionate Release Statute, 18 U.S.C. § 3582(c)(1)(A), the First Step Act of 2018, S. 3747, 115th Cong., and the so-called Holloway doctrine, United States v. Holloway, 68 F.Supp.3d 310 (E.D.N.Y. 2014). Some very clever and innovative people are using them to argue that federal district court judges are now empowered to take a second look at unduly harsh sentences and reduce them if “extraordinary and compelling reasons” exist. Encouragingly, this position appears to be gaining traction with federal district court judges.

In our June 2019 issue, staff writer Chad Marks introduced readers to this topic in his article titled “The Holloway Doctrine and First Step Act: Federal Judge Issues Order Urging Government to Dismiss One of Two 18 U.S.C. § 924(c) Stacking Convictions,” in which he details his own decades-long sentence and quest for relief utilizing the foregoing provisions in arguing for his compassionate release based upon extraordinary and compelling reasons.

We now have the good fortune of providing readers with Professor Shon Hopwood’s thoughts and guidance on the matter. Shon is at the very forefront of this movement.

He served over a decade in federal prison, and upon his release, he earned a college degree as well as a law degree with honors. He then clerked for a federal judge and became licensed to practice law in Washington state and Washington, D.C. He’s currently an Associate Professor of Law at Georgetown University Law Center. On April 1, 2019, President Donald J. Trump honored him at a White House ceremony for his tireless work on criminal justice reform.

Shon has graciously given permission to Criminal Legal News to reprint his blog posts together with his “Sample brief for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A).” I want to take this opportunity to express my sincere gratitude for allowing us to share his insightful work with our readers.

Shon’s following post was published on his blog prisonprofessors.com on June 18, 2019.

A Second Look at a Second Chance: Seeking a Sentence Reduction under the Compassionate Release Statute, 18 U.S.C. § 3582(c)(1)(A), as Amended by the First Step Act

There is a viable argument for why federal district court judges can use the compassionate release statute, as amended by the First Step Act, as a second look provision to reduce a sentence for people in federal prison if “extraordinary and compelling reasons” are present. Over the weekend, I posted both a law review article (entitled Second Looks & Second chances that will be published by Cardozo Law Review) and a sample brief (that will form the basis of challenging Adam Clausen’s ridiculous 213-year federal sentence). Both discuss the reasons why federal judges can and should give sentence reductions in cases where people in federal prison have a demonstrated record of rehabilitation in addition to compelling reasons why they were sentenced too harshly. See 18 U.S.C. § 3582(c)(1)(A).

In my article, I explain that there is a long history of second look provisions in American law, and why second look provisions are normatively desirable. More importantly, the text and history of Section 3582(c) supports the view that, when Congress first enacted the compassionate release statute in 1984, it intended compassionate release to act as a second look provision to take the place of parole, which Congress was abolishing. The problem was that Congress gave the power to trigger a sentence reduction under the compassionate release statute to the Director of the Federal Bureau of Prisons (“BOP”).

Leaving the BOP Director with ultimate authority to trigger and set the criteria for compassionate release sentence reductions created several problems. The Office of the Inspector General found that, among many other problems, the BOP failed to provide adequate guidance to staff regarding the criteria for compassionate release and that BOP had no timeliness standards for reviewing such requests. As a result of these problems and others, the OIG concluded that: “BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.” Congress heard the complaints. Congress passed, and President Trump signed, the First Step Act of 2018, which, among other things, changed the procedures and ultimately the criteria for when a person in federal prison can seek a sentence reduction under the compassionate release statute in 18 U.S.C. § 3582(c)(1)(A)(i). After the changes made by First Step, federal prisoners can file a motion for a sentence reduction, and federal district courts are authorized to reduce a sentence even if the BOP fails to respond or even in the face of BOP opposition to a sentence reduction.

Under the First Step Act, Congress took the power that previously resided with the BOP Director to trigger and set the criteria for sentence reductions and transferred it to Article III courts—where it should be.

I will have more to say in future blog posts over the coming days.

The article is still a work in progress, so I welcome any comments on it or the sample brief.

Thank you,
Shon Hopwood

P.S. There were a number of people who have reviewed drafts and provided invaluable comments on the article and the legal argument for expanded use of compassionate release. But I want to highlight one of them: Ohio State Professor Douglas Berman not only helped me refine the legal argument, but he is also a consistent source of encouragement. I used to read Doug’s Sentencing Law and Policy blog while I was in federal prison; it is blessing to be able to work on issues related to federal sentencing with him outside of prison. Thank you, Doug!

Shon’s following post was published on his blog prisonprofessors.com on June 24, 2019.

Federal District Court Judge uses compassionate release as a second look resentencing provision

I recently posted about my new law review article called Second Looks & Second Chances, and the argument that federal district court judges may use the compassionate release, as amended by the First Step Act, to give second looks in individual cases and then reduce the sentences in those cases. Last week, a federal district court in the Southern
District of Texas used compassionate release for just this purpose.


Importantly, Judge Marmolejo held that the criteria contained in the Sentencing Guidelines for compassionate release was inconsistent with the changes that Congress made to the compassionate release statute in the First Step Act. Because of that conflict, she concluded:

Thus, the correct interpretation of § 3582(c)(1)(A)—based on the text, statutory history and structure, and consideration of Congress’s ability to override any of the Commission’s policy statements “at any time,” Mistretta v. United States, 488 U.S. 361, 394 (1989)—is that when a defendant brings a motion for a sentence reduction under the amended provision, the Court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)–(C) warrant granting relief.

This is the first case, of which I’m aware, that a federal judge has held that nothing in the statutory text of § 3582(c), nor the Sentencing Guidelines, precludes a judge from making its own determination of what are “extraordinary and compelling” circumstances warranting a reduction of sentence. I hope to see many more.

I continue to believe that Congress intended for compassionate release to act as a second look provision in 1984, when it enacted the compassionate release provision while at the same time abolishing federal parole. The problem was that Congress handed over the triggering mechanism to the Director of the Bureau of Prisons, which gave the Director the power to set the criteria no matter what the U.S. Sentencing Commission said. Congress fixed that problem in the First Step Act, by allowing federal judges to have the authority to reduce sentences even if the BOP Director finds that extraordinary and compelling reasons aren’t present. And the criteria in U.S.S.G. § 1B1.13 cmt. n.1(D) is inconsistent with these congressional changes and thus is no longer binding on federal judges.

Shon’s following post was published on his blog prisonprofessors.com on June 25, 2019.

Another federal judge uses compassionate release as a second look resentencing provision

Another federal judge has found that the criteria for compassionate release, contained in the U.S. Sentencing Guidelines, is inconsistent with the statutory changes made by the First Step Act. Yesterday, Federal Judge Sim Lake reduced Arturo Cantu-Rivera’s prior sentence of two concurrent life sentences to time served.

Judge Lake based the sentence reduction on two grounds. Judge Lake first found that Cantu-Rivera met the age-related criteria under the Guidelines. But more importantly, Judge Lake found that U.S.S.G. § 1B1.13 comm. n.(1)(D) was inconsistent with the statutory changes made by Congress through the First Step Act. See page 3, n.1 (“Because the current version of the Guideline policy statement conflicts with the First Step Act, the newly-enacted statutory provisions must be given effect.”). He then used that very criteria to justify the sentence reduction.

As I’ve been blogging about for the past week, the compassionate release statute, as amended by the First Step Act, can be used by federal judges to provide a second look for people in federal prison who received long sentences and have a demonstrated record of rehabilitation. I write about this second look provision in a new essay called Second Looks & Second Chances and in a sample brief, both of which I posted online.

The following is an excerpt from Shon’s Sample Brief.

I. This Court Has Authority to Resentence Clausen under Section 3582(C)(1)(A)(i) for the Extraordinary and Compelling Reasons Presented Here.

With the changes made to the compassionate release statute by the First Step Act, courts need not await a motion from the BOP Director to resentence prisoners to provide a shorter term of imprisonment. I write about these changes in the sentencing court; absent such a motion, sentencing courts had no authority to modify a prisoner’s sentence for extraordinary and compelling reasons. Id.

Congress never defined what constitutes an “extraordinary and compelling reason” for resentencing under § 3582(c). But the legislative history gives an indication of how Congress thought the statute should be employed by federal courts. One of Congress’s initial goals in passing the Comprehensive Crime Control Act was to abolish federal parole and create a “completely restructured guidelines sentencing system.” S. Rep No. 98-225, at 52, 53 n.74 (1983). Yet, recognizing that parole historically played a key role in responding to changed circumstances, the Senate Committee stressed how some individual cases may still warrant a second look at resentencing:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment. Id. at 55–56 (emphasis added). Rather than having the Parole Commission review every federal sentence focused only on an offender’s rehabilitation, Congress decided that § 3582(c) could and would enable courts to decide, in individual cases, if “there is a justification for reducing a term of imprisonment.” Id. at 56.
Compassionate Release (cont.)

Congress intended for the situations listed in § 3582(c) to act as “safety valves for modification of sentences,” id. at 121, that enabled sentence reductions when justified by various factors that previously could have been addressed through the (now abolished) parole system. This particular safety valve would “assure the availability of specific review and reduction to a term of imprisonment for extraordinary and compelling reasons” and “would allow courts to respond to changes in the guidelines.” Id. Noting that this approach would keep “the sentencing power in the judiciary where it belongs,” rather than with a federal parole board, the statute permitted “later review of sentences in particularly compelling situations.” Id. (emphasis added).

Congress thus intended to give federal sentencing courts an equitable power that would be employed on an individualized basis to correct fundamentally unfair sentences. And there is no indication that Congress limited the safety valve of § 3582(c)(1)(A) to medical or elderly release; if extraordinary and compelling circumstances were present, they could be used to “justify a reduction of an unusually long sentence.” S. Rep No. 98-225, at 55–56.

B. The U.S. Sentencing Commission concluded that § 3582(c)(1)(A)’s “extraordinary and compelling reasons” for compassionate release are not limited to medical, elderly, or family circumstances.

Congress initially delegated the responsibility for determining what constitutes “extraordinary and compelling reasons” to the U.S. Sentencing Commission (“Commission”). See 28 U.S.C. § 994(r) (“The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”). Congress provided only one limitation to that delegation of authority: “[r]elief shall solely be considered extraordinary and compelling reason.” 28 U.S.C. § 994(t) (emphasis added). Congress no doubt limited the ability of rehabilitation alone to constitute extraordinary circumstances so that sentencing courts could not use it as a full and direct substitute for the abolished parole system. Congress, however, contemplated that rehabilitation could be considered with other extraordinary and compelling reasons sufficient to resentence people in individual cases. Indeed, the use of the modifier “alone” signifies just the opposite: that rehabilitation could be used in tandem with other factors to justify a reduction.

The Commission initially neglected its duty, leaving the BOP to fill the void and create the standards for extraordinary and compelling reasons warranting resentencing under § 3582(c)(1)(A). [ ] The Commission finally acted in 2007, promulgating a policy that extraordinary and compelling reasons includes medical conditions, age, family circumstances, and “other reasons.” U.S.S.G. § 1B1.13, application note 1(A). After a negative DOJ Inspector General report found that the BOP had rarely moved courts for a § 3582(c)(1)(A) modification even for prisoners who met the objective criteria, see U.S. Dep’t of Justice Office of the Inspector General, The Federal Bureau of Prisons’ Compassionate Release Program (Apr. 2013) (“FBOP Compassionate Release Program”), the Commission amended its policy statement, expanding the guidance to courts on qualifying conditions and admonishing the BOP to file motions for compassionate release whenever a prisoner was found to meet the objective criteria in U.S.S.G. § 1B1.13. Id. at application note 4; see also United States v. Dimasi, 220 F. Supp. 3d 173, 175 (D. Mass. 2016) (discussing the progression from the OIG report to new ‘encouraging’ guidelines).

The Commission created several categories of qualifying reasons: (A) “Medical Conditions of the Defendant,” including terminal illness and other serious conditions and impairments; (B) “Age of the Defendant,” for those 65 and older with serious deterioration related to aging who have completed at least 10 years or 75 percent of the term of imprisonment; (C) “Family Circumstances,” where a child’s caregiver or spouse dies or becomes incapacitated without an alternative caregiver; and (D) “Other Reasons,” when the Director of the BOP determines there is “an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).” Id., application note 1(A). The Commission also clarified that the extraordinary and compelling reasons “need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment.”

C. Through the First Step Act, Congress changed the process for compassionate release based on criticism of BOP’s inadequate use of its authority, returning to the federal judiciary the authority to act on its own to reduce sentences for “extraordinary and compelling reasons.”

Prior to Congress passing the First Step Act, the process for compassionate release under § 3582(c)(1)(A) was as follows: the U.S. Sentencing Commission set the criteria for resentencing relief under § 3582(c), and the only way a sentencing court could reduce a sentence was if the BOP Director initiated and filed a motion in the sentencing court. See PL 98–473 (HJRes 648), PL 98–473, 98 Stat 1837 (Oct. 12, 1984). If such a motion was filed, the sentencing court could then decide where “the reduction was justified by ‘extraordinary and compelling reasons’ and was consistent with applicable policy statements issued by the Sentencing Commission.” Id. So even if a federal prisoner qualified under the Commission’s definition of extraordinary and compelling reasons, without the BOP Director’s filing a motion, the sentencing court had no authority to reduce the sentence, and the prisoner was unable to secure a sentence reduction. This process meant that, practically, the BOP Director both initiated the process and set the criteria for whatever federal prisoner’s circumstances the Director decided to move upon.

Leaving the BOP Director with ultimate authority for triggering and setting the criteria for sentence reductions under § 3582(c)(1)(A) created several problems. The Office of the Inspector General found that the BOP failed: to provide adequate guidance to staff on the criteria for compassionate release, to set time lines for reviewing
compassionate release requests, to create formal procedures for informing prisoners about compassionate release, and to generate a system for tracking compassionate release requests. See FBOP Compassionate Release Program, at i–iv. As a result of these problems, the OIG concluded that “BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.” Id.; see generally Stephen R. Sady & Lynn Deffebach, Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration, 21 Fed. Sent. Rptr. 167 (Feb. 2009).

Congress heard those complaints. In late 2018, Congress passed the First Step Act, part of which transformed the process for compassionate release under § 3582(c)(1)(A). See P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). Section 603 of the First Step Act changed the process by which § 3582(c)(1)(A) compassionate release occurs: instead of depending upon the BOP Director to determine an extraordinary circumstance and then move for release, a court can now sentence “upon motion of the defendant,” if the defendant has fully exhausted all administrative remedies, or “the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). Once the defendant who has properly exhausted files a motion, a court may, after considering the 18 U.S.C. § 3553(a) factors, resentence a defendant, if the court finds that extraordinary and compelling reasons warrant a reduction. Id. Any reduction of a sentence that a court orders must also be “consistent with applicable policy statements issued by the Sentencing Commission.” Id. The effect of these new changes is to allow federal judges the ability to move on a prisoner’s compassionate release application even in the face of BOP opposition or its failure to respond to a prisoner’s request for compassionate release in a timely manner. Congress made these changes in an effort to expand the use of compassionate release sentence reductions under § 3582(c)(1)(A). Congress labeled these changes, “Increasing the Use and Transparency of Compassionate Release.” 164 Cong. Rec. H10346, H10358 (2018) (emphasis added).

Senator Cardin noted in the record that the First Step Act made several reforms to the federal prison system, including that “[t]he bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.” 164 Cong. R. 199, at S7774 (Dec. 18, 2018) (emphasis added). In the House, Representative Nadler noted that First Step included “a number of very positive changes, such as . . . improving application of compassionate release, and providing other measures to improve the welfare of 11 Federal inmates.” 164 Cong. Rec. H10346-04, H10346-04, H10362 (Dec. 20, 2018) (emphasis added).

Federal judges now have the power to order reductions of sentences even in the face of BOP resistance or delay in the processing of applications. The legislative history leading up to the enactment of the First Step Act establishes that Congress intended the judiciary not only to take on the role that BOP once held under the preFirst Step Act compassionate release statute as the essential adjudicator of compassionate release requests, but also to grant sentence reductions on the full array of grounds reasonably encompassed by the “extraordinary and compelling” standard set forth in the applicable statute.

D. Statutory text defines judicial sentence reduction authority around “extraordinary and compelling reasons,” and the policy statements of the U.S. Sentencing Commission under § 1B1.13 do not preclude this Court from resentencing Clauses.

Once a prisoner has properly pursued administrative remedies and filed a motion for compassionate release, a federal court possesses authority to reduce a sentence if and whenever the court finds “extraordinary and compelling reasons warrant such a reduction.” A court must consider the 18 U.S.C. § 3553(a) sentencing factors in reducing any sentence, and any reduction of a sentence that a court orders must also be “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A).

As noted above, the Sentencing Commission created a catch-all provision for compassionate release under U.S.S.G. § 1B1.13, application note (1)(D), which states: Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

The Commission also stated the process by which compassionate release reductions should be decided:

Motion by the Director of the Bureau of Prisons.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c) (1)(A).


The dependence on BOP in these policy statements is a relic of the prior procedure that is now inconsistent with the First Step Act’s amendment of § 3582(c)(1)(A).

Application note 1(D) can no longer limit judicial authority to cases with an initial determination by the BOP Director that a prisoner’s case presents extraordinary or compelling reasons for a reduction, because the First Step Act has expressed allows courts to consider and grant sentence reductions even in the face of an adverse or unresolved BOP determination concerning whether a prisoner’s case is extraordinary or compelling, See 18 U.S.C. § 3582(c)(1)(A), as amended by P.L. 115-391 § 503 (Dec. 21, 2018). And the Commission’s now-dated statement indicating that the BOP must file a motion in order for a court to consider a compassionate release sentence reduction no longer controls in the face of the new statutory text enacted explicitly to allow a court to consider a reduction even in the absence of a BOP motion. Id. With the First Step Act, Congress decided that federal judges are no longer constrained or controlled by how the BOP Director sets its criteria for what constitutes extraordinary and compelling reasons for a sentence reduction. Consequently, those sections of the application notes requiring a BOP determination or motion are not binding on courts. See Stinson v. United States, 508 U.S. 36, 38 (1993) (“We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”). Put differently, now that the First Step Act has recast the procedural requirements for a sentence reduction, even if a court finds there exists an extraordinary and compelling reason for a sentence reduction without the BOP Director’s initial determination, then the sentence reduction is not inconsistent “with the applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A).
In the old dictionaries cited by Gorsuch that "superadding" and no constitutional violation. Unless the prisoner can prove that, there is no severe pain and that the State has refused to remedied alternative method of execution that unusual only when the prisoner himself can that test, a method of execution is cruel and invented by the Court by three Justices in 2008 be cruel and unusual, Gorsuch employed a test penalty of death.

As terrible as this result will be for Mr. Bucklew, the opinion will cause even more damage to American constitutional law. The Court analyzed what constitutes cruel and unusual punishment pursuant to the so-called "original meaning" school of interpretation, which holds that the Eighth Amendment should mean the same thing today that it did when it was adopted in 1791. To discern that meaning, Gorsuch looked to Samuel Johnson's and Noah Webster's dictionaries from 1773 and 1828, as well as Blackstone's Commentaries on the Laws of England from 1769. By those lights, "cruel and unusual" means punishments that are "tortures" and "barbarous," where "terror, pain or disgrace [were] superadded" to the penalty of death.

To determine whether the proposed execution by pentobarbital of Bucklew would be cruel and unusual, Gorsuch employed a test invented by the Court by three Justices in 2008 and adopted by a majority in 2015. Under that test, a method of execution is cruel and unusual only when the prisoner himself can prove that there is "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." Unless the prisoner can prove that, there is no "superadding" and no constitutional violation. There is nothing in the Eighth Amendment or in the old dictionaries cited by Gorsuch that puts that burden on the death row prisoner. Despite the fanfare with which the Federalists trumpet their "originalist" philosophy, they, like all lawyers and judges, have to engage in interpretation and construction when writing constitutional law. Gorsuch's opinion strives to look like originalism, but is actually twenty-first century conservatism delivered in a more attractive rhetorical package.

What is so ominous about this decision is the conservative Justices' stated resolve to make their version of originalism stick. They threw down a rhetorical gauntlet. Gorsuch chastised the dissenting Justices not merely for disagreeing with his conclusions, but for failing "to grapple with the understanding of the Constitution on which our precedents rest." In other words, for failing to make their dissenting arguments based on the originalist school of interpretation. In the coming years, we will see over and over again that rejection of the schools of constitutional interpretation that have prevailed for the last eighty years. Pursuant to "originalism," the new Federalist majority will restrict personal liberties, increase protection for property interests, strike down legislation and regulation designed to protect consumers, workers, and the environment, restrict access to the courts for redress against the government, and promote narrowly defined national interests at the expense of international commitments. The victims of the new Supreme Court will not primarily be convicted murderers, but the vast majority of our people.

Michael Avery is Professor Emeritus at Suffolk Law School in Boston. He began practicing law in 1970 and specialized in civil rights, police misconduct, and criminal defense.

Court Reporters Likely Fail to Accurately Transcribe Testimony for Speakers of ‘African American English’

Recent Vice.com article draws attention to a pioneering study that concludes court reporters exhibit low proficiency with African American English ("AAE"), and that the problem results in a systemic deprivation of the most basic rights in the criminal justice system.

Rachel Jeantel was a close friend of Trayvon Martin, the black teenager who was killed by George Zimmerman in 2013. At Zimmerman's trial, Jeantel testified about her phone conversation with Martin immediately before he was shot. Because Jeantel spoke in AAE, she was described on Fox News as "brutally ignorant" and as having a "credibility problem." A juror on the case said she was "hard to understand" and "not credible."

The May 23, 2019, Vice.com article cited Jeantel's interaction with the justice system as the inspiration for the recent study titled, "Testifying while black: An experimental study of court reporter accuracy in transcription of African American English," by Taylor Jones, University of Pennsylvania; Jessica Kalbfeld, New York University; Ryan Hancock, Philadelphia Lawyers for Social Equity; and Robin Clark, University of Pennsylvania, and published in the Linguistic Society of America journal Language.

The study authors sought to understand how well court reporters understand and transcribe AAE, and how a lack of proficiency may be disadvantaging speakers of AAE when they interact with the justice system.

They also provide some background on the study of AAE, which is sometimes referred to as African American Language, African American Vernacular English, and Black English Vernacular. It is spoken primarily by descendants of slaves of African descent who were in bondage in the United States. It is often labeled as "broken" English, though the authors note that AAE is "highly systematic and rule-governed" and is a distinct dialect, much like Scottish English.

Professor Arthur Spears, a linguist not involved with the study, has linked the stigma and delegitimization of the language to its connection to African Americans, and to blackness in general. It is the likely outcome of this stigma on court transcription that the authors sought to quantitatively measure.
Nine native AAE speakers were recruited from West Philadelphia, North Philadelphia, Jersey City, and Harlem, and the researchers made recordings of various phrases in an otherwise quiet room (unlike a noisy courtroom). Twenty-seven court reporters volunteered for the study, and these included both black (approximately 25 percent) and nonblack participants also from the Philadelphia area.

While court reporters must pass a proficiency test certifying 95 percent accuracy or better on Standard American English plus specific legal and medical jargon, the participants didn’t do nearly as well with AAE. The best performed at 91.2 percent, the worst at 58.4 percent, with an average of 82.9 percent. However, word accuracy is only the beginning. When asked to paraphrase the utterances, the average comprehension rate was a mere 33 percent. According to the study, “The court reporters’ transcriptions altered the who, what, when, where, and force of an utterance in 701 of the 2,241 transcriptions, fully 31%.” The phrase “he don’t be in that neighborhood,” which should be translated as “He isn’t usually in that neighborhood,” became “We are going to be in this neighborhood” after transcription.” With regards to the accuracy between black and nonblack reporters, the authors concluded the following: “… neither group seemed to understand the majority of what they were hearing or to have the ability to communicate the meaning of the utterances clearly, but nonblack court reporters were significantly worse at this task.”

The authors suggest possible reasons for the lack of accuracy in AAE transcriptions. They mention a workplace culture where court reporters often are admonished for asking to have a phrase repeated or clarified. Stigma around AAE, however, seems to be the most prevalent cause. One court reporter stated “that they do not understand the dialect they are asked to transcribe on a daily basis, while framing it as a deficiency on the part of the speaker” (paraphrasing by study authors).

While the stigma attached to AAE was an obvious factor, all of the reporters expressed a sincere desire to improve their ability to transcribe AAE, with the worst performing reporters saying they were willing to do “anything to help the profession.”

Forty-four percent of the population of Philadelphia are black, and they are disproportionately likely to come into contact with the justice system. When court reporters are unable to accurately record spoken phrases because of linguistic variations, they are simply “incapable of performing their basic job duties.”

According to study co-author and NYU grad student Kalbfeld, “Once something is in the court record via the transcript, it legally becomes what was said even if it is inaccurate, which brings up questions of due process and equal protection under the law if some people are less likely to be accurately transcribed than others.”

The authors propose the narrow solution of requiring ‘all court reporters to be certified not just on ‘standard’ English, but on other dialects also, especially those they are most likely to encounter.”

Spears remarks, “The injustice involved in court reporting is intolerable and an insult to the legal notion of all citizens’ receiving equal treatment under the law.” The authors note that “this is the result of a long historical process that will take enormous effort and goodwill to undo.”

Sources: vice.com, Linguistic Society of America
Fifth Circuit: Plain Error Requiring Resentencing Where Court Didn’t Give Defendant Chance to Speak at Sentencing Hearing and Prospective Allocation Provided Added Details to Lead Reasonable Judge to Reconsider Harsh Sentence

by Michael Berk

The U.S. Court of Appeals for the Fifth Circuit remanded Jose Santos Figueroa-Coello’s case for resentencing, holding that the district court’s violation of Rule 32 of the Federal Rules of Criminal Procedure amounted to reversible plain error.

At this defendant’s sentencing hearing, counsel briefly mentioned several points in a bid for leniency, but the judge never asked Figueroa-Coello himself if he had anything to say before sentencing him to the top of his Guidelines range, violating the defendant’s right to “a specific and unequivocal opportunity to speak.” This right is not absolute, however. Since counsel did not object, Figueroa-Coello had to meet the demanding plain-error standard set forth in Puckett v. United States, 556 U.S. 129 (2009), on direct appeal.

The Court explained Puckett’s four-prong test as follows: “the appellant must show the lower court’s action (or lack thereof) (1) deviated from unaunted and established legal rules, (2) was clear or obvious, rather than subject to reasonable dispute, and (3) affected his substantial rights. [Puckett] This court then has discretion to correct the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id.”

The Government conceded that the judge deviated from an established legal principle. Rule 32(i)(4)(A)(ii) requires federal sentencing courts to address each defendant personally to provide a chance to speak “on any subject of his choosing prior to the imposition of sentence.” This deviation was “clear or obvious, rather than subject to reasonable dispute.” And, since the defendant was actually sentenced to the top of the advisory range, the Fifth Circuit presumed prejudice to his substantial rights. [Puckett] This court then has discretion to correct the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id.”

The Government conceded that the judge deviated from an established legal principle. Rule 32(i)(4)(A)(ii) requires federal sentencing courts to address each defendant personally to provide a chance to speak “on any subject of his choosing prior to the imposition of sentence.” This deviation was “clear or obvious, rather than subject to reasonable dispute.” And, since the defendant was actually sentenced to the top of the advisory range, the Fifth Circuit presumed prejudice to his substantial rights—the record demonstrated an “opportunity” for the omission “to have played a role in the district court’s sentencing decision.”

Thus, the Court’s opinion focused on the fourth and final prong of the plain-error standard. The plain-error rule does not mandate automatic correction but only provides for “discretionary relief.” The Fifth Circuit will only right a wrong under this rule if it is convinced that the result of the error is so “un-

Pennsylvania Supreme Court Holds Consent to Search Does Not Include K-9 Sniff When No K-9 Present When Consent Given and Wait 40 Minutes for Its Arrival

by Dale Chappell

In a case of first impression, the Supreme Court of Pennsylvania held that a search in connection with a traffic stop that was performed 40 minutes after consent was given, because there was no K-9 unit on scene so police made the motorist wait until its arrival, exceeded the scope of the consent to search. The same way a search by human police officers is a “search” under the Fourth Amendment so too is a dog-sniff search by a K-9 unit. But they are not one and the same. When Pennsylvania police stopped Randy Valdivia on Interstate 80 for failure to use his turn signal and discovered that he had a prior drug conviction in Florida, they became suspicious of the Christmas packages in the backseat and asked if they could search his car. He consented. What he didn’t know, and what the troopers didn’t tell him was that they had also requested a K-9 unit to the scene.

About 40 minutes later, a K-9 unit arrived and searched Valdivia’s vehicle. The dog alerted to the Christmas packages, which contained about 20 pounds of marijuana. Charged with possession of the marijuana with intent to deliver, he was convicted at a bench trial after his motion to suppress the evidence was denied.

On appeal, Valdivia argued that the K-9 search was not within the scope of his consent because a reasonable person wouldn’t have understood he was consenting to a search by a dog that was not on scene and that the 40-minute delay was too long. The Superior
Court rejects this argument and affirmed his conviction. Valdivia appealed to the Pennsylvania Supreme Court.

The scope of consent for police to search requires consideration of what a “reasonable person in the position of the defendant would have believed he or she was allowing,” the Court instructed. The Court then explained that “Pennsylvania law differs considerably from federal law” with respect to searches by trained narcotics dogs. The U.S. Supreme Court has held that “a canine sniff of an item to which the police have a lawful right of access is not considered a search under the Fourth Amendment….” United States v. Place, 462 U.S. 696 (1983). The Pennsylvania Supreme Court rejected that approach in Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987), warning that “a free society will not remain free if police may use this, or any other crime detection device, at random and without reason.”

The Johnston Court concluded that a search performed by a trained narcotics dog constitutes a search under Pennsylvania law. But the Court explained that they are “not akin” to searches performed by human officers, adding that a dog sniff is a “separate and distinct mechanism for drug detection.” It then adopted a rule allowing a canine search if “the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test” and that they “are lawfully present in the place where the canine sniff is conducted.” Johnston.

Turning to the present case, the Court stated the question it must answer is “whether a reasonable person under the circumstances would have understood Valdivia’s general consent given to two human officers to include a search conducted by a later produced narcotics detection dog.”

Because Valdivia gave consent for police on scene to conduct a search that he assumed would have been done immediately by human officers and not by a K-9 unit over 40 minutes away, the Court ruled that “a reasonable person in Valdivia’s position would not have understood his consent to encompass a search conducted by a drug sniffing dog.” Thus, the K-9 search exceeded the scope of the consent given by Valdivia, and the evidence discovered as a result of the search should have been suppressed, the Court concluded.

Accordingly, the Pennsylvania Supreme Court reversed the Superior Court’s decision and remanded for further proceedings consistent with its opinion. See: Commonwealth v. Valdivia, 195 A.3d 855 (Pa. 2018).

**Court Extends McQuiggin Actual Innocence Exception to Defaulted Legal Claim, Vacates § 924(c) Conviction**

by Dale Chappell

The U.S. District Court for the Eastern District of California held in a collateral proceeding on January 2, 2019, that McQuiggin’s actual innocence exception applies to a legal claim that was procedurally defaulted, vacating a conviction under 18 U.S.C. § 924(c) that carries a mandatory 30-year consecutive sentence.

David Garcia was convicted of using explosives to damage property under 18 U.S.C. § 844(i) and also convicted of possession of explosives in furtherance of a crime of violence under 18 U.S.C. § 924(c). The judge instructed the jury that § 844(i) was a “crime of violence” for purposes of § 924(c). Garcia was sentenced to five years in prison for the property damage convictions, plus a mandatory consecutive 30-year sentence for the § 924(c) conviction.

When Garcia appealed, his lawyer challenged only the interstate commerce element of § 844(i) and never mentioned that § 924(c) requires the use of violent force against the “property of another,” which could not have applied since Garcia blew up his own property.

Garcia’s conviction was affirmed by the Court of Appeals.

In a motion to vacate his § 924(c) conviction under 28 U.S.C. § 2255, Garcia argued that § 924(c) requires the use of violence against someone else’s property, and because he damaged his own property with explosives, he could not have been properly convicted under § 924(c).

The magistrate judge, in her Report and Recommendation ("R&R"), agreed with Garcia that he could not have been convicted under § 924(c), but she wrote that he “procedurally defaulted” the claim because he could have and should have raised it on appeal. The magistrate recommended the Court deny Garcia’s motion.

In his objections to the R&R, Garcia argued that because he was “actually innocent” of the § 924(c) conviction, he should be excused from the procedural default doctrine. The district judge agreed with Garcia and granted his motion, vacating his § 924(c) conviction.

Typically, claims that could’ve been raised on appeal can’t be raised under § 2255. This is because § 2255 “may not do service for an appeal.” United States v. Grady, 456 U.S. 152 (1982). This is called the “procedural default doctrine.” An exception to this rule is when a prisoner shows “cause” for not bringing the claim on appeal, and “prejudice” would result if the claim were not heard.

In McQuiggin v. Perkins, 569 U.S. 383 (2013), the Supreme Court reiterated that actual innocence of a crime is the perfect example of “cause and prejudice” to allow the claim to be heard on collateral review, avoiding procedural default.

The district judge in Garcia’s case took a unique position and applied McQuiggin’s actual innocence exception to a legal claim that could have been raised on appeal but was simply ignored. McQuiggin involves allowing a later actual innocence claim “in light of new evidence.” However, Garcia did not have new evidence of his innocence. In fact, his claim existed throughout the entire criminal proceedings: the judge’s erroneous jury instruction that § 844(i) was a crime of violence for purposes of § 924(c).

The judge’s focus, though, was on Garcia’s actual innocence in granting his motion. And the fact that his claim could have been raised earlier was excused based on the reasoning in McQuiggin.

Accordingly, the Court granted Garcia’s § 2255 motion and vacated his § 924(c) conviction and consecutive 30-year sentence. See: United States v. Garcia, 2019 U.S. Dist. LEXIS 1207 (E.D. Cal. 2019).

**Writer’s note:** While this case is a district court decision that does not bind any other judge or court, it is encouraging and persuasive that actual innocence should carry more weight than the judicially-created procedural default doctrine. An appeal is still likely, however. The Government did move to stay the judgment to allow for it to appeal, but the district court criticized the Government for not objecting earlier and denied the Government’s motion. Now, the Government must wait until the new judgment is entered and then appeal from that. See: Haynes v. United States, 873 F.3d 954 (7th Cir. 2017) (§ 2255 not “final” for appeal by any party until relief granted and new judgment entered) (collecting cases). This will be a case to watch.
Fourth Circuit: Cannot Substitute Career Offender Predicate on Collateral Review

by Anthony Accurso

The U.S. Court of Appeals for the Fourth Circuit reversed a district court’s denial of a defendant’s § 2255 motion, holding the lower court committed clear error when it rejected defendant’s claim that his attorney’s failure to challenge a prior drug conviction for use as a career offender enhancement did not result in prejudice because a prior robbery conviction would still support the enhancement.

Antwaun Winbush pleaded guilty to one count of possession with intent to distribute cocaine base in 2011. His PSR designated two prior offenses, viz., trafficking cocaine and illegal conveyance of drugs onto the grounds of a detention facility, as prior drug offenses that supported a career offender enhancement under § 4B1.1 of the U.S. Sentencing Guidelines. Winbush then received 151 months at sentencing.

He filed a motion under 28 U.S.C. § 2255, arguing that his attorney should have challenged the conveyance charge as being insufficient to support the career offender enhancement because it lacked the prerequisite intent element. The district court agreed that counsel was deficient but decided no prejudice occurred because Winbush’s prior Ohio conviction for third-degree robbery would have been sufficient to sustain the career offender enhancement even if the conveyance charge were invalidated.

Winbush appealed this decision, arguing that the Fourth Circuit’s ruling in United States v. Hodge, 902 F.3d 420 (4th Cir. 2018), precluded such a substitution. In Hodge, the Court ruled that such a substitution was not permissible because the government “cannot identify only some ACCA-qualifying convictions at sentencing—thereby limiting the defendant’s notice of which convictions to contest—and later raise additional convictions to sustain an ACCA enhancement once the burden of proof has shifted to the defendant....”

The Government argued that Hodge was inapposite because Hodge concerned the ACCA, an enhancement that carries a statutory mandatory minimum sentence. Whereas, Winbush’s case concerned an enhancement under the Guidelines, which are merely advisory. The Fourth Circuit rejected this argument based on the same rationale as set forth in Hodge—that allowing the substitution of a previously undesignated predicate conviction would deprive Winbush fair notice and shift the burden of proof onto him during collateral review.

Further, the Court explained that the career offender designation still has serious consequences for defendants. Molina-Martinez v. United States, 136 S. Ct. 1338 (2016). In fact, the Fourth Circuit has held that a lawyer’s failure to challenge the designation can constitute deficient performance, resulting in prejudice. United States v. Carthorne, 878 F.3d 458 (4th Cir. 2017).

Accordingly, the Court reversed the district court’s denial of Winbush’s § 2255 motion and remanded with directions to resentence him without a career offender enhancement. See: United States v. Winbush, 922 F.3d 227 (4th Cir. 2019).

Maryland Court of Appeals Rules That Courts Must Ask Non-Compound ‘Strong Feelings’ Question Upon Request During Voir Dire

by Douglas Ankney

The Court of Appeals of Maryland reaffirmed that, upon request, trial courts must ask non-compound “strong feelings question” of potential jurors during voir dire in the following form: “Do any of you have strong feelings about [crime with which defendant is charged]?” During voir dire in Gordon Collins’ trial on charges of burglary and theft, the trial court asked, “Does anyone on this panel have any strong feelings about the offense of burglary to the point where you could not render a fair and impartial verdict?” (“compound strong feelings question”). None of the jurors responded. The court asked an identical question concerning the offense of theft, and again, no juror responded.

Defense counsel objected on the grounds that the questions should be asked in the form, “Does anyone on this panel have any strong feelings about the offense of burglary?” and “Does anyone on this panel have any strong feelings about the offense of theft?” (“compound strong feelings question”). The Court overruled the objection.

Even though the court asked a different question concerning the offense of theft, and again, no juror responded, the Court observed that such a question required potential jurors to determine for themselves if they qualified to sit as jurors, but it is the function of the trial court to make that determination. Additionally, the question deprived the defense of knowing which, if any, jurors had been victims of a crime and if the answer to that part of the question is yes, whether that fact would interfere with your ability to be fair and impartial in this case?

The Court began its analysis with Dingle v. State, 759 A.2d 819 (2000), which held that a trial court abused its discretion when during voir dire it asked the compound question: “[H]ave you or any family member or a friend been a victim of a crime, and if the answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this case?”

A jury was selected and opening statements were given before recess was called. After returning from recess, the prosecutor informed the Court that failure to ask the strong feelings questions was reversible error. Over defense’s objections, the court then asked the strong feelings questions. Collins was convicted of both charges, and the Court of Special Appeals affirmed. Certiorari to the Court of Appeals was granted.

The Court began its analysis with Dingle v. State, 759 A.2d 819 (2000), which held that a trial court abused its discretion when during voir dire it asked the compound question: “[H]ave you or any family member or a friend been a victim of a crime, and if the answer to that part of the question is yes, would that fact interfere with your ability to be fair and impartial in this case?”

The Court observed that such a question required potential jurors to determine for themselves if they qualified to sit as jurors, but it is the function of the trial court to make that determination. Additionally, the question deprived the defense of knowing which, if any, jurors had been victims of a crime and then asking follow-up questions to determine if a challenge for cause was appropriate.

In Pearson v. State, 86 A.3d 1232 (2014), the Court applied this reasoning to compound strong feelings questions. The Court observed that such questions shift the jurors’ focus to determining if they can be fair and impartial instead of simply whether they
have strong feelings about the particular offense(s) for which the defendant is being tried. A juror would make a response only if he or she determined that he or she could not be fair and impartial. If a juror had strong feelings about the offense but believed the feelings had no effect on impartiality, then no response would be given. This would prevent counsel from having knowledge to ask follow-up questions to explore the reasons for the strong feelings and prevent the court from then determining if the juror were fit to try the case. Pearson held that a trial court must ask strong feelings questions and not compound strong feelings questions during voir dire when defense requests it.

The Court determined that in this case the “victim question” asked by the trial court was not an adequate substitute strong feelings question because a juror could have strong feelings without ever experiencing being a victim. The same was true of the “pity question” and the “general question.” Furthermore, asking the proper strong feelings questions after the jury was seated did not cure the trial court’s error of failing to ask the properly worded questions during voir dire. For one thing, by the time the trial court asked the questions, the jurors already knew they were selected as a juror, and they may have already been invested in the case by hearing the specific facts of the charged offenses. And since they had already been asked the questions in compound form, they may have been too embarrassed to answer truthfully because it would appear they had changed their minds for no apparent reason. Also, the jurors then knew the purpose of the question was to determine if the strong feelings would affect their impartiality, and they had already made that determination for themselves.

Accordingly, the Court reversed the judgment of the Court of Special Appeals and remanded to that court with instructions to reverse the circuit court’s judgment and remand to that court for a new trial. See: Collins v. State, 205 A.3d 1012 (Md. 2019).

Hawai’i Supreme Court Remands for Resentencing Where Circuit Court Considered Defendant’s Refusal to Admit Guilt in Imposing Consecutive Sentences

by Douglas Ankney

The Supreme Court of Hawai’i remanded for resentencing in a case where the circuit court based the sentence, in part, on the defendant’s refusal to admit guilt.

In 2015, Ronald Melvin Barnes was convicted by a jury of four counts of first-degree sexual assault against a minor and another count of first-degree sexual assault against a different minor.

Pursuant to HRS § 706-601, a probation officer (“PO”) filed a presentence investigation and report (“PSI”). The PO stated in the PSI that Barnes would not participate in the PSI because Barnes was planning to file an appeal and that Barnes stated he was innocent of all charges.

At Barnes’ sentencing, the State moved for consecutive sentences because Barnes preyed upon two victims. Defense counsel opposed the motion and informed the court that upon counsel’s advice, Barnes would not be making any statement due to a planned appeal. The circuit court asked Barnes if he wanted to make a statement, and Barnes replied, “Not in this court, Your Honor.”

The circuit court then stated it considered all of the sentencing factors of HRS § 706-606, including the nature of the offense and Barnes’ characteristics. Then the judge said, “In addition, while the defendant certainly has a right to appeal all matters that are appealable, he has been uncooperative in the preparation of any aspect of the presentence report and does not appear to have expressed any sadness that the two children suffered harm of any kind.”

The court sentenced Barnes to 20 years on each count. The sentences for the four counts against one victim were to run concurrently, but the sentence for the one count against the other victim was to run consecutively. Barnes appealed, arguing the circuit court abused its discretion. The Intermediate Court of Appeals (“ICA”) affirmed, and the Supreme Court granted certiorari.

In a somewhat unusual move, the Supreme Court, citing plain error, vacated and remanded on an issue not presented in the appeal. Hawai’i Rules of Penal Procedure Rule 52(b) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The Supreme Court instructs that “[w]here a defendant’s substantial rights have been affected, plain error review is appropriate.” State v. Miller, 223 P.3d 157 (Haw. 2010).

The Court observed that pursuant to the Fifth Amendment to the U.S. Constitution and Article I, section 10 of the Constitution of Hawai‘i, a criminal defendant has the right to remain silent. The “distinction between imposing a harsher sentence upon a defendant based on his or her lack of remorse, on the one hand, and punishing a defendant for his or her refusal to admit guilt,” is “subtle, yet meaningful.” State v. Kamana‘o, 82 P.3d 401 (Haw. 2003). A sentencing court “may not impose an enhanced sentence based on a defendant’s refusal to admit guilt with respect to an offense the conviction of which he intends to appeal.” Id. Three factors determine whether a sentencing court relied on a defendant’s refusal to admit guilt when imposing a sentence: (1) the defendant maintained innocence after conviction; (2) the judge attempted to get the defendant to admit guilt; and (3) the appearance that if the defendant affirmatively admitted guilt then his sentence wouldn’t have been as severe. Id. With respect to the second factor, it is satisfied if the sentencing court confirms the defendant is maintaining a claim of innocence. Id.

Barnes maintained his innocence as shown in the PSI. The sentencing court was aware of his statement in the PSI, and Barnes confirmed it when he told the trial judge he had nothing to say. And the sentencing court implied that had Barnes “expressed sadness” regarding the harm the victims had suffered, then the motion for consecutive sentences wouldn’t have been granted. The Court concluded that all three factors were satisfied and that Barnes’ sentence was likely improperly influenced by his insistence in his innocence.

Accordingly, the Court vacated the judgment of the ICA and remanded to the circuit court for resentencing consistent with the Court’s opinion. See: State v. Barnes, 2019 Haw. LEXIS 135 (Haw. 2019).
California Supreme Court: Prop 47 Requires Dismissal of Conviction Based on a Predicate Felony That Is Later Reduced to a Misdemeanor

by Douglas Ankney

The Supreme Court of California ruled that when the felony underlying a conviction for “street terrorism” is later reduced to a misdemeanor, then the street terrorism conviction must be vacated and the charge dismissed.

In 2013, Luis Donicio Valenzuela and his associate Timothy Medina confronted Manny Ramirez. Valenzuela tried to punch Ramirez and then took Ramirez’s $200 bicycle from him after accusing him of being in a rival gang. Ramirez reported the incident, and the police recovered the bicycle at Valenzuela’s address and arrested him. A jury convicted Valenzuela of felony grand theft and of street terrorism.

While Valenzuela’s case was on appeal, the voters passed Proposition 47 (“Prop. 47” aka, the Safe Neighborhoods and Schools Act) in November 2014, which reduced to a misdemeanor any theft of property that did not exceed $950. Valenzuela petitioned the trial court to resentence him on his felony grand theft conviction after reclassifying it as a misdemeanor and to dismiss his street terrorism conviction because it was predicated on the former felony grand theft conviction. The trial court resentenced the theft conviction as a misdemeanor but refused to dismiss the street terrorism conviction. The trial court’s judgment was affirmed by the Court of Appeal, and the Supreme Court granted Valenzuela’s petition for review.

The Court observed that the crime of street terrorism is governed by California Penal Code § 186.22(a). The essential elements are: (1) active participation in a criminal street gang; (2) knowledge that the gang’s members engage, or have engaged, in a pattern of criminal activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. People v. Albillar, 244 P.3d 1062 (Cal. 2010).

Regarding the third element, the Court had previously ruled, “[M]isdemeanor conduct ... cannot constitute ‘felonious criminal conduct’ within the meaning of” this element. People v. Lamas, 169 P.3d 102 (Cal. 2007). Liability under this statute is limited “to those who promote, further, or assist a specific felony committed by gang members and who know of the gang’s pattern of criminal activity.” People v. Castenada, 3 P.3d 278 (Cal. 2000).

Prop. 47 amended various provisions of the Penal Code and the Health and Safety Code to reclassify as misdemeanors some narcotics and theft offenses. Penal Code § 1170.17(a) and (b) created a procedure whereby persons serving a sentence for a qualifying felony may petition to have the conviction reclassified as a misdemeanor. Penal Code § 1170.18 provides that “[a] felony conviction that is recalled and resentenced ... or designated as a misdemeanor ... shall be considered a misdemeanor for all purposes [except for various possession of firearms offenses].” Prop. 47 “shall be liberally construed to effectuate its purposes.”

The Supreme Court determined that the trial court correctly reclassified and resentedenced the theft charge as a misdemeanor in accord with Prop. 47. The Court also determined that “there is no dispute that the theft of Ramirez’s $200 bicycle—the same conduct that gave rise to defendant’s conviction for grand theft—constituted the felonious criminal conduct involved with his conviction for street terrorism.” The Court concluded the street terrorism conviction must be dismissed pursuant to a Prop. 47 resentencing because the underlying “felonious criminal conduct” element is now absent. As such, the Court concluded that Valenzuela “cannot properly be resentenced for the street terrorism offense. Instead, this conviction must be dismissed in his Proposition 47 resentencing.”

Accordingly, the Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings consistent with its opinion. See: People v. Valenzuela, 7 Cal. 5th 415 (2019).

West Virginia Supreme Court Announces Parole Eligibility Statute for Prisoners Who Committed Crimes as Minors is Retroactive

by Douglas Ankney

The Supreme Court of West Virginia announced that the provision of the Juvenile Sentencing Reform Act of 2014 that applies to parole eligibility for persons who committed crimes when they were less than 18 years of age is to be applied retroactively.

Sixteen-year-old Christopher J. sexually abused two boys he was babysitting in 2007. The boys, ages 3 and 4, did not report the abuse until 2012. Christopher was tried as an adult. He was convicted and given a sentence of 35 to 75 years in prison. Christopher subsequently filed a habeas petition alleging, inter alia, that W. Va. Code § 61-11-23(b) of the Juvenile Sentencing Reform Act of 2014 applied retroactively. The provision set parole eligibility at no more than 15 years for persons who committed their crimes before reaching age 18. The circuit court rejected Christopher’s argument, and he appealed to the Supreme Court of West Virginia.

The Court first provided the background to what prompted the Legislature to enact the Juvenile Sentencing Reform Act. It began with the Supreme Court of the United States’ (“SCOTUS”) decision prohibiting the imposition of a death sentence on defendants who committed their crimes before they were 18 years of age. Roper v. Simmons, 543 U.S. 551 (2005). In Roper, SCOTUS observed that juveniles’ lack of maturity caused them to be more reckless than adults; juveniles are more susceptible to negative outside influences and peer pressure than adults are; and a juvenile’s character is not as well formed as an adult’s, which means a juvenile is more amenable to rehabilitation. Because of these traits, it is a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment to sentence to death a person who committed a crime while a juvenile. In Graham v. Florida, 560 U.S. 48 (2010), SCOTUS applied the reasoning of Roper to defendants who received sentences of life without parole for non-homicide offenses committed when they were juveniles. And in Miller v. Alabama, 567 U.S. 460 (2012), SCOTUS applied the same reasoning to defendants who committed homicide while a juvenile and had received life without parole. The West Virginia Supreme Court took note of the fact that Montgomery v. Louisiana, 136 S. Ct. 718 (2016), held that Miller was to be
applied retroactively. In response to these decisions from SCOTUS, the Legislature passed the Juvenile Sentencing Reform Act.

The Court observed that it is presumed a statute operates only prospectively, not retrospectively, unless it appears by clear, strong, and imperative words that the Legislature intended to give the statute retroactive force and effect. Taylor v. State Comp. Com’r, 86 S.E.2d 114 (W. Va. 1955). The courts are to give meaning and congruency to the various provisions of a statute in light of the meaning of the statute as a whole. State ex rel. Holbert v. Robinson, 59 S.E.2d 884 (W. Va. 1950). When the Legislature “includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion.” Russello v. United States, 464 U.S. 16 (1983). The West Virginia Supreme Court “refuses to afford a statute an illogical construction.” Foster Found v. Gainer, 717 S.E.2d 883 (W. Va. 2011).

The Court explained that W. Va. Code § 61-11-23(b) is one provision of four provisions of the statute and must be interpreted in light of the whole statute. In the fourth provision of the statute at W. Va. Code § 61-11-23(d)(2), it reads, “The provisions of this subsection are applicable to sentencing proceedings for convictions rendered after the effective date of this section....” Since these words requiring prospective application are found only in this subsection, it means the Legislature intentionally and purposefully meant for only this subsection to be applied prospectively but excluded only prospective application to the other three subsections. Any other interpretation would be illogical and nonsensically conclude that the Legislature expressly excluded retroactive application of one provision while implicitly excluding retroactive application of the other three provisions of the same statute. Thus, the Court concluded that W. Va. Code § 61-11-23(b) is to be applied retroactively. Accordingly, the Court reversed the part of the circuit court’s judgment that held W. Va. Code § 61-11-23(b) does not apply retroactively. See: Christopher J. v. Ames, 2019 W. Va. LEXIS 311 (2019).

**Seventh Circuit Orders Grant of Successive § 2255 Motion and Resentencing in Pre-Booker Mandatory Guidelines Case Involving Elements Clause’s Definition of ‘Crime of Violence’**

by Chad Marks

In 1987, Todd D’Antoni was charged with selling cocaine to a juvenile resulting in her death. While being held in jail on those charges, he solicited another prisoner to kill a government witness for cash and drugs. That prisoner contacted law enforcement, agreeing to cooperate in regards to the murder-for-hire plot. As a result, D’Antoni was charged with conspiracy to kill a government witness.

D’Antoni pleaded guilty to both crimes. The court sentenced him to 35 years on the drug count, and a five-year consecutive term on the conspiracy charge. While in prison serving his 40-year term, D’Antoni again found himself on the wrong side of the law. He was charged with conspiracy to distribute LSD while in jail. A jury convicted him of those charges. The presentence report calculated a mandatory Guidelines term of imprisonment range of 51-63 months.

The Government responded to that, arguing D’Antoni was a career offender and should be sentenced as such. Specifically, the Government contended that under the 1990 Guidelines his cocaine conviction was a qualifying controlled substance offense and that his conspiracy to kill a government witness conviction subjected him to the career offender Guidelines sentencing scheme. The court agreed, which placed him in a Guidelines range of 262-327 months. The court subsequently sentenced him to 264 months of imprisonment to be served consecutively to the already imposed 40-year term.

He appealed, arguing that the court erred in classifying him as a career offender. The court disagreed, affirming the sentence.

The U.S. Supreme Court on June 26, 2015, issued its landmark decision in Johnson v. United States, 135 S. Ct. 2551 (2015), holding that the ACCA residual clause definition of “violent felony” which is identical to the Guidelines’ residual clause “crime of violence” definition is unconstitutionally vague. A year later in Welch v. United States, 136 S. Ct. 1257 (2016), the Supreme Court held that Johnson announced a new substantive rule that has retroactive effect in cases on collateral review.

D’Antoni, in light of these rulings, sought permission to file a successive § 2255 motion. He argued his career offender sentence was invalid because (1) Johnson applied to invalidate § 4B1.2’s residual clause as unconstitutionally vague and (2) his prior conviction for conspiracy to kill a government witness could only be considered a crime of violence under the residual clause and thus no longer qualified as a predicate offense. The Seventh Circuit granted his application.

The district court, relying on the Supreme Court’s decision in Beckles v. United States, 137 S. Ct. 866 (2017), ruled that D’Antoni could not make a vagueness challenge to the pre-Booker mandatory Guidelines, and thus his prior conspiracy conviction remained a crime of violence pursuant to the residual clause. The court did grant a certificate of appealability.

D’Antoni filed a notice of appeal. That appeal was stayed while the Seventh Circuit was deciding Cross v. United States, 892 F.3d 288 (7th Cir. 2018). The Cross Court held that “Beckles applies to only advisory guidelines, not to mandatory sentencing rules,” and therefore, “the guidelines residual clause is unconstitutionally vague insofar as it determined mandatory sentencing ranges for pre-Booker defendants.”

With this decision, the mandatory Guidelines were subject to attack on vagueness grounds, and attack D’Antoni it did.

The Court found that his conspiracy conviction did not include force as an element and its only possible connection to sub sec 4B1.2’s definition of “crime of violence” was the residual clause. Based on Cross, the residual clause from the pre-Booker mandatory Guidelines was excised, and absent the residual clause, the application notes have no legal force. Therefore the Government could not rely on the application notes in arguing that D’Antoni was not entitled to relief.

Accordingly, the Court reversed the judgment of the district court and remanded with instructions to grant D’Antoni’s successive § 2255 motion and for resentencing consistent with this opinion. See: D’Antoni v. United States, 916 F.3d 658 (7th Cir. 2019).
The following is a press release from FAMM:

WASHINGTON — Thousands of sick, dying, and elderly federal prisoners who are eligible for early release will now have access to free legal representation in court through the newly established Compassionate Release Clearinghouse. The clearinghouse, a collaborative pro bono effort between FAMM, the Washington Lawyers’ Committee for Civil Rights and Urban Affairs, and the National Association of Criminal Defense Lawyers (NACDL), is designed to match qualified prisoners with legal counsel should they need to fight a compassionate release denial or unanswered request in court.

“People who can barely make it out of their beds in the morning should not have to go into court alone against the largest law firm in the nation,” said Kevin Ring, president of FAMM. “Congress was clear that it wanted fundamental changes in compassionate release, yet we’ve seen prosecutors continue to fight requests from clearly deserving people, including individuals with terminal illnesses. It’s gratifying to know we will be able to help people in a tangible and meaningful way.”

The Compassionate Release Clearinghouse recruits, trains, and provides resources to participating lawyers. The Clearinghouse’s design and implementation is being assisted by the Washington, D.C., law firm of Zuckerman Spaeder LLP through its partner Steve Salky.

“Sick and dying prisoners for years were unjustly denied release on compassionate release grounds by the Bureau of Prisons,” said Jonathan Smith, executive director of the Washington Lawyers’ Committee for Civil Rights and Urban Affairs. “Now, prisoners will be assisted by dedicated and high-quality lawyers in seeking relief from the courts, evening the playing field, and allowing many of these prisoners to return home.”

The effort was made possible by the passage of the First Step Act, which addresses a well-documented, three-decades-long issue in which sick, elderly, and dying prisoners have been routinely denied early release by the Bureau of Prisons (BOP). Until December 2018, there was no mechanism to challenge or appeal those decisions. Now, prisoners are allowed to appeal directly to a sentencing judge if their petitions are denied or unanswered.

Since the passage of the First Step Act, prisoners have been filing motions for release, and some have been challenged by federal prosecutors. The Compassionate Release Clearinghouse will make sure those prisoners have an attorney to fight for them in court.

“NACDL is proud to participate in this critically important effort,” said NACDL Executive Director Norman L. Reimer. “To make the promise of the First Step Act a reality for qualified sick, elderly, and dying prisoners, the nation’s criminal defense bar is committed to recruiting pro bono attorneys to be champions for those in need. Additionally, NACDL’s First Step Implementation Task Force will aggregate resources to support attorneys who undertake this important work.”

The Clearinghouse started matching attorneys with prisoners in need in February, and has matched more than 70 cases with pro bono attorneys. The Clearinghouse is actively recruiting additional attorneys and law firms to join in the effort.

FAMM is a national nonpartisan advocacy organization that promotes fair and effective criminal justice policies that safeguard taxpayer dollars and keep our communities safe. Founded in 1991, FAMM is helping transform America’s criminal justice system by uniting the voices of impacted families and individuals.

Founded in 1968, The Washington Lawyers’ Committee for Civil Rights and Urban Affairs works to create legal, economic and social equity through litigation, client and public education and public policy advocacy. While we fight discrimination against all people, we recognize the central role that current and historic race discrimination plays in sustaining inequity and recognize the critical importance of identifying, exposing, combatting and dismantling the systems that sustain racial oppression. For more information, please visit www.washlaw.org or call 202.319.1000. Follow us on Twitter at @WashLaw4CR.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL’s many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

This press release was originally published June 19, 2019 on the FAMM website, famm.org; reprinted with permission. Copyright, 2019 FAMM

Massachusetts Supreme Court: Discharge From Civil Commitment Required When Examiners Conclude Defendant Is Not Sexually Dangerous

by Douglas Ankney

Following convictions for two counts of rape of a child in 1977, Wayne Chapman was sentenced to prison for a term of 15 to 30 years. But later that same year, Chapman was found to be a sexually dangerous person and committed to the Massachusetts Treatment Center for an indefinite term of one day to life.

In 1991, Chapman petitioned for release from civil commitment pursuant to G. L. c. 123A that was in effect at the time of his sentence and to be returned to ordinary confinement to serve the remainder of his original sentence. The judge granted his petition, and Chapman was returned to prison.

In 2004, when Chapman had one month remaining until his release from prison, the Commonwealth petitioned to have Chapman...
committed as a sexually dangerous person beyond the term of his criminal sentence. The petition was filed under the current version of G. L. c. 123A.

After a trial in 2007, Chapman was found to be a sexually dangerous person and was committed to the treatment center for an indeterminate period of one day to life.

In 2016, Chapman petitioned for release under G. L. c. 123A because both qualified examiners at the treatment center concluded he was no longer sexually dangerous. Chapman also was evaluated by a five-member community access board (“CAB”). Three CAB psychologists concluded Chapman remained sexually dangerous while two concurred he was no longer sexually dangerous. The Superior Court judge granted Chapman’s petition. But Chapman’s release was stayed until the resolution of this appeal by the Commonwealth.

The Supreme Judicial Court of Massachusetts observed, “Liberty — the right of an individual to be free from physical restraint — is a fundamental right.” Matter of E.C., 92 N.E.3d 724 (Mass. 2018). “Laws in derogation of liberty must be narrowly tailored to further a compelling and legitimate government interest, and must be strictly construed, in order to comply with the requirements of substantive due process.” Id.

Because civil commitment is justified only to prevent future harm, a person may be deprived of the fundamental right to liberty only where the individual’s dangerousness is linked to a mental illness or abnormality that causes the individual to have serious difficulty in controlling his or her behavior. Kenniston v. Department of Youth Servs., 900 N.E.2d 852 (Mass. 2009). When the Commonwealth contends a prisoner is a sexually dangerous person, it may file a petition seeking to civilly commit the individual following release from custody. G. L. c. 123A, § 12(a)-(b).

A judge then conducts a hearing to determine if probable cause exists to believe the person may be sexually dangerous. G. L. c. 123A, § 12(c). If the judge finds probable cause to believe the person is sexually dangerous, then the person is committed to the treatment center for a period not exceeding 60 days for the purpose of examination and diagnosis under the supervision of two qualified examiners. G. L. c. 123A, § 13(a).

Within 45 days, each qualified examiner must provide the court with a written report summarizing his or her diagnosis and stating whether in their professional opinion the individual is sexually dangerous. Id. The Commonwealth then has 14 days from the date the reports are filed to decide whether to petition the court for a trial. G. L. c. 123A, § 14(a).

The trial is to be held within 60 days of the Commonwealth’s filing the petition for trial. Id. But as a practical matter, such trials are held a year more after the petition is filed. During all this time, the individual is confined at the treatment center. And if the individual is determined to be sexually dangerous at the ensuing trial, he or she is committed to the treatment center for an indeterminate period of one day to life. G. L. c. 123A, § 14(d). Once committed, the individual may petition for discharge only once every twelve months. G. L. c. 123A, § 9. But it often takes years for the petition to be scheduled for trial, during which time the individual remains confined.

Because of the length of time a person may be civilly committed as a sexually dangerous person (up to life) and because of the length of time a civilly committed individual is forced to await trial on his or her § 9 petition seeking discharge, the Court held in Johnstone, petitioner, 903 N.E.2d 1074 (Mass. 2009), that at least one of the two qualified examiners must opine that the individual is a sexually dangerous person. If neither of the qualified examiners concludes the individual is a sexually dangerous person, the Commonwealth “cannot rely upon other sources of potential expert evidence, such as the CAB’s opinion that the petitioner is sexually dangerous, to meet its burden of proof at trial,” and the petitioner is entitled to release before trial. Id.

To prolong a civil commitment where neither examiner opines that the individual is sexually dangerous would violate due process. Green, petitioner, 59 N.E.3d 1127 (Mass. 2016).

The Court declined the Commonwealth’s request to overrule Johnstone as being incorrectly decided. The Court invoked the principle of stare decisis in reiterating its preference for following precedent because doing so “promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” Shiel v. Rowell, 101 N.E.3d 290 (Mass. 2018).

Since neither of the qualified examiners determined that Chapman continued to be sexually dangerous, he was entitled to discharge without awaiting a trial on his petition. Accordingly, the Court affirmed the judgment allowing his petition for discharge from civil commitment. See: Chapman, petitioner, 482 Mass. 293 (2019).

Private Citizens Carrying Guns Commit Fewer Crimes Than Cops

by Douglas Ankney

According to a study by the Crime Prevention and Research Center (“CPRC”), citizens with a permit to carry a concealed weapon “are convicted of misdemeanors and felonies at less than a sixth of the rate for police officers.” John R. Lott, Jr., president of CPRC, said.

“With about 685,464 full-time police officers in the U.S. from 2005 to 2007, we find that there were about 103 crimes per hundred thousand officers.” He added, “For the U.S. population as a whole, the crime rate was 37 times higher—3,813 per hundred thousand people.”

Lott noted that the statistics for police were admittedly low due to under-reporting and the fact that police officers do not arrest each other for many crimes for which average citizens are arrested.

But, “between October 1, 1987, and June 30, 2017, Florida revoked 11,189 concealed-handgun permits for misdemeanors and felonies,” according to the report. “This is an annual revocation rate of about 10.4 permits per 100,000.”

In Texas in 2016, there were “148 permit holders … convicted of a felony or misdemeanor—a conviction rate of 12.3 per 100,000,” Lott noted. “Among police, firearms violations occur at a rate of 16.5 per 100,000 officers. Among permit holders in Florida and Texas, the rate is only 2.4 per 100,000.”

The study also revealed that “between 2012 and 2018, the percent of women with permits grew 111% faster than for men, and the percent of blacks with permits grew 20% faster than for whites.”

Unfortunately, blacks who lawfully carry guns are often shot and killed by police. Notably, Jemel Roberson and EJ Bradford—two black men who stopped mass shootings with their legal firearms—were gunned down by police arriving on the scene.

Source: thefreethoughtproject.com
Under Marsy’s Law, Police Using Violence Can Claim ‘Victim’ Status

by Ed Lyon

Citizens encounter cops in many ways. Cops respond to emergencies, provide security at some public gatherings and private forums, direct traffic, and address children in schools. Aside from uniform colors and headgear styles, cops look pretty similar with their utility belts, shoulder patches, collar tabs, badges and name tags. Under a law that is slowly, inexorably and steadily becoming widespread, cops look pretty similar.

Under Marsy’s Law, police officers and sheriff’s deputies who were involved in shootings with suspects in 2018 were quick to glom onto Marsy’s Law to hide their inner workings and procedures from public scrutiny with governmental transparency concerning acts of law enforcement a thing of the past, particularly when its [sic] controversial or potentially illegal,” stated the Cato Institute’s Jonathan Banks. If the actions of the North and South Dakota cops are any indications, these negative predictions are already coming to pass.

Georgia Supreme Court Announces New Evidence Code Abrogates Categorical Exclusionary Rule of Mallory

by Douglas Ankney

On May 6, 2019, the Supreme Court of Georgia held that the categorical exclusionary rule first announced in Mallory v. State, 409 S.E.2d 839 (Ga. 1991), is no longer the law in Georgia because the rule was abrogated by the “new” evidence code that took effect on January 1, 2013.

On January 26, 2015, Candice Nicole Orr reported to police that her husband, Otto Orr, had repeatedly punched and kicked her in front of their child. Otto was arrested on January 28, 2015, and later charged with family violence battery and cruelty to children in the third degree. At trial, Otto testified that Candice was addicted to drugs and attacked him whenever she became angry. On the date of his alleged offense, Otto testified that he hit Candice in self-defense only after she had struck him over the eye with a glass ashtray. During the prosecutor’s cross-examination, she elicited testimony concerning Orr’s silence in not reporting the ashtray incident to police. During closing argument, the prosecutor again commented on Orr’s pre-arrest silence by telling the jury, “That night the defendant—he wants to now claim self defense. I find that particularly convenient. He never told the story to the police, never once said: ‘Hey, wait, wait, wait, wait. I’m the victim here. She came at me with an ashtray.’ I submit to you that this is something made up because he has an interest in the outcome of this case.” Otto’s counsel moved for a mistrial on grounds that the prosecutor commented on Otto’s failure to tell police his story. The trial court denied the motion. The jury found Otto guilty of both charges, and the court sentenced him as a recidivist to five years on the battery count and 12 months on the cruelty charge to be served concurrently.

Otto filed a motion for a new trial, asserting, among other things, the trial court erred under Mallory by not granting a mistrial based on the State’s improper comments on his pre-arrest silence. The trial court granted his motion. The State appealed, and the Court of Appeals affirmed, holding that until the Supreme Court overrules Mallory, state courts are bound by it. The Supreme Court granted the State’s petition for certiorari.

The Court first observed that the Mallory opinion concerned a murder case in which the Supreme Court had reversed Mallory’s convictions based on improperly admitted hearsay evidence. But the opinion went on to address several issues that could arise on retrial. One of those issues was whether the exclusionary rule is more prejudicial than probative. The Court then observed that since the U.S. Supreme Court had not erected a constitutional barrier to this sort of evidence, the states were “free to formulate evidentiary rules defining the situation in which silence is viewed as more probative than prejudicial.” The Mallory Court then announced the categorical exclusionary rule: “[I]n criminal cases, a comment upon a defendant’s silence or failure to come forward is far more prejudicial than probative.”

However, in the instant case, the Court observed that the categorical exclusionary rule in Mallory did not have a basis in common law, nor did it rest on constitutional or statutory law. The rule was simply an act of judicial lawmaking. The Court opined that the

Looking to Eleventh Circuit precedent, the Court explained that Rule 403 of the new Evidence Code (OCGA § 24-4-403) requires a trial court to apply a balancing test to the facts and circumstances of a particular case at hand to determine if the probative value of the evidence outweighs the prejudicial impact of the evidence. Jones. Thus, Rule 403 of the new Evidence Code is incompatible with the categorical exclusion of evidence under Mallory. Consequently, the new Evidence Code abrogated Mallory.

Accordingly, the Court vacated the judgment of the Court of Appeals and remanded for proceedings consistent with its opinion, understanding that the Court of Appeals may need to remand to the trial court to address other issues raised in Otto’s motion for a new trial. See: State v. Orr, 305 Ga. 729 (2019).

Ninth Circuit: Running From Police Alone Doesn’t Give Rise to Reasonable Suspicion Justifying Stop and Frisk

by Douglas Ankney

The U.S. Court of Appeals for the Ninth Circuit held that running from police, by its self, does not provide reasonable suspicion to justify stopping and frisking the person.

Sandra Katowitz — an employee of the YWCA in the Belltown neighborhood of Seattle, Washington — called 911 and reported, “One of [her] residents just came and said they saw someone with a gun.” When the dispatcher asked what the person was doing with the gun, Katowitz replied that the resident had only said a young black man of medium build with dreadlocks had a gun. Katowitz did not indicate that the resident was frightened or upset or otherwise alarmed by the gun’s presence. Likewise, there was no indication the man was loitering near the YWCA or harassing any of the residents. The reporting witness did not provide her name and refused to speak to the dispatcher or to the officers who responded to the call.

Officers Ryan Mikulcik and Curt Litsjo spotted Daniel Derek Brown, who matched the 911 description. They began driving behind Brown slowly for several blocks before turning him to the ground at gunpoint. The officers found a firearm and drugs on Brown. At a hearing on Brown’s motion to suppress the evidence, he argued the officers lacked reasonable suspicion to stop him pursuant to Terry v. Ohio, 392 U.S. 1 (1968). The district court denied Brown’s motion, and he appealed.

The Ninth Circuit observed that an officer may only “conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” Illinois v. Wardlow, 528 U.S. 119 (2000). In analyzing Brown’s claim, the Court considers “the totality of the circumstances surrounding the stop, including both the content of information possessed by police and its degree of reliability.” United States v. Williams, 846 F.3d 303 (9th Cir. 2016). An anonymous tip that identifies an individual but lacks “moderate indicia of reliability” provides little support for a finding of reasonable suspicion.” Florida v. J.L., 529 U.S. 266 (2000). The tip must be reliable in its assertion of illegality. Id. And “[h]eadlong flight — wherever it occurs — is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” Wardlow. But the Supreme Court has a long history of recognizing that innocent people flee from police. Alberty v. United States, 162 U.S. 499 (1896). In our racially charged society it is not unreasonable for a black man to flee from police out of fear for his safety. Wardlow. The Court noted that “the Supreme Court has never endorsed a per se rule that flight establishes reasonable suspicion.” Flight is merely one factor in the overall reasonable suspicion analysis. Id. Furthermore, the Supreme Court has held that a person has no obligation to respond when approached and questioned by police. Florida v. Royer, 460 U.S. 491 (1983).

The Court then explained that possession of a gun in Washington state is presumptively legal. Carrying a concealed pistol without a license constitutes a misdemeanor, and failure to carry the license is merely a civil infraction. RCW §§ 9.41.050(1). Nevertheless, a suspicion that a person may be carrying a gun without a license is “certainly not enough alone to support a Terry stop,” the Court stated, citing Delaware v. Prouse, 440 U.S. 648 (1979), in which the Supreme Court held that police may not stop drivers solely to ensure compliance with licensing and registration laws.

In the present case, the police had a tip that a young, black man was in possession of a gun, which is presumptively legal in Washington, and there was no indication that criminal activity was afoot. The witness didn’t complain she was threatened by the man or that the man used or displayed the gun to cause anyone to feel alarmed or harassed. Nor was the man loitering near the YWCA. And the Belltown neighborhood was not a known high-crime area.

The tip was also anonymous. The reporting resident did not identify herself or personally speak with the dispatcher or the responding officers. Nor did the witness assert any illegality.

Regarding Brown’s running away, the Court noted the fact that the officers did not command Brown to stop while following him, nor did they tell Brown they wanted to speak to him. The officers followed Brown, a young black man, for several blocks before turning on their emergency lights.

The Court determined that the totality of the circumstances didn’t amount to reasonable suspicion justifying stopping and frisking Brown. It noted there was no reliable tip; no previous attempt to talk to the suspect is not prohibited; and possession of a gun is presumptively legal in Washington.

Accordingly, the Court reversed the district court’s denial of the motion to suppress. See: United States v. Brown, 2019 U.S. App. LEXIS 16886 (9th Cir. 2019).
A new study that analyzed more than 5 million criminal cases in New York City — beginning in 1987 — intimates that the city has “already done a better job of slashing its use of bail and jail than nearly any other urban area in the United States,” despite high-profile cases such as that of 16-year-old Kalief Browder, who was held in Rikers Island jail for three years because his family was unable to pay the $3,000 bail. Browder later committed suicide, allegedly spurred in part by his experiences in jail. It appears that a paradigm shift on the part of judges and other decision-makers is the reason for this change, rather than new statutes or court rules. As the study shows, “Judges have drastically cut back on bail and jail in criminal cases. And defendants are still showing up in court.” The city’s return-to-court rate is 86 percent versus about 75 percent nationwide.

Data released by the New York City Criminal Justice Agency show that the percentage of cases in which bail is set has dropped from 48 percent to 23 percent and that the rate at which defendants are released without having to pay any money has increased from 50 percent to 76 percent. That compares with a national average of approximately 45 percent to 50 percent and a low of 11 percent in the city of New Orleans, according to The Marshall Project. “As a result, New York City’s jail population has dropped from nearly 22,000 in 1991 to about 7,800 this year, making it the least incarcerated major city in the United States — by a long shot. Much of that improvement has occurred in just the past few years.” And further, “This seismic change in how the nation’s largest city handles bail and jail is the result not of top-down change in the system but of thousands of small shifts in courtrooms every day. Whereas California, New Jersey, Maryland and a handful of other states have tried to eliminate money bail legislatively or through a court order—with mixed success—New York has done so organically, potentially offering a model for other large cities in otherwise recalcitrant states.”

As The Marshall Project also points out, “Like many states, New York has a bail law that is half a century old…. Criminal justice reformers around the country are admonishing the Empire State to change its system, arguing that having to pay money to get out of jail unfairly targets the poor. And a newly elected Democratic majority in Albany is eager to heed those calls, as lawmakers this month pore over the final details of a bill that would make New York the third state to abolish money bail. That’s why Democrats in the New York State Assembly still see top-down legislative reform as necessary, despite the state’s largest city already being so ahead of the curve.”

Source: themarshallproject.org

New York City's Bail Success Story
by Bill Barton

Eighth Circuit Overlooks Procedural Default, Orders Immediate Release From Excessive ACCA Sentence Based on Prior Sex Offense
by Michael Berk

The U.S. Court of Appeals for the Eighth Circuit reversed the denial of William Anthony Lofton’s 28 U.S.C. § 2255 petition, remanding to the U.S. District Court for the Southern District of Iowa with instructions to vacate his ACCA sentence and immediately release him from custody.

Lofton was convicted in July of 2007 of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Although that charge carried a maximum sentence of 10 years’ imprisonment, at sentencing the district court handed down a 327-month sentence based on five qualifying priors under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1), which mandates at least 15 years’ imprisonment where the defendant has a criminal history involving three or more “violent felonies” or “serious drug crimes.”

After the invalidation of the ACCA’s “residual clause” in Johnson v. United States, 135 S. Ct. 2551 (2015), and made retroactive on collateral review in Welch v. United States, 136 S. Ct. 1257 (2016), Lofton sought collateral review of his sentence, claiming that four of those prior convictions — one for theft, one for aggravated criminal sexual abuse, and two for aggravated battery — no longer qualifies as “violent felonies” for purposes of ACCA sentence enhancement. The sentencing record was ambiguous as to whether the district court relied on the now-unconstitutional “residual clause,” which had defined a “violent felony” by its “serious potential risk of physical injury.”

The district court denied § 2255 relief. On appeal, the Government conceded that Lofton’s prior theft conviction no longer qualifies as a violent felony.

The Court explained that while Lofton’s appeal was pending, the Eighth Circuit announced a new standard that requires successive § 2255 claimants to “show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement.” Walker v. United States, 900 F.3d 1012 (8th Cir. 2018). The Eighth Circuit subsequently applied that standard at the merits stage of a claimant’s initial § 2255 petition. Golinveaux v. United States, 915 F.3d 564 (8th Cir. 2019).

Whether the standard is satisfied is generally a factual question that the district court must answer by reviewing the record to determine if the sentencing court specified which ACCA clause it relied upon. Walker. If the record is inconclusive, the Court explained that, as per Golinveaux, it “may consider the relevant background legal environment in the first instance to determine if the sentencing court likely relied upon the residual clause.”

As to his prior sex offense, the Court pointed out that it was neither an “enumerated offense” nor did its elements satisfy the “force clause” of the ACCA. The Court rejected the Government’s claim “that violent force should not be required in the context of criminal sexual abuse” and held that Lofton had shown that the sentencing judge “more likely than not used the residual clause to classify [Lofton’s sex offense] as a violent felony.”

Analyzing the underlying statute, the Court found that the Illinois law Lofton had been convicted under, 720 Ill. Comp. Stat. 5/12-16(6)(1)(i) (1998), was overbroad for ACCA purposes, as it could be violated “by having a child touch him for sexual gratification.” Such activity would not necessarily involve force, pain, or even “lack of consent.” Because it does not require “the use, attempted use, or threatened use of physical force against...
the person of another,” that statute “on its face cannot qualify as an ACCA predicate,” the Court held.

Although Lofton had not challenged the validity of the drug prior’s qualification, the Court determined that the district court had erred in finding that it met the pertinent definition for a serious drug offense, which requires that the underlying statute provide for “a maximum term of imprisonment of ten years or more.” The Illinois law against delivery of cannabis, Ill. Rev. Stat. 1988, ch. 38, par. 1005-8-1(7), carried a maximum sentence of three years, and so it likewise could not serve as an ACCA predicate.

That brought Lofton’s qualifying priors down to four to only two—and application of the ACCA requires at least three. The Government argued, however, that Lofton was not entitled to relief because he had procedurally defaulted the claim as to the drug crime. Relying on the plain language of § 2255 (permitting correction of a sentence “in excess of the maximum authorized by law”) and Eighth Circuit precedent, the Court held that Lofton’s sentence—nearly three times the maximum allowed by law for his firearm-possession conviction —represented a “miscarriage of justice,” which had to be corrected “to avoid manifest injustice.” No showing of cause and prejudice was necessary, the Court said, “to excuse” the procedural default under these circumstances.

Lofton had already been punished for longer than the law allowed. Accordingly, the Court ordered that the district court “direct that he be released from custody immediately,” See: Lofton v. United States, 920 F.3d 572 (8th Cir. 2019).

Fifth Circuit: Confrontation Clause Violated When Officer’s Testimony Relates Incriminating Information Received From Non-Testifying Informant

by Douglas Ankney

The U.S. Court of Appeals for the Fifth Circuit ruled that when a testifying officer relates the statement of a non-testifying confidential informant that facially incriminates a defendant, it violates the defendant’s Sixth Amendment right to confront witnesses against him.

Coy Marshall Jones was arrested on May 3, 2017, due to an investigation into suspected large-scale methamphetamine distribution by Eredy Cruz-Ortiz. Special Agent Royce Clayborne received a tip from a confidential informant that a drug deal would occur in the parking lot of a Valero gas station. A surveillance team observed Jones arrive at the gas station and pull alongside a truck driven by Cruz-Ortiz’s roommate. The two vehicles left the gas station and traveled down County Road 213. Detective Michelle Langham drove by and observed the two vehicles meet for less than a minute in a dirt pull-off on the side of the road and then drive off in opposite directions. Officers followed only Jones’ vehicle. When Jones turned onto County Road 201, Langham instructed a sheriff’s deputy to stop Jones for a traffic violation. When the deputy activated his emergency lights, Jones sped up and passed out of view several times.

No one observed Jones throw anything out of his truck, but when he finally stopped, the windows on both sides of his truck were down. No drugs were found in his truck, but a deputy found a Ziploc bag containing almost a kilo of methamphetamine about one-half mile from where Jones stopped. A fingerprint analysis found no prints matching Jones. He was charged, inter alia, with possession with intent to distribute methamphetamine.

At trial, agent Clayborne testified on direct examination that the reason Jones was followed and not the other vehicle is the police knew Jones had just received a large amount of methamphetamine. But on cross examination, Clayborne answered affirmatively when defense counsel stated that the police did not see any interaction between Jones and the other driver. Then on re-direct, the prosecutor asked Clayborne how he knew Jones had just received drugs if no one saw any interaction between Jones and the other driver. Clayborne answered: “So once we saw ... what looked like a drug deal, I made a phone call to my confidential source, who made some phone calls himself and got back to me that the deal had happened.” Jones was convicted. On appeal he argued, among other things, that the testimony regarding the confidential informant violated his rights under the Confrontation Clause.

The Fifth Circuit observed, “Police officers cannot, through their trial testimony, refer to the substance of statements given to them by non-testifying witnesses in the course of their investigation, when those statements incriminate the defendant.” Taylor v. Cain, 545 F.3d 327 (5th Cir. 2008). “Where an officer’s testimony leads to the clear and logical conclusion that out-of-court declarants believed and said that the defendant was guilty of the crime charged, Confrontation Clause protections are triggered.” United States v. Kizzee, 877 F.3d 650 (5th Cir. 2017).

The Government conceded that the informant’s statements could not be used as evidence of Jones’ guilt. But the Government argued the statements were introduced, not for their truth that a drug deal transpired, but only to explain the actions of the law enforcement officers. The Court explained: “Testifying officers may refer to out-of-court statements to provide context for their investigation or explain background facts, so long as the out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain the officer’s actions.” Kizzee.

However, the Court has also made it clear that “[w]hen such evidence comes into play, the prosecution must be circumspect in its use, and the trial court must be vigilant in preventing its abuse.” United States v. Evans, 950 F.2d 187 (5th Cir. 1991). A witness’ statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial even if helpful to explain why officers took subsequent actions. Kizzee.

“Statements exceeding the limited need to explain an officer’s actions can violate the Sixth Amendment—where a non-testifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay.” Id. The Court concluded that Clayborne’s testimony wherein he stated the confidential informant told him the drug deal had occurred specifically linked Jones to the crime. Accordingly, the Court vacated Jones’ convictions and remanded for further proceedings consistent with its opinion. See: United States v. Jones, 2019 U.S. App. LEXIS 14550 (5th Cir. 2019).
In the early 1970s, an armed team entered a Stockholm, Sweden, bank to rescue hostages being held by bank robbers, as well as to, hopefully, arrest the robbers.

To the rescuers’ shock and surprise, the hostages took up weapons with their captors to fight against their rescuers. The psychological condition the hostages had succumbed to became aptly known as Stockholm syndrome.

In January 2018, Houston, Texas, an unnamed FBI agent employed an unorthodox solution to ensure against any possibility of being resisted by the hostage he was helping to rescue. The agent stuck the barrel of his M-4 rifle in the window of the dark room where hostage Ulises Valladares lay bound on a sofa — and shot Valladares.

The agent stated that when he stuck his M-4's barrel into the window, someone grabbed the barrel, causing the agent to fire it twice, killing Valladares, who turned out to be the room’s only occupant.

In October 2018, Houston Police Chief Art Acevedo expressed disbelief in the agent’s story. “Our investigative findings do not support the description of how the shooting occurred by the shooting agent,” Chief Acevedo publically stated.

What a shame for Valladares’ orphaned son, whose mother died from cancer last year, that the Houston Police Department is not the lead agency in this investigation. The FBI is not saying anything. It is busy investigating itself. Law enforcement leaks hint that the feds may take years for the FBI to comply. Due to FOIA request backlogs, it may take years for the FBI to comply. A subsequent request for expedited handling for that reason was denied.

However, in a recent ‘Do as I say, not as I do’ move, the FBI has embarked on a campaign to encourage local law enforcement agencies to publically disclose information on their departments’ use-of-force incidents and enter the data into a new federal database.

Sheriff Bob Gualtieri of Pinellas County, Florida, and Police Chief Gina Hawkins of Fayetteville, North Carolina, are two of the FBI video stars. They are strongly urging locals to submit to the transparency the FBI itself refuses to provide and further encourage the surrender of data to the new federal database of local use-of-force statistics and information that the FBI says it also will contribute to but has yet to make good on its word on that score, either.

Source: nbcnews.com

The FBI Polices Itself Like Kids Guarding a Candy Store
by Ed Lyon

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Source: nbcnews.com

They need to be marked for life
by Sandy, NARSOL

The mandatory chemical castration law that has just passed in Alabama is being debated every way possible. Health professionals are weighing in on why, medically, it is not an effective prevention strategy. From a moral and human rights perspective, the general consensus is that it is barbaric and reminiscent of our nation’s earlier and darker forays into eugenics.

Both of those arguments are valid, but the primary reason it is doomed to fail at having any significant impact on reducing child sexual assault is the same reason that other attempts such as residency restrictions and “child-safe zones” fail. It is the same reason that the registry itself is a dismal failure.

The registry, those laws, and this new attempt – its questionable efficacy aside — have failed and will continue to fail because they are targeting the wrong population.

Prior to the passage of Alabama’s law, nine other states have or have had laws allowing for the use of chemical castration in some shape or form. California and Florida are cited as being states that, like Alabama, mandate its use. The language in California law, Section 645 (1996) states that with a victim under 13, the injections “may” be requested by an offender after the first offense, and that after a second like offense, he “shall undergo” the treatment.

Florida’s statute 794.0235 (1997) likewise says it may be requested after a first conviction of any form of sexual battery (794.011) and “shall” be used after a second offense. Unlike California, Florida does not attach an age limit to the prerequisite.

Louisiana (14:43.6) reads very similar to that of Florida with the exception of specifying a victim age of less than 13.

501.061, Texas Penal Code, allows the procedure upon request after the 2nd offense of a child under 14 and has a laundry list of conditions that must be met by anyone requesting it. According to information from Texas Voices, it is virtually never used.

Wisconsin’s NARSOL state contact reports that while statute 302.11(1)(b)2 states it may be a requirement of the DOC or Parole under certain circumstances, DOC says the controversial treatment is currently offered but never required.

Iowa has language in its laws that allow its usage under certain circumstances, and Georgia and Oregon have allowed the practice in the past if not currently.

Alabama’s requirement is that all those whose victim was a child under 13 receive the very costly treatment as a condition of release after a first offense and that the cost is borne by the offender, making the Alabama law more stringent than any of the others.

There is some evidence that as part of a complete treatment program, which includes psychotherapy and extensive follow up, some recipients of the medication will benefit to
NYC Program Helps Former Prisoners Realize Their Dream

A vast majority of prisoners dream of getting out of prison and staying out. They talk about it, and most plan for it. A program in New York City called “Getting Out and Staying Out,” or “GOSO”, for short, helps former prisoners do exactly that.

GOSO assists them with obtaining employment.

Geoffrey Goliath, associate executive director of GOSO, says when a company employs a person through GOSO, the first 240 hours of work are paid for by GOSO.

Once the former prisoners complete that internship period, they are either hired or let go by the companies in which they have been placed.

Goliath said about 70 percent of GOSO’s placements get full-time jobs at the same pay rate as everyone else.

Oliver and Leo Kremer own Dos Toros, a restaurant chain with 20 locations that participates in GOSO. Michael Van Leuvan, one of their employees hired through GOSO, is an example. He was 15 when he was sent away for drugs. Van Leuvan said his time in prison began with a gang and that he returned multiple times after being released.

Now, at age 31, he has a wife and three kids and is thrilled to be earning $20 an hour managing one of the restaurants. “Honestly, it’s been a total win,” says Leo, who started using GOSO four years ago. “In our experience, everyone we work with from GOSO is really committed to doing a great job.”

Source: nypost.com

Study Details the Effect of Brain Scan Evidence on Sentencing

by Anthony Accurso

A new study shows that neurobiological evidence (brain scans) used at sentencing may reduce the amount of prison time prescribed at sentencing but may conversely also increase the amount of prescribed involuntary hospitalization.

This study performed by researchers at Georgia State University used controlled surveys of volunteers to determine the impact of evidence of an impulse control disorder on sentencing.

The evidence for this disorder was either presented as having a neurobiological cause (as shown by an abnormal brain scan) or merely a psychological one. The condition also was variously presented as treatable or untreated. Participants were given the option to allocate some of the sentence between prison time and involuntary hospitalization.

Compared to the baseline (in which the hypothetical offender had no diagnosed impulse control disorder), participants were likely to reduce the amount of prison time by 33 percent when presented evidence of a psychological disorder that was untreated and by 54 percent when it was treatable. When presented with neurobiological evidence, prison times were reduced even further, with the treatable case resulting in a 74 percent reduction in prescribed prison time compared to the untreated case, which resulted in a 53 percent reduction.

However, the diagnosis was likely to elicit longer prescribed periods of involuntary hospitalization when compared to the baseline. Neurobiological evidence resulted in longer prescribed terms of involuntary hospitalization than mere psychological evidence, and the terms were longer for untreated conditions in both cases. An untreated condition shown to have a neurobiological basis resulted in a 155 percent addition of hospitalization time compared to the baseline prison time.

In short, providing neurobiological evidence of a treatable impulse control disorder resulted in the lowest amount of prescribed prison time, while neurobiological evidence of an untreated disorder resulted in the longest time prescribed for involuntary hospitalization.

One caveat to this research is that while the researchers note that brain-scan evidence is being used for leniency in 5 percent of murder cases at the appellate level and 25 percent of death penalty trials, the hypothetical offense upon which participants made their judgments was sexual assault, not murder.

Source: forensicmag.com

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Source: forensicmag.com
The Office of the Inspector General at the U.S. Department of Justice has unfurled a new study on state and federal law enforcement agencies’ reporting of deaths of individuals who were under the custodial watch of federal law enforcement agents. The results are disturbing.

“Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013” examines state and federal law enforcement agencies and their compliance with the Death in Custody Reporting Act of 2013. That federal bill — H.R.1447 and S.2807 — calls for all federal law enforcement agencies to create an inventory of deaths that have occurred under their custody.

According to the report, many law enforcement agencies have yet to comply with the law, with work remaining to collect data. Further, it is not even clear to the Office of Inspector General that a full inventory exists of which federal agencies even have law enforcement authority.

In fact, the inspector general concluded that it is “impossible … to fully assess DCRA compliance for the whole of the federal government,” it wrote. “[U]ntil [the U.S. Department of Justice Bureau of Justice Statistics] collects complete reports from all federal agencies, the Department will be unable to determine the total number of individuals who died in federal custody and which agency had custodial responsibility at the time of death.”

Perhaps, even bleaker, is that state agencies had yet to comply with the law, though the statute required them to do so starting in fiscal year 2016. The state agencies, by contrast, may not begin doing so until 2020, the report concludes.

Further, within the U.S. Bureau of Prisons, the agency has yet to include the time of death in its death-in-custody reports, making it difficult to track accurate causes of death for criminal prosecution, civil litigation, and administrative purposes.

The agency has agreed to reverse this trend, it wrote in a November 2018 letter included in the report’s appendix. It supports a recommendation to provide a time stamp on deaths in custody, actual, general, or estimated time. For “the small number of cases for whom the time of death is completely unknown to the BOP, the BOP will report a missing value to [Bureau of Justice Statistics].”

‘Ferguson Bill’

Passage of The Death in Custody Reporting Act of 2013 in December 2014 came in the aftermath of the shooting of Michael Brown, an unarmed black teen in Ferguson, Missouri. Riots erupted in the streets, and many have pointed to that moment in history as the zenith of the Black Lives Matter civil rights movement.

In turn, some began calling it the “Ferguson Bill.” Its sponsor, though, U.S. Rep. Bobby Scott (D-VA), said the bill is about far more than those events.

“People are calling this the ‘Ferguson Bill,’” Scott told The Marshall Project. “But we’ve been pushing this for much longer than that. Actually, it was originally in response to a lack of data about deaths that happen in prisons. We were trying to have a discussion about prison violence, when we started realizing, how do we have a discussion about this when there aren’t any facts?”

However, more than five years after the passage of the landmark legislation, the bill’s vision still stands far from achieving any real fruition. Facts, suffice to say, are hard to come by.

And, for that reason, members of the Law Enforcement Reform Working Group — which include organizations such as the American Civil Liberties Union, Human Rights Watch, the Drug Policy Alliance, and others — slammed the U.S. Department of Justice in a December letter for slow-walking implementation of the dictates of the Death in Custody Reporting Act.

“DOJ’s delayed implementation of DCRA is unacceptable, as there continues to be an unreliable national census of custodial and arrest-related deaths, including national statistics on mortality rates, demographic impact, circumstances of these deaths, and implicated law enforcement agencies,” wrote the organizations in a letter addressed to the DOJ. “Simply put, the federal government does not know how many people are killed by law enforcement every year…. Knowing the number and circumstances of police-caused fatalities is crucial to developing policies that could reduce the number of such fatalities.”

“This data is also critical to providing the public and DOJ the information needed to ensure law enforcement agencies are complying with civil rights laws, and to assisting DOJ with fulfilling its enforcement responsibilities.”

Sources: oig.justice.gov, congress.gov, hrw.org, themarshallproject.org

Wisconsin Supreme Court Holds That Statute Doesn’t Require Habeas Petitioner to Plead Timeliness, Overruling Smalley v. Morgan

by Douglas Ankney

The Supreme Court of Wisconsin held that neither Wisconsin Statute (“Wis. Stat.”) § (Rule) 809.51 nor principles of equity impose a “prompt and speedy” pleading requirement in a habeas petition. In so doing, the Court overruled State ex rel. Smalley v. Morgan, 565 N.W.2d 805 (Cr. App. 1997), which imposed a “prompt and speedy” pleading requirement.

On March 7, 2008, Ezequiel Lopez-Quintero was found guilty of first-degree intentional homicide and carrying a concealed weapon. At Lopez-Quintero’s sentencing the following month, his attorneys were instructed by the trial court that a Notice of Intent to Pursue Postconviction Relief (“Notice”) must be filed within 20 days if Lopez-Quintero planned to appeal. The court provided him with a “Notice of Right to Seek Postconviction Relief” form. Lopez-Quintero reviewed the form with his attorneys and marked the box indicating “I plan to seek postconviction relief.” One of the attorneys signed the form and certified that he counseled his client about the 20-day deadline to make a decision about seeking postconviction relief and filing a Notice.
At the conclusion of the sentencing hearing, one of the attorneys said he would “get that other document [Notice] filed within 20 days.” But no Notice was filed, and no appeal occurred. Almost 10 years later in February 2018, Lopez-Quintero petitioned the Court of Appeals for a writ of habeas corpus pursuant to Wis. Stat. § (Rule) 809.51(1). Based on State v. Knight, 484 N.W.2d 540 (Wis. 1992), he claimed his attorneys were ineffective for failing to file the Notice. Lopez alleged that he relied on his attorneys to pursue the appeal after he “unequivocally” indicated his intent to pursue postconviction relief when he checked the box on the Notice. He alleged his attorneys’ failure deprived him of an appeal. He requested his time for filing be reinstated, so he could pursue an appeal. He provided no reasons for waiting almost a decade before filing his habeas petition. The Court of Appeals, citing Smalley, denied his petition ex parte as “untimely.” The Wisconsin Supreme Court granted his petition for further review.

The Supreme Court observed that a habeas corpus petition is not a substitute for an appeal. But where an appeal was not taken due to an attorney’s ineffectiveness in failing to file the Notice, the remedy is to file the habeas petition in the Court of Appeals. Knight, Counsel’s "failure to perfect an appeal when the defendant has indicated a desire to appeal constitutes ineffective assistance of counsel." State ex rel. Flores v. State, 516 N.W.2d 362 (Wis. 1994). A petition filed in the Court of Appeals pursuant to Wis. Stat. § (Rule) 809.51(1) “must contain a statement of the legal issues and a sufficient statement of facts that bear on those legal issues, which if found to be true, would entitle the petitioner to relief.” State ex rel. Coleman v. McCaughtry, 714 N.W.2d 900 (Wis. 2006). “One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning.” Fond Du Lac City v. Town of Rosendale, 440 N.W.2d 818 (Wis. 1989).

The Court examined Wis. Stat. § (Rule) 809.51 and found it imposed no time limit on when a petition may be brought. It thus held that “neither Wis. Stat. § (Rule) 809.51 nor equity imposes a ‘prompt and speedy’ pleading requirement in the filing of a petition for habeas corpus.”

The Court then addressed and overruled the Smalley decision. It observed that Smalley denied a habeas petition ex parte for failing to allege facts demonstrating that the petitioner sought prompt and speedy relief. Relying on the principles of equitable estoppel and laches, the Smalley decision held that Wis. Stat. § (Rule) 809.51 required a petitioner to “allege facts [in the petition] that he sought prompt and speedy relief.” But the Supreme Court determined it could not “add words to a statute to give it a certain meaning.” Thus, the Court overruled Smalley and ruled that the Court of Appeals cannot deny habeas petitions ex parte for untimeliness. Instead, the Court of Appeals must direct the State to respond to the petition if it meets the filing requirements of the statute.

The Court argued that Smalley was correctly decided because otherwise defendants could bring habeas petitions 50 years after being sentenced if there is no time limitation. The Court rejected that argument on the ground that the State may then raise the defense of laches, the elements of which are: (1) unreasonable delay in filing the petition, (2) lack of State’s knowledge that petitioner would be bringing the habeas claim, and (3) prejudice to the State. The Supreme Court emphasized that the State bears the burden to raise and prove all the elements of the defense. Accordingly, the Supreme Court reversed the decision of the Court of Appeals and remanded for further proceedings on the habeas corpus petition. See: State ex rel. Lopez-Quintero v. Dittmann, 2019 WI 58 (2019).

$1 Million Settlement for NYC Crime Lab Tech Who Blew Whistle on Use of Untested DNA Tests for Decades

by Ed Lyon

Television crime dramas like Bones and CSI that depict sterile, efficient crime labs seem to be little more than good art imitating bad life as instance after instance of shoddy work and poor conditions from Wisconsin [CLN, March 2019, p.30] to Texas [CLN, March 2019, pp.40-41], coupled with an overall lack of unitized standards [CLN, January 2019, p.35], open people’s eyes to the real world of forensic science.

Just when conditions cannot seem to sink any lower, New York City’s Office of the Chief Medical Examiner ("OCME") has been outed as having extensively used a DNA testing method for over 20 years without ever conducting a scientific study to prove its validity.

Low Copy Number ("LCN") DNA testing uses miniscule bits of DNA from multiple donors taken from items found at crime scenes. The items could be firearm grips, bludgeons, or a purse. The city’s OCME began using this method in 2006 and quit using it in 2017. During this time, the OCME represented that the LCN testing method had been vetted by proper scientific analysis but refused to release the results. "OCME stands behind its science," stated medical examiner spokesperson Ana Worthy-Davis, referring to the questioned method.

Marina Stajic, PhD., would prove the OCME’s LCN DNA science had not, in fact, a single leg to stand on—behind or in front. Stajic had directed the OCME’s toxicology lab since 1986 and knew first hand that no scientific testing had ever validated the LCN method.

In 2004, New York’s governor appointed Stajic to serve on a state forensic science panel. She served these two masters well, keeping them separate until in 2014 when she cast a vote her OCME peers disliked. Another forensic panel member, noted exoneration lawyer Barry Scheck, had been trying to obtain a copy of the validation study on LCN DNA testing. It was being used in court cases, so Scheck was concerned. Stajic cast a vote with Scheck and another defense lawyer to compel the OCME to release the LCN DNA validation study. The vote failed to carry a majority, but the result was devastating because now it was “discovered” that the validation study had never been done despite the OCME’s claims.

Reprisals against Stajic by her peers were immediate and brutal. Chief Medical Examiner Barbara Sampson responded “Hold me down,” in an email to a coworker. “Stajic sucks,” emailed an OCME lawyer. Retaliation was nearly as swift. Stajic was soon terminated. Stajic filed a whistleblower suit, which the city quickly settled for $1,000,000. “My concern was … there could be wrongful convictions. And if the wrong people were convicted, that would mean the wrong person would be walking free,” stated Stajic after the settlement was announced.

Source: nytimes.com
P EACEFULLY SLEEPING THE NIGHT AWAY, grandmother Charlene Klein was rudely awakened by Allentown, Pennsylvania, cops beating on her door on May 2, 2016. A law-abiding citizen, she opened her front door in response to the Knights in Blue’s persistent pounding, only to find herself entering one of her absolute worst nightmares, while now wide awake.

On Klein’s front porch stood officers Stephen Madison and Christopher Hendricks. In her front yard stood officers Michael Good and Jacoby Glenny amidst a phalanx of other cops. Without preamble, Madison first asked Klein if her son was there and then if cops could search her home.

Klein asked if they had either a warrant to arrest her son or to search her home. When Madison admitted to having no warrants, Klein refused entry into her home and attempted to close the screen door.

As Klein tried to close the screen door, Madison reached out to prevent her from doing so. His finger was caught and slightly pinched. Madison then jerked the screen door open, grabbed the petite, 4 feet, 11-inch tall grandmother by her shoulder and bully-handled her outside to the porch. With Madison on one of the tiny woman’s arms and Hendricks on the other, they pulled them behind her back so forcefully she would later require surgery to repair the damage. Then they ran her into a concrete wall.

While the two cops were brutalizing and handcuffing the grandmother, Good and Glenny led other cops to invade her home attempting to find her son who was not there.

Madison’s pinched finger culminated in an aggravated assault charge for the seriously injured grandmother. It was later dismissed. An internal investigation exonerated the cops from any wrongdoing.

Attorney Robert Goldman represented Klein in a federal lawsuit over the matter. The police department’s exoneration of the bully cops did not faze the jury even a small bit as they found in Klein’s favor on a number of claims. Surprisingly they found the former police chief liable for failing to supervise his cops and against the city, also finding its policies were deliberately indifferent to its citizens’ constitutional rights. The jury further found that Hendricks, Good, and Glenny were liable for both the unconstitutional invasion and search of Klein’s home, failing to intervene to stop the cops assaulting Klein, and for an overall conspiracy to violate her constitutional rights.

The total damage award by the jury was $270,000. The amount of the jury award, in relation to the misbehavior of these out-of-control cops, is an injustice in itself.

NEW YORK COURT OF APPEALS: JURY TRIAL RIGHT ATTACHES TO DEPORTABLE CRIMES PUNISHABLE BY LESS THAN SIX MONTHS IN JAIL

A S A MATTER OF FIRST IMPRESSION, THE Court of Appeals of New York ruled that a noncitizen defendant charged with state crimes that carry a penalty of less than six months in jail but subject him or her to deportation of convicted is entitled to a jury trial under the Sixth Amendment.

The appeal by Saylor Suazo came after a bench trial that resulted in convictions for Class B misdemeanors of attempted assault in the third degree, attempted obstruction of breathing or blood circulation, menacing in the third degree, and attempted criminal contempt in the second degree. Each of those charges were reduced immediately before trial from Class A misdemeanors, which carry more than six months imprisonment, to Class B misdemeanors that carry three months imprisonment by amending the charges to attempt.

The distinction was important because the Appellate Division affirmed, holding that deportation is a collateral consequence of conviction that does not trigger the Sixth Amendment. Suazo appealed.

The Court of Appeals began its analysis by pointing out that SCOTUS “does not refer solely to the maximum prison term authorized for a particular offense.” Courts must “examine the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial.” Blanton v. North Las Vegas, 489 U.S. 538 (1989). The Court of Appeals added that, under Blanton, “it is the defendant’s burden to overcome the presumption that the crime charged is petty and establish a Sixth Amendment right to a jury trial.”

The Court of Appeals observed that the Immigration and Nationality Act makes it practically inevitable that a noncitizen will be forcibly removed from the country if convicted of a crime, whether the crime is petty or serious. The Court of Appeals added that, under United States v. Blanton, it is the defendant’s burden to overcome the presumption that the crime charged is petty and establish a Sixth Amendment right to a jury trial.

Deportation was recognized in Padilla v. Kentucky, 559 U.S. 356 (2010), as “drastic measure,” and in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), SCOTUS reiterated that “deportation is a particularly severe penalty,” which may be of greater concern to a convicted alien than any potential jail sentence.” Similarly, the Court of Appeals found the loss of liberty inherent in deportation “is frequently more injurious to noncitizen defendants than six months of imprisonment or less.”

The People argued that deportation is a federally imposed penalty, making it technically collateral. However, the Padilla Court explained that “deportation is nevertheless intimately related to the criminal process,” as a matter of first impression.
and “it [is] most difficult to divorce the penalty from the conviction in the deportation context.” While deportation is technically collateral, the Court of Appeals said “it is undoubtedly a severe statutory penalty that flows from the federal government as the result of a state criminal conviction.” As such, the Court rejected the People’s argument.

The Court instructed that “the Sixth Amendment mandates a jury trial in the ‘rare situation’ where a legislature attaches a sufficiently ‘onerous’ penalty to an offense, whether that penalty is imposed by the state or national legislature.” The Court concluded that deportation constitutes a sufficiently severe penalty to trigger the right to a jury trial. According to the Court, its ruling applies to “the narrow context of cases involving CPL 340.40-mandated nonjury trials of lesser misdemeanors....”

**Report: Google Can Track You Even When Your Phone’s Off**

by Anthony Accurso

A n article recently published on TheAntiMedia.com highlights various ways the U.S. government and corporations track one’s everyday movements through his or her cellphone and singles out Google’s Sensorvault project for scrutiny.

Between the revelations of whistleblower Edward Snowden, the efforts of organizations like the Electronic Frontier Foundation (“EFF”), and various investigative reporting outlets, Americans have been told time and again that they are under ever-increasing surveillance. We “opt-in” to data collection in exchange for various conveniences and entertainments, but we rarely understand the consequences of doing so.

A great many Americans carry smartphones without understanding their true surveillance potential. In 2010, The Washington Post revealed the NSA has the means to locate cellphones “even when they are turned off” and had used this technology in pursuit of terrorist targets in Iraq.

Even closer to home, it was reported in 2016 that the FBI has a technique called the “roving bug,” which allows them to enable your phone’s microphone, converting it to a listening device without your knowledge. And while many Americans are aware that Google collects their “data,” few understand the true extent of this surveillance.

A bipartisan group from the U.S. House Energy and Commerce Committee sent a letter to Google CEO Sundar Pichai seeking written answers to questions about Sensorvault, as well as a “briefing” with committee staff.

Sensorvault is a database that tracks and stores the location data from every Google device and account, going back to 2009. This data, available to law enforcement through what is known as a “geo-fence warrant,” allows an agency to pinpoint all the devices near the location a crime was committed, and follow them through time and place, effectively “tailing” users without having to physically follow them.

The EFF’s Jennifer Lynch says such warrants are the kind of fishing expeditions the Fourth Amendment was designed to protect us against, turning innocent people into suspects simply because they were in the wrong place at the wrong time.

The article closes with a plea for Americans to push back against such invasions of privacy by withdrawing support, financially and socially, from companies such as Google, which continue to disrespect users and their data.

We will see if Americans have the will to do anything about the intersection of corporations and government in the age of big data and mass surveillance.

Source: theantimedia.com

**Police, Prosecutor Misconduct Continues Unabated as Evidenced by Record Number of Exonerations in 2018**

by Douglas Ankney

A ccording to an analysis of the National Registry of Exonerations performed by the Death Penalty Information Center, a record 151 exonerations were reported in 2018. Victims of wrongful homicide convictions accounted for 68 exonerations. The overwhelming majority of wrongful convictions were obtained by police/prosecutorial misconduct (107) or perjury/false accusation (111), with both often occurring in combination.

Matthew Sopron was convicted of double murder and sentenced to life without parole in Chicago in 1998. At a postconviction hearing in 2018, William Bigeck—the prosecutor’s star witness who had implicated Sopron—testified that Sopron “had absolutely nothing to do with the murders.” Bigeck further stated he was 18 at the time of the crime, and he only changed his story after prosecutors threatened him with the death penalty.

Daniel Villegas was convicted of capital murder in El Paso, Texas, and was sentenced to life. He was 16 years old and falsely confessed to the crimes after a detective handcuffed him to a chair, threatened to take him to the desert and “beat his ass,” slapped him, and told him he would die in the electric chair if he didn’t confess. The Texas courts reversed his conviction due to ineffective assistance of counsel. At Villegas’ third trial, he presented evidence of his innocence and was acquitted.

Bobby Joe Maxwell was charged with capital crimes for a series of 10 murders and five robberies in Los Angeles in 1978 and 1979. Dubbed the “Skid Row Stabber,” Maxwell won a new trial in 2010 after new evidence proved the prosecutor’s prison informant was a “serial liar.”

Maxwell later suffered a heart attack and became comatose. All charges were dropped.

DNA exonerated 14 prisoners with homicide convictions. In all 14, prosecutors presented perjured testimony or false witness accusations.

Source: deathpenaltyinfo.org
Simi Valley, California, and a wrongfully convicted man who spent nearly four decades in prison have reached a $21 million settlement.

Craig Coley was convicted of the 1978 murders of Rhonda Wicht and her 4-year-old son Donald. Wicht had been raped. Prosecutors sought the death penalty, but the then 31-year-old Coley was sentenced to life without parole.

Former California Governor Jerry Brown pardoned Coley in 2017 after at least three law enforcement officers opined that a detective had “mishandled” the case. Investigators in Simi Valley, about 40 miles northwest of Los Angeles, discovered biological samples from the case in a laboratory. The trial court had ordered the samples destroyed, but a private firm purchased the laboratory and stored the samples. DNA testing of key pieces of evidence used at the trial — a bed sheet and one of Donald’s tee-shirts — revealed someone other than Coley committed the crimes.

This case was unusual in that all concerned government officials — including the police department and current prosecuting attorney — agreed that the now 71-year-old Coley was wrongfully convicted and deserved the $21 million in compensation.

“While no amount of money can make up for what happened to Mr. Coley,” said Simi Valley City Manager Eric Levitt, “settling this is the right thing to do for Mr. Coley and our community.”

The city said 39 years was the longest prison term overturned in California. Source: cnn.com

$21 Million Settlement for Wrongfully Convicted Man Released After 39 Years in Prison

by Douglas Ankney

Record Number of Exonerations Prompts Michigan AG to Create Conviction Integrity Unit

by Douglas Ankney

Few nightmares can equate with being an innocent person wrongly convicted and incarcerated.

Since innocence projects began appearing in the 1990s, dozens of prisoners in Michigan have been exonerated. In 2017 a record number—14—were exonerated, according to the National Registry of Exonerations. This prompted Michigan Attorney General Dana Nessel to announce the creation of a Conviction Integrity Unit (“CIU”). “We have a duty to ensure those convicted of state crimes by county prosecutors and our office are in fact guilty of those crimes,” Nessel said in a written statement.

Most of the exonerations came from Wayne County in cases involving Detroit police. The wrongful convictions were the result of systemic problems so entrenched in the Detroit police department in the 1990s and early 2000s that the federal government entered into a consent judgment/settlement with the city to avoid lawsuits alleging mistreatment of citizens and excessive use of force. Wayne County has its own CIU, and the newly created CIU will take cases from all the other counties.

Nessel named longtime criminal defense attorney Robyn B. Frankel as the head of the CIU. Frankel’s appointment is to ensure the thoroughness of the CIU when reviewing cases that had been handled by the attorney general’s office and local prosecutors. Modeled after the unit in Wayne County, Nessel’s CIU will include reviewing court records and any newly discovered post-trial evidence submitted by defendants. If further review is needed, officials will interview county prosecutors, law enforcement, defense attorneys, and witnesses in addition to taking another look at old and new evidence.

Sources: detroitnews.com, recordeagle.com

News in Brief

Arizona: Rapper Jay-Z has hired attorney Alex Spiro for a family preparing to sue the city of Phoenix for $10 million, alleging excessive force by police, unlawful imprisonment, false arrest, physical injuries, emotional stress and civil rights violations after their 4-year-old daughter walked out of a dollar store May 29, 2019, with an unpaid doll, newsmaven.io reports. Cellphone video shows police pulling over Dravon Ames, 22, and his pregnant fiancée, Iesha Harper, 24, along with their children, ages 1 and 4, at their babysitter’s apartment complex. Cops were responding to an anonymous report of shoplifting at the store. “Multiple videos show Phoenix police officers with guns drawn, screaming orders rife with profanities and foul language,” newsmaven.io reports. “Officers are seen surrounding the car, pulling their guns and threatening to kill them.” Officers, who have not been named, were not wearing body cameras. Ames was cited for driving with a suspended license.

California: Armed with a sledgehammer and warrant, San Francisco cops raided the home of freelance journalist Bryan Carmody May 10, 2019, in search of the source of a confidential police report into the Feb. 22 death of San Francisco Public Defender Jeff Adachi. “I knew what they wanted,” Carmody told The Los Angeles Times. “They wanted the name.” They handcuffed him for several hours while they hauled off notebooks, cameras, phones, computers and an iPod, according to latimes.com. The eight- to 10-officer squad drew their guns and combed through his belongings before transporting him to his office, which they also searched. Two weeks earlier, cops also stopped by his home seeking the name, even though California’s shield law “protects journalists from being bullied by police into revealing confidential sources,” mercurynews.com reports. Police Chief Bill Scott apologized and said the warrants did not fully identify Carmody as a journalist.
San Francisco Chronicle editor-in-chief Audrey Cooper tweeted: “The problem is, you can’t put this egg back together. The police have chilled sources with their actions and also know whatever is in this journalist’s files. The implications are chilling.” Adachi died of an overdose of cocaine and alcohol, the coroner reported.

**California:** Two police officers fired 76 times to fatally shoot a man whose family only wanted help for him. In July 2018, a man called Anaheim police to say his brother Eliuth Penaloza-Nava, 50, “had ingested an unknown drug and was hallucinating,” according to the DA’s report, reports ktla.com. Nava reportedly got into his truck and drove it toward the officers’ police cruiser. “He attempted a U-turn but ran out of room and ended up perpendicular to the officers’ vehicle,” ktla.com reports, and did not exit the vehicle upon police command. Officers Kevin Pedersen and Sean Staymates chased him through West Anaheim and fired the shots, striking homes and cars and fatally hitting his body with at least nine bullets. An officer bodycam video “was described as ‘disturbing’ and ‘difficult’ to watch by city officials,” ktla.com reports. However, in May 2019, the Orange County District Attorney’s Office said there was insufficient evidence to file charges against Pedersen and Staymates. Pedersen was fired.

**Connecticut:** Demonstrations occurred after security camera footage revealed a cop firing on a car with an unarmed black couple in April 2019 near the Yale University campus in New Haven. The protesters, carrying “Black Lives Matter” signs, demanded that the cops involved—Town of Hamden police officer Devin Eaton and Yale police officer Terrance Pollack—be investigated. They say that Stephanie Washington, 22, and her boyfriend Paul Witherspoon III, 21, were unfairly targeted. According to the New Haven Register, “Hamden has started a local probe into the shooting and State Senate President Pro Tempore Martin M. Looney and state Sen. Gary Winfield, both D-New Haven, called for a thorough investigation of the police shooting.” According to Daily Mail, “During the shooting, Washington was shot in the face and has since been hospitalized with non-life-threatening injuries, according to university officials,” while Witherspoon was unharmed. In the lead-up to the shooting, cops believed the car the couple had been in was involved in an armed robbery of a newspaper delivery person. Video from their vehicle, reports the Daily Mail, “shows that prior to the shooting, they had been enjoying each other’s company and were singing songs to each other. They had been singing ‘Nothing In This World’ by R&B singer Avant and Keke Wyatt.”

**Florida:** Orlando’s 2018 patrol officer of the year Jonathan Mills has a record of using excessive force and of “blatant racism,” and, as a result, the police department will review its “selection and evaluation process” for the award, orlandosentinel.com reports. Mills was named in two excessive-force lawsuits that were settled by Orlando in 2017 for $130,000. In one incident, a man claimed Mills sexually assaulted him as he searched for drugs during a traffic stop in 2014, while another man accused Mills of slamming him to the ground without provocation after pulling him over in October 2013, nypost.com reports. In addition, Mills, who is white, is seen in a video of a 2016 traffic stop, criticizing a black woman’s appearance. “That hairdo is sad,” Mills said. “You’ve got to get your hair done, girl.” After that, Mills underwent sensitivity training and was reassigned from a tactical squad to patrol duties. In addition, an internal affairs probe concluded that he had violated department policy.

**Georgia:** Atlanta Municipal Court Judge Terrinee Gundy has been accused of “an abandonment of her duties” through tardiness and absenteeism from court, leading some defendants to be illegally jailed by failing to deliver required hearings. She also “disabled a courthouse recording system to conceal the tardiness,” the Associated Press reports. Now the state’s Judicial Qualifications Commission — an investigative panel — has filed ethics charges with the state Supreme Court, alleging nine counts of misconduct in a “willful and persistent pattern of absenteeism,” reports lawandcrime.com. “Law.com noted that, on one day in 2017, Gundy absence from court allegedly deprived six charged individuals their constitutional right to a hearing. The JQC also alleged that Gundy made false statements in written responses and in person, the Atlanta Journal-Constitution reported.”

**Louisiana:** Public outcry over the death of Anthony Childs led the Shreveport City Council in June 2019 to abolish the city’s sagging pants law that was disproportionately enforced against blacks, according to The Washington Post. In February, a patrol officer followed the young black pedestrian and it was because he was wearing low-hanging pants, Shreveport Police Chief Benjamin Raymond confirmed at a May meeting organized by the NAACP. Police fired a hail of bullets when they saw a gun. Although the coroner determined “Childs died of a self-inflicted gunshot wound” to the chest, residents called the pursuit racial profiling. “The sagging pants ordinance is just so small and petty compared to the loss of life,” Councilwoman LeVette Fuller told The Washington Post.

**Louisiana:** A now-fired Iberville Parish Sheriff’s Office deputy has been charged with first-degree rape, malfeasance in office and pornography involving juveniles after police say he filmed the rape of a year-old boy on his cellphone. Shaderick Jones, 33, has been arrested and accused of coercing a woman in her home to perform a sex act on her 1-year-old son in exchange for not arresting the woman on an open traffic arrest warrant, thehille.com reports, quoting St. Gabriel Police Chief Kevin Ambeau. In addition to arresting Jones, “authorities seized several electronic devices from his home after executing a search warrant.” Chief Ambeau said: “I have 30 years of experience. This is at the top of the list for the worst case. I have never witnessed something so disgusting — it’s sickening to your stomach to see,” Hill and the boy’s mother were being held without bond.

**Mississippi:** James Hollins, a 29-year-old Jackson police officer accused of sexually abusing a 15-year-old girl in the back of his patrol car several times weekly over six months, was found dead May 27, 2019, from an apparent suicide, usatoday.com and wblt.com report. He fatally shot himself with another officer’s service revolver in a Dodge Charger along Interstate 220, JPD spokesman Roderick Holmes told the news sites. When asked if there was any connection between the allegations and the suicide, the chief told a reporter.
there was “no knowledge right now it’s con-
ected.” Attorney Lisa Ross, who represents
the girl’s mother, said sexually explicit videos
reveal the misconduct. Chief James Davis
placed Hollins on administrative leave. The
officer had been with the department about
three years.

Missouri: The St. Louis prosecutor’s
office has added 22 more names to its list of
police officers barred from bringing cases to its
office after a research project unearthed racist
and anti-Muslim social media posts” from the
officers, nydailynews.com reports. “St. Louis
Circuit Attorney Kimberly M. Gardner re-
layed the decision in a letter to the city’s public
safety director and its police chief, she said in
a news release. Seven of the 22 were banned
permanently from presenting cases and the
other 15 would be reviewed for reinstatement.”
The announcement, reports stltoday.com, “fol-
lows the disclosure [in June 2019] of a study
by the Philadelphia-based Plain View Project
of Facebook posts by current and former of-
ficers in St. Louis and seven other jurisdictions
around the country.” Gardner explained: “After
careful examination of the underlying bias
contained in those social media posts, we have
concluded that this bias would likely influence
an officer’s ability to perform his or her duties
in an unbiased manner.”

Pennsylvania: Racist and anti-Muslim
social media posts by police officers have
roiled the Philadelphia community. A full
“72 officers were taken off the streets and
placed on administrative duty,” according to
cnn.com, while an investigation continues.
The bigoted posts include those by a police
inspector, six captains, and eight lieutenants,
inquirer.com reports. Philadelphia Police
Commissioner Richard Ross called the
posts “disturbing, disappointing and upset-
ting.” Each one will be reviewed “to see if the
speech is constitutionally protected by the
First Amendment.” The posts came to light
because of the nonprofit Plain View Project,
which checked public Facebook posts from
officers in eight jurisdictions, and provided
screenshots of them.

Oklahoma: Cement Acting Police Chief
Stacy Burger, who is married with four kids,
was jailed and charged with soliciting child
prostitution over an incident in March 2019,
according to kswo.com. A 16-year-old girl
told investigators that Burger, 40, arrived at
her Chickasha home and both went into his
car parked in an alleyway. Although the girl
said she’d known Burger since she was 11
and considered him a “role model” and “father
figure,” he allegedly propositioned her, offer-
ing her “a lot of money” for oral sex. She said
no. He then asked if one of her friends could
give her oral sex. She refused. “Later during
an online conversation, Burger allegedly asked
the girl not to ‘rat’ him out and that he had not
thought about her age,” kswo.com reports.
Burger allegedly admitted the solicitation to
Chickasha cops, but said, “I was off duty, in
my own car which wasn’t tied to my job at all.”
Burger, however, was carrying a gun.

Oregon: The eastern Oregon city of
Pendleton will no longer jail people who
cannot pay fines due to minor violations, city
attorney Nancy Kerns said in June 2019.
Thanks to a lawsuit settlement over the city’s
so-called “modern-day debtors’ prison,” city
court must now consider ability to pay. “No
person shall be incarcerated for the inability
and lack of financial resources to pay finan-
cial obligations to the Court, including fines,
costs and restitution,” a new policy states. It
is noteworthy that The Supreme Court ruled
almost 50 years ago that a person can’t be jailed
for not being able to pay a fine. However con-
sider the case reported of Angela Minthorn,
who was jailed nearly two months for owing
about $1,000. A low-income woman with dis-
ableties, “she sued in early 2018, contending
she’d been violated the U.S. Constitution
by incarcerating a debtor unable to pay the
debt,” lntribune.com reports. “A settlement
was reached in April, with the city paying
Minthorn $130,000.”

Pennsylvania: Ten Latino plaintiffs and
the ACLU filed suit in June 2019 against the
Pennsylvania State Police and six troopers
for being in the immigrant enforcement busi-
ness.”Pennsylvania State Police troopers have
routinely violated the law by stopping and
holding people based solely on their Latino
appearance, terrifying drivers and passengers
while usurping federal authority to investigate
supposed immigration violations, the ACLU
claims in a federal lawsuit,” propublica.org
reports. The plaintiffs “contend it is a pattern
development of police misconduct that follows a
common script. Latino motorists, the suit says,
were pulled over by troopers who immediately
sought to ascertain the immigration status of
the car’s occupants,” propublica.org reports,
sometimes even before asking to see a driver’s
license. The suit seeks “both damages and
vindication of their constitutional right to be
free from unlawful detention.”

Washington: The state has announced
it will expand law enforcement’s DNA data-
base to solve cold cases. “Under the new law,
detectives can now obtain DNA samples from
deceased sex offenders, and those convicted
of indecent exposure are required to submit
takes to the state and national DNA da-
tabase,” K5News reports. The database in
named is in memory of Jennifer Bastian, 13,
and Nichella Welch, age 12, who were mur-
dered during 1986 in Tacoma. Their suspected
killers were first arrested last year because of
DNA evidence. Said retired Tacoma Police
Detective Lindsey Wade, who helped crack
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