Police State: From Social Justice to Social Dominance

by Michael Fortino, Ph.D.

Just when we thought things could not get any worse, somehow they did. In the midst of a global pandemic, economic collapse, mass unemployment, and racial divide, we were exposed to a dark truth about police brutality—a truth we could not unsee because the weight of its evidence pressed down squarely on our neck.

Chances are that by the time you read these lines the world will have already changed again. No one now can possibly keep up with the seismic transformations taking place globally, a paradigm shift triggered at the surface level by violent events perceived as reactions that point to racism throughout the nation and the world—implicit and obvious but actually resulting from a deeper groundswell of longstanding social frustration.

We now live in a country where factions of our citizenry believe police have moved from revered to racist, from guardian to warrior, from peacekeeper to punisher, and from public servant to public enemy number one.

Fortunately or unfortunately, video footage shot in real-time does not lie, but neither do the numbers. The difference is where we choose to look. What we are failing to see is a paradigm shift that has moved the pendulum of our society from a culture of social justice to one of social dominance.

From Torch Bearer to Flame Thrower

What it takes to set off an explosion is a spark. The spark, in this case, was the killing of George Floyd in Minneapolis at the hands of four police officers, a Black man helpless on the ground, choked to death under the knee of four police officers, a Black man helpless on the ground, choked to death under the knee of Rodney King on a dark street in Los Angeles, this was a cold-blooded spectacle taking place in broad daylight, an existential display of the exertion of government sanctioned power on the helpless, a grotesque lack of empathy, and all of it wrapped in a big blue bow for the entire world to observe.

The words of the dying man, “I can’t breathe,” at a time when thousands in the world are dying precisely because a virulent infection deprives them of breath, Floyd’s neck-compressed suffocation and his demise instantly streaming onto our hearts. Unlike the violent and senseless beating of Rodney King on a dark street in Los Angeles, this was a cold-blooded spectacle taking place in broad daylight, an existential display of the exertion of government sanctioned power on the helpless, a grotesque lack of empathy, and all of it wrapped in a big blue bow for the entire world to observe.

The words of the dying man, “I can’t breathe,” at a time when thousands in the world are dying precisely because a virulent infection deprives them of breath, Floyd’s neck-compressed suffocation and his demise instantly became a communal symbol of a world held hostage, trapped, helpless to resist, unable to fight back against economic oppression, biological infiltration, and now, victimization at the hands of a new group of rogue warriors.

George Floyd’s killing also touched a nerve and set off a greater sense of volcanic discontent that is as global as the Covid-19 pandemic. The underground chambers where the lava has been boiling for decades, where the eruption of human emotion is palpable from fear of an invisible disease. We grew more stressed from the deep downturn of the economy—a continuing anxiety about our future as the number of COVID-19 cases continues to grow.

What boils up to the surface is economic disparity, the enormous gap between the haves and have-nots, and frustration with issues of racism and class discrimination. It seems that social justice is dead on arrival.

From Guardian to Gang Member

Police forces and law enforcement agencies around the world have become intrinsically tools of oppression. Whether it be ideological, political, or economic power, police forces have been transformed to follow a gang-culture that resembles an “us against them” mentality even when such turf wars are happening in the very neighborhood where an officer may reside.

Local protests took many forms and cried many injustices, but they existed locally first and foremost. Initially, most were aimed at local governments and municipalities, and they were directed at the police departments assigned to keep that community safe. The tables have been turned, and the police are the very ones now under attack.

Perhaps the COVID-19 lockdowns brought to the surface innate vulnerabilities. Maybe it was the result of lost wages and
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 looming unemployment. Whatever it was, George Floyd’s death was the spark that ignited this virtual tinderbox. The combustion of an atavistic scream decrying “enough is enough!” Enough of the inhumane bureaucracies, senseless governance, and a punitive legal system designed to punish and incarcerate minorities and the poor—a system that now defined its own citizens as criminals and castigates all who fail to bow to oppression and exploitation.

In recent years, levels of crime in the U.S. have fallen dramatically, but confrontational incidents continue to play out. Michael Brown in Ferguson, Breonna Taylor in Louisville, Ahmad Arbery in Brunswick, and dozens of similar incidents since 2014 have triggered spasms of recrimination and media scrutiny and speculation. Now, in the pressure-cooker atmosphere of a global pandemic, the killing of George Floyd and Rayshard Brooks have caused an explosion of public awareness and protest. These cases show a pattern, but racism may not be the common denominator.

The Numbers Don’t Lie

In the U.S., where police have killed 7,633 persons between 2013 and 2019, frustrations have continued to build for many years. While many flashpoints of police violence have sparked cries of systemic racism on the one hand, and “a few bad apples” on the other, the problem is far deeper and far more complex than either of these two generalized views. To be sure, there is ostensibly, a racial component, but it is far greater and more subtle than an implicit bias of officers patrols the streets.

Policing in the U.S. is predominantly local. There are 18,000 law enforcement agencies, most of them small; only 65 are federal. They employ roughly 800,000 officers. The agencies are composed mostly of White officers, but in major cities, they are well integrated. In Chicago, for example, minorities make up 47.8% of the force; Blacks constitute 24.7% of the officers. In New York, minorities make up 47.8% of the force; Blacks are 11.6%. In L.A., 64% of the force is made up of minorities, 11.6% Black, 43.4% Latino. And yet there persists the narrative of the White cop and the Black offender, of the traffic stop gone wrong when someone is “Driving While Black,” or the Black suspect resisting arrest. The stereotypes are endless. The Black citizen shot while unarmed or the poor and subjugated family who are the victims of an announced home intrusion of overzealous White officers. Yes, unfortunately, these incidents happen, but we are not receiving the whole story from the media. This is an issue that is covered extensively by the media, both liberal and conservative, each side viewing the incidents through their own political filter and with their own agenda in mind.

Statistics show that Blacks are proportionately three times more likely than Whites to be killed by police. Death at the hands of the police is now the sixth leading cause of death for young Black men.

Young Black men are 2.5 times likelier to be killed by police than young White men. Studies show however, that on the issue of police shootings, the numbers indicate that there does not exist a clear causal relationship between implicit racial bias and a police escalation culminating in violence. There is a wider perspective at issue. Generations of oppression, abject poverty, rampant unemployment, and lack of opportunity have been endured within many Black communities. The result has been a proliferation of criminal activity growing out of this large-scale disparity.

There are important differences between White and Black neighborhoods to be sure. Blacks in inner city neighborhoods have been victimized and profiled as a result of the “War on Drugs” of the 1980s. This association in the minds of law enforcement continued to persist to the point that it became a self-fulfilling prophecy. Prison populations swelled with Black drug offenders.

Recent trends, however, paint a different picture. From 2008 through 2018, the imprisonment rate among Blacks dropped by 28%, Hispanics dropped by 21%, and Whites by only 13%. By 2018, the imprisonment rate of incarcerated Blacks reached its lowest levels since 1989. Most, it seems, have broken out of the cycle, yet disenfranchisement continues to persist in certain sectors, especially in minority businesses.

Of those who have endured, many small, Black-owned businesses have recently been ravaged by the pandemic lockdown, forced to close their doors permanently—twice the rate of White-owned businesses. Many, it is reported, were left out of the CARES Act Paycheck Protection Program. These blighted areas have become hot spots for anger, frustration and resentment, and now, with the imposition of a global pandemic and a community lockdown, recent hardships have “torn
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the Band-Aid off of the wound.”

Over the years, constant exposure to Black offenders predisposes cops (White and Black) to anticipate criminality even if none exists. Though they are only 13% of the population, data show Blacks commit 52% of all homicides. This reality fosters a stereotype. In Chicago this weekend as I write this article, CNN is reporting 107 shootings within the city proper, and nine confirmed homicides. These numbers become little more than a “blip on the screen” for most media outlets because they are simply not sensational enough despite the fact that 116 lives and families have been altered, some forever.

Even though the media persistently ignore the statistics, the truth is that far more Whites are killed by police than Blacks. Between 2015 and 2016, 1,051 Whites were killed by police compared to only 510 Blacks. Of course, this number can be deceiving when we account for a per-capita ratio. Before doing that, we must first consider several mitigating factors. Less than 1% of police killings involved an unarmed victim, making this event the time of the death.

Instances of police shootings of White suspects and/or random civilians are remarkably similar to cases of the killings of Black suspects. Hundreds of cases transpire year after year involving White suspects shot and killed as a result of belligerent acts while intoxicated, following a routine traffic stop, confronted erroneously by police, or unprovoked and simply sitting in the sanctity of their own home, yet many go unreported.

While violent incidents involving White officers point to a larger issue in policing, there is a racial component that cannot be dismissed. With consideration for the per-capita ratio, Whites are 62% of the population but represent half of those killed by police since January 2015. Blacks, on the other hand, represent only 13% of the population yet accounted for a full one third of all victims killed by police. To explore these numbers further, in a typical community in the U.S. composed of a mixed-race population, the White populace would account for only 8% of police killings while Blacks would account for 23%. On the surface, the rationale that there exists an obvious racial bias would seem like the most facile explanation, but let us dig a bit deeper.

The killing of a White suspect by police does not draw the kind of media attention reserved for White-on-Black incidents. One of the mainstream media’s thematic agendas is America’s enduring legacy of racism—the endless trauma of slavery and the plight of an entire segment of the American culture. The false narrative persists that Black suspects are killed in large numbers while White suspects are let off with a slap on the wrist. The statistics, however, do not bear that out. For every George Floyd or Rayshard Brooks, there exists similar instances where White men are killed by overzealous police officers.

Between 2003 and 2009, there were 98 million arrests in the United States (roughly 1.17 million per month); 4,813 of those arrests involved an arrest-related death. And 2,931 of the 4,813 crimes of death were declared homicides by law enforcement personnel. Of the 4,813 total deaths, 42.1% were White deaths, 31.8% were Black deaths, and 19.7% were Hispanic deaths; specifically, 2,026 White, 1,529 Black, and 949 Hispanic deaths. The notion that police are going into entire neighborhoods and shooting people is an enduring myth. In reality, there are other forces at play.

While the existence of implicit racial bias is undeniable, there is a factor that is far more central: the senseless overzealousness and militarization of police in an era of social dominance. This phenomenon is the result of a skewed and unbalanced training process that has shaped police officers and law enforcement from a traditional role of guardian to new role as warrior.

From Peacekeeper to Warrior

The first impulse is to reform policing. But first we would need to analyze objectively just exactly what we want our police forces to do, what their role should be in society, and how they should be managed. The truth is that for decades we have not paid close attention to this problem. If anything, we have contributed to it.

Before America’s reactionary obsession with “law and order” in the 1970s, when prisons were thinly populated mostly with violent and truly dangerous people, police were looked upon as guardians of social justice, as peacekeepers whose role was to protect and serve. Collectively, if not accurately or honestly, we were in an Andy of Mayberry mindset; policemen were local sheriffs or constables who knew us on a first-name basis. They were the “Joe Fridays” of the day—calm, collected, and fair-minded, and their beat was a quiet tree-lined Mainstreet. Of course, this was an era that has long passed. Police and law enforcement began to morph into a “warrior culture” as far back as the Prohibition of the 1920s.

The New York Police Department became known for its “Broken Window Policing” policy—a concept in which officers are tasked with policing every move and every minor infraction (investigating every broken window), thereby preventing larger or more serious infractions. This theory suggests that the more police presence that exists on every corner and in every public venue, the less likely citizens will engage in serious crime.

Although violent crime in New York has dropped dramatically since the inception of the program (which may have resulted from a myriad other factors), the policy itself has critics, many suggesting that policing every minor infraction is both a waste of police resources and an infringement on the day-to-day liberty interests of society. This concept did not originate with the NYPD, and the skeptics may have a point.

It was during the Prohibition Era of the 1920s that police were reassigned to a new pursuit—the investigation of any and all illegal alcohol-related infractions, including the arrest of bootleggers, moonshiners, speakeasy owners, and even the patrons of alcohol consumption themselves. Shortly into this new order of policing, communities began to see violent crimes increase as much as 246%. South Carolina, which enforced prohibition
to the maximum extent of the law, experienced an increase in homicides of 45%. The bottom line was that police, while distracted by chasing rum-runners, neglected more serious investigations.

As mobsters began to prosper during Prohibition, bad guys had larger and more lethal arsenals that included “Tommy Guns” and explosives. Police were tasked with meeting this call with equal, if not greater force. A demand for warlike weaponry on the streets of America began to grow, and police forces, for the first time, began to resemble warriors.

Shortly after World War II, Los Angeles Police Chief William Parker was described by University of Georgia’s associate professor of history Stephen Mihm in his book, Policing, as “the archetype of a new culture of policing.” Mihm depicts Parker as a police chief who “de-spised community policing.” Parker believed that officers should not live in the same district or neighborhood that they are assigned to protect. Parker suggested that neighborhood ties to police would lead to corruption.

After the Watts riots in 1965, Parker’s successor, Darryl Gates, took the concept of an impenetrable police force to a new level by enrolling his officers into “counter-insurgency” tactical training with the Marine Corps. It was Gates who created the very first “Special Weapons And Tactics Team” (“SWAT”), recruiting sharp-shooters, marksmen, and explosives experts from the veteran pools of the Vietnam and Korean wars. His officers were skilled in concealment, ambush, night operations, infiltration, and guerilla warfare, none of which had ever previously entered into civilian police training. SWAT raids grew from 3,000 in 1980 to 50,000 by 2014 and upward of 85,000 today.

By 1968, these military-style tactics eventually morphed into the “Model Civil Disturbance Plan” followed by the “Senior Officer Civil Disturbance Orientation Course” (“SEADOC”), both designed to contain civilian populations en masse. To further support these initiatives, the “law and order” faction of Congress enacted the Law Enforcement Assistance Administration (“LEAA”), which facilitated the transfer of military equipment to civilian police departments. Equipment began to arrive in local precincts that included helicopters, body armor, armored vehicles, and military-grade weapons and explosives. In 1971, the first “no-knock” raids were introduced as an effective tactic to intimidate drug traffickers during Nixon’s War on Drugs.

The term “Warrior Cop” was first introduced by journalist Radley, who described a new era of policing that would give our peacekeepers and guardians a new and intimidating image. In 1981, Congress expanded LEAA under the “Military Cooperation with Civilian Law Enforcement Act” enabling police departments to access expanded military tactical equipment as the War on Crime grew.

Since 1990, it is estimated that $5.1 billion in military equipment has been shared with police departments throughout the country, including, armored vehicles, military-grade equipment, weapons, and explosives, yet less than one third of that equipment has ever been utilized on the street, according to Brian O’Neill of the Pittsburgh Post-Gazette. He reports that three New Hampshire towns, less than 30 miles apart, were each granted armored personnel carriers.

To qualify for one of the vehicles, the town of Keen described a need to protect its annual pumpkin festival as a possible terrorist target. O’Neill notes that police are able to purchase bayonets (just in case) at $25.69 per blade and, if the need arises, a mine-resistant tactical vehicle at the sweetheart deal of $733,000.
In 1997, Congress introduced the first version of the “National Defense Authorization Act,” better known as “Program 1033,” updated again after 9/11 which, according to Mihm, expanded the availability and access of tactical military equipment to police precincts by permitting those departments to qualify as approved para-military units, eligible for everything from attack helicopters to tanks. You just never know when you might need a shoulder-to-air rocket launcher while patrolling America’s streets.

The security arm of the Los Angeles County School District received a grenade launcher from military surplus but was eventually pressured by board members to return the equipment.

Another addition to police expansion of power came in the form of an initiative known as, “Civil Asset Forfeiture” (“CAF”). Under CAF, police have the right to seize money and property from suspected criminals without a conviction or even an arrest. This is essentially “legal theft by police.” What began as an opportunity for police to seize the home of a young drug dealer’s grandmother who happened to learn that her grandson was selling drugs out of her game room downstairs grew into a multi-billion dollar money and property grab. Some examples of seized assets include a $5 million helicopter now owned free of charge by the L.A. Police Department, a $1 million mobile command bus commandeered by the Prince George County, Maryland Sheriff’s Office, and $227,000 in cash for the purchase of a new tank by the Douglasville, Georgia, police.

**A Culture of Social Dominate**

By all accounts and metrics, the U.S. is a violent society and has been one from its beginnings in revolt and upheaval. There are serial killers of all kinds, mass shooters, young White supremacists—think Dylan Roof who slaughtered people in a church in Charleston while they prayed. There are those who kill for greed, those who kill for sport, and those who kill for no good reason. The U.S. has maintained a sociopathic streak throughout its history. An innate ability to kill without conscience in the name of a cause—a cause often blindly followed and wholly misunderstood. We are seemingly always on the edge of chaos, held together by frail filaments of social connection and economic interest. In a free, pluralistic society, what emerges is not just the best of human impulses but also the absolute worst.

We look to police to provide a sense of public safety. But what happens when police become a mirror of our foibles, acting only as our sentries, as our “perimeter guards”—a term affectionately given by Attorney General William Barr to his riot police tasked with clearing Lafayette Park for President Trump’s photo-op. What happens when policing is co-opted and corrupted by the system and by the very society it has been tasked to protect?

**Dominance Now a Global Epidemic**

Modern global societies, whether capitalist-democratic or authoritarian, are vast pyramid hierarchies where power and control flow top-down. The U.S. Constitution was a noble rational-minded attempt to diffuse this typical model of social order, to distribute power through a web of checks and balances. Yet, since its conception, consequent generations have done everything they could to disable it and return society to more pragmatic territory. It took more than a hundred years after the founding of the Republic to reclaim a sense of moral justice, at least on paper; it took another hundred years to inspire the civil rights movement. Six more decades have elapsed, and the issue of racial equality is still in dispute. And that is just a small part of the larger problem. As we attempt to move back to a culture of social justice, we venture farther away.

America, as a culture, is driven by social dominance. America is also the incarceration capital of the world. There are now 2.2 million people behind bars in the United States and another 4.5 million on some form of active custody. We all know the statistic—America has 5% of the global population yet holds 25% of all the prisoners worldwide. As if that was not enough, our courts continue to sentence people to lengthy, draconian sentences that destroy the lives of individuals and their families socially and economically—and all while providing virtually no rehabilitative process. We are aware of the successful penal systems of the Netherlands, yet we fail to appreciate the judicial practice of “sealing” felony records upon release in order to give a former prisoner the opportunity to truly start anew. We replaced rehabilitation with retribution. It seems that no amount of racial diversity or sensitivity training or integration can overcome the failure of a system based on dominance and subservience. These systems will invariably mirror the social hierarchy of the society in question. That’s why the protests in the U.S. have now moved onto a global stage. Nations everywhere are demanding change—a return to social justice. Much like that which we observed during the Arab Spring, their citizenry was awakened through a common goal—to restructure their own toxic hierarchies.

We are seeing a mirror of our own power struggles within the political and authoritarian societies of other nations around the world, like us, each seemingly propelled toward a system of social dominance. Nation-states such as Brazil, Indonesia, or our neighbor to the south, Mexico, have experienced their own “George Floyd moment.”

Protests flared up in Brazil’s Rio De Janeiro where police forces were granted absolute impunity alongside a militarized presence, which killed 1,810 citizens last year, mostly poor. Three out of four were Black.

Most of the dead, according to Brazilian police, were gunned from the “favelas,” the shanty towns of the poor, destitute, and homeless.

Populist President Jair Bolsonaro has...
vowed to “kill criminals like roaches” and has outfitted police with helicopters, assembled as riot-clad “goon squads” tasked with conducting deadly botched raids, and ordered to kill innocent bystanders with no consequences—a form of law enforcement he may have perfected by observing the Philippine “death squads” under Duarte.

In Indonesia, the banner of Black Lives Matter (transformed into “Papuan Lives Matter”) was unfurled in reaction to the oppression of Papuans whose skin is darker than that of other Indonesians. In 2019, a Papuan student dormitory was besieged by a racist mob calling the inhabitants “monkeys.” Rather than dispersing the mob, police forces “stormed the dorm with tear gas and arrested 43 Papuans,” The Economist reported.

In Mexico, in the State of Guadalajara on June 4 this year, citizens took to the streets to protest the death of Giovanni Lopez, killed in police custody. The protests forced an arrest and provoked murder charges against three officers involved. Although the outcome of the case against the authorities has not yet been determined, it is a pattern beginning to be observed around the world in Western and developed countries. Territorial nation-states such as Hong Kong will likely continue to challenge oppression and police brutality that has recently reemerged—the return of thousands of years of Chinese authoritarian rule.

While there has been sporadic unrest in various cities throughout the world at different times and for various reasons, the perfect storm of global unrest triggered by George Floyd’s death is, by all accounts, unprecedented—a true zeitgeist of rebellion.

The Struggle Between Black and Blue

Power and control, the human need for them, are pervasive. Social psychologist Felicia Pratto defines “Social Dominance Theory” as “a basic idea [in which] the persistence of social inequality derives in part from people’s endorsement of hierarchy-promoting ideologies.” Today, we have an insatiable hunger for authority, the need to be in charge, in control, to stand out, to feel important, to express a sense of dominance, and to have one’s voice be the loudest. We now swim in a sea of selfies and social media where everyone is attempting to make a splash while everyone else is just below the surface attempting to make their own. As we drift further out into this sea of anonymity, our personal desire and the desire of institutions is to cling desperately to social dominance.

This instinct drives policing. At its core, policing is about exerting power and control, dominating, imposing the rules. Current police training is driven by this maxim. An officer must be in control of a situation at all times. Anything else may be perceived as weakness, as a betrayal of duty. In his mission of “keeping the peace,” an officer’s duty often becomes distorted, driving him to immediately resist all imposing actors or to disable or eliminate any existential threat. It is a Dirty Harry-style of public safety that Americans have grown to expect.

One possible solution that has already been largely implemented is the integration of police forces. Today, about 75% of all police officers are White. In the Harvard Law Review, authors Devon W. Corbado and L. Song Richardson look at the way the integration process allows police departments to undertake an internal review and investigation. The authors point to integration concepts described in James Forman’s book, Locking Up Our Own: Crime And Punishment In Black America (Farrar, Giroux and Straus, 2017). “Across

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

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This effort is part of the Human Rights Defense Center’s Stop Prison Profiteering campaign, aimed at exposing business practices that result in money being diverted away from the friends and family members of prisoners.
the ideological spectrum,” the author states, “people have had to engage the question of whether, especially in the context of policing, it’s fair to say that Black lives are undervalued.... The emergence of Black Lives Matter movements have made it virtually impossible to be a bystander in the debate.”

In their analysis of Forman’s work, Corbado and Richardson highlight the conflictive role of facing integrated minority officers in their jobs. There is the “Black” line, and then there is the “Blue” line. Black officers walk a tightrope when attempting to balance both. On one side, while on street patrol, they face criticism and attack from members of their own race—often referred to as “Uncle Toms” or “Sell-outs.” On the other side, they face the possibility of being accused by fellow officers of lenience or favoritism when dealing with Black suspects. Yet, Black officers are equally subject to the prevailing tensions and dangers that are inherent on the job.

Police are often first respondents to extreme situations that call for quick thinking, not unlike what is often referred to by soldiers as “the fog of war,” where split-second decisions, control and command, and life-altering imperatives define the difference between success and failure—between life and death. Domestic violence calls have been known by officers to involve the greatest risk and volatility, yet recent protests, such as those demanding “defunding” police reforms in San Francisco and Seattle, are also calling for specialized responders rather than police. A domestic violence call, they suggest, would be replaced by a domestic mediator such as a technology to incorporate the best of both. Similar to the process undertaken by first responder paramedics when communicating in real-time with emergency physicians, social workers could appear on a small screen just below the officer’s body cam, thus incorporating officer control with the assistance of mediation. Technology has found its way into nearly every aspect of modern-day policing, some for the good and the others not so much.

Robocops of Tomorrow

Interestingly, only 18% of cops actually wear active body-cams. The mind reels at the thought of what may be undisclosed in the other 82% of encounters, interrogations, and arrests where no witness exists to share an alternate perspective. Technology will be the “game-changer” on both sides of tomorrow’s law and order.

Policing weaponry of the future is arriving daily from the secret laboratories of the Defense Advanced Research Projects Agency, which includes technologies that are assigned “Classified” status. Police will now have access to a form of ray gun that directs a microwave at a suspect and interferes with brainwave activity. Another weapon expands the capability of the Taser for crowd control through a wide-angle spray from a Taser shotgun. In addition, there are multiple acoustic and energy-directed weapons that emit an invisible but deadly deterrent.

Of course, there have been multiple civil actions directed at police departments, citing Fourth Amendment privacy complaints. Today, we see police forces, such as that of the City of Baltimore, flying autonomous drones over the metropolitan area and recording every waking movement of its citizenry in a 24/7 surveillance. Police also are able to utilize heat-sensing thermal imaging to now peer behind the wall of a residence in order to assess the number of party-goers that may be in violation of COVID-19 social distancing restrictions—a high-tech version of “stop and frisk.” GPS has given cops an edge by reviewing phone logs to determine exactly where a suspect may have traveled. The problem exists when investigators begin to review phone logs in an attempt to discover crimes where no suspicion of a crime had previously existed.

David McGuire, executive director of the ACLU, Connecticut suggests, “The biggest red flag for the ACLU is when the use of technology [leads] to arrest.” And Supreme Court Justice Sonia Sotomayor warns, “GPS monitoring ... may alter the relationship between citizens and government in a way that is inimical to a democratic society.”

The Constitution Project estimates that there are more than 30 million security cameras watching our every move. Big Brother’s eye in the sky and elsewhere could significantly intensify law enforcement’s vigilance and its thirst for control over the masses. Where will it stop?

Citizens’ rights groups have been fighting back. The latest apps include a tracking capability that places protesters one step ahead of the anti-protest enforcers. The app, “Citizen,” which scans police communications, has soared in downloads over the previous month by 633%, and the app “Signal” provides protesters with encrypted messaging allowing them to communicate protest strategies without police eavesdropping. Life on the streets has become a high-tech game of cat and mouse.

Social Dominance Orientation

The ideology that informs the training of police to react in such situations is referred to as “Social Dominance Orientation (’SDO’).” *Harvard Law Review,* as part of an extensive study on policing, introduced the concept of SDO in a 2018 White paper titled “Locking Up Our Own.” As part of the study, the authors offered their theory on the origin of this paradigm shift in culture. They write: “Although scholars typically describe SDO as an individual difference variable, empirical evidence suggests that it is also a group-based phenomenon.” In other words, where one is located in a particular social hierarchy partly determines one’s SDO. Members of high-status groups generally have a stronger SDO than members of low status groups. For example, men tend to have a higher SDO than women while Whites evidence a higher SDO than Blacks or Latinos. Similarly, police officers evidence a stronger SDO than civilians, even after controlling for a range of other characteristics such as gender, social class, age and educational background,” the study suggested. “In addition,” the study continued, “people’s SDO increases when their sense of relative status in society is threatened.” Finally, “Police cultures and training are fundamentally hierarchical.... The criminal justice system is itself hierarchically ordered ... suspects at the bottom, police officers somewhere in the middle, and judges on top.”

It is not difficult to see how SDO plays out in police confrontations with suspects, particularly when there exists an element of...
rational and/or economic tension or disparity. Police, White or minority, often develop an “us-versus-them” mentality in most public interactions. This is often apparent in the off-handed comments that are discovered on an officer’s personal Facebook page or over the radio with the intention of inciting a reaction from fellow officers. These superior or “top dog” attitudes are evident in many settings – as police prepare to engage in a raid, after successful busts, or in a prison setting where social dominance by guards often leads to bullying, humiliation, or outright aggression against a prisoner.

Police protocols and police training are often designed to engender a culture of social dominance. Training requires that officers take immediate command and control over every situation, and a failure to do so could send a message of vulnerability and weakness regardless of the situation. According to Harvard Business Review in their 2018 study “Policing,” the report suggests, “Although not as robust as that of White officers, Black officers typically evidence relatively high levels of SDO.”

There are serious problems with this social dominance principle, problems that go beyond individual implicit racial bias and which speak to the macro-level of social hierarchy or “top dog” status. In “Trust And Law Abidingness: A Proactive Model Of Social Regulation,” 81 B.U.L. Rev. 361 (2001) author Tom R. Tyler states: “By approaching people from a dominant perspective, police officers encourage resistance and defiance, create hostility and increase the likelihood that confrontation will escalate into struggles over dominance that are based on force.”

This is exactly how the Rayshard Brooks incident in a Wendy’s parking lot in Atlanta played out. The officer, thwarted in his attempt to restrict Brooks, and only after a peaceful and seemingly cordial interaction that lasted some forty-six minutes, was pushed to use deadly force after Brooks commandeered the officer’s Taser. Losing a weapon, psychologists suggest, is tantamount to a total loss of command and virility, an emasculation of sorts. Officers who rely on proper training and protocols, and who may lose composure and panic, often find themselves faced with a potentially lethal decision. At the moment Brooks snatched the Taser from the officer, SDO theorists suggest that the suspect challenged the social dominance of that officer, implicit racial bias then became a secondary component.

Even in the streets, police brutality was often directed at the media and likely as a condition of “social dominance.” As the world watched on live television, police aggressively grabbed and arrested CNN’s Omar Jimenez in a show of authority. Photo journalist Linda Tirado lost an eye when an officer aimed and fired a rubber bullet directly at her as she reported. Other journalists displaying obvious identification badges and camera crews were also the subject of police attacks. Australia Channel 7’s Amelia Brace and her cameraman, Tim Myers, were targeted during the Lafayette Park incident involving President Trump’s photo op. Myers was gut-punched and hit in the face by an officer knocking his camera to the ground, and both were shot with rubber bullets. Violently targeting and attacking the press would seem only to be an example of “force of power,” rather than “rule of law.”

Institutional Intervention

Post George Floyd and Rayshard Brooks, the first institutional step, and many thought it long overdue, was to charge the officers involved with murder. In the days that followed the incident in front of that now

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famous Minneapolis convenience store, cops who used excessive force against protesters were eventually suspended or removed from active duty. These are the first signals of true change motivated by public outrage. But can the momentum for real change be sustained?

Congress, in all its fallibility, has targeted policing for reform. The deeper hierarchical problems in the legal system however, are being ignored. Implicit racial bias is not the only issue. In fact, it may only be the tip of the iceberg, but lawmakers are zeroing in on this topic because it is political and popular. Another example is the flawed and impotent First Step Act legislation that places the onus of prison reform on the prison system itself rather than on the courts where the true power base resides. This legislation proposed by the Trump administration seemed to have been a rallying cry for votes but failed to accomplish any meaningful change in the grander scope of prison and sentencing reform.

As the Rev. Raphael Warnock noted on the eve of Rayshard Brooks’ funeral, “Wall Streeters and bankers gambled brazenly with millions of investors’ dollars, nearly destroyed the global economy in 2008, and plunged thousands into bankruptcy, joblessness and misery. They were let off by the courts and later even rewarded with hefty bonuses. George Floyd tried to pass a counterfeit $20 bill. Rayshard Brooks fell asleep in a take-out line at Wendy’s. Their punishment was death.” This commentary begs the question: Is the issue racism or shark-tank predatory capitalism, or is it an unfortunate mix of both?

America is beginning to realize that abusive policing is the inevitable gateway to mass incarceration. Both George Floyd and Rayshard Brooks were well acquainted with the system. Both had prison records. Brooks spoke about his experience in an online video he made in February as part of a post-conviction support meeting. His tone and his words are heartbreaking, eerily prophetic of his fate, especially when he describes how nearly impossible it is for felons to find their way back into a productive life or even a simple and peaceful one. Few will disagree that Brooks’ attempt to resist arrest was wrong, but few have given much thought to what Brooks was attempting to run from. After all, he initially offered peacefully and cooperatively to walk home or get a ride home, yet officers continued to prod and poke and push until Brooks was convinced he would surely face a return to prison or worse. He ended up with worse.

“This is much bigger than the police,” Warnock pointed out at Brooks’ funeral. “[Our legal] system cries out for renewal and reform.” His voice echoed through the historic Ebenezer Baptist Church in Atlanta from the very same pulpit behind which Martin Luther King, Jr., once held forth. It seems like the more things change, the more they stay the same. Warnock asked the congregation to consider why Brooks and Floyd had resisted arrest. The answer is easy. Both men were struggling to get by, struggling to stay above water and out of the fray. Confronted with an uncaring and punitive system and a brand of policing that cares nothing for the immediate results of its actions, but merely fulfills a bureaucratic, soul-less function, the human impulse in both of these incidents was to struggle, to run. This was the same impulse that drove slaves in the old South to flee North, to escape from dehumanization and punishment, an impulse that recurs in many of these botched confrontations. Whether the suspect is Black or White, challenging the SDO of the officer who seeks an arrest at any cost may result in a lethal outcome.

From Public Servant to Public Enemy
While eliminating chokeholds and other invasive and brutal techniques and denouncing processes like no-knock warrants and raids, stop and frisk laws, or investigatory detentions are a step in the right direction, we are only attacking the symptom rather than the disease. There is now movement in many communities to wholly defund the police—a radical solution. Others call for increased funding to go toward outlandish weaponry that should truly remain on the battlefield. Seattle’s mayor has taken an initial step by introducing an immediate budget cut exceeding $20 million. The real question here is whether we need to cut budgets or increase budgets for more extensive and appropriate training.

In a recent study by CNN, it was determined that barbers in North Carolina are required to complete 1,521 hours of training to earn a license, while police in that same state are required to complete only 620 hours. In Florida, interior designers can only be licensed after 1,760 hours of training, yet police in Florida need only 770 hours. And in Louisiana, a manicurist may practice after 500 hours of training, yet you can become a Louisiana police officer by completing a 360-hour course.

The city of Camden, New Jersey, took a different tack. In 2012, this city had the fifth highest murder rate. The following year, the city disbanded its 141-year-old police department. It restructured the demographic representation into a county-wide sheriff-style policing entity. It was able to then retain many of the original police officers but under a more localized representation. Camden is unique in that 93 percent of its population are minorities, according to Politico.com.

The result proved to be a success. Camden was able to eventually grow back a police force from 175 to 400 officers. New protocols were implemented for sensitivity training, de-escalation, and racial bias.

According to current Police Chief Scott Thompson, “An officer would no longer be an ‘arbitrary decider’ of what is right or wrong.” Scott goes on to suggest, “[They become] a facilitator and a convener.”

Former New Jersey Governor Chris Christie opined, “The most effective way to [change underlying principles] is to start over.” Their greatest tool for improvement involved an intensive review process in which watch commanders review body-cam footage alongside internal affairs and officers after every significant arrest.
The process seems to be working. In 2014, prior to the restructure, citizens in Camden filed 65 excessive-force complaints; last year there were only three.

Another crucial aspect of policing reform that must be addressed is the immense power of police unions. In many communities, these powerful unions overprotect officers who violate procedural protocols. They supply high-priced lawyers after violent incidents and generally act as an impregnable shield to keep officers from suspension, dismissal, or prison. American society seems to be addicted to heavy-handed policing. This is a danger to a nation founded on personal freedom and personal responsibility. It threatens the very fabric of the Constitution. As the Rev. Warnock stated at Rayshard Brooks’ funeral, echoing the words of Martin Luther King, Jr., “We’re tied in a single garment of destiny.” All races, all ethnicities, and all people of every creed, religion, or sexual orientation make the U.S. a truly pluralistic society. Our attempt to morally and ideologically homogenize it will come to failure.

In these unsettled times, we are tempted to reduce our problems to simple explanations, to ascribe all the ills in our legal and policing systems to racism. We believe that renaming streets and buildings and tearing down monuments will change everything. But until we change our narrow view of ourselves, nothing crucial will change. It may be accurate, in exploring the history of policing for example, to better comprehend the roots of our current problems in the policing of previous centuries when one of the tasks of law officers was to track down runaway slaves or to keep people from voting or drinking. But these historic facts taken out of historical context do not fully explain the recent punitive mindset of our society. Nor do they consider the singular once-in-a-lifetime effect of a global pandemic. Nor do they present a comprehensive understanding of larger moral, religious, and economic factors. Many racial and ethnic groups have been exploited, dehumanized, and murdered throughout world history. To demonize America for what has been a historic human failure will not allow us to move forward. History cannot and should not be re-written, even in its brutal and ugly truth. It is all that we have upon which to learn, grow, and move forward.

The gathering of statistics, which shock and anger us, cannot be swept under the rug. Much like the proverbial frog in a slow-boiling pot, we as a society have permitted the system to turn up the heat of law enforcement by, say, three degrees each year over the previous 90 years. We now find ourselves 180 degrees from where the first began. The world of Andy of Mayberry and good cop “Joe Friday” seems long gone. We need to wake up to our present reality and begin to turn down the heat.

Some claim implicit racial bias, others decry militarization, and yet others point to a culture of violence and desensitization fostered by social media is the cause of our current policing predicament. Each is merely a symptom of a systemic cancer. We as a society are to blame. After all, we are the police, we are the courts, we are the laws. We are both the protesters and the system, and incredibly even under the siege of a deadly pandemic, we are still breathing.

With each breath, we may now begin to regain our composure, to renew our values, to resist our temptation for cliché solutions. We must abandon our personal agenda and seek a greater change that may benefit all individuals. In this way, we will honor the memory of George Floyd and all the countless victims of oppressive policing. Only then will we redirect our course from social dominance over some to social justice for all.

Michael Fortino is an acclaimed author and keynote speaker on Leadership and Change, having spoken before audiences as large as 14,000. Over his career, he appeared on the front page of The Wall Street Journal, USA Today, and in countless publications. Fortino was featured on Good Morning America and The Tonight Show, and he has interviewed two U.S. Presidents.


Sixth Circuit Vacates Firearms Possession Conviction; Government Showed Jury Unauthenticated Prejudicial Facebook Video Not Admitted as Evidence

by Matt Clarke

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

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

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

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

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

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

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

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

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

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

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

The Court observed that during deliberations “the jury’s only question was a request to see the rap video,” which prompted the Court to declare that it’s rare an appellate court has “such a clear indication that one specific piece of evidence likely influenced the jury.”

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

Tenth Circuit: Deputy ‘Trying to Help’ Doesn’t Make Search Permissible Under Community Caretaking Exception to Warrant Requirement

by Douglas Ankney

The U.S. Court of Appeals for the Tenth Circuit ruled that a deputy trying to help a woman retrieve her belongings by opening the lid to a camper did not make a subsequent warrantless search lawful under the community-caretaking exception to the warrant requirement.

Deputy Buddy Clinton and Sergeant John Wofford responded to a report of a verbal altercation between Jack DeWayne Neugin and his girlfriend, Julie Parrish, in a restaurant parking lot. When Clinton arrived, Neugin was sitting on the curb, and Parrish was inside the restaurant.

Clinton learned the couple’s pickup truck had broken down. He went inside the restaurant to help Parrish arrange a ride while Wofford stayed with Neugin. Parrish told Clinton she needed to retrieve her belongings, so he accompanied her to the truck. Without obtaining permission, Clinton opened the lid of the camper attached to the back of the truck. As he did so, he looked inside and saw “a large bucket containing several rounds of ammunition.” He asked who owned the ammunition, and Neugin said he had obtained it from a deceased family member. Clinton set the bucket aside while Parrish removed her items from the truck.

Clinton requested dispatch to run a
background check on Neugin and learned he was a felon. He asked Neugin if he had a firearm, and he replied no. Neugin then refused to give Clinton permission to search the truck, explaining he had purchased the truck for Parrish. Clinton then asked Parrish whether Neugin had a firearm. She said he had a shotgun in the truck and that he had threatened her with it the previous evening. She then consented to a search of the truck.

Clinton found a shotgun in the truck and arrested Neugin. The truck was impounded and inventoried. Neugin was indicted for firearm and ammunition possession by a felon.

Neugin moved to suppress the evidence seized from the truck as fruit of an unlawful search. The U.S. District Court for the Eastern District of Oklahoma reasoned that Clinton acted as a "community caretaking" when he opened the camper, and therefore, the search was not unconstitutional. The district judge found that the ammunition was in plain view when the camper was opened and became subject to seizure when Clinton learned Neugin was a felon. When Clinton then heard about Neugin threatening Parrish with a shotgun and then saw the shotgun, he had authority to arrest Neugin and seize the evidence, according to the district court. Alternatively, the discovery of the evidence was inevitable because the truck was impounded and inventoried, the court concluded. Neugin pleaded guilty on the condition that he could appeal the district court's denial of his suppression motion.

The Tenth Circuit observed "[t]he Fourth Amendment protects people from unreasonable government searches of their 'persons, houses, papers, and effects.' One way a defendant may establish that the government conducted a search for Fourth Amendment purposes is to show both 'a subjective expectation of privacy in the object of the challenged intrusion' and society's 'willing[ness] to recognize that expectation as reasonable." California v. Ciraolo, 476 U.S. 207 (1986).

Reasonable searches require a warrant based on probable cause, and searches conducted without a warrant are per se unreasonable — subject to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347 (1967). While the defendant bears the burden of proving the Fourth Amendment was implicated, United States v. Hernandez, 847 F.3d 1257 (10th Cir. 2017), the government bears the burden of proving that the warrantless search was justified by one of the exceptions. United States v. Carbee, 27 F.3d 1493 (10th Cir. 1994). The "community-caretaking exception" is a recognized exception to the warrant requirement. Cady v. Dombrowski, 413 U.S. 433 (1973). This exception allows the government to introduce evidence obtained through searches that were "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id. Noninvestigatory searches of automobiles under the community caretaking function do not offend the Fourth Amendment, as long as the activities are warranted in terms of state law or sound police procedure, and are justified by concern for the safety of the general public. United States v. Lugo, 978 F.2d 631 (10th Cir. 1992).

The "exclusionary rule" provides that when the government obtains evidence through an unconstitutional search, the evidence is inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963). If an unlawful act or unlawfully obtained evidence leads to the discovery of additional evidence, that additional evidence is also inadmissible as "fruit of the poisonous tree." Id. But there are also exceptions to the exclusionary rule, one of which is the "inevitable discovery doctrine." United States v. White, 326 F.3d 1135 (10th Cir. 2003). The inevitable discovery doctrine permits the government to use unlawfully obtained evidence if the government can prove, by a preponderance of the evidence, that the evidence would have been discovered by lawful means wholly divorced from the unlawful search. Id. In determining whether the government has met its burden of proof, courts look at "demonstrated historical facts" and not speculative elements or what could have or might have occurred. Id.

In the instant case, Clinton's act of lifting the camper lid to help Parrish retrieve her belongings was indeed a search, the Court stated. Neugin had covered the bed of his pickup with a camper, hiding the contents from public view. As such, he had an expectation of privacy that society was willing to recognize. Clinton's act of lifting the lid to the camper was not "warranted in terms of state law or sound police procedure, and [was not] justified by concern for the safety of the general public." Clinton and Wofford could have stayed with Neugin while Parrish went to the truck by herself to retrieve her belongings. Consequently, the community-caretaking exception does not apply to Clinton's act of opening the camper, the Court concluded.

As such, the Court ruled that the search was unlawful, and thus, the evidence of the ammunition and shotgun were subject to the exclusionary rule as fruit of the poisonous tree. The Government argued that the evidence would have been inevitably discovered when the truck was impounded and inventoried. But the Court determined that the truck was impounded only after Neugin was arrested based on the unlawful search. Neugin's arrest was not wholly divorced from Clinton's unlawful activity, the Court explained. The Government had not shown that Clinton would have inevitably discovered the ammunition or shotgun by lawful means and then lawfully arrested Neugin. Without arrest, the truck would not have inevitably been impounded. The truck was in a parking lot, and Neugin could have called his own towing service or a mechanic. The Court pointed out that the Government cannot meet its burden of proof based on what might have or could have happened.

The Court concluded that Clinton unconstitutionally searched the truck when he opened the camper and looked inside. He exceeded any community-caretaking role, and the police would not have inevitably discovered the evidence absent the Fourth Amendment violation. Because Clinton's unlawful act caused the discovery of the ammunition and firearm, the evidence should have been suppressed as fruit of the poisonous tree.

Accordingly, the Court reversed. See: United States v. Neugin, 958 F.3d 924 (10th Cir. 2020).
Attacking the Guilty Plea: Establishing Prejudice in the Guilty Plea Context
by Dale Chappell

In my last column, we went over the general standard for showing ineffective assistance of counsel (“IAC”) in the guilty plea context under Strickland v. Washington, 466 U.S. 668 (1984).

In this column, we'll go over the showing required to establish prejudice in the different categories of IAC regarding guilty pleas.

There are three main categories of IAC in the guilty plea context: (1) bad advice to plead guilty, (2) bad advice to reject a plea offer, and (3) the failure to communicate a plea offer or option to plead. And under each category, the Strickland standard applies, but how to establish “prejudice” to meet that standard varies by category.

The purpose of this column is to help you understand how to meet Strickland’s prejudice standard for whichever category your claim falls under.

Bad Advice to Plead Guilty
By far, most IAC claims attacking the guilty plea will fall under the category where counsel’s bad advice induced the guilty plea. The prejudice showing required for this category of claims was announced by the U.S. Supreme Court in Hill v. Lockhart, 474 U.S. 52 (1985): “The defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”

Hill was the first Supreme Court case to apply Strickland in the guilty plea context (Strickland involved IAC during trial). The Court found that Hill hadn’t shown a reasonable probability of a different outcome (i.e., “prejudice”) because he never alleged he would’ve gone to trial had he received correct advice from his lawyer about his parole eligibility before pleading guilty.

Whether you need to show that you would’ve won at trial to show prejudice under Hill is another matter. The Supreme Court has recently clarified that success may have nothing to do with the decision to go to trial. In Lee v. United States, 137 S. Ct. 1958 (2017), the Court acknowledged that in some cases throwing a “Hail Mary” by going to trial might seem more rational than pleading guilty with a guaranteed losing outcome, like being deported. In Lee, the Court took yet another look at establishing prejudice after bad legal advice led to a guilty plea.

When Lee pleaded guilty, it all but guaranteed he would be deported. But by going to trial, he had the slim chance of an acquittal. The Government argued that Lee wouldn’t have gone to trial because he surely would have lost. But the Court countered that it would’ve been rational for Lee to go to trial: “But for his attorney’s incompetence, Lee would have known that accepting the plea agreement would have certainly led to deportation. Going to trial: almost certainly.” That “almost certainly” chance was enough to make it a rational choice for Lee to go to trial.

Calling the Hill prejudice inquiry “expanded” by Lee and several other Supreme Court cases applying Hill to guilty pleas, the Third Circuit summed up Hill’s standard this way: “The Hill inquiry did not involve examining the petitioner’s likelihood of success had he insisted on trial, but merely whether he would have gone to trial at all.” Velazquez v. Sapt Fayette SCI, 937 F.3d 151 (3d Cir. 2019).

The lesson is that chances of success at trial matter little if it’s the only rational option available. Success at trial is just one of several factors on whether you would have not pleaded guilty but instead “insisted on going to trial” to show prejudice under Hill.

Do you have to prove you would have gone to trial, instead of some other option, to establish prejudice under Hill? What if you could have negotiated a better plea deal or taken some other option? Courts have accepted other alternatives in order to establish prejudice under Hill. See, e.g., United States v. Swaby, 855 F.3d 233 (4th Cir. 2013) (“but for his counsel’s erroneous advice, he could have negotiated a different plea agreement”); Rodriguez-Penton v. United States, 905 F.3d 481 (6th Cir. 2018) (collecting cases).

Besides counsel’s bad advice, the government’s misconduct could also provide grounds to establish prejudice under Hill. In a case where the government purposely withheld “stunning” evidence favorable to the defense, the court concluded that, “absent this misconduct, there was a reasonable probability that the petitioner would not have pleaded guilty but, rather, would have rejected the proffered plea agreement and opted for trial.” Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006) (affirming grant of § 2255 motion).

Bad Advice to Reject Plea Offer
What if your lawyer told you to reject a favorable plea offer because you had a great defense and could win at trial, only to find out he was dead wrong? The Supreme Court addressed this situation in Lafler v. Cooper, 566 U.S. 156 (2012).

The Court explained that a few things have to happen to establish prejudice under Strickland in this category of IAC: (1) you have to show a “reasonable probability” you and the prosecutor would have reached an agreement, (2) the court would’ve accepted it, and (3) your conviction or sentence would have been less severe under the plea deal than what you received after losing by going to trial.

That’s a lot to show but not impossible. When you request your case file from your previous lawyer, ask for any emails and notes between the lawyer and the prosecutor that were part of plea negotiations. United States v. Strother, 509 Fed. Appx. 571 (8th Cir. 2013) (email is considered a formal offer). Next, research your state’s laws and rules on the court accepting a guilty plea (Federal Rule of Criminal Procedure 11 for federal prisoners) and use it as a guide to meet the second prong. Finally, contrast the huge sentence you got for going to trial with the little one the prosecutor offered under the deal you rejected, and there’s your claim in a nutshell.

One thing to keep in mind is that it’s not about whether your decision to reject the plea offer was knowing and voluntary, as some courts have tried to say, and it has nothing to do with whether you got a fair trial after rejecting the plea offer. The Supreme Court in Lafler already rejected this line of reasoning and instructed that Strickland’s IAC standard is the proper measuring tool for these types of claims.

A Failure to Communicate
So, what if your lawyer failed to tell you about a good plea offer, and you ended up taking a worse offer later, or you pleaded guilty openly without an agreement and got a longer sentence?
In *Missouri v. Frye*, 566 U.S. 134 (2012), the Supreme Court addressed this issue. The State argued that because Frye had no constitutional right to a plea offer from the prosecutor there was no constitutional violation when his lawyer neglected to tell him about a favorable offer. But the Court wasn't impressed. It explained that because guilty pleas are “so central” to the criminal justice system the Sixth Amendment right to counsel necessarily extends to “the plea-bargaining process.”

The Court therefore ruled that counsel has a “duty” to communicate all plea offers — even if he or she believes they were worthless. After all, the decision to plead guilty (or not) rests in your hands, not your lawyer’s.

The Court also clarified that whether the guilty plea Frye eventually did enter was knowing and voluntary was irrelevant. The focus of the inquiry, the Court said, is all about counsel’s actions in not advising him about the favorable plea offer. For you to establish prejudice for such a claim, you must show exactly the same three things as in *Lafler* (Lafler and Frye were decided the same day, and Lafler actually adopted Frye’s prejudice requirement).

In other cases where counsel has failed to advise of the option to plead guilty without a plea agreement — what’s called an open or “straight up” plea — courts have applied *Frye* to establish prejudice. *Miller v. United States*, 2015 U.S. Dist. LEXIS 1936 (M.D. Fla. 2015) (“the petitioner must show a reasonable probability that he would have actually taken advantage of that option” of the open plea, citing *Frye*).

### Relief in Federal Court for State Prisoners

State prisoners can take these claims to federal court after they’ve exhausted their state court postconviction remedies. Under 28 U.S.C. § 2254(d)(1), a state prisoner may file a habeas corpus petition in federal court if the state court’s denial resulted in a decision that is contrary to or involved an unreasonable application of established federal law. Since every Supreme Court case listed in this column is considered “clearly established federal law,” the state court’s decision applying any of them can be challenged in federal court under § 2254. *Rompilla v. Beard*, 545 U.S. 374 (2005) (explaining when state courts misapply established federal law for habeas corpus relief).

### Conclusion

Figuring out which category your IAC claim challenging your guilty plea falls under will greatly help you to focus your claim on the prejudice standard established by the Supreme Court for that category. And understanding the standard for your particular category will help you keep the court on track when the prosecutor tries to steer it off track in its response to your claims.

In my next column, we’ll examine the rules and laws on directly attacking a guilty plea. While many readers may be well beyond this point in their case, it will help you to understand what your lawyer should have done had he or she properly challenged your guilty plea at the appropriate time. This will help bolster your IAC claim challenging your guilty plea.

**Editor’s note:** This is the third column in a series on attacking the guilty plea.

**About the author:** Dale Chappell is a staff writer for *Criminal Legal News* and *Prison Legal News*. For over a decade, he has helped prisoners challenge their wrongful convictions and sentences, with dozens being released from prison. He is a member of the National Lawyers Guild and was a 20-year career firefighter before becoming an advocate for prisoners. He is the author of two books written in conjunction with attorney Brandon Sample: *Winning Cites: Section 2255*, A Handbook for Prisoners and Lawyers and *Winning Cites: Attacking the Guilty Plea*. Email info@brandonsample.com for more information on these books (prisoner emails accepted).

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**Report Finds NYPD Officers Accidentally Deploy Tasers 25% of the Time**

by Douglas Ankney

A recent report found that officers in the New York Police Department (“NYPD”) fired their Tasers 995 times in 2018. Of those incidents, 224 times the use of the Tasers was unintentional.

Retired NYPD Captain John Eterno, now director of graduate studies in criminal justice at Malloy College, was shocked by the number. “I could understand a few, but that’s a lot,” Eterno said. “It’s definitely a training issue.”

The annual NYPD report was released a day before the Civilian Complaint Review Board (“Board”) released a review of complaints regarding police Taser use between 2014 and 2017. The review found officers and executives received differing levels of training on how to use the devices.

The Board recommended that instruction to beat cops be equivalent to that received by their bosses. The Board also suggested police rely on de-escalation tactics rather than use of force—particularly with emotionally disturbed persons.

A spokesman for the NYPD said, “Our guiding principle, in all cases, is to use only a reasonable level of force necessary in any situation.” And on that note, NYPD data show that in 2017 a newer Taser, known as the X26P, was less effective and resulted in officers having to resort to lethal force more often. Discharges from older Taser models resulted in subjects continuing to resist and/or attack officers 25 percent of the time while the discharges from the X26P resulted in subjects fighting back 36 percent of the time.

According to Joseph Giacalone, a retired NYPD detective sergeant and adjunct professor at the John Jay College of Criminal Justice, ineffective Tasers pose safety concerns for officers and the public. It is suggested the newer model’s ineffectiveness is due to the model’s far lower maximum charge. And the reduced charge stems from lawsuits against Axon, the Taser’s manufacturer. But Axon countered that its own testing showed that innovations with the X-26P actually provided “increased effectiveness.”

Giacalone’s observations were perhaps best illustrated by the tragic 2019 event involving two NYPD officers and Kawaski Trawick. Trawick called the cops after being locked out of his apartment while cooking. The officers received a report from building security that Trawick was banging on the doors of his neighbors. When the officers encountered Trawick at his apartment in a supportive housing facility, they found him in his underwear clutching a stick and a kitchen knife. After Trawick refused multiple orders to drop his weapons, one officer fired his Taser. The electric charge knocked Trawick to the ground, but then he jumped to his feet and charged at the officers. An officer then shot Trawick four times with his gun, killing him.

Sources: nypost.com, gotamist.com
Fourth Circuit: IAC for Counsel’s Bad Advice That Open Plea Would Allow Appeal Denial of Motion to Suppress

by Dale Chappell

The U.S. Court of Appeals for the Fourth Circuit held on April 20, 2020, that counsel’s erroneous advice that an open guilty plea without a plea agreement would allow an appeal of the denial of a motion to suppress evidence amounted to ineffective assistance of counsel (“IAC”), where the defendant showed that the ability to appeal drove his decision to plead guilty.

After the U.S. District Court in Maryland denied Sheriff Akande’s motion to suppress the evidence in his bank fraud case, he pleaded guilty without a plea agreement (“open plea”). The district court held a hearing, advising Akande of the rights he was waiving by pleading guilty and accepted his plea. But before he was sentenced, Akande’s lawyer moved to withdraw his guilty plea, admitting on the record that she told Akande that if he pleaded openly, “he would be preserving all of his appellate rights.”

She conceded that this was “not a correct statement of the law.” In fact, he could only preserve his right to appeal the suppression motion denial if he entered a conditional plea allowing an appeal or if he went to trial.

Before the court could decide the motion to withdraw his guilty plea, Akande’s lawyer withdrew from the case, and he was appointed new counsel — who withdrew his motion to withdraw his guilty plea. He was sentenced to just over 16 months in prison, and the Fourth Circuit affirmed his conviction on direct appeal. Akande then filed a motion to vacate his conviction under 28 U.S.C. § 2255, claiming IAC in his decision to plead guilty. Without holding a hearing, the district court denied the motion, but the Fourth Circuit granted a certificate of appealability to hear the appeal.

The question before the Fourth Circuit was whether counsel’s bad advice to plead guilty “prejudiced” Akande under Strickland v. Washington, 466 U.S. 668 (1984). The law was established long ago by the U.S. Supreme Court in T ollett v. Henderson, 411 U.S. 258 (1973), that a guilty plea waives most plea errors, including failed challenges to the evidence. To show prejudice, Akande had to show that “he would not have pleaded guilty and would have instead insisted on going to trial.” Lee v. United States, 137 S. Ct. 1958 (2017). This did not mean he had to prove he would have won at trial but only that it would have been “rational” in light of the facts.

The Government argued that even if Akande could have appealed the denial of the suppression motion, he would have lost, and therefore, there could be no prejudice. But the Court rejected this, citing Garza v. Idaho, 139 S. Ct. 738 (2019), which held that it is the right to appeal that counts, not the viability (or likelihood of success) of the appeal, when it comes to assessing IAC.

The Government also argued that the district court’s guilty plea hearing cured any errors by counsel. At the hearing, the district court told Akande that he was waiving his right to appeal: “If you were found guilty after that trial, you have the right to complain about any mistakes that might have been made before or during that trial.... But by pleading guilty, you, in essence, are giving up your right to complain about the conviction.”

While a judge’s comments at the plea hearing can cure any bad advice by counsel, the Fourth Circuit reiterated its rule that “the district court’s admonitions must be sufficiently clear and specific” to correct counsel’s error. The Court found that the district court’s warnings to Akande “were too general to cure plea counsel’s misadvice.” Akande could not have been expected to understand that the suppression ruling would fall under the term “any mistakes that might have been made before or during trial.”

The Court found Akande established prejudice because his claim that his right to appeal was the most important factor for him was corroborated by plea counsel’s testimony at the plea withdrawal hearing. This “clear and contemporaneous evidence,” the Court said, met the Lee standard in establishing prejudice for such an error. “Had counsel accurately advised Akande that he could maintain his appellate rights only by proceeding to trial, it would have been entirely rational for him to do so.”

Accordingly, the Court reversed the denial of Akande’s § 2255 motion and remanded to the district court. See: United States v. Akande, 956 F.3d 257 (4th Cir. 2020).

California Supreme Court: § 459.5(b) Prohibits Charging Shoplifting and Theft for Same Property

by Douglas Ankney

The Supreme Court of California held that California Penal Code § 459.5(b) prohibits charging both shoplifting and theft for the same property, even in the alternative.

Anthony Lopez exited a Walmart pushing a cart containing merchandise valued at $496.37. An asset protection officer confronted him, and Lopez admitted he had not paid for the items. Lopez later told police that he had gone to Walmart with $5 to purchase a few items and had no intention of stealing anything. But once inside the store, he decided he needed money and placed the items in his cart and left without paying for them. The prosecutor filed a complaint charging Lopez with felony shoplifting under § 459.5(a) but amended the complaint to add a charge of petty theft with priors under § 484(a) and § 666. Lopez’s attorney did not demur to, or otherwise object to, the amended complaint.

At Lopez’s trial, the jury submitted a note stating “split on the decision for shoplifting, based on intent.” The jury found Lopez guilty of petty theft, but the court declared a mistrial on the shoplifting charge and dismissed it on the motion of the prosecutor. In a bench trial, the court found true all the alleged priors.

Lopez appealed, arguing § 459.5(b) prohibited charging him with both shoplifting and theft for the same property. He also argued his attorney was ineffective for failing to demur to, or otherwise object to, the amended complaint. The Attorney General responded that the prosecutor had violated § 459.5(b) by charging shoplifting and theft in the conjunctive, but the claim had been forfeited. As to the ineffective counsel claim, the Attorney

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General contended that Lopez didn’t suffer any prejudice by his attorney’s failure to object because § 459.5(b) would have permitted the prosecutor to respond to the objection by amending the complaint to charge shoplifting and theft in the alternative, which would have resulted in the same conviction. The Court of Appeal agreed with the Attorney General and affirmed. The California Supreme Court granted Lopez’s petition for review.

The Court observed that in 2014 California voters passed Proposition 47 to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.” People v. Gonzales, 392 P.3d 437 (Cal. 2017). Proposition 47 added § 459.5 to the Penal Code to separate the new offense of ‘shoplifting’ from burglary. People v. Martinez, 413 P.3d 1125 (Cal. 2018). If a person enters a commercial establishment that is open during regular business hours with the intent to commit larceny and the value of the property taken or intended to be taken is worth $950 or less, it is now “shoplifting,” but “[a]ny other entry into a commercial establishment with intent to commit larceny” continues to be second degree burglary § 459.5(a). But entering a commercial establishment and taking another’s property without consent with the intent to permanently deprive the owner of the property is also theft. § 484(a). Because a single course of conduct may constitute shoplifting, theft, and burglary, the voters limited the prosecutor’s charging discretion in § 459.5(b), which provides that: “Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”

The Court of Appeal concluded that a prosecutor who choose to charge both shoplifting and theft in the alternative could do so. The Court of Appeal had concluded that a literal reading of the statute would lead to an absurd result. That is, if the evidence were sufficient to support a conviction for both shoplifting and theft, the jury would have to choose between the two. The statute expressly prohibits charging theft and shoplifting for taking the same property. Petty theft is a lesser included offense if there is substantial evidence from which a jury could conclude the defendant committed the lesser offense but not the charged offense. People v. Smith, 303 P.3d 368 (Cal. 2013). Petty theft is a lesser included offense of shoplifting because it requires the same proof as shoplifting minus the intent element. People v. Shockley, 314 P.3d 798 (Cal. 2013). If a prosecutor charged only shoplifting, but the evidence did not convince the jury that the intent to steal was formed before entering a store, the defendant could get away with stealing the merchandise because the prosecutor was prohibited from charging him with theft. The statute requires the prosecutor to charge only shoplifting, and shoplifting requires the proof of formation of the intent to commit larceny before entering the commercial establishment. Therefore, the Court of Appeal concluded that a prosecutor could charge both shoplifting and theft in the alternative for theft of the same property.

But the Supreme Court rejected this conclusion. The statute expressly prohibits charging theft and shoplifting for taking the same property. That prohibition includes charging theft in the alternative. The Court opined that a trial court has a sua sponte duty to instruct the jury on any “uncharged” lesser included offense if there is substantial evidence from which a jury could conclude the defendant committed the lesser offense but not the charged offense. People v. Lopez, 462 P.3d 499 (Cal. 2020).
**Massachusetts Supreme Judicial Court: GPS Monitoring Unreasonable When It Doesn’t Further Any Governmental Interest**

by Douglas Ankney

The Supreme Judicial Court of Massachusetts ruled that imposition of GPS monitoring as a condition of bail was an unreasonable search because the monitoring did not further any legitimate governmental interest.

In July 2015, Eric Norman was charged in Boston Municipal Court with possession of a Class B substance with intent to distribute. Two of the conditions of his pretrial release were that he was to stay out of Boston, and he was ordered to wear a GPS monitoring device. He signed a form consenting to the release to the government of coordinates and other data related to his physical location and that he understood if he violated the terms of his release he could be jailed.

Then in August 2015, a home invasion and robbery occurred at a residence in Medford. Without any information connecting Norman to the crime, police asked the probation office to check its electronic monitoring (“ELMO”) records to determine if anyone under GPS supervision was present at the crime. The police obtained neither a warrant nor a court order for the GPS location data. The stored data from ELMO identified Norman as being present when the crime was committed and that he went to a location in Everett shortly before and after the crime.

Police executed a search warrant at the Everett address and recovered inculpatory evidence against Norman. Police arrested Norman on charges that included armed robbery while masked.

Norman moved to suppress the GPS location data and its fruits, arguing that police acquisition of the data violated his rights under the Fourth Amendment of the U.S. Constitution and under art. 14 of the Massachusetts Declaration of Rights.

The judge granted the motion, finding that Norman had consented to the use of the GPS monitoring data only for enforcing the conditions of his release and not for general law enforcement purposes. The Commonwealth appealed.

The Supreme Judicial Court observed “a search in the constitutional sense occurs when the government's conduct intrudes on a person’s reasonable expectation of privacy.” Commonweal v. Augustine, 4 N.E.3d 846 (Mass. 2014). Even though probationers have a diminished expectation of privacy, GPS monitoring of a probationer is a search. Commonwealth v. Johnson, 119 N.E.3d 669 (Mass. 2019). A pretrial detainee has a greater expectation of privacy than does a probationer. Commonwealth v. Silva, 31 N.E.3d 1092 (Mass. 2015). Thus, the Court explained that GPS monitoring as a condition of Norman’s pretrial release was a search.

The Fourth Amendment and art. 14 prohibit unreasonable searches and seizures. Commonwealth v. Rodriguez, 37 N.E.3d 611 (Mass. 2015). The Court determines the reasonableness of a search by “balanc[ing] the intrusiveness of the police activities at issue against any legitimate governmental interests that these activities serve.” Id. When a judge orders GPS tracking, it is a highly intrusive “modern-day scarlet letter” that is physically tethered to the individual, reminding the public that the person has been charged with or convicted of a crime. Commonwealth v. Hanson H., 985 N.E.2d 1181 (Mass. 2013).

The municipal court judge imposed GPS monitoring as a condition of pretrial release or “bail.” But judges do not have inherent authority to impose pretrial conditions of release. The conditions of release must be permissible under G.L. c. 276, § 58, the applicable bail statute. And the purpose and goal of the statute is to permit conditions of release that will ensure a defendant appears in court.

Since imposition of GPS monitoring did nothing to ensure Norman would appear in court, it did not serve the purposes of the statutory scheme, the Court concluded. That is, the intrusive governmental activity did not further any legitimate governmental interests. Consequently, the search was unreasonable.

Accordingly, the Court affirmed, albeit on different grounds, the municipal court’s decision granting the motion to suppress. See: Commonwealth v. Norman, 142 N.E.3d 1 (Mass. 2020).

**D.C. Circuit Reverses Nearly 50-Year-Old Murder Conviction Over Faulty Hair Evidence**

by Dale Chappell

For the second time in the past year, the U.S. Court of Appeals for the D.C. Circuit overturned a decades-old murder conviction after the federal government admitted that it used faulty hair evidence to secure the conviction.

After almost 50 years of sitting in prison on a murder conviction, Dennis Butler was notified by the Government that the hair evidence it used at trial to convict him was faulty, and it agreed to waive any procedural defenses against allowing Butler to move for relief in the district court.

Butler was arrested in 1970 and charged with the murder of Jesse Mears in Northeast Washington, D.C. It was alleged that Butler had confessed to murdering Mears. James Hill and his girlfriend, Phyllis Gail Robinson, were drug users who bought drugs off Butler and would use drugs with him. Hill testified that Butler told him “he had just killed the rent man,” which Hill took to mean Mears. Hill then repeated the story to Robinson, who later recanted and said her testimony was a lie fueled by fear. Hill also later admitted that it wasn’t Butler who called him after the murder but rather he called Butler to buy some drugs.

There was also paint evidence entered by the prosecutor, which supposedly linked Butler to the scene of the crime, because the paint on his clothes matched the “base” type as that found at the crime scene. An expert testified that the paint at the apartment and on Butler’s clothes was all the same.

Not so much relying on its witnesses or the paint, the prosecutor told the jury in closing...
arguments that Butler’s hair and the ones found on Mears’ clothes, “they were the same in every microscopic detail, the same.” He said the expert testified that out of 10,000 examinations, he recalled “approximately four times” that he was wrong about hairs that matched under his analysis. The prosecutor got the conviction.

But in 2015, the Government reviewed Butler’s case as part of the largest postconviction review in history of convictions obtained using microscopic hair analysis. The National Academy of Sciences published a groundbreaking report in 2009, finding that “no scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population” and noted there were no scientific data to support the practice of microscopic hair analysis, which involves comparing two hair samples side-by-side to find their similarities.

Butler’s was one of the cases identified by the Government’s review, and it agreed to let him file a motion to vacate his conviction under 28 U.S.C. § 2255 all these years later. But the Government did not agree that Butler was entitled to relief; instead, it said it “took no position regarding the materiality of the error,” meaning that the court could still deny relief if it found that the hair evidence was not material in the determination of Butler’s guilt. On August 6, 2017, the district court denied Butler’s motion, finding that the hair evidence was not material and therefore did not violate his due process rights under the Constitution.

On appeal, the Government again conceded that the microscopic hair evidence was false and exceeded the limits of science. But it still maintained that the hair evidence was not material to Butler’s conviction.

The D.C. Circuit explained that it had held in a recent case decades-old false hair evidence, not unlike Butler’s, that the evidence was “material” because it “could in any reasonable likelihood have affected the judgment of the jury.” United States v. Ausby, 916 F.3d 1089 (D.C. Cir. 2019). This “reasonable likelihood” standard, the Court said, means that the false evidence “undermines the confidence in the verdict, which is ‘quite easily satisfied.’” [Writer’s note: John Ausby’s murder conviction based on false hair evidence was vacated in 2019, and the government sought to retry him. It eventually gave up and dropped the murder charge on January 9, 2020, and he was released the next day — almost 50 years after his conviction. United States v. Ausby, 2020 U.S. Dist. LEXIS 27973 (D.D.C. Feb. 19, 2020).]

The Government argued that Hill’s and Robinson’s testimonies were what convicted Butler, not the hair evidence. But during Butler’s direct appeal in 1973, the D.C. Circuit said the testimonies “presented a particular danger of unreliability” and “should have sufficed to put the jury on notice ... it should be weighed with caution.” But it was the hair evidence that negated the harmful effects of those shaky testimonies, the court noted.

Fast-forward more than 40 years, and the Government still wanted to use the “dangerous” testimonies of Hill and Robinson to keep the admittedly false hair evidence. “The government cannot in one breath concede the hair testimony’s falsity and in the next breath urge that the hair testimony was accurate after all,” the Court said on Butler’s § 2255 appeal. “Hair microscopic evidence offered powerful corroboration for Hill’s and Robinson’s testimony pointing to Butler as the perpetrator.” The Court found that the hair evidence was “material.”

Accordingly, the D.C. Circuit reversed the district court’s judgment and remanded with instructions to grant Butler’s motion to vacate his sentence pursuant to § 2255. See: United States v. Butler, 955 F.3d 1052 (D.C. Cir. 2020).
Minnesota Supreme Court: Non-Identifying Information About CI Must Be Disclosed Upon Request

by Anthony Accurso

The Supreme Court of the State of Minnesota affirmed a decision by the Court of Appeals, which held the district court erred in denying a defendant's request for non-identifying information about a confidential informant ("CI").

In February 2017, law enforcement filed an affidavit requesting a search warrant for the home of Tyler James Dexter. The affidavit claimed a CI had visited Dexter's home within the previous 72 hours and saw firearms and large quantities of marijuana. Police executed the warrant, found the marijuana and guns, and charged Dexter with fifth-degree possession of a controlled substance under Minn. Stat. Section 152.025, subd. 1(1).

Prior to trial, Dexter filed for information relating to the CI, both their identity and information about their relationship with police. The district court denied this information, citing the State's common-law privilege "to withhold from disclosure the identity of persons who furnish information" to law enforcement. See Roviaro v. United States, 353 U.S. 53 (1957).

Dexter then filed to suppress the evidence of the search on the grounds that the CI was an agent of the State and had search his property illegally. This motion was denied because Dexter lacked information on the CI's relationship with police, which had earlier been denied to him.

Dexter was convicted, but the Court of Appeals overturned his conviction on the grounds that the district court properly denied identifying information on the CI but erred in failing to disclose the non-identifying information. The State then appealed to the Minnesota Supreme Court.

The Court found that the State's common-law privilege is "limited by its underlying purpose." Roviaro. Further, when "the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." Id. Thus it held that the Court of Appeals properly concluded non-identifying information about the CI must be disclosed.

Minn. R. Crim. P. 9.01, subd. 1 states, "The prosecutor must, at the defense's request ... allow access ... to all matters within the prosecutor's possession or control that relate to the case, except as provided in Rule 9.01, subd. 3...." The State argued that the information requested did not "relate to the case," and thus Dexter had no right to it.

The Court disagreed. The Fourth Amendment protects against searches by the State but not those conducted by private persons. United States v. Jacobsen, 466 U.S. 109 (1984). However, if a private person acts as an agent of the State, then Fourth Amendment protections apply. State v. Buswell, 460 N.W.2d 614 (Minn. 1990). To determine whether a person acted as a government agent, courts must, on a case-by-case basis, consider "all the facts and circumstances relative to the search." Id. "It is only when the government takes some type of initiative or steps to promote the search, that a private citizen is deemed to be an agent or instrument of the government." Id.

The warrant application was vague about the CIs relationship to law enforcement. Dexter's motion had requested information about when the CI began working with the police, as well as the timing and content of his communications with the police. He also requested information about when the CI visited his home.

The Court determined that this information was directly related to the case as it would establish "whether the informant acted as a police agent and, if so, whether the informant entered Dexter's home in violation of the Fourth Amendment."

Finally, the Court sought to alleviate the State's concerns about the "slippery slope" of allowing information to be disseminated which might be used to identify the CI. The Court said district courts could conduct an in camera review to determine what information might be an issue to address the State's concerns.

Accordingly, the Court upheld the Court of Appeals' decision to vacate Dexter's conviction, grant his motion for non-identifying information on the CI, and allow him to file a renewed suppression motion based on any information obtained, should he choose to do so. See State v. Dexter, 941 N.W.2d 388 (Minn. 2020).

Michigan Supreme Court Announces Court Must Inform Defendant of Consecutive Sentencing Authority When Accepting Plea

by David M. Reutter

In a case of first impression, the Supreme Court of Michigan held that MCR 6.302(B)(2) requires the trial court, in cases where such advice is relevant, to advise a defendant of its discretionary consecutive-sentencing authority and possible consequences of that authority for defendant's sentence.

The Court's April 29, 2020, ruling was issued in an appeal brought by Kelly C. Warren. He drove while intoxicated in November 2014 and also did so the following summer. In each case, he was charged, among other crimes, with operating a vehicle while intoxicated, third offense (OWI-3rd). The prosecution gave notice of a sentence enhancement as a habitual offender — as a fourth-offense habitual offender.

Warren agreed to plead guilty to one count of OWI-3rd in each case in exchange for dismissal of the remaining charges and the habitual-offender enhancement. During the plea hearing, the trial court confirmed with the parties that each charge carried a five year maximum.

At no point did the court inform Warren that it had authority under MCL 768.7b(2)(a) to impose consecutive sentences. It ultimately sentenced him to consecutive two- to five-year prison terms because he had committed a felony while released on bond for another felony. Therefore, he was subject to a maximum of 10 years' imprisonment.

Warren moved to withdraw his plea based on the trial court's failure to advise him of the possibility of consecutive sentences. After that motion was denied, Warren sought leave to appeal in the Court of Appeals. That motion was denied, but the Michigan Supreme Court granted leave with directions for the appellate court to compare People v.
would not be eligible for parole until the
concerned informing a defendant he or she
cepting a guilty or no-contest plea.

Court to inform defendants of discretionary
...whether MCR 6.302(B)(2) requires a
solve the specific question in W arren's case,
remainder of his sentence.

of his parole status could subject him to the
did not moot the appeal because revocation
granted leave to appeal.

The Court noted W arren was released on
parole on January 7, 2020, but is under supervi-
vision until January 2021. His parole status
did not moot the appeal because revocation
of his parole status could subject him to the
remainder of his sentence.

It found that prior case law did not re-
solve the specific question in Warren's case, viz.,
whether MCR 6.302(B)(2) requires a
court to inform defendants of discretionary
consecutive-sentencing authority before ac-
cepting a guilty or no-contest plea. Johnson
concerned informing a defendant he or she
would not be eligible for parole until the
minimum sentence imposed by the court was
served, undiminished by allowance for good
time, special good time, or special parole. Blan-
ton required the court to inform a defendant of
"any mandatory minimum sentence required
by law" before accepting a plea.

The Court noted it must resolve the
question presented in the first instance. MCR
6.302(B)(2) requires that during a plea hear-
ing the trial court inform the defendant of the
"maximum possible prison sentence for the of-
fense." The Court found MCL 768.7b impacts
maximum sentence W arren faces. That
statute's effect "is to postpone the moment at
which sentencing for one or more subsequent
offenses will commence, and that the purpose
of the statute is to deter persons accused of one
crime from committing others by removing
the security of concurrent sentences should
conviction result on any or all of the crimes
so committed," explained the Court.

"In the fullest light of reality, defendant's
'maximum possible prison sentence' will be
determined by both the durations of the
sentences for each offense and their suscep-
tibility to consecutive sentencing," the Court
instructed. In effect, this "constitutes an en-
hanced punishment," according to the Court.

Thus, in order for the defendant "to fully
understand the consequences of a plea," the
defendant must be advised that the sentence
"for a subsequent offense to which he or she is
pleading guilty may not proceed immediately
but rather may be delayed," i.e., consecutive
sentences are possible, the Court concluded.

The Court further noted MCR 1.107 re-
quires that "words used in singular also apply
to the plural, where appropriate." Accordingly,
MCR 6.302(B)(2) can reasonably be read to
require trial courts to inform defendants of
"the maximum possible prison sentences for the
offenses."

The Court ruled "when a trial court
advises a defendant of his or her 'maximum
possible prison sentence' it must encompass
not only the 'maximum possible prison sen-
tence' for each individual 'offense' but also
the 'maximum possible prison sentence' for
the conviction of 'offenses' specifically as to
which the trial court possesses an authority
to impose consecutive sentences."

Accordingly, the Court reversed the
Court of Appeals' judgment and remanded to
the trial court to allow W arren to withdraw or
affirm the guilty plea. See: People v. W arren
The Supreme Judicial Court of the Commonwealth of Massachusetts ("SJC") upheld a superior court's order suppressing evidence obtained from a cellphone because the search of the cellphone was unsupported by probable cause, and the officer failed to follow guidelines relating to inventory of property.

Tomas Barillas was arrested in March 2017 on an outstanding warrant for three different criminal cases for larceny and drug offenses.

Lynn police had also received a tip that he was responsible for the fatal stabbing of Jason Arias. Lieutenant Thomas Reddy of the Lynn Police Department and Trooper Matthew Wilson of the Massachusetts State Police both participated in the arrest at the home of Barillas' parents, but it was Trooper Wilson who, upon arresting Barillas, patfrisked him and seized a cellphone from his pocket.

Barillas was transferred to the Lynn Police Department Station. Trooper Wilson kept the cellphone on his person instead of submitting it as part of the detainee's property, as was required by policy. Barillas' father, Eduardo, and his minor brother, James (a court pseudonym), were voluntarily interviewed while Barillas was being booked. James disclosed to Wilson that the cellphone belonged to him, not Barillas, and described its unique markings, including two scratches. Wilson asked for the code to unlock the phone, then confirmed the code provided did work. James and Eduardo were presented with a form to consent to a voluntary search of the phone, which they signed. Another officer conducted a "hand search" of the phone and found video of Barillas talking about the stabbing.

Prior to trial, Barillas moved to suppress evidence from the cellphone. The motion was granted, and the Commonwealth immediately sought interlocutory review, which was granted by the SJC.

First, the Court determined that the patfrisk and seizure of the cellphone were warranted. "A search incident to a custodial arrest is well established as an exception to the warrant requirement under both the Fourth Amendment and art. 14. Commonwealth v. Mauricio, 80 N.E.3d 318 (Mass. 2017). Mass. Gen. Laws ch. 276, §1, specifically limits a search incident to a lawful arrest to two types of property: "fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, ... [and] weapons that the arrestee might use to resist arrest or effect his escape."

However, in order to search the cellphone's contents, a warrant was needed. "Our answer to the question of what police must do before searching a cellphone seized incident to an arrest is accordingly simple — get a warrant." Riley v. California, 573 U.S. 373 (2014).

The Commonwealth argued that the cellphone was a weapon and thus subject to search and seizure under Mass. Gen. Laws ch. 276, § 1. The Court rejected this argument as being also clearly contradicted by Riley, which said search of a phone as a weapon is limited to "examination of the physical aspects of a phone ... say, to determine whether there is a razor blade hidden between the phone and its case."

As for how the phone was handled, the SJC has repeatedly upheld suppression orders where investigatory use is made of the items seized for inventory purposes. Mauricio. Under Commonwealth v. Vuthy Seng, 766 N.E.2d 492 (Mass. 2002), police may "retain in custody all items on the person" pursuant to a written policy for inventory but not investigatory purposes. Trooper Wilson did not deliver the cellphone to the booking officer as he should have done under the official policy, but he instead asked investigatory questions of James using the phone.

Quoting Mauricio, the Court concluded "the search exceeded the scope of and was inconsistent with the purposes underlying the inventory search exception to the warrant requirement, and is thus at odds with our law."

Accordingly, the Court affirmed the superior court's order granting Barillas' motion to suppress. See: Commonwealth v. Barillas, 140 N.E.3d 911 (Mass. 2020).

The U.S. Court of Appeals for the Seventh Circuit reversed the decision of the U.S. District Court for the Northern District of Illinois that denied Anthony Howell's motion to suppress, holding that police lacked reasonable suspicion to frisk him.

Chicago Police Officers Sean Kelly and Christopher Miller arrived at a warehouse in response to an anonymous 911 caller who reported that a Hispanic male wearing a black sweater and black hat and carrying a black bag was climbing under the fence surrounding a warehouse. The officers stopped Eric Escobar who was walking outside the warehouse in question and patted him down.

After the officers determined Escobar worked at the warehouse, Escobar noticed another person (later identified as Howell) walking toward the officers. Escobar suggested that Howell was the person the officers were looking for. Kelly called from across the street, "What's going on?"

Howell was a white male and wasn't carrying a bag. But according to Kelly, Howell did not answer. Instead, Howell "did a "quick double take," had "a look of panic on his face," and placed his hands in his pockets. Kelly approached Howell and immediately frisked him for weapons. Kelly felt a hard object in Howell's jacket pocket, and Howell pulled away. During an ensuing scuffle between Howell and Kelly, a .38 caliber revolver fell out of Howell's pocket.

Howell was charged with unlawful possession of a handgun by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He filed a pretrial motion to suppress the gun, arguing police violated his Fourth Amendment rights by stopping and frisking him without reasonably suspecting him of criminal activity. The district court denied the motion, finding that Kelly had reasonable suspicion to frisk Howell because: (1) Howell matched the caller's description "close enough" since he...
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was wearing a black jacket and dark hat; (2) Howell had refused to answer Kelly's question and did a quick double take; (3) and Howell put his hands in his pockets suggesting he was concealing something. Howell was convicted, and he appealed. One of his arguments was that the district court erred in denying his motion to suppress.

The Seventh Circuit observed that “[u]nder the Fourth Amendment, police may stop a person only if they have reasonable suspicion that he is engaged in criminal activity.” Terry v. Ohio, 392 U.S. 1 (1968). To determine if police had the requisite reasonable suspicion, courts examine the totality of the circumstances. Id. The reasonable suspicion must be based on specific, articulable facts that would justify an intrusion on the suspect's liberty and dignity. United States v. Street, 917 F.3d 586 (7th Cir. 2019). But a frisk — a limited pat down of a suspect's outer clothing to search for weapons — is permissible under the Fourth Amendment only if the officer can “point to specific and articulable facts” indicating “that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.” Terry.

Because a frisk is more intrusive than a stop, the Fourth Amendment compels the additional armed-and-dangerous inquiry. Terry. An anonymous tip giving a bare-bones description of a suspect's race, sex, and clothing and reporting a possible nonviolent crime without anyone being in imminent danger or any observation of a weapon is not likely to provide reasonable suspicion justifying a frisk. United States v. Watson, 900 F.3d 892 (7th Cir. 2018). Nor does looking nervous or remaining silent when faced with an officer’s questions. Illinois v. Wardlow, 528 U.S. 119 (2000).

The Court concluded that because Howell resembled the caller's description, Kelly had reasonable suspicion to stop him. But Kelly lacked any reasonable suspicion to frisk Howell. Howell's looking nervous, not responding to Kelly’s “[w]hat’s going on,” and putting his hands in his pockets did not give rise to a reasonable suspicion that he was armed and dangerous, the Court concluded.

The Court was “most concerned” by Kelly’s reaction in immediately commencing a pat down of Howell without asking any further questions, such as: “Where do you live?“ “Do you know anything about a burglary here?” or “Were you trying to climb under this fence?” Kelly responded to Howell in the same manner as he had responded upon meeting Escobar.

But frisks cannot be rote or reflexive — officers must make each decision to frisk based on reasonable suspicion determined by the totality of the circumstances, the Court reiterated. Kelly failed to do so, and thus the frisk violated Howell's Fourth Amendment rights.

Accordingly, the Court reversed the district court's denial of the motion to suppress and vacated his conviction for possession of the revolver. See: United States v. Howell, 2020 U.S. App. LEXIS 14142 (7th Cir. 2020).

FOIA Redaction Limbo: How Low They Will Go

by Ed Lyon

One of the things most free governments around the world have historically admired about the United States is its willingness to open its file cabinets many drawers to its citizens upon request. Since the passage of the Patriot Act that followed the Twin Towers' destruction on 9/11, however, that willingness to disclose information under the Freedom of Information Act (“FOIA”) by the government has become increasingly limited by congressional acts with whatever remains untouched steadily dwindling.

Journalist Emma Best has submitted enough FOIA requests that she is considered to be a “vexatious” requester, according to techdirt.com writer Tim Cushing. She has filed more than 1,600 FOIA requests with the FBI alone.

What the government often does is deny, dilute, and redact its responses in order to “secure the nation” and “protect the integrity of deliberative processes.”

AlphaBay was one of the many progenies of the dark web's Silk Road, a clandestine URL site where anything from firearms, identities, and narcotics had been bought and sold. A U.S. Department of Justice (“DOJ”) taskforce, combining elements of the DEA, FBI, and IRS, took down AlphaBay in 2017.

The DOJ issued a public statement about the operation and posted it online—just four paragraphs long and made openly and freely to the public.

Best submitted a FOIA request for the statement. The Secret Service responded, redacting the entire third paragraph after deeming it “too sensitive to be released to the public generally.”

In its entirety, that redacted paragraph reads: “This is likely one of the most important criminal investigations of the year – taking down the largest dark net marketplace in history,” said Attorney General Jeff Sessions. "Make no mistake, the forces of law and justice face a new challenge from the criminals and transnational criminal organizations who think they can commit their crimes with impunity using the dark net. The dark net is not a place to hide. The Department will continue to find, arrest, prosecute, convict, and incarcerate criminals, drug traffickers and their enablers wherever they are. We will use every tool we have to stop criminals from exploiting vulnerable people and sending so many Americans to an early grave. I believe that because of this operation, the American people are safer — safer from the threat of identity fraud and malware, and safer from deadly drugs.”

The reasoning behind the Secret Service decision to redact a statement like this defies logic. At worst, it places evidencers on notice of the DOJ’s resolve to put them out of business and in prison. If the U.S. Navy reasoned along those same inane lines, it would be ordering its submarines to be fitted with screen doors to keep its sailors cooler during their long undersea voyages. As for the Secret Service’s disingenuous redaction to Best’s FOIA request, she is pursuing an appeal.

Source: techdirt.com

Are Phone Companies Taking Money from You and Your Loved Ones?

HRDC and PLN are gathering information about the business practices of telephone companies that connect prisoners with their friends and family members on the outside.

Does the phone company at a jail or prison at which you have been incarcerated overcharge by disconnecting calls? Do they charge excessive fees to fund accounts? Do they take money left in the account if it is not used within a certain period of time?

We want details on the ways in which prison and jail phone companies take money from customers. Please contact us, or have the person whose money was taken contact us, by email or postal mail:

KMOSES@HUMANRIGHTSDEFENSECENTER.ORG

Prison Legal News
Addrs: Kathy Moses
PO Box 1151
Lake Worth, Florida 33460

Criminal Legal News
**U.S. District Court Chooses Judicial Remedy, Instead of § 2255, to Allow Out-of-Time Appeal**

by Dale Chappell

In an unusual move, the U.S. District Court for the Northern District of Texas rejected the typical remedy under 28 U.S.C. § 2255 and instead opted to grant a “judicial remedy” to allow an out-of-time appeal, where the Court found that counsel was ineffective for failing to file a direct appeal.

Perhaps one of the most common claims under § 2255 is ineffective assistance of counsel (“IAC”) for failing to file a requested appeal in a criminal case. That’s what Devonte Dillard claimed in his § 2255 motion, and that’s the claim the Court agreed deserved relief. But how the Court granted Dillard relief was not the way most other courts have typically done it.

Dillard pleaded guilty in 2016 to conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951 and to using a firearm in furtherance of that conspiracy under 18 U.S.C. § 924(c). He was then sentenced to 20 years in federal prison without parole, 10 years for the conspiracy and 10 years for the firearm, running consecutively. He did not appeal. Instead, Dillard moved for relief under § 2255 claiming that (1) his § 924(c) conviction was now unconstitutional in light of the U.S. Supreme Court’s decision in United States v. Davis, 139 S. Ct. 2319 (2019), and (2) that counsel was ineffective for failing to file an appeal.

As to the relief requested, Dillard argued that the Court should grant his motion with respect to the Davis claim by vacating his § 924(c) conviction and then reenter the sentencing judgment to allow him to take an out-of-time appeal. After conducting an evidentiary hearing and finding IAC, the magistrate judge filed a report and recommendation (“R&R”) that the district judge should grant Dillard’s appeal claim but dismiss without prejudice his firearm claim. Even though the R&R recommended granting his motion, Dillard still filed objections to the R&R, pushing for his alternative remedy.

The § 2255 Remedy to Allow an Out-of-Time Appeal

Under § 2255, if a court finds a sentence or conviction is unconstitutional, it shall vacate and set the judgment aside and shall [1] discharge the prisoner or [2] sentence him or [3] grant a new trial or [4] correct the sentence.

In United States v. West, 240 F.3d 456 (5th Cir. 2001), the court recognized that § 2255 does not expressly allow a court to vacate a judgment and then re-impose it to allow an appeal as a remedy; however, it also “is not prohibited by § 2255.” The court then clarified that a district court may fashion a § 2255 remedy to allow an out-of-time appeal by vacating the judgment, re-imposing the same judgment, and then dismissing all remaining claims in the motion without prejudice (to allow them to be raised again in a later motion). This § 2255 remedy is the most common method in nearly every court for granting an out-of-time appeal due to counsel’s failure to file a requested appeal.

**The “Judicial Remedy” to Allow an Out-of-Time Appeal**

The West Court also recognized another remedy, called the “judicial remedy,” whereby an out-of-time appeal may be granted but not by way of § 2255. It described the remedy this way: “Under the judicial remedy crafted in our circuit’s precedent, the same result can be reached by granting an out-of-time appeal and re-entering the criminal judgment as by vacating the judgment and resentencing” with the same sentence. In other words, it’s a judge-created remedy that has evolved through years of court decisions. The West Court explained that with this remedy, “a court must deny the statutory remedy [under § 2255], for it is inconsistent to ‘grant’ § 2255 in name, yet deny it in substance by refusing to apply the remedy it provides” under the four options in the statute.

**Application of the Judicial Rule in Dillard’s Case**

District Judge Sam Lindsay said he was “not convinced that granting [Dillard] relief under section 2255 is the best course of action.” Instead, he “modified” the R&R and agreed that a judicial remedy was the best resolution. First, he found that since the issue of whether Dillard’s § 924(c) conviction should be vacated was never addressed in the R&R, it exceeded the scope of the R&R. [Writer’s note: While the district judge may outright “reject” the R&R and address any issue in the motion, Judge Lindsay did not take this route.] Judge Lindsay then turned his attention to Dillard’s failure to appeal the claim.

For such a claim, the judge discussed the two remedies in West. After comparing the two, he reiterated that by granting § 2255 relief he would have had to choose one of the statutory remedies in § 2255. But with a judicial remedy, he could reenter the criminal judgment to allow the appeal and dismiss Dillard’s entire motion without prejudice.

**Dillard’s Appeal Waiver**

The Government had argued that Dillard’s appeal waiver in his plea agreement foreclosed the relief he was seeking in claim 1, i.e., that his firearm conviction should be vacated in light of Davis. The Government, however, conceded that he would be allowed to file an appeal despite his waiver and therefore agreed to relief on the appeal claim. While not expressly mentioned by the Government, its position aligns with the Supreme Court’s recent decision in Garza v. Idaho, 139 S. Ct. 738 (2019), which ruled that counsel may still be ineffective for failing to file an appeal, even with the existence of an appeal waiver.

After the appeal is filed, the Government may then choose to enforce the waiver on Dillard’s firearm claim, or it may choose to ignore the waiver and concede relief. The court of appeals may even find that Dillard is now “actually innocent” of his firearm conviction, as some courts have done in similar cases, and conclude that the waiver doesn’t apply under the “miscarriage of justice” exception. See, e.g., United States v. Reetz, 928 F.3d 630 (5th Cir. 2019) (finding § 924(c) claim not procedurally defaulted because defendant was “actually innocent of those charges under Davis”). Judge Lindsay chose to let the court of appeals decide that issue and declined to address Dillard’s appeal waiver.

**The Fifth Circuit’s Unusual Rule on Granting § 2255 Relief for an Out-of-Time Appeal**

The Court’s judicial remedy also prevented a sticky situation for Dillard, should he later file another § 2255 motion after his appeal. In the Fifth Circuit, claims dismissed without prejudice in a § 2255 motion granted to permit an out-of-time appeal may be raised in another motion filed after the appeal. But any new claims that could have been raised in
California Court of Appeal: Trial Court Abused Discretion Denying Compassionate Release Where Statutory Criteria Are Met

by Dale Chappell

The Court of Appeal of California, Fourth Appellate District, held on April 30, 2020, that the trial court abused its discretion when it denied a motion for compassionate release based upon considerations other than those set forth in Pen. Code § 1170, subd. (e).

The Department of Corrections and Rehabilitation found that Tony Flores Torres was terminally ill and deserved compassionate release, and the Board of Parole Hearings (“Board”) agreed.

With that support, Torres filed his motion in the trial court for compassionate release. The 76-year-old prisoner cited his battle with cancer, which has left him in a wheelchair and unable to move his head. Doctors for the Board confirmed he “does not retain the capacity to commit or influence others to commit criminal acts that endanger the public safety.” They also found he had less than six months to live. Both findings met the criteria for relief.

That was in April 2019. Four months later, the court denied his motion. It found that while Torres met the statutory criteria for compassionate release, as the Board suggested, he didn’t “deserve” release. The judge said he had discretion to deny relief and was doing so because Torres was a “brutal person,” Torres appealed.

The issue before the Court of Appeal was whether the trial court abused its discretion in denying compassionate release when Torres met the necessary criteria in the statute. A trial court abuses its discretion when it relies on improper considerations in granting or denying compassionate release. Under Pen. Code § 1170(e)(2), a prisoner is statutorily entitled to compassionate release if he (A) is terminally ill and has less than six months to live, and (B) he doesn’t “pose a threat to public safety.” When these criteria are met, the trial court “shall have the discretion” to grant relief.

The trial court here found the statutory language gave it discretion to deny Torres relief based on findings about his criminal history. But the Court of Appeal disagreed. It said that a trial court doesn’t have “unfettered” discretion to deny compassionate release under § 1170(e), if he qualifies under that statute.

The Court cited statutory interpretation rules, which requires a court to “promote” the purpose of a statute in its application of the law. Here, § 1170(e) was enacted, the Court said, “to save the state money by authorizing the release from prison those inmates who are terminally ill or permanently medically incapacitated and do not pose a threat to public safety.”

In one of its prior decisions, the Court had already ruled that the Board lacked discretion to deny compassionate release when a prisoner qualified under the statute. While the Board “may” recommend compassionate release under § 1170(e), the Court said it “must” do so if he qualifies under the statute. Martinez v. Board of Parole Hearings, 183 Cal. App. 4th 578 (2010). The same is true for trial courts, the Court of Appeal concluded.

The Legislature also decided which prisoners deserve compassionate release, the Court noted. It expressly forbade death sentences, life without parole, and convictions for killing law enforcement officers from compassionate release. “By excluding those inmates from receiving a compassionate release, the Legislature indicated that all other inmates are entitled to one as long as they satisfied section 1170, subdivision (e)’s criteria,” the Court explained. The “inclusion of one thing in a statute implies exclusion of the other.” In re Lance W., 694 P.2d 744 (Cal. 1985).

The Court concluded that “whether the inmate deserves to remain — and die — in prison as punishment for his or her offenses or behavior is improper.” It was undisputed that Torres met the statutory criteria for compassionate release, the Court said. The trial court denying him relief because he did not deserve it was improper, and the court therefore abused its discretion.

Accordingly, the Court reversed the trial court’s denial of compassionate release and remanded with instructions to enter an order granting Torres compassionate release. See: People v. Torres, 48 Cal. App. 5th 550 (2020).

Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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

Please contact Kathy Moses at kmoses@humanrightsdefensecenter.org, or call (561) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth Beach, FL 33460.
Colorado Supreme Court: Warrant Allowing General Search of Cellphone Unconstitutional Violation of Particularity Requirement

by Douglas Ankney

The Supreme Court of Colorado held that a warrant authorizing a general search of Pamela Kay Coke’s cellphone was overbroad and violated the Fourth Amendment’s particularity requirement.

Fifteen-year-old T.F. told police Coke had sexually assaulted him. T.F. gave officers his cellphone, which contained messages from “Pam” apologizing (without saying why) and asking T.F. to take a walk with her so they could talk. Two officers went to Coke’s office to speak with her. The officers explained that she was not under arrest and did not have to speak with them.

Coke responded that she had retained a lawyer, and she did not want to speak without her lawyer present. The officers also told Coke they were seizing her cellphone as possible evidence. They took the phone and obtained a warrant to search all texts, videos, pictures, contact lists, phone books, phone records, electronic data packets, and data showing ownership or possession on the cellphone. The ensuing search revealed that Coke’s phone was the source of the text messages on T.F.’s phone.

Before trial, Coke moved to suppress all evidence, including the evidence found on her phone. The trial court granted the motion, concluding, in pertinent part, that the search warrant was overbroad. The People appealed.

The Colorado Supreme Court observed “[t]he Fourth Amendment protects individuals against unreasonable searches and seizures.” The Fourth Amendment states, in pertinent part, that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” A search conducted pursuant to a warrant is typically reasonable. People v. Davis, 508 P.3d 266 (Colo. 2019).

However, “general warrants” that permit a “general, exploratory rummaging in a person’s belongings” are prohibited. Andreasen v. Maryland, 427 U.S. 463 (1976). To prevent general, exploratory searches, the Fourth Amendment requires a “particular description” of the things to be seized. Id. Because modern cellphones possess immense storage capacities, capable of collecting and storing many distinct types of data in one place, the Colorado Supreme Court had previously recognized that cellphones “hold for many Americans the privacies of life” and are entitled to special protections from searches. Davis. Additionally, a warrant authorizing the search of a cellphone simply for general indicia of ownership violates the Fourth Amendment’s particularity requirement. People v. Herrera, 357 P.3d 1227 (Colo. 2015).

The warrant in the instant case contained no particularity as to the alleged victim or time period during which the assault allegedly occurred. Instead, the warrant authorized a search of all texts, videos, pictures, contact lists, phone books, and phone records irrespective of when the files were created or stored and regardless to whom they were sent or from whom they were received. Furthermore, the warrant authorized a search for general indicia of ownership. The Court concluded that such broad authorization violated the particularity requirement demanded by the Fourth Amendment and was thus unreasonable. Davis. And “[t]he principal means of effectuating the [particularity] requirement is to suppress all evidence seized pursuant to an overbroad, general warrant.” People v. Roccaforte, 919 P.2d 802 (Colo. 1996).

Accordingly, the Court affirmed the trial court’s order suppressing the contents of Coke’s cellphone. See: People v. Coke, 461 P.3d 508 (Colo. 2020).

Eleventh Circuit Holds Georgia Terroristic Threats Conviction Overbroad for ACCA

by Dale Chappell

The U.S. Court of Appeals for the Eleventh Circuit held on April 8, 2020, that a prior conviction under Georgia’s terrorist threats statute was overbroad and therefore failed to meet the elements clause of the Armed Career Criminal Act (“ACCA”).

Najee Oliver was sentenced as an armed career criminal based on two prior drug convictions and a Georgia terrorist threats conviction. He had argued in the district court that Georgia’s statute fell outside ACCA parameters, objecting to the presentence report’s (“PSR”) conclusion that he had to be sentenced under the ACCA’s 15-year mandatory minimum because of those priors.

The district court disagreed with Oliver and imposed the 15-year sentence.

On appeal, Oliver raised his preserved error, again arguing that the terrorist threats statute is overbroad because it includes damage to property without requiring personal injury. Having the question properly before the Court, the Eleventh Circuit agreed with Oliver and held the statute is overbroad for those very reasons and, for the first time, discussed why the statute does not meet the ACCA’s elements clause.

Under the ACCA, a prior conviction for a “violent felony” qualifies if it “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). In determining whether a prior conviction’s statute contains this element, a court uses the “categorical approach,” which requires consideration of only “the elements of the statute of conviction, not the specific conduct of the particular offender,” the Court reiterated. United States v. Davis, 875 F.3d 592 (11th Cir. 2017). However, if those elements “effectively create several different crimes” under the same statute, it is a “divisible” statute allowing the sentencing court to resort to the “modified categorical approach.” Id. This includes looking at state court documents to determine what part of the statute — which crime — formed the prior conviction. Mathis v. United States, 136 S. Ct. 2243 (2016).

But different ways (or “means”) to violate a statute does not mean it has different elements comprising different crimes. This distinction was clarified by the Supreme Court in Mathis, which explained that elements are “constituent parts of a crime’s legal definition,” and means are “various factual ways of committing some component of the offense.” This distinction was critical in deciding Oliver’s appeal.

Under Georgia’s terrorist threats statute, O.C.G.A. § 16-11-37(1), “a person
committed the offense of a terrorist threat when he or she threatens [1] to commit any crime of violence, [2] to release any hazardous substance ... or [3] to burn or damage property.” The Court noted that three types of threats qualify under the statute. But are they separate crimes to allow resort to the modified approach?

Eleventh Circuit precedent confused the matter. It was largely assumed prior to Oliver’s appeal that Georgia’s terrorist threats statute fell under the ACCA’s elements clause. In United States v. Greer, 440 F.3d 1267 (11th Cir. 2006), the court held that the district court erred in refusing to impose an ACCA sentence based on a prior Georgia terrorist threats conviction. The court said that there was “no real dispute” that the prior convictions’ indictments proved the three convictions were crimes of violence under the ACCA. The court relied on the district court’s determination that the priors were violent felonies under the ACCA. The defendant challenged that aspect, but the Eleventh Circuit didn’t analyze it any further. In other words, the court assumed the Georgia statute qualifies under the ACCA because it didn’t have to decide the issue.

The same defendant in Greer later filed a motion under 28 U.S.C. § 2255 to vacate his sentence, arguing Johnson v. United States, 135 S. Ct. 2551 (2015), undid his ACCA sentence. But the parties agreed on appeal of the denial of that motion that the terrorist-threats statute is divisible, and the court assumed it was without any further analysis.

Oliver’s case finally brought that specific question properly before the Eleventh Circuit. Applying Mathis to the terrorist threats statute, the Court used the Supreme Court’s three-step Mathis framework in evaluating whether a prior conviction is divisible. First, the Court looked to the statute itself, which it said did “not speak plainly to whether the statute’s alternatives are elements or means.” Next, it turned to state case law to see how the courts treat the statute. The Court found “no Georgia appellate decision has definitively answered the question” of whether the statute contains different crimes to be charged. Finally, the Court looked at the jury instruction (equally inconclusive) and Oliver’s prior state records. But Oliver’s old indictment was never made part of the federal record and was not available for the Court to use.

The Court made a point about looking to Oliver’s state court records. The Government argued that since the PSR referred to the state indictment, the Court could rely on that to find that it charged Oliver with the “crime of violence” threat provision.

The Court rejected this position: “Even if Mathis permits us to peek at the language in Oliver’s indictment, it is inconclusive, as it does not by necessity mean that the term is an element.” Mathis said that an indictment “could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements.” That is, the Court said it was not so much whether Oliver was charged with the “crime of violence” threat but rather how the indictment referred to the statute in charging Oliver.

Because none of the Mathis methods “speak plainly” as to whether the statute is divisible, “we must resolve the inquiry in favor of indivisibility,” the Court concluded. As such, the statute is overbroad, and thus, the Court stated “that it categorically does not qualify as an ACCA predicate offense.” Therefore, Oliver doesn’t have three qualifying predicate offenses under the ACCA, the Court ruled.

Accordingly, the Court vacated Oliver’s ACCA sentence and remanded. See: United States v. Oliver, 955 F.3d 887 (11th Cir. 2020).
Policing is irrelevant for public safety — but these alternatives are proven to work

by Justin Podur/Independent Media Institute, AlterNet.com

Recent protests, catalyzed by the murder of George Floyd in Minneapolis, call for an end to racist police violence. With their actions, the protesters have also moved beyond many of the stale policing debates of the recent past. Defund, disband, abolish — people who would never have even heard these words in discussions about the police are now seriously considering them.

The breakthroughs in the police debate would not have been possible without the protesters, who have remained steadfast despite being beaten and abused by police everywhere in the United States. But this is not about making a breakthrough in the debate. This is about life and death. To stop police from killing people, 1,000 a year, year after year, changes will have to be made to the system. The protesters will be vindicated only if the changes made are the right ones.

Reform programs will only be successful if they start from the premise that the policing institution has lost its social legitimacy, which it never deserved. Reforms that assume police legitimacy — whether they involve more body cameras, better oversight, a more diverse force, or more prosecution of killers among the police — do not do the job.

Once the police are viewed as an illegitimate institution, we are well on our way. As Mariame Kaba argues in the New York Times, we could do worse than to make a 50 percent cut to police budgets and let the logic of austerity get the job done, as it has with the rest of the public sector. But 50 percent can be bargained down to 10 percent, and 10 percent to 2 percent, as long as police and their advocates can continue to link public safety with policing. The backlash against abolishing police as “politically unrealistic” in light of reforms that assume police legitimacy is effective propaganda that masks its supporters’ and its leaders’ true intentions.

The goal has to be to abolish the class of people who have the legal right to end lives (and to lie to you while you must tell the truth).

Do police currently have the right to kill? Absolutely. Using conservative estimates and public data, writer Lee Camp calculated that police killed an average of 900 people per year — in other words, at least 12,600 people from 2005 to 2019. In this period, Camp writes, a total of three police officers were convicted of murder and had those convictions stand up to appeal. That is less than one-tenth of one percent, but it rounds off cleanly to zero.

The license to kill, above all, must be taken away from police. It survives because of a mystique — helped by ubiquitous cop shows, books, and movies — which is based on three notions: the idea that they are courageous because their job is dangerous, the idea that they keep society safe, and the fact that you can call them in an emergency.

Courage? Yes, policing is the 16th most dangerous job in America, behind logging workers, fishing workers, pilots, roofers, refuse collectors, truck drivers, farmers, steelworkers, construction workers, landscapers, power-line workers, grounds maintenance workers, agricultural workers, construction trade helpers, and the first-line supervisors of mechanics, installers, and repairers. But no worker in any of the top 15 most dangerous jobs has the option of killing people, 1,000 a year, year after year, and public data, writer Lee Camp calculated that police killed an average of 900 people per year. Using conservative estimates of one percent, but it rounds off cleanly to zero.

Safety? Police have no special function keeping society safe. In Alex Vitale’s book The End of Policing, he cites criminologist David Bayley’s earlier book Police for the Future, in which Bayley calls this one of the “best kept secrets of modern life. Experts know it, the police know it, but the public does not know it.” We have known for 50 years that police don’t help public safety. French anthropologist Didier Fassin, in his 2013 book Enforcing Order, cites the Kansas City experiment of the 1970s: “This unprecedented study, unique at the time, compared three zones of the city: in the first, reactive, crews limited their activity to responding to residents’ calls; in the second, proactive, they at least doubled the time they spent on patrol; in the third, serving as a control zone, they continued their previous mixture of activity. The results of a full year of operations and measurement appeared identical: neither attacks on persons, whether assault and battery, sexual assaults or muggings, nor attacks on property, whether burglary or damage to vehicles, varied significantly as a result of the different systems implemented; similarly, the experience of crime and the feeling of insecurity as reported by residents and business owners showed no variation between the zones, nor did the level of satisfaction with the police; and it turned out that in all three cases, 60 percent of the officers’ time was spent on activities not directly related to law enforcement, including a quarter bearing no relation at all to police work… Ultimately, it was evident that the patrols used preventatively had no effect on crime, either in terms of offenses recorded by law enforcement or from the point of view of residents’ perception of risk.”

The results were ignored: police kept patrolling for the next five decades. Fassin, who hung out with Paris police as part of his study, made his own calculations of how they spent their time:

“In my experience, time spent in response to calls often amounted to approximately 10 percent of the shift time; it was rare that it rose to 20 percent (five calls per team per night shift was a maximum that was rarely reached), with the rest of the time being devoted to random patrols, and to the administrative recording of actions taken.”

Think Paris is anomalous? Think again: “A number of studies conducted in the United States reveal that officers on patrol spend between 30 and 40 percent of their time responding to calls (on average five calls per team per hour in cities), only 7–10 percent of which are related in some way to offenses or crimes, and between 40 and 50 percent of their working day on random patrol and paperwork, with the rest of the time devoted to various tasks.”

Here’s how Fassin describes the daily work of the police he observed:

“Cruising around quiet streets and peaceful neighborhoods, the police wait for occasional calls that almost always turn out to be pointless, either because they relate to mistakes or hoaxes, or because the teams arrive too late or bungle the case due to their clumsiness, or because there is no cause for any official questioning or arrest.”

Fassin cites a criminologist from Ontario, Richard Ericson, who in 1982 found that police spent 76 minutes out of an eight-hour shift responding to calls, arguing that “the presence of police officers has become an end in itself.”

So, police have the 16th most dangerous job, and they are irrelevant for public safety—but society needs someone to call in an emergency. This role can be filled by trained
Myth of Technology as an Equalizing Force in Criminal Justice

by Anthony Accurso

Since the rise of social media and ever-present cellphones with cameras, the narrative around these developments has been that justice is rapidly democratizing.

While many law enforcement failures and abuses have been exposed by citizens with technology, this is not the case for all technology. “Access to digital forensics can mean the difference between exoneration and prison time,” reports The Appeal.

For instance, DNA technology is (mistakenly) regarded as a neutral form of incontrovertible proof. But this perception ignores asymmetries in resources and incentives between prosecutors and defense counsel. Prosecutors regularly oppose testing samples that can exonerate people, including people scheduled to be executed.

DNA evidence has now opened up to unregulated use of genealogy databases by law enforcement to track suspects. Policies vary from agency to agency, and some, like the Orlando Police Department, have no policies at all.

“In California, an innocent twin was jailed. In Texas, police met search guidelines ignores asymmetries in resources and incentives between prosecutors and defense counsel. Prosecutors regularly oppose testing samples that can exonerate people, including people scheduled to be executed.”

Source: theappeal.org
Fourth Circuit Requests Further Information on Stingray Device to Determine Whether It Violates Fourth Amendment Rights

by Anthony Accurso

The U.S. Court of Appeals for the Fourth Circuit remanded a case to the U.S. District Court for the District of Maryland because the lower court failed to provide sufficient development on the record to determine whether the use of a stingray device violated the defendant’s rights.

Kerron Andrews was wanted for attempted murder in 2014 when Baltimore City Police used a cell-site simulator (aka stingray device) marketed as “Hailstorm” to track him down inside an apartment in Baltimore, Maryland.

After his arrest, he prevailed on a motion to suppress contraband found during his arrest because the state court decided the warrant used to locate him was too vague since it did not disclose the use of the Hailstorm, which the court described as a “far-reaching new search technology.” State v. Andrews, 134 A.3d 324 (Md. Ct. Spec. App. 2016).

Andrews then sued the city in federal court for conducting a search without a valid warrant. The federal court found that the warrant was sufficient in its vague description of the Hailstorm simulator to support the warrant and thus the search. It did so without conducting “factfinding into (1) the surveillance capabilities and configuration of the Hailstorm simulator and (2) the circumstances surrounding issuance of the [warrant].” Andrews appealed.

On appeal, the Fourth Circuit reviewed landmark cases on Fourth Amendment searches. Berger v. New York, 388 U.S. 41 (1967) rejected the use of a new eavesdropping device in part because “the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation.” In Katz v. United States, 389 U.S. 347 (1967), the U.S. Supreme Court instructed courts must ensure that “no greater invasion of privacy is permitted than in necessary under the circumstances ... by authorizing the carefully limited use of electronic surveillance.” In Kyllo v. United States, 533 U.S. 27 (2001) (discussing law enforcement’s use of a heat sensor to see “inside” a home), the Supreme Court concluded that “obtaining by sense-enhancing technology any information regarding the interior of the home that physical intrusion into a constitutionally protected area constitutes a search.”

The Fourth Circuit explained that “the Supreme Court has directed us to take special care in evaluating the reach of new technologies into protected areas.” As the Supreme Court explained in Carpenter v. United States, 138 S. Ct. 2206 (2018), courts must ensure that “the progress of science does not erode Fourth Amendment protections.” Justice Sotomayor, in her concurring opinion in United States v. Jones, 565 U.S. 400 (2012), urged judicial caution where a new method of monitoring “is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously” because such a method “evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.”

After a review of the relevant case law, the Fourth Circuit decided it needed more information about the Hailstorm simulator before it could strike the appropriate “balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.” Quoting from Pennsylvania v. Mimms, 434 U.S. 106 (1977).

More specifically, the Court wanted to know (1) the range of the device, (2) the number of cell devices it could monitor at once, (3) all data from a user’s device the Hailstorm could intercept, (4) how much of this is stored, (5) what data intercepted is accessible by law enforcement, and (6) whether the device was configured to minimize data collected from devices not belonging to Andrews.

Accordingly, the Court remanded the case to the district court to obtain the information requested and whether the district court’s findings of law change regarding whether the Baltimore City Police’s use of the simulator violated Andrews’ rights. See: Andrews v. Balt. City Police Dep’t, 2020 U.S. App. LEXIS 9641 (4th Cir. 2020).

Kansas Supreme Court: District Court Failed to Apprise Defendant of Right to Jury Trial

by Douglas Ankney

The Supreme Court of Kansas held that a district court “failed to properly apprise [Bryan Richard] Harris of his right to a jury trial and failed to ensure that Harris understood the nature of the right he was giving up.”

Harris was transported to the Atchison County Jail after being arrested on an outstanding misdemeanor warrant. At the jail’s intake, someone removed Harris’ jacket and placed it on the intake bench. After Harris was patted down and placed in a holding cell, someone moved the jacket to a filing cabinet behind the intake desk. About 20 minutes later, an officer searched the jacket and found cigarettos that contained marijuana. Harris was charged with a felony in connection with the marijuana.

At arraignment on the felony, Harris pleaded not guilty. His attorney first asked the court to set the case for trial and then asked Harris if he wanted “a judge or a jury?” Harris answered, “Go with the judge. I want the bench.” The district judge then asked, “Are you asking for a jury trial, Mr. Harris?” Harris answered, “I’m asking for a bench trial.... I don’t want to waive any liabilities, right?” Harris’ attorney then interjected, “It’s up to you. If you want the Court to make a decision — or a jury — it’s up to you.” Harris responded, “I want the judge to make a decision.... I want the judge to. I don’t want the Court to. I want the judge to.”

At the ensuing bench trial two months later, Harris was represented by a different attorney. Harris expressed he was dissatisfied with the attorney’s failure to file some suggested motions. The district court told Harris that the decisions of whether to plead guilty or not guilty; whether to testify or to not testify; and whether to have a jury trial or a bench trial were up to Harris — but matters of trial strategy were decisions to be made by his attorney.

Harris then stated he “chose a bench trial because it ain’t going to be mostly deciding...
Oklahoma Enacts Jailhouse Informant Law, Joins Other States

by Dale Chappell

A new law enacted in Oklahoma will crack down on unreliable jailhouse informants who testify against others in exchange for leniency in their own cases and sometimes for other benefits.

The law was sponsored by Senator Julie Daniels and Representative Chris Kannady, making Oklahoma the third state to enact jailhouse informant laws. Maryland enacted a similar law in April, and Connecticut did so last year.

The leading cause of wrongful convictions has consistently been the use of eyewitness identification (which includes jailhouse informants) and false confessions. In John Grisham’s book The Innocent Man, he told the true story of the wrongful convictions of Ron Williamson and Dennis Fritz, who were wrongfully convicted of the rape and murder of Debbie Sue Carter in Ada, Oklahoma, in 1982.

While Williamson was in jail for writing bad checks, a jailhouse informant told authorities that he confessed to Carter’s murder. Fritz also was implicated in the crime, and they were both convicted by jailhouse informant testimony. Williamson was sentenced to death; Fritz was sentenced to life in prison. That same jailhouse informant had been used multiple times in other cases to secure convictions and had received substantial benefits — none of which was ever disclosed to the defense.

Seventeen years later, DNA evidence cleared Williamson and Fritz of the crime and pointed to Glenn Gore, who had committed other crimes while the two men sat in prison for his rape and murder of Carter. “Two innocent men and my family were devastated by unreliable jailhouse witnesses,” Carter’s cousin Christy Sheppard said. “The new law can protect the next innocent man and deliver justice that crime victims deserve.”

The law will require district attorneys to (1) disclose to the defense any deals or benefits that Harris could be informed of his right to jury trial to allow him to either exercise that right or properly waive it. See: State v. Harris, 461 P.3d 48 (Kan. 2020).

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The Supreme Court of South Carolina reversed Billy Phillips’ murder conviction because the State presented improper testimony regarding DNA evidence and provided information to the jury that was simply wrong.

Well-known drug dealer Darius Woods was found shot to death on his couch. His handgun — the murder weapon — was laying on his chest. He was known to carry large amounts of cash, and his pockets were turned inside out, indicating robbery. After his arrest, Phillips filed a pretrial motion seeking to exclude the expert testimony of Lilly Gallman regarding DNA testing she had performed. The trial court held a hearing on the motion but did not take any testimony. The trial court ruled Gallman’s testimony was admissible.

Gallman testified that of the 13 DNA samples submitted for testing only 11 samples contained enough DNA for testing. She testified that the samples were “touch DNA.” (Touch DNA, also known as “trace DNA,” comes from epithelial cells that are deposited after a person touches or handles an object.) Gallman compared the DNA samples prepared from the remaining 11 samples with a sample submitted by Phillips. She testified that he was excluded as a contributor from all but two of the samples.

The sample taken from the murder weapon and the sample taken from the inside of Woods’ pants pocket contained a mixture of DNA from at least three people. Gallman testified that Woods and Phillips’ couldn’t be excluded as contributors to the mixtures in either sample.

Concerning the sample taken from the gun, Gallman further testified that “the probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in two hundred.” As to the pants pocket, she testified the probability was “one in two.” At one point during the trial, the prosecutor referenced three people handling scissors and asked “if ... you find that there’s at least three, that just means I have left part of my DNA on there. Correct?” Gallman answered: “It means that you left cells, skin cells on that item.” At no point did Gallman inform the jury that the touch DNA samples contained only a fragment of a DNA profile.

The State also presented to the jury the videotape of the pre-arrest police interview of Phillips. He stated he had been to Woods’ home several times the day of the murder, smoking pot and drinking alcohol. He stated he had handled Woods’ gun while imitating law enforcement.

In her closing argument, the prosecutor told the jury: “If you don’t touch it, you are automatically excluded. One hundred percent excluded. Well, we have his DNA on that gun [and] we also know that defendant’s DNA is inside [Woods’] pocket. Had he not touched the gun or the pocket, his DNA would not be there.” Phillips was convicted, and he appealed.

One argument on appeal was that the trial court erred in admitting Gallman’s testimony because its probative value was outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury.

The South Carolina Supreme Court observed “[w]hen admitting scientific evidence under Rule 702, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” State v. Council, 515 S.E.2d 508 (S.C. 1999).

This is part of the trial court’s “gatekeeping role” regarding the admission of expert testimony. Id. The proponent of scientific evidence has a corresponding responsibility to provide the trial court with the factual and scientific information needed to carry out its gatekeeping duty. Id. The test outlined in Council is materially similar to the federal test in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

If the evidence is admissible, it must then be balanced against “the danger of unfair prejudice, confusion of the issues, or misleading the jury.” SCRE, Rule 403. In most cases, the risk of confusing or misleading a jury with DNA evidence is low because the DNA evidence is usually straightforward and reliable, and its probative force is highly persuasive. Council. Complete DNA profiles have been used to show that the probability was greater than 99.9% that a particular person was the source of the DNA. State v. Ramsey, 550 S.E.2d 294 (S.C. 2001). Because the persuasiveness of DNA evidence is so great upon the minds of jurors, “when DNA evidence is introduced against an accused at trial, the prosecutor’s case can take on an aura of invincibility.” People v. Wright, 37 N.E.3d 1127 (N.Y. 2015).

But in most cases involving only touch DNA, including the instant case, the DNA evidence is not worthy of the same confidence because touch DNA samples usually provide only a fragment of the DNA profile. A complete DNA profile contains all of the alleles (genetic markers) in a sequential pattern or chain unique to each individual. But a fragment contains only a piece of the chain representing a partial pattern that may be found in more than one person’s DNA. (For illustrative purposes only, suppose one person’s alleles were in a pattern identified as A - G - E - B and another person’s were identified as C - G - E - B - D. A fragment found to have the pattern G - E - B could belong to either person.) “Touch DNA poses special problems because epithelial cells are ubiquitous on handled materials, because there is an uncertain connection between the DNA profile identified from the epithelial cells and the person who deposited them, and because touch DNA analysis cannot determine when an epithelial cell was deposited.” Hall v. State, 569 S.W.3d 646 (Tex. Crim. App. 2019).

Additionally, the size of the fragment determines an analyst’s ability to determine the probability that a random person other than the suspect was the source of the DNA. In the instant case, Gallman testified that the probability of someone other than Phillips being the contributor to the DNA recovered from Woods’ pocket was one in two. That meant any person from half of the world’s population could have left the DNA. This, in turn, meant the probative value of the evidence in identifying Phillips as the person who had his hands inside Woods’ pocket robbing him was almost zero while the risk of confusing and misleading the jury was great.

This error was compounded by both Gallman’s testimony and the prosecutor’s closing argument. Each misled the jury into believing that the only way a fragment matching Phillips’ DNA could be found on the gun...
and in the pocket were if Phillips had touched both. But as explained earlier, a DNA frag-
ment is not unique to an individual person. The touch DNA in this case could have been
left by a person other than Phillips even though the fragment contained some alleles
found in a pattern similar to some of Phillips’.

Additionally, “[t]ouch DNA is ... subject to what is known as secondary transfer. This refers
to the possibility that an individual or an object may serve as a conduit between a source and a final destination without any direct encounter.” Bean v. State, 373 P.3d 372 (Wyo. 2016). That is, suppose a person deposits epithelial cells when touching a coffee cup. A second person then handles that cup and the deposited epithelial cells are transferred to the second person’s hands. The second person then handles a pistol and deposits the first per-
son’s epithelial cells onto that pistol. The first
person’s DNA would be found on the pistol even though that person never touched the pistol. [Editor’s note: See the cover story of the September 2018 issue of CLN for an in-depth discussion of the dangers of using secondary DNA transfer evidence in criminal cases.]

Finally, the South Carolina Supreme Court concluded that the trial court failed in its gatekeeping responsibility. The trial court neither took any testimony at the pretrial hearing nor conducted any analysis to determine whether the probative value of the DNA evidence was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. And the prosecutor failed to provide the trial court with any scientific information to enable it to make that determina-
tion. The Supreme Court instructed: “DNA evidence is a complicated scientific subject.... [I]f an objection is made, the trial court must hold a Daubert/Council hearing, the proponent of the evidence must present the factual and scientific basis necessary to satisfy the foundational elements of Rule 702, and the trial court must conduct an on-the-record balancing of probative value against the applicable Rule 403 dangers.”

The Court concluded that by not con-
ducting the Daubert/Council hearing, the trial court left itself without a meaningful opportu-
ity to exercise its discretion; the State failed to estab-
lish Gallman’s testimony would assist the trier of fact; and the probative value of the DNA evidence was substantially outweighed by the danger the evidence would confuse the issues and mislead the jury.

Accordingly, the Court reversed the convictions and remanded for a new trial. See: State v. Damme, 944 N.W.2d 98 (Iowa 2020).

Iowa Supreme Court Announces That ‘Good Cause’ in Newly Amended Appeals Statute Means ‘a Legally Sufficient Reason’

by Douglas Ankney

The Supreme Court of Iowa an-
nounced that the words “good cause” in the newly amended appeals statute of Iowa Code § 814.6(1)(a)(3) means “a legally suf-
cient reason.”

Mercedes JoJean Damme pleaded guilty to two counts of theft in the third degree. The State agreed to seek no more than a two-year sentence that would be suspended if Damme was accepted into a program with the Water-
loo Women’s Center for Change. The State also agreed to follow any more lenient sentence that may be recommended in her presentence investigation report.

At Damme’s sentencing on July 1, 2019, the trial court rejected the State’s recommended suspended sentence and imposed indeterminate terms of two years of imprisonment on each count to be served concurrently, a $625 fine, a criminal sur-
charge of 35 percent, court costs, attorney fees, a law enforcement initiative surcharge of $125, and restitution.

Damme appealed her sentence on numeros-
ous grounds, but she did not challenge her guilty plea or conviction. The State argued that Damme’s appeal should be dismissed because she failed to establish good cause for the appeal as required by Iowa Code § 814.6 (2019).

The Iowa Supreme Court observed “[t]he Iowa legislature amended Iowa Code sec-
tion 814.6, effective July 1, 2019, as follows: ’1. Right of appeal is granted the defendant from: (a) A final judgment of sentence, except in the following cases: ... (3) A conviction where the defendant has pled guilty. This subparagraph does not apply to a guilty plea for a class ‘A’ felony or in a case where the defendant establishes good cause.’” Because the legislature did not define “good cause” within the statute, the Court “look[ed] to the common meaning of the term in interpreting the statute.” State v. Tesch, 704 N.W.2d 440 (Iowa 2005). A dictionary can be a reliable source for the common meanings of words. Id. Black’s Law Dictionary defines “good cause” to mean “[a] legally sufficient reason.” Black’s Law Dictionary (11th ed. 2019). The Court adopted that definition.

The burden, then, was on Damme to establish a legally sufficient reason to pursue her appeal because she had been sentenced on the date the amended statute took effect. State v. Macke, 933 N.W.2d 226 (Iowa 2019). And since what constitutes good cause is context-
specific, the Court had to determine what would be a “legally sufficient reason to appeal” when a defendant has pleaded guilty. However, as it had often done in past decisions, the Court concluded that the good-cause provi-
sion in this case was ambiguous.

Because of the ambiguity, the Court had to determine what the statute meant to accomplish and “seek to advance, rather than defeat, the purpose of the statute.” Rhoades v. State, 880 N.W.2d 431 (Iowa 2016). The statute sought to restrict, and thereby limit, the number of frivolous appeals challenging convictions based on guilty pleas, the Court determined.

But Damme had not challenged her conviction or her guilty plea. She challenged her sentence, which was neither mandatory nor part of her plea bargain. Sentences are invari-
able imposed after trial courts have accepted guilty pleas. Because this timing provided a legally sufficient reason to appeal notwithstanding the guilty plea, the Court held that “good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea.” The Court concluded that based on the facts of this case, “good cause exists to allow Damme’s appeal to proceed.” Turning then to the merits of Damme’s appeal, the Court ruled that “Damme failed to show that the sentencing court relied on improper factors in imposing her sentence,” and thus it found no error.

Accordingly, the Court affirmed the sentence imposed by the sentencing court. See: State v. Damme, 2020 Iowa Sup. LEXIS 61 (2020).
The Supreme Court of South Carolina dismissed the State’s appeal of a guilty plea and affirmed denial of motions to reconsider the sentence for recusal of the trial court.

The Court’s order came in an appeal of the State brought in the prosecution of Rick Quinn, Jr. He is a former member of the South Carolina House of Representatives, having served from 1989-2004 and 2010-2017 and as House Majority Leader from 1999-2004.

In 2014, a state grand jury was convened to investigate alleged public corruption by former and current members of the South Carolina General Assembly. As it related to Quinn, the investigation focused on his “practice of using his office as House Majority Leader and leader of the House Republican Caucus to direct mailing and political services to his family’s businesses, First Impressions, which did business as RQ&A.

The investigation resulted in Quinn being charged in May 2017 with statutory misconduct in office and common law misconduct in office. A charge of criminal conspiracy was lodged in October 2017. Charges of failing to register as a lobbyist was brought against RQ&A, Quinn’s father’s business, at that time.

At a plea hearing on December 13, 2017, Quinn entered a guilty plea under a plea agreement in which he would plead guilty to statutory misconduct in office while the other two indictments would be dismissed, and RQ&A would plead guilty and pay restitution of $3,000. The plea agreement provided for Quinn to make a “limited allocation” statement to support a factual basis, which was provided to the State prior to the hearing and the State would make a broader factual presentation.

After the presentations were made, Quinn entered his guilty plea to misconduct in office. Neither party objected, and the court deferred sentencing for two months after accepting the plea. In the interim, the State raised concerns in a motion to clarify. It was concerned that Quinn failed to satisfy statutory elements to support the conviction.

The court held a sentencing hearing on February 12, 2018. It conducted a second colloquy of Quinn to confirm he was guilty of misconduct in office, and it sentenced him to the maximum possible punishment of one year imprisonment suspended to two years’ probation, a $1,000 fine, and 500 hours of public service.

The State objected to the plea before and after the sentencing. It subsequently filed a motion for the trial court to reconsider the sentence or vacate the plea and for the court to recuse itself. After the court denied those motions, the State appealed.

The Supreme Court found “the State cannot appeal the guilty plea” under the facts of the case. It held the State “is not an aggrieved party permitted to appeal under Rule 201(b), SCACR, because it successfully secured a guilty verdict against Respondent through plea agreement.” A guilty plea is tantamount to a guilty verdict, and thus it authorizes imposition of the punishment mandated by law. *State v. Cantrell*, 158 S.E.2d 189 (S.C. 1967).

The Court further found there was no abuse of discretion in sentencing Quinn. The State argued the trial court erred in “failing to consider its presentation of facts in sentencing Respondent and instead determining innocence” as to facts he did not admit.

The Court found Quinn was duly convicted of misconduct in office. Moreover, “a sentencing judge has great discretion in the kind of evidence she may use to assist her in determining punishment to be imposed.” *Cantrell*. Additionally, under S.C. Code Ann. § 24-21-410 (2007), the court has the “power to suspend Respondent’s sentence to two years’ probation.”

Finally, the Court found no evidence of judicial bias or prejudice on the part of the trial court.

Accordingly, the Court dismissed the State’s appeal of the guilty plea and affirmed the trial court’s orders regarding sentencing and recusal issues. See: *State v. Quinn*, 2020 S.C. LEXIS 62 (2020).

Two New Forensic DNA Standards Added to the OSAC Registry

National forensic science organization approves standards for interpreting DNA mixtures.

by the National Institute of Standards and Technology, U.S. Department of Commerce

The Organization of Scientific Area Committees (OSAC) for Forensic Science has placed two new standards covering the interpretation of DNA evidence on its registry of approved standards. This stamp of approval from OSAC, which is administered by the National Institute of Standards and Technology (NIST), indicates that these standards are technically sound and will help forensic laboratories improve their processes and methods.

OSAC is a professional organization whose 550-plus members have expertise in 25 forensic disciplines as well as scientific research, measurement science, statistics, law and policy. OSAC works to strengthen the practice of forensic science by facilitating the development and promoting the use of high-quality, science-based standards.

This milestone is the culmination of an effort that began in 2015. The two new standards were initially drafted by OSAC, then further developed and published by the Academy Standards Board (ASB) of the American Academy of Forensic Sciences, and finally reviewed by OSAC for placement on the registry. The new standards are:


Before laboratories can use a method to analyze crime scene evidence, they must perform validation studies and use the results of those studies to develop a protocol. These new standards include detailed requirements for conducting validation studies, developing protocols from them and verifying that those protocols work correctly.

In addition, the new standards are the first to focus on DNA mixtures, which occur when evidence contains DNA from multiple...
individuals. DNA mixtures can be more difficult to interpret than evidence that contains DNA from only one individual. Past studies have shown that different labs, or different analysts within a lab, sometimes produce different conclusions when evaluating the same DNA mixture. The new standards are aimed in part at helping labs achieve consistent and reproducible conclusions.

“Every forensic laboratory wants to put out the highest-quality data possible and the most accurate and reliable information and results,” said Robyn Ragsdale, a senior crime laboratory analyst at the Florida Department of Law Enforcement and chair of OSAC’s Biology/DNA Committee. “These standards will help them do that.”

Two aspects of the new standards in particular will help with this. First, the verification step must demonstrate that a laboratory’s protocols produce consistent and reliable conclusions with DNA samples different from the ones used in the initial validation studies. Second, the new standards require that labs not interpret DNA mixtures that go beyond what they have validated and verified. For example, if a lab has tested its protocol for up to three-person DNA mixtures, it should not interpret casework that contains DNA from four or more people.

These new standards complement the FBI’s DNA Quality Assurance Standards. Those standards mainly apply to laboratories that upload data to the FBI’s national DNA database, and they do not address how to develop and verify protocols for interpreting DNA mixtures.

The new standards also build upon guidelines published by the Scientific Working Group on DNA Analysis Methods, or SWGDAM. Guidelines are looser than standards in that they suggest best practices that laboratories should follow, while standards list requirements that labs must follow to be considered in compliance by an accrediting body.

Compliance with these new standards, as with almost all forensic science standards in the United States, is voluntary. However, some labs are already meeting or close to meeting these new standards. In addition, by adopting these standards, forensic labs can improve their processes and demonstrate their commitment to quality.

Additional standards are in the pipeline. For instance, the ASB is finalizing standards, also initially drafted by OSAC, for validating the probabilistic genotyping software that many laboratories use for interpreting DNA mixtures. The American National Standards Institute (ANSI) accredited standards development process at ASB together with the drafting and approval processes at OSAC involve multiple layers of technical review and ensure that standards are developed via a consensus process that invites input from all stakeholders prior to placement on the OSAC registry.

For more information on OSAC’s role in the standards development process, visit the OSAC website. ^n

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Big Brother, as Well as Big Business, Are Tracking You: the Snitch in Your Own Pocket, Purse, or Belt Holder

by Ed Lyon

Some ancient cultures believed that everywhere a person went they left an invisible essence of themselves behind that marked their passage. While this is true as far as scent goes, that quickly deteriorates. Today, thanks to technology, it’s taken on more of a prophetic fulfillment than a mere prehistoric cultural belief.

For instance, it is not unusual for a person with a cellphone to receive a text message and accompanying coupon for a business they are strolling by. Yes, Big Business wants your business to the point that it tracks your every move through your smart phone. Big Business is on point and on its toes in its never-ending quest for its share of the almighty dollar. It is, however, the entity that mints those dollars that citizens need be aware of.

Big Brother has partnered with Big Business in a Big Way to share the ability to track peoples’ movements. The Wall Street Journal (“WSJ”) reported on a major operation by the Department of Homeland Security’s (“DHS”) Customs and Border Protection division in early 2020. The anomaly the agencies focused on was a spate of cellular phone signals in a remote desert area between Arizona and Mexico.

Using location data provided by a company called Venntel, DHS used the data “to detect cellphones moving through what was later discovered to be a tunnel created by drug smugglers between the U.S. and Mexico that terminated in a closed Kentucky Fried Chicken outlet on the U.S. side near San Luiz, Ariz,” reported the WSJ.

Venntel gathers data it compiles for tracking by mining applications or apps. People who click on weather apps that adjust a forecast as the person moves from place to place, mapping apps that adjust the user’s position on a virtual map, or something as innocent as a food-ordering app that shows the nearest burger or pizza place, are invaluable tools in tracking cellphone users. Data compiled from enough of these apps assemble life patterns and reveal identities.

The New York Times stated “it would be relatively simple to figure our individual identities in this kind of data.”

Even Little Brother is active in this practice. Former Mississippi County, Missouri, Sheriff Cory Hutcheson is now a felon serving time in a federal prison. He illegally tracked many people through their cellphones without first obtaining a warrant. Among his victims was a county judge, former sheriff, and state police officers. Had he stuck to John Q. Citizen, Hutcheson would probably still be sheriff but as reason.com puts it, “bad cops gonna bad cop, and they’re going to do their worst with whatever tools you give them.”

Securus provided Hutcheson the tracking data he requested. Although Securus is primarily a prison phone provider, the company toadies to mainstream law enforcement by offering location services on cellphones. It obtains its data from Location Smart which, in turn, partners with major providers of cellphone communication networks.

In 2018, the U.S. Supreme Court instructed that “historical cell-site records present even greater privacy concerns than GPS tagging of vehicles.” In order to keep at least one step ahead of the developing law on advancements in technology and constitutional rights, it seems as though Big and Little Brother have been employing convoluted corporate shell games in order to surveil Americans. ^h

Source: reason.com
Neuroscience and Criminal Cases

by Jayson Hawkins

A prime consideration in determining guilt and assessing punishment for a crime has long been the mental state of the accused. Legal precedents that weighed the workings of the human mind can be traced to the 17th century, according to Deborah Denno of Fordham University School of Law. Responsibility for criminal acts before the Enlightenment were laid at the feet of “the devil,” though this cause seldom resulted in mercy for defendants.

Perhaps the most famous case involving one’s mental state comes from England in 1843, where Daniel McNaughton was acquitted by reason of insanity for slaying the British prime minister’s secretary. The McNaughton rule has since been adopted throughout the U.K. and by half the states in the U.S., yet it was not until the 20th century that actual clinical diagnoses became widely recognized in the courtroom. Even so, many judges and juries have been reluctant to rely on psychological arguments. What has been lacking is a hard science of results that can be measured and reproduced.

Neuroscience is changing that.

Advances in technology have allowed researchers to begin mapping mental processes and deficits. A pivotal case in 1981 saw the attorneys for John Hinckley, Jr. convince a jury that their client was not culpable for shooting President Ronald Reagan, in part due to a CAT scan showing how Hinckley’s brain had atrophied. The four decades since have seen an explosion in the field’s reach, as neuroscientists can now identify reactions in the brain to experiences like love, pain, and failure.

The use of such technology in the courtroom has lagged behind its development, yet recent years have shown a steady rise in brain tests being introduced as evidence. The majority have been in civil cases where brain imaging (MRI) offer insight into the extent of a personal injury, but records of U.S. judicial opinions from 2005 to 2015 also show more than a 400 percent increase in the use of neuroscience to defend against criminal charges. This trend is only expected to continue as more judges and attorneys become aware of the technology’s applications.

After recent studies have exposed the repeated misuse and outright failure of several fields of forensic science, many justice system professionals hope neuroscience can provide a more reliable alternative. Evidence of any type seldom offers certainty, but brain imaging has shown promise in specific tasks.

A study at Stanford University, for example, had better than 90 percent accuracy in identifying if subjects were seeing photos taken from their point of view or someone else’s by monitoring blood flow in the brain. Owen Jones, a legal scholar at Vanderbilt University, notes that such tests “could have a lot of different legal implications,” like assessing the reliability of witness testimony.

Other applications include understanding mental functions linked to recidivism and determining the maturity of one’s brain. This latter concept, referred to as mental age, could have an impact on justice reform for juveniles and the sentencing of young adults, whose brains have not fully developed.

Colorado district court judge and neurolaw expert Morris B. Hoffman forecasts in a 2018 paper that breakthroughs in brain research should soon improve the ability to detect chronic pain and will be able to accurately identify mental age, memories, and lies in the coming decades. He does not believe, however, that neuroscience will ever overturn the notion of personal responsibility or lead to a complete comprehension of addiction.

Critics of neuroscientific evidence have voiced two main concerns. The first is that one’s state of mind when a crime is committed may not be reflected by brain imagery done after the fact. The second points out that studies of average mental functions are not necessarily applicable to that of a specific individual.

University of Pennsylvania scholar of law and psychiatry Stephen J. Morse says the determining factor in the use of neuroscientific evidence should be its legal relevance, yet he doubts whether studies of the brain will ever trump the existing law. In a courtroom, he notes, “if there is a disjunct between what the neuroscience shows and what the behavior shows, you’ve got to believe the behavior.”

Source: knowablemagazine.org

Maine Supreme Judicial Court Vacates Conviction on Double Jeopardy Grounds

by Douglas Ankney

The Supreme Judicial Court of Maine vacated one of Ronald Paquin’s convictions for gross sexual misconduct on double jeopardy grounds and ordered the trial court to enter a judgment of acquittal on three additional counts.

Paquin served as the priest at the Roman Catholic Church in Haverhill, Massachusetts, when he allegedly engaged in sex acts with two boys under the age of 14. Paquin was indicted on 15 counts of gross sexual misconduct against Victim Number 1 (Counts 1-13 and Counts 30-31) and sixteen counts of gross sexual misconduct against Victim Number 2 (Counts 14-29). The indictment to Count 5 charged that Paquin, “[o]n or about between [sic] November 1, 1986 and February 28, 1987, in Kennebunkport, YORK County, Maine ... did engage in a sexual act with [the victim] ...”

The indictment charging Count 30 read identical to Count 5 but with the dates changed to December 1, 1986, and December 31, 1986, and with the additional language “To wit: Engaging in a sexual act in the form of direct physical contact between the genitals of [the victim] ... and the mouth of Ronald Paquin.”

At trial, the State advised the trial court that it would be dismissing Counts 27-29 “based on [Victim Number 2’s] testimony of not recalling.” Paquin’s counsel raised the question of whether Paquin’s consent to the dismissal was required, and the trial judge said he “would be dismissing those counts on a judgment in response to [a motion for judgment of acquittal] anyway, so it’s sort of moot. I’ve already indicated I’m likely to grant the motion for judgment of acquittal on those counts anyway. Whether [Paquin] agrees or not, the evidence is not in the record at this point.”

After the State rested its case-in-chief, Paquin moved for judgment of acquittal on all counts. The trial court granted the motion as to Counts 10 through 13. After the court indicated it was also inclined to grant the motion with respect to Counts 27 through 30, the State elected not to press for a judgment of acquittal on those counts.
Paquin of both counts based on the same acts, therefore, did not require proof of a fact that the other does not, and if so, there is no double jeopardy violation for multiple prosecutions or punishments. Id.

In Paquin’s case, the trial court granted the State’s motion to dismiss Counts 27-29 due to insufficient evidence. Consequently, the trial court’s dismissal was actually an acquittal.

Accordingly, the Court vacated the conviction on Count 30 and remanded with instructions to dismiss Count 30 with prejudice, and the Court vacated the dismissal of Counts 27-29 and remanded with instructions to enter a judgment of acquittal on those counts. See: State v. Paquin, 2020 ME 53 (2020).

Criminal Legal News

Eighth Circuit Affirms Habeas Relief Decades After Conviction Because Prosecutor Destroyed Evidence Prior to Trial

by Dale Chappell

The U.S. Court of Appeals for the Eighth Circuit affirmed a habeas relief to two codefendants on April 29, 2020, after an Arkansas state prosecutor (now a state supreme court justice) intentionally destroyed evidence about favorable treatment for a jailhouse informant that influenced the jury’s verdict.

Over 30 years ago, Myrtle Holmes was found dead in the trunk of her car in Fordyce, Arkansas, after a robbery at her house. Charlie Vaughn, John Brown, and Reginald Early were charged with capital murder in her death, and Vaughn took a plea. As part of that deal, he implicated not only Brown and Early in the murder but also Tina Jimerson who allegedly drove them to the house. Vaughn’s factual basis for his guilty plea was read to the jury at the consolidated trial of the other three, and all three were convicted and sentenced to life in prison. Their convictions became final after Vaughn took the investigator several months to uncover, Jimerson filed for postconviction relief under 28 U.S.C. § 2254. The U.S. District Court for the Eastern District of Arkansas held an evidentiary hearing and found that Prescott was incentivized by the sheriff, who told him his drug case “would be gone” if he helped. And he also found that the tape had been destroyed by the prosecutor. Presbyterian, for his part, signed an affidavit for Stimson that he was promised favorable treatment for his help. Upon discovery of this evidence, which took the investigator several months to uncover, Jimerson filed for postconviction relief under 28 U.S.C. § 2254. The U.S. District Court for the Eastern District of Arkansas held an evidentiary hearing and found that the prosecutor’s actions were “untruthful.” In light of these findings, Brown then filed his own habeas petition in federal court, making the same claims — that their constitutional rights were violated when the prosecution destroyed favorable evidence in “bad faith.”

The district court granted both petitions, and they have since been vacated (Early, how-
ever, confessed to his part in the crime and did not challenge his conviction). The State appealed the grant of relief to the Eighth Circuit.

Procedural Default Defenses

The State argued two procedural default defenses: (1) that their petitions were time-barred and (2) that the petitions were "procedurally defaulted" because they had not exhausted their administrative remedies in state court before going to federal court. The Eighth Circuit found both of the State's defenses without merit.

- **Timeliness**: Typically, a federal habeas petition under § 2254 must be filed within one year of a conviction becoming final. 28 U.S.C. § 2244(d)(1)(A). In this case, the convictions became final in 1994. However, under § 2244(d)(1)(D), that one-year clock starts over on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

Jimerson wasn't given access to the file with Prescott's statement to law enforcement until January 7, 2015. She filed her petition on June 30, 2015, and was therefore timely based on that provision. And because Brown only discovered the facts about Prescott at Jimerson's evidentiary hearing, his petition filed December 21, 2016, also was timely.

- **Exhaustion**: In its response to Jimerson's petition, the State made the following admission: "Appellant [the State] also admits that Jimerson has no unexhausted, non-futile state remedies available to her." It made the same admission for Brown's petition. Under Wood v. Milyard, 566 U.S. 463 (2012), the U.S. Supreme Court held that a court may not raise a defense that is waived by the government. Here, the State expressly waived any exhaustion defense it had, and its attempts to raise it on appeal were rejected by the Eighth Circuit (nevertheless, the Court continued its analysis and found both had showed "Cause and prejudice" to excuse any procedural default, even if the State hadn't waived the defenses).

The Youngblood Error

Under Arizona v. Youngblood, 488 U.S. 51 (1988), the prosecutor has a duty to preserve potentially useful evidence for trial. If the prosecutor destroys that evidence in bad faith prior to trial, this violates a criminal defendant's constitutional rights. When trial counsel for Jimerson made a broad discovery request, the prosecutor disclosed an informant, but not Prescott, and the file made no mention of the recording of Vaughn by Prescott.

The State argued that the tape was destroyed not in bad faith but because it was "inculpatory, not exculpatory." In other words, it asserted the tape would have hurt Jimerson and Brown instead of helping them. The Court found this baseless. "What the recording contained appears to be significant enough that law enforcement and the prosecution worked together to mutually conceal its existence from the defense," it said. The prosecutor's response to the discovery request by destroying the evidence was "more accurately classified as untruthful," the Court said.

"Without the recording, Brown and Jimerson lost the ability to argue to the jury that Vaughn's confession was influenced or perhaps even enticed by an informant who stood to gain complete dismissal of his pending felony drug charge," the Court explained. This had a "substantial and injurious effect or influence on the jury's verdict."

Accordingly, the Court affirmed habeas relief to Brown and Jimerson. See: Jimerson v. Payne, 957 F.3d 916 (8th Cir. 2020).}

Eleventh Circuit Vacates Firearm Conviction Based on Rehaif

**by Douglas Ankney**

**Based on Rehaif v. United States, 139 S. Ct. 2191 (2019) ("Rehaif I"), the U.S. Court of Appeals for the Eleventh Circuit vacated Oniel Christopher Russell’s conviction of possessing a firearm and ammunition as an immigrant unlawfully in the U.S. in violation of 18 U.S.C. §§ 922(g)(5)(A), 924(a)(2).**

Russell arrived in the U.S. on October 29, 2008, as an authorized nonimmigrant visitor. In February 2012, Vanessa Hood — a U.S. citizen — filed a Form I-130, Petition for Alien Relative, seeking to classify Russell as her spouse. The U.S. Citizenship and Immigration Services ("CIS") approved her petition in July 2012. Russell then filed a Form I-485, Application to Register Permanent Residence or Adjust Status. But Hood subsequently requested her petition be withdrawn after discovering that Russell was still married to another woman in Jamaica.

In October 2016, CIS canceled Hood’s I-130 application and Russell’s I-485 application.

But in the intervening period, on August 24, 2013, police discovered during a traffic stop a loaded Ruger firearm in the glove compartment of a vehicle driven by Russell. He gave a sworn statement claiming ownership of the Ruger, and he was released without being arrested. Then in December 2017, Russell was charged with the §§ 922(g) and 924(a)(2) offenses based on possession of the loaded Ruger.

The Government moved, in limine, to exclude evidence of the immigration forms submitted to CIS by Hood and Russell. He argued during the hearing on the motion that he “would never be here illegally;” that he toured the world as an artist; and that like every other citizen he paid taxes, had credit cards and a driver’s license, owned a business, and had a bank account. The documents were evidence that he “had started the ball rolling” and were necessary to his right to present a complete defense.

The Government, relying on United States v. Rehaif, 868 F.3d 907 (11th Cir. 2017) ("Rehaif I"), argued that Russell’s subjective belief about his immigration status was irrelevant as to his guilt of the charged offenses. The U.S. District Court for the Middle District of Florida noted that, per Rehaif I, whether someone is in the U.S. illegally is an "objective standard," so if "someone believes they’re here legally, that doesn’t change the fact[] that they either are or are not here legally." The Government’s motion was granted, and the evidence was excluded. Russell was convicted, and he appealed on grounds unrelated to Rehaif I.

While Russell’s appeal was pending, the U.S. Supreme Court decided Rehaif II, which reversed Rehaif I. The Supreme Court held in Rehaif II that “in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” The Eleventh Circuit then directed Russell and the Government to submit supplemental briefing on how Rehaif II affected this case.

Because the issue wasn’t properly preserved in the district court, the Eleventh Circuit reviewed for plain error, which re-
quired Russell to show (1) an error (2) that was obvious (3) affected his substantial rights, and (4) affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Cotton, 535 U.S. 625 (2002). An error affects substantial rights if there is a reasonable probability, absent the error, the outcome of the proceeding would have been different. Molina-Martinez v. United States, 136 S. Ct. 1338 (2016).

The Court observed that the district court’s exclusion of the CIS documents based on the conclusion that Russell’s subjective belief about his immigration status was irrelevant was obvious error in light of Rebaif II. The error affected his substantial rights because there was little, if anything, in the record to establish that the Government had proven Russell knew he was in the U.S. illegally, i.e., that he knew he belonged to the relevant category of persons barred from possessing a firearm. And the CIS documents were evidence from which a jury could have concluded he believed he was in the U.S. legally. And the error affected the fairness, integrity, and public reputation of the judicial proceedings because Russell was prevented from presenting a complete defense and the Government had secured a conviction without being required to prove Russell’s subjective knowledge of his immigration status, the Court concluded. Thus, the Court ruled that the district court’s exclusion of the CIS documentary evidence was plain error.

Accordingly, the Court vacated Russell’s convictions and remanded to the district court for further proceedings consistent with the Court’s opinion. See: United States v. Russell, 957 F.3d 1249 (11th Cir. 2020).

Washington Supreme Court: Defendant Detained for Search at Border Was ‘In Custody’ for Miranda Purposes

by Douglas Ankney

The Supreme Court of Washington determined that Alejandro Escalante was “in custody” and entitled to the warnings enunciated in Miranda v. Arizona, 384 U.S. 436 (1966), when he was detained for a search at the U.S.-Canada border.

Escalante and three friends were returning from a music festival. Border patrol agents were searching all vehicles coming from the festival. Escalante and his friends were directed to a secondary inspection area. Agents took their documents. The men were told to leave their belongings in the van and wait in a secondary “lobby.” The lobby was an 11-by-14-foot secured room that was not accessible to the public. The door was locked and controlled by an agent sitting behind a glass partition. Those detained in the lobby could neither use the bathroom nor access water without first obtaining permission and submitting to a pat-down search.

Agents patted down all four men, finding narcotics on two of them but none on Escalante. The two men with narcotics were moved to detention cells while Escalante and the fourth man continued to be held in the lobby. All of the men were held for five hours while agents searched the van. During this time, the agent behind the glass partition watched Escalante and kept his documents. No other travelers were in the lobby. The search uncovered drug paraphernalia and personal items containing drugs, including a backpack with small amounts of heroin and lysergic acid diethylamide (“LSD”). Without giving Miranda warnings, agents confronted Escalante with each item and asked if he owned it. Escalante admitted he owned the backpack. Local law enforcement officers then arrested Escalante and finally gave him Miranda warnings.

Escalante was tried in state court on charges of possessing heroin and LSD. He moved to suppress his statement that he owned the backpack because it was obtained by interrogation while he was in custody without Miranda warnings. The trial court denied the motion, the statement was admitted, and Escalante was convicted. The Court of Appeals affirmed, and the Washington Supreme Court granted further review.

The Court observed “[t]he Fifth Amendment guarantees that individuals will not be compelled by the government to incriminate themselves.” The Fifth Amendment protects an individual’s right to remain silent “unless he chooses to speak in the unfettered exercise of his own will.” Miranda. But interrogations while a suspect is in custody undermine the suspect’s will to remain silent due to the coercive effect of an isolated, police-dominated atmosphere where there is potential for brutality and psychological ploys designed to secure confessions. Id.


Because border searches are usually very brief, generally the individual is not deemed to be in custody for Miranda purposes, but courts must examine the facts and circumstances of each incident to make that determination. United States v. FNU LNU, 653 F.3d 144 (2d Cir. 2011). Relevant circumstances include the nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on the suspect, and the duration and character of the questioning. United States v. Butler, 249 F.3d 1094 (9th Cir. 2001).

The Court determined that Escalante was in custody because: (1) he was held in a lobby dominated by law enforcement and not open to the public; (2) the agents controlled all movement in and out of the lobby; (3) Escalante was subjected to a pat-search and had to obtain permission to use the bathroom or access water; (4) agents took his documents and did not return them; (5) drugs were discovered on two of his companions, which heightened the suspicion on him; and (6) the detention lasted more than five hours. The Court concluded that a reasonable person in these circumstances would have felt their “freedom of action [was] curtailed to a degree associated with formal arrest.” Thus, the Court held that Escalante’s unwarned statements should have been suppressed.

Accordingly, the Court reversed, vacated his convictions, and remanded for further proceedings consistent with its opinion. See: State v. Escalante, 461 P.3d 1183 (Wash. 2020).
Never Convicted but Never Exonerated, Either
by Ed Lyon

Issues facing exonerees and wrongfully convicted individuals have been recurring topics in CLN and PLN. Still, there’s another category of arguably similarly situated citizens that must also be paid some attention: Those who were wrongfully accused of crimes they did not commit.

Even though a great many of these innocents were cleared of culpability and released before trial and others prior to being indicted, consider those whose lives were temporarily disrupted. Some of these victimized citizens’ lives would be all but destroyed just by their accusation and arrest.

Brandon Gonzales, 23, was attending a homecoming party in October 2019 at a Greenville, Texas, event hall. He had left the event and was sitting in a car outside when gunfire erupted from within the venue. He was told by fleeing partygoers that someone was inside shooting a firearm. Two parties were killed, and many others wounded. Gonzales left the area and went home, thankful that neither he nor any of his friends had been among the dead or wounded, resuming his former life … for a short while.

Gonzales would fall victim to an all-too-real (and common) example of an erroneous eyewitness identification. Three days after leaving that party, he found himself under arrest at his job by a phalanx of Hunt County sheriff’s deputies. With more than one death at that party, capital murder was the charge in the state that leads the nation in death penalties assessed and executions carried out. Gonzales had good reason to worry about his future.

With a hurriedly assessed $1 million bond, the former automobile dealership employee could never in his wildest dreams have hoped to make, Gonzales spent nine days in jail, reading his Bible, praying for deliverance, and writing in his journal. Apparently his prayers would be granted.

The investigators looking to actually solve the case rather than just obtain a conviction had cleared him of any involvement, despite a flawed eyewitness statement. Released from jail, Gonzales found himself facing an entirely new raft of problems. The New York Times had run the story of his capital murder arrest, even to the point of printing his mugshot. His story and booking photograph landed on the web. Gonzales soon found himself to be the object of a great deal of unwanted, unecessary, and unhelpful attention. When he saw a bystander filming him at a local department store, he moved thousands of miles away to live with relatives in Florida, seeking a fresh start.

Even after arriving in Florida, he remained haunted by his false arrest ordeal. After a Google search where his arrest, charge, and mugshot remain, employment door after employment door slammed firmly shut. One prospective employer recently suggested that Gonzales let some more time elapse before trying to find a job.

A bad eyewitness accusation and the cops’ rush to arrest are not an isolated or even rare occurrence. This is demonstrated by the recent release of a movie about Richard Jewell, a former security guard who found a bomb at the 1996 Olympic Games. He saved many lives yet wound up being falsely accused of planting the bomb himself. Because of that false accusation, Jewell’s life was effectively destroyed due to the false accusation against him.

Gonzales was also vilified. “This really, it ruined my life,” he told The Dallas Morning News. “Everything was going great. I got up to go to work every morning. I provided for my kids. Now it’s like, even though I was set free — they finally found out I was innocent — it’s still there.”

Gonzales credits friends, family, and lawyers for sticking with him. Exculpatory evidence and a contradictory timeline given by an unnamed witness bolstered his innocence. Gonzales, it was revealed, was on a FaceTime call with his girlfriend while the shooting was going on. Others saw him sitting in his vehicle outside the party site.

Who killed Byron Craven Jr. and Kevin Berry, and injured six others, remains a mystery. Who devastated Gonzales’ life isn’t.

Source: nytimes.com, dallasnews.com

Fourth Circuit: Erroneous Career Offender Sentence Correctable in First Step Act Resentencing
by Dale Chappell

The U.S. Court of Appeals for the Fourth Circuit held on April 23, 2020, that a retroactive change in law that rendered a career offender sentence erroneous required a district court to fix that error when resentencing under the First Step Act’s application of the Fair Sentencing Act ("FSA") to lower a crack cocaine sentence.

Brooks Chambers was sentenced 15 years ago to almost 22 years in federal prison without parole for conspiracy to distribute 50 grams or more of crack cocaine. At the time, this offense (because of a prior drug conviction) required a mandatory minimum of 20 years in prison. While the FSA retroactively changed the crack cocaine amounts that would trigger higher statutory sentences, Chambers couldn’t get resentenced under the FSA itself because he was a career offender.

When the First Step Act was enacted and applied the FSA retroactively to even career offenders, Chambers filed a motion under 18 U.S.C. § 3582(c)(1)(B), which allows the district court to modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute. The U.S. District Court for the Western District of North Carolina agreed that Chambers qualified under the First Step Act, but it refused to reduce his sentence on the basis that it could not correct the erroneous career offender penalty. The court also decided not to reduce his sentence, citing the “need for deterrence and to protect the public” and because of the “seriousness” of his crime.

Standard on Appeal

On appeal, Chambers argued that the district court misunderstood its scope of authority in resentencing under the First Step Act, and it could have reduced his sentence despite his career offender status, correcting that error.

While resentencing under the First Step Act is left to the discretion of the district court, the Fourth Circuit did not review Chambers’ appeal under the “abuse of discretion” standard but under the de novo standard, taking a fresh look without considering the district court’s determinations. This is because Chambers’ challenge was about the scope of the district court’s sentencing authority, not the resentenci-
The Simmons Error

Chambers needed at least two prior drug or violent felony convictions to be a career offender, and he had three felony drug convictions in North Carolina in the 1990s. But after an en banc court decided United States v. Simmons, 649 F.3d 237 (4th Cir. 2011), two of those convictions couldn’t have been qualified under the career offender guideline because he could not have been sentenced to more than a year in prison for them under North Carolina’s structured sentencing system.

The Fourth Circuit has since declared Simmons retroactive. Miller v. United States, 735 F.3d 141 (4th Cir. 2013). This meant that “the career-offender designation was just as much an error in 2005 as it was when we decided Simmons in 2011,” the Court said.

The Court Had Authority to Fix the Error

The question was whether the district court had the authority to correct the career offender error in light of Simmons. Under the First Step Act, a court may reduce a crack cocaine sentence “as if” the FSA were “in effect at the time the covered offense was committed.” First Step Act, § 404(b). Under § 3582(c)(1)(B), the court gets its authority to reduce a sentence from the statute authorizing the reduction, here § 404(b) of the First Step Act.

The Government argued that the “as if” language of § 404(b) limits the district court’s role to only reduce Chambers’ sentence under the statutory changes by the FSA – the crack cocaine portion – and not his guidelines career offender sentence.

The Fourth Circuit rejected this position. “Section 404(b) also expressly permits the court to ‘impose a reduced sentence,’” the Court explained, and “not ‘modify’ or ‘reduce,’ which might suggest a mechanical application of the [FSA], but ‘impose.’” When a district court “imposes a new sentence,” it must also calculate the guidelines range, according to Gall v. United States, 552 U.S. 38 (2007). “That is why the sentencing court in this case received a supplementary PSR, for example.”

The Court called the Government’s argument “extreme”: “Chambers’ case is a perfect example of the resulting absurdity if we construe the First Step Act to only allow a Fair Sentencing Act statutory modification and no more,” the Court said. “It would pervert Congress’ intent to maintain a career-offender designation that is as wrong today as it was in 2005.” The Court cited other courts that have held the same.

The Court stated “we now hold that any Guidelines error deemed retroactive, such as the error in this case, must be corrected in a First Step Act resentencing.”

Section 3582(c)(2) Is the Wrong Avenue

Finally, the Government (and the dissenting opinion by Judge Rushing) argued that § 3582(c)(2) was the proper avenue for relief, not § 3582(c)(1)(B). They both cited United States v. Hegwood, 934 F.3d 414 (5th Cir. 2019), where the Fifth Circuit ruled that § 3582(c)(2) was the proper avenue, which prevents correction of an erroneous career offender sentence under the First Step Act resentencing.

But the Fourth Circuit said Hegwood is wrong, reiterating that the Fourth Circuit and many other circuits have already found that § 3582(c)(2) is not the proper way to apply the First Step Act. United States v. Wirsing, 943 F.3d 175 (4th Cir. 2019).

The Court further reasoned that the First Step Act was created to help fix the crack cocaine sentencing disparity that disproportionately affects many Black defendants with long sentences.

The Court explained: “Under the First Step Act, Congress authorized the courts to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme. In doing so, it did not import the strictures of § 3582(c)(2), even though it certainly could have. Perhaps it did not want to because it hoped for greater justice for individuals like Chambers.”

Accordingly, the Court vacated the district court’s resentencing order and remanded for further proceedings consistent with its opinion. See: United States v. Chambers, 956 F.3d 667 (4th Cir. 2020).}

Government Study Finds Facial Recognition Sorely Lacking in Accuracy

by Dale Chappell

A study by the National Institute of Standards and Technology (“NIST”), a non-biased government agency that does independent testing on various technologies and industries, has found that facial recognition software used to identify criminal suspects is lacking across the board in accuracy.

The study was thorough; it used 189 different facial recognition algorithms submitted by 99 companies.

The problem is exacerbated by the fact that the technology returns an inordinate number of false-positives targeting minorities.

The study found that African American people were 100 times more likely to be misidentified than white men, depending on the algorithm used.

The faces of African American women were falsely identified by facial recognition programs most often, when the most common kind of search used by police investigators where an image is compared to thousands or millions of other images in hopes of a match.

However, the highest false-positive rate of all ethnicities, according to the study, was for Native Americans. Middle-age men consistently had the highest accuracy rate. That’s also the group that promotes the use of facial recognition software in fighting crime.

Last year, the American Civil Liberties Union (“ACLU”) conducted an experiment using Amazon’s “Rekognition” facial recognition software and found that 28 members of Congress were identified as criminals. This was just using facial recognition and not based on any acts.

In response, Amazon said the ACLU used its software the wrong way. When it was given a chance to participate in the NIST study to prove its software was accurate, Amazon elected to sit out the government study.

Up ahead, the Department of Homeland Security wants to use facial recognition software to screen all air travelers at international airports. While a few lawmakers want to pause to see how the error rates can be corrected before implementing this policy, many are pushing ahead full speed, using the public as guinea pigs. This creates real-world consequences of the false alerts using facial-recognition software for many innocent people.

Also noteworthy: With such a low accuracy rate, the goal of using facial recognition software to find the person who did commit a crime becomes even more remote, especially when law enforcement puts its focus on the wrong person, while the real person casually walks away.

Source: techdirt.com
Idaho Exoneree Fights for Wrongful Conviction Compensation

Christopher Tapp of Idaho Falls, Idaho, was convicted of a murder and rape after 20-plus hours of interrogations over a three-week period in 1996. He was 19 at the time of his arrest. Despite being innocent of the crime, after intensive browbeating by cops, he pleaded guilty. This is not as uncommon as it may seem. A full 18 percent of exonerations arise from guilty pleas. [CLN August 2018]

The victim’s mother, Carol Dodge, was never quite fully convinced of Tapp’s guilt in 1996. August 2019

Carol Dodge voiced her concerns to Little, stating, “I lost my only daughter to a brutal murder. There is nothing that will replace my losses. I cannot even begin to comprehend why you did such a thing [referring to Little’s veto]. Don’t you think the state of Idaho owes him something, a lot actually, for all the years that were wrongly taken from him?”

In July 2019, Tapp was working at a plastic bag manufacturing plant, married to a teacher with three children and was hoping to begin college classes soon. He has filed a formal notice of intent to sue Idaho Falls for wrongfully convicting him in violation of his 1st, 4th, 5th, 6th, 8th, and 14th Amendment rights under the U.S. Constitution. [CLN August 2019]

Source: abajournal.com, abcnews.go.com

Fifth Circuit Clarifies AEDPA Time Limit Tolling for Louisiana Prisoners Filing Federal Habeas Corpus

The U.S. Court of Appeals for the Fifth Circuit clarified on May 15, 2020, that a “properly filed” federal habeas corpus petition by a Louisiana prisoner tolls the clock under the Antiterrorism and Effective Death Penalty Act (“AEDPA”) while state postconviction relief is “pending.” The Court’s decision defined what both of those terms means under the Louisiana postconviction relief scheme, settling an intra-circuit split among the federal courts in the state.

Colby Leonard filed for postconviction relief (“PCR”) in a Louisiana state trial court to challenge his armed robbery conviction in 2011, after waiting over 10 months to do so. His petition was dismissed on the merits, and he timely applied to the appellate court for review. That court, however, dismissed his petition as improperly filed, but it gave him extra time to file a proper petition, ruling that, “in the event Leonard elects to file a new application with this Court, the application must be filed on or before October 22, 2013.” Leonard timely filed his corrected petition just weeks later.

After Leonard’s state PCR appeals were completed, he filed a federal habeas corpus petition under 28 U.S.C. § 2254 in the U.S. District Court for the Middle District of Louisiana. The court dismissed his petition as untimely, saying that (1) his state petition to the appellate court was not “properly filed,” and (2) the law was “unclear” if the appellate court’s grant of extra time kept his state petition “pending” to toll the federal AEDPA clock. The district court denied Leonard a certificate of appealability (“COA”) on this issue, despite it being an open question. The Fifth Circuit granted a COA, and Leonard filed a pro se appellate brief.

The AEDPA imposes a strict one-year time limit for a state prisoner filing a federal habeas corpus petition. This clock starts when the conviction becomes final, i.e., after all state appeals are exhausted. 28 U.S.C. § 2244(d)(1). However, the clock is “tolled” while a “properly filed” state postconviction application is “pending,” if it is filed within that one-year period. § 2244(d)(2).

The Court found that Leonard’s state application was properly filed and thus remained pending in the state courts, tolling the AEDPA clock.

Leonard’s State Petition Was ‘Properly Filed’

The U.S. Supreme Court has defined a “properly filed” application as one “when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.” Artuz v. Bennett, 531 U.S. 4 (2000). The question in the present case was whether the state appellate court’s rejection of Leonard’s petition as improperly filed ended tolling under § 2244(d) (2). Under Louisiana law, a prisoner may seek review of the trial court’s denial of a PCR petition by “invoking the supervisory jurisdiction of the court of appeal.” This is not an appeal but an application to the appellate court. This must be done within 30 days, but either the trial or appellate court may grant an extension of time.
The Fifth Circuit found that “properly filed” under the AEDPA refers to the application filed in the trial court. In order to “honor the text” of the AEDPA, “which refers only to a single habeas application,” and not to multiple applications throughout the habeas process,” the Court concluded that the “properly filed” language in § 2244(d)(2) means the initial application only, not any subsequent applications for appeal.

Leonard’s State Petition Remained Pending

A state postconviction application remains ‘pending’ under the AEDPA “until the application has achieved final resolution through the state’s post-conviction procedures,” the Supreme Court ruled in Saffold. The Supreme Court explained that this promotes AEDPA’s ends by requiring a state prisoner to make “one complete round of the state’s established” PCR process. This gives the state courts the first shot at correcting any constitutional problems.

Whether Leonard’s application remained pending after the appellate court’s rejection was a “thorny procedural question,” the Fifth Circuit admitted. That’s because there’s a split among several federal district courts in Louisiana on whether an extension of time by a state appellate court after dismissal for improper filing keeps that petition “pending.”

The Fifth Circuit recognized that its precedents on this issue “do not chart the clearest path.” The Court pointed to the Supreme Court for help: “The touchstone, however, must be the Supreme Court” teaching that a state post-conviction application remains ‘pending’ within the meaning of § 2244(d)(2) as long as the ordinary state collateral review process is ‘in continuance’ — that is, until the application has achieved final resolution through the state’s post-conviction procedures.”

At no time was Leonard’s state PCR application in an untimely status, the Court observed. He received an extension of time from the appellate court, and he filed his corrected application within that extended time. It did not matter that Leonard never requested the extra time, and the court itself granted it. Leonard’s application did not “achieve final resolution” until the Louisiana Supreme Court denied review. Only then did tolling stop under the AEDPA, and Leonard promptly filed his federal petition before the one-year clock expired.

The Court clarified that, “if a prisoner receives extra time to seek review of the denial of his initial habeas application (and does so), then that application remains ‘pending’ for purposes of § 2244(d)(2).” That’s what occurred in the present case, the Court explained.

Accordingly, the Court vacated the denial of Leonard’s federal habeas petition and remanded to the district court for further proceedings consistent with its opinion. See: Leonard v. Deville, 960 F.3d 164 (5th Cir. 2020).

Missouri Shows Indifference to Human Life by Proceeding with Execution Amid Pandemic

by Douglas Ankney

The “Show Me” state showed indifference to human life by carrying out the death sentence of Walter Barton on May 19, 2020, at the state prison in Bonne Terre, Missouri. Neither the courts nor the governor would intervene.

Executions require interactions among large numbers of people. Court personnel is involved with last-minute hearings. Attorneys must interview witnesses. There are witnesses to the execution itself. The press must be there. Members of the victim’s family are usually in attendance, as well as friends and family of the prisoner being killed. Clergy are involved. Prison staff participate in the execution. Because of coronavirus concerns, the prison required checking workers and visitors’ temperatures and the wearing of face masks.

Texas, the leader in U.S. executions, has rescheduled six executions so far during the coronavirus pandemic. But Missouri’s Republican Governor Mike Parson is in a hurry to get the state back to business-as-usual. In addition to executions, Parson has allowed sporting events, concerts, and church services to resume along with the re-opening of hair salons, restaurants, and gyms, at least through mid-June.

Barton, 64, was convicted of the 1991 slaying of Gladys Kuehler. There is considerable doubt as to Barton’s guilt since Missouri relied on a jailhouse informant and blood-spatter evidence to convict him. Both types of evidence are considered unreliable.

Barton has always maintained his innocence.

The State had to take him to trial five times before it could select him for execution. "Missouri is about ready to put to death an actually innocent man," said Barton’s attorney, Frederick Duchardt Jr. in February.

Source: motherjones.com, KIRO7.com

Dogs Can Detect One-Billionth of a Teaspoon of Gasoline

by Douglas Ankney

According to a recent study from the University of Alberta, trained dogs can detect gasoline in trace amounts as small as one-billionth of a teaspoon (or 5 pico-liters). “During an arson investigation, a dog may be used to identify debris that contains traces of ignitable liquids — which could support a hypothesis that a fire was the result of arson,” explained Robin J. Abel, graduate student in the Department of Chemistry and lead author of the study. “Of course, a dog cannot give testimony in court, so debris from where the dog indicated must be taken back to the laboratory and analyzed.”

But there is a glitch. The trace amounts of gasoline detected by the dogs cannot be confirmed with laboratory analysis. “In this field, it is well-known that dogs are more sensitive than conventional laboratory tests,” said James Harynuk, an associate professor of chemistry and Abel’s supervisor. “There have been many cases where a dog will flag debris that then tests negative in the lab.”

To solve the problem, scientists first needed to know the limits of canine sensitivity. According to a paper titled “A novel protocol for producing low-abundance targets to characterize the sensitivity limits of ignitable liquid detection canines” — published by Abel, Harynuk, and Jeffrey L. Lunder in Forensic Chemistry — the dogs provided no indication at levels of 3 pico-liters or below. Based on the findings of the study, scientists are now attempting to develop a test that will detect gasoline in quantities as minute as that detected by the dogs.

Source: ualberta.ca
Fulton County Prosecutor in Georgia to Expunge MLK and Other Civil Rights Leaders’ Records, But not Everyone Agrees

by Michael Fortino, Ph.D.

On October 19, 1960, the Rev. Dr. Martin Luther King, Jr. was arrested while taking part in the Atlanta Student Movement’s campaign of boycotts and sit-ins, in which he and others attempted to seek service at a whites-only dining room in the Rich’s Department Store in Atlanta, Georgia. Sixty years later, that arrest record could be expunged, but Dr. King himself, if he were still alive, might have objected.

Fulton County Solicitor General Keith Gammage said, “I always had in my mind, what effect would it have if we expunged the record for arrests of Martin Luther King, Jr. and the other civil rights protesters, and called those arrests what they were—unconstitutional and biased arrests.”

Gammage, 48, born after King’s death, is on the board of trustees at King’s Ebenezer Baptist Church.

“There is a gap between social justice-related protests and activism and a true criminal offense,” he said. “And what the protesters and activists were fighting for, remains a barrier for other citizens today.”

Gammage’s announcement of the proposed expungement came on the eve of the anniversary of King’s April 4, 1968 assassination. Not everyone attending agreed.

Gammage has said he’s had positive conversations with the King family regarding his plan and “wouldn’t do it without their full support.”

He went on to say, “This could be a clarion call for other people that they could have their records cleaned and cleared, and have a second chance at the American dream.” The expungement would cover only Fulton County arrests, but the Solicitor General said he would “encourage other jurisdictions to start similar discussions.”

Leading “Black Power Studies” scholar Peniel E. Joseph, a professor at the LBJ School of Public Affairs and a member of the history department in the College of Liberal Arts at the University of Texas, said King’s record should be cleared “as a matter of political and legal ethics.”

Joseph further proclaimed, “The record should be expunged in the sense that the society, and not Martin Luther King, Jr., were the ones guilty of crimes of violence and illegality against black bodies in that generation.” He suggested, “It’s important to recognize that as a corollary to expanding contemporary notions of guilt and innocence as we try to pursue expansive criminal justice reform in the state of Georgia and nationally.”

“King didn’t like to be arrested,” writes Clayborne Carson, a biographer of King. “He was not like John Lewis.” Referencing a conversation King shared with his wife Coretta Scott King, Carson memorializes Dr. King’s feelings — “the loneliness of prison was too much to bear.”

Carson’s biography describes King through Coretta’s eyes, “He just broke down and cried and then he felt so ashamed of himself. Even the Rich’s arrest, I don’t sense that he meant to get arrested when he came to Rich’s that day.”

The 1960 Atlanta arrest was a particularly troubling event for King. On May 4 of that year, about five months before the arrest, he was stopped in Dekalb County, allegedly because there was a white woman passenger in his car. The vehicle was borrowed and had an expired license plate. Dr. King had just moved back to Georgia and was still using his Alabama driver’s license. He was given a ticket and allowed to drive on. Then, on September 23, he appeared at the Dekalb County civil and criminal court to resolve the ticket. The Judge dismissed the charge on the expired plates but fined King $25 and put him on probation for the lack of a Georgia license. The probation required that he “shall not violate any Federal or State penal statutes or municipal ordinances for one year.”

It is not clear whether King knew he was still on probation when he accompanied Lonnie King, Julian Bond, and Herschelle Sullivan to the Rich’s protest where all were formally arrested.

Lonnie King said later, “I indicated to him that he was going to have to go to jail if he intended to maintain his position as one of the leaders of the civil rights struggle. Apparently King was somewhat reluctant to go with the students. “The consequences for him were greater than the students,” said Carson.

King, over his brief 39 years on Earth, was arrested more than two dozen times. The arrest at Rich’s violated his DeKalb probation and was one of only two felony charges he received. The second felony, later acquitted, was for tax fraud in Alabama.

For the DeKalb charge, King was sentenced to four months in jail. Shortly after being sentenced, he was awakened in his cell at 3:30 a.m., put in handcuffs and leg irons, and transported in the backseat of a police car to the Georgia State Prison, Reidsville. “Reidsville was very traumatic for him,” Carson said. “They didn’t tell him where he was being transferred to. He didn’t know if they were going to beat him or kill him, or whether it was meant to scare him. They certainly accomplished that.”

Vice President Richard Nixon, then running for president, refused to intervene on King’s behalf. His Democratic rival, John F. Kennedy, did however. Robert Kennedy called the judge, and King was subsequently released.

Biographer Carson and Auburn University professor Bernard LaFayette each have a slightly “different take” on the expungement process. LaFayette said, “I wouldn’t want mine expunged. That is part of my history as a civil rights worker. Our arrests were for challenging the segregation system. That was necessary in order to change the conditions.” LaFayette was arrested 30 times for civil rights activities.

Regarding expungement, Carson suggested, “It is really a good idea to do that in a massive way. When you do the time, you pay your debt, that should be the end. Unfortunately, it’s not.”

While Carson was a UCLA student in the 1960s, he was arrested twice, but even he is not positive he would want his own record expunged. “It is a badge of honor and it doesn’t change the historical reality that you were arrested,” Carson said.

The civil rights movement expungements are only a relatively small part of Gammage’s crusade to remove “the yoke of misdemeanor convictions that often shackle people years after the fact.”

Gammage went on to say, “Some of the people whose record we expunged were in their 70’s who couldn’t get into senior housing for an arrest 20 years earlier for a $15 bad check or stealing a loaf of bread…. it has been removing a yoke from around their necks.”
Survey: California Cops Abusing Privacy Rights with Auto Plate Readers

by Jayson Hawkins

Automated license-plate readers ("ALPRs") have come into wider use among law enforcement circles, touted for making the jobs of police easier and more efficient.

The technology employs high-speed cameras in cop cars, on top of streetlights, and other locations to record the license plate of every single vehicle that passes. The data are automatically uploaded to a computer vehicle network that tracks the precise place and time each one is spotted, thus allowing an algorithm to flag speeding and other traffic violations.

It is also capable of tracking every vehicle on the road, creating a profile of where each one went, how long each stayed, and other details that pry into the lives of private citizens.

Authorities claim the technology is only used to monitor "people of interest," yet there is little-to-no oversight as to which individuals are placed on such a list or who might have access to the resulting data. Civil rights advocates have pointed out that ALPRs can be turned against political rivals or any other group by tracking which vehicles show up at protests, union meetings, religious services, health clinics, or gun stores.

An investigation launched in the summer of 2019 by the California State Auditor’s office found that fears of potential abuses of the technology were far from ungrounded. ALPRs were already being used by 230 state agencies at the time of the audit, with 36 more planning to deploy them in the coming months. Among those that had the technology currently in use, 96 percent stated they had policies in place governing its usage and who could access the data; however, of the four agencies reviewed "neglect[ed] to institute sufficient monitoring" and had not implemented state guidelines intended to shield police data from being shared with federal immigration authorities. Investigators found that the agencies’ data were being made available to over 1,000 law enforcement groups covering 44 states.

The report concluded with several recommendations, including that state agencies using ALPRs need to assess and revise their related policies by August 2020. It also suggested legislation requiring the California Justice Department to create a model ALPR policy for local agencies to use as a template. That model should include limits on how long data can be kept and which personnel are allowed to access it, and that those practices come under periodic review.

Because local agencies have been operating in violation or ignorance of existing state law regarding ALPRs, it is unclear how additional legislation would make a difference. One effective solution has been proposed by the watchdog group EFF: a moratorium on ALPR use in California, at least until civil rights and privacy concerns can be satisfactorily addressed.

FBI Provides Fitness App in Exchange for Users’ GPS Coordinates

by Douglas Ankney

During the coronavirus lockdown, the FBI is urging people to stay in shape by downloading its Fitness App. On March 23, 2020, the agency tweeted “download the FBI’s Physical Fitness Test app to learn proper form for exercises you can do at home like pushups and sit ups.” According to the FBI, the FitTest was created in 2018 and uses the "phone's GPS and accelerometer" to provide users a “more realistic PFT experience.”

But the digital workout tool has been slammed on social media as a sneaky means for the government to obtain personal information amid the coronavirus pandemic.

One distrustful Twitter user quipped, "Looking to get ripped while ceding your location data to the FBI? Boy, do we have the app four [sic] you.”

Another user tweeted, “I’ll pass on this one.”

And Fight for the Future posted, “DO NOT - AND WE CANNOT STRESS THIS NEXT PART ENOUGH - DOWNLOAD THIS APP”

Nonessential businesses, including gyms, were forced to close after New York Governor Andrew Cuomo ordered New York City be placed on lockdown. In response, many folks have turned to the internet as a resource for fitness tips and other apps promoting wellness while staying at home.

The FBI’s Physical Fitness Test app promises users they may “train like an agent” using a variety of exercises that don’t require equipment. The FBI maintains that it “does not collect personal user data from this app; the information remains stored on the device in accordance with FBI.gov’s privacy policy.” And the government can be trusted to keep its word — just ask the indigenous tribes of America.
New Jersey man reaches out to police ahead of a possible altercation to make sure authorities are aware of his son’s autism-related issues.

Gary Weitzen’s son Christopher has autism. Christopher has anxiety issues, and it is difficult for him to look people in the eye. Because of his anxiety, when he was younger, he would take off running if he was not constantly supervised. “Our friends called our house Fort Weitzen,” said Gary. “I couldn’t let Christopher out of my sight.”

Now Christopher is in his twenties. He likes to take walks at night, though he appears angry and noncommunicative to people who are unaware of his issues.

Gary informed the local police in South Orange, New Jersey about his son’s issues, as well as his parents’ contact information. They understand that John Deere tractors and Thomas the Tank Engine characters may help him calm down, and they are aware of his anxiety triggers.

“It’s a smart move,” said Sgt. Adrian Acevedo, “to tell us his son is blowing off steam, has special needs, and won’t make eye contact or listen to us. If we didn’t have this information, we could mistakenly take him for a burglar.”

According to a 2017 study by the A.J. Drexel Autism Institute at Drexel University, one in five teens with autism are stopped and questioned by police before age 21, and five percent are arrested. Research done by the Children’s Hospital of Philadelphia found that people with disabilities, such as autism, are five times more likely to be incarcerated than the general population, and “civilian injuries and fatalities during police interactions are disproportionately common among this population.”

According to Wendy Fournier, president of the National Autism Association, her group has published “The Big Red Safety Box” and “Meet the Police” programs to help parents address wandering and police interactions.

Weitzen said educating local police about a person’s disabilities can save lives, especially since people with autism “may keep their hands in their pockets because it’s a coping mechanism. They may repeat a word because it helps them focus. Not all uniformed personnel understand these behaviors.”

In 2016, North Miami Police shot a behavioral therapist who was trying to calm down a young man with autism who was holding a toy truck the officers mistook as a weapon.

Educat ing officers can prevent such situations. According to Sgt. Acevedo, “Knowing your child and having your child know us completely changes that situation.”

Source: nytimes.com

In 2018, the MacArthur Justice Center filed a class-action lawsuit against the city of Chicago, former Police Superintendent Eddie Johnson, and the city’s police officers, challenging the city’s gang database. The suit was filed on behalf of several community groups and four specifically named plaintiffs who are currently in the database.

This year there’s a plan. As of February 26, the Chicago Police Department (“CPD”) set a plan to revamp the controversial Chicago gang database within the next 12 months.

According to Charlie Beck, interim CPD superintendent, the new system will involve much stricter criteria when adding someone to the database, as well as centralizing the police department’s gang information.

Previously, referrals from any officer — including school resource officers — that someone’s name be added to the database could occur without oversight or vetting. “Thousands of people have been erroneously classified,” according to the complaint.

“Who’s going to believe them that they’re not a gang member if you have this official record saying they’re a gang member? The consequences are devastating, particularly to the immigrant community,” said MacArthur lawyer Vanessa del Valle. “Being labeled as a gang member hurts people in their immigration proceedings. It prevents them from getting basically any type of immigration relief.”

There was no way to remove your name once in the database. A coalition of community groups — including Mijente, Black Youth 100, Beyond Legal Aid, and Organized Communities Against Deportations — spearheaded a drive to eliminate the database. Allena Bradley, an organizer with Black Youth 100, said it’s been “an uphill battle, to say the least.” Bradley also pointed out that some people as young as nine years old have been added to the database, apparently relying on unvetted information from a teacher or school resource officer that went to the police department.

Now, an individual must admit to gang membership in the last five years on video. If no video is present, he or she must meet two of six criteria to be added to the database. This includes an unrecorded self-admission; wearing of distinctive gang emblems or tattoos; evidence from a reliable confidential informant within the last two years; the use of distinctive gang signs; being identified as a gang member by another government or penal institution; or being arrested, charged, or convicted of a crime where gang membership is an element of the offense or is documented in the court record.

In an attempt to reduce subjective judgment, the wearing of gang emblems, clothing, or tattoos cannot be used together to admit someone to the database.

In addition to the list of criteria, there will be a “multi-level approval process,” and if someone on the list has not had contact with law enforcement for a period of five years, they will be removed from the database.

Despite plans for reform, many civil rights attorneys and activists are still committed to eradicating the system altogether. There is no assurance of how police officers and supervisors will be trained, which can lead to continued violence due to racial profiling and police brutality, as well as a general strained relationship between the people of Chicago and its police department.

In order to get a better understanding of crime and how to stop it, the police must form a relationship with the people and work together in a manner that is productive and positive.

Carolina Gaete, director of the Blocks Together community group, said police wrongfully arrested her 17-year-old son Tomas “Nico” Gaete because he was in the database.
He was accused of carrying out a gang-related shooting. The case was dismissed, and he was released after spending a week in jail.

“I fought so hard for him to stay out of jail, and then he gets accused of something he didn’t do because of racist tools that police use,” said Carolina Gaete. “If this is happening to Nico, I’m sure this is happening all over the city.”

According to the suit, of the more than 128,000 adults listed in the database, 95 percent are Black or Latinx. Access to data has been consistent complaints from communities of color for decades. Regardless of the demographic, people of color loudly expressed their outrage about how they are treated by the police,” said the 2016 report.

Using Doctor-Prescribed Marijuana Could Send Some People Back to Prison

by Douglas Ankney

Melissa Gass is a wife and a mother of five children who suffers from seizures as a result of a car crash when she was 10 years old. The seizures occur weekly, sometimes daily. She suddenly feels a throbbing pain in the back, left side of her brain, and then the next thing she knows, she is waking up face down in the dirt — or in an intensive care unit — covered with her urine and feces. Often, someone has injected diazepam gel into her rectum to keep her alive.

But in 2016, the state of Pennsylvania legalized medical marijuana, and Gass, at age 42, obtained a doctor’s certification for it in February 2019. She put a dot of cannabis oil in a spoonful of peanut butter three times per day, and her seizures stopped almost entirely.

But in September, her Lebanon County probation officer told her that due to a new county court policy, she could go to jail if she didn’t stop using the cannabis oil. (Gass is on probation because back in 2016, she was treating her symptoms with a mixture of prescription medication and alcohol when she hit her husband of 20 years, and the state prosecuted her.)

Gass is now the lead plaintiff in a lawsuit by the ACLU of Pennsylvania challenging the court rule in Lebanon County that prohibits parolees and probationers from using their prescribed marijuana. According to the ACLU, at least a half-dozen counties in Pennsylvania have similar policies.

Marijuana for medical use is legal in 33 states. And in 11 states, people age 21 and over may smoke it for recreational use. But in many of those same states, drug testing for those on probation and parole remains the rule, and those individuals may be sent to prison for using any marijuana. Fortunately for Gass, the Lebanon County rule has been put on hold while her case is pending, and she may continue using her prescribed marijuana.

Source: marshallproject.org

New Method to Determine Time of Death for Forensic Investigators

by Kevin Bliss

Researchers at Amsterdam UMC — led by forensic biophysicist Maurice Aalders in collaboration with Co Van Ledden Hulsebosch Center and the Netherlands Forensic Institute — have devised a new method for calculating time of death using ambient body temperature with an average deviation of about 45 minutes.

Current time-of-death estimates are calculated by inserting a rectal thermometer into the corpse and comparing the result to a chart based on body weight and the area’s climate. The charts used do not even take into account different types of body structure. Not to mention insertion of the rectal thermometer could potentially destroy trace evidence.

New techniques use a non-invasive method by determining body temperature using thermal imaging or sensors attached directly to the body, then comparing them to a chart, taking into consideration such aspects as the amount of body fat, whether the victim was clothed, partially submerged in water, and several other factors.

“In our study, we achieve an accuracy of 45 minutes on average of people who are dead 5 to 50 hours,” said Aalders. “This is a major step forward in forensic investigations at the crime scene, where an inanimate body has been found. Our method can be used up to two days after the victim’s death.”

Computers are being used to re-create 3D images of the crime scene to help investigators.

Said Aalders: “Obviously we want to refine this further. We are convinced that it can be done even more accurately. But this improvement is already useful to the police. We are working on a method with which we capture a body at the crime scene 3D. That method, structure from motion photogrammetry, means that photography is taken from all directions, with which a program makes a 3D model. This is immediately read into our program to calculate the cooling. In this way, investigators can determine the time of death even more accurately for a variety of bodies, postures and situations.”

The database used in the new method has been tested against controlled conditions. Full results of the study can be found in the journal Science Advances.

Source: forensicmag.com

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Unrest After Kentucky Cops Shoot Sleeping Black Woman to Death in Her Bed While Serving No-Knock Warrant

by Ed Lyon

Calling for “justice for Breonna,” a recent vigil in Louisville and demonstrations across the country have focused on the young unarmed Black woman fatally shot by police in her own bed.

Breonna Taylor was a hard-working emergency room technician on the front lines in the nation’s fight against the coronavirus. On March 13, 2020, she was killed in her sleep, at home with boyfriend Kenneth Walker, during a reckless raid by Louisville Metro Police Department (“LMPD”) detectives. News reports said the detectives were serving a no-knock drug warrant intended for a residence 10 miles distant from Taylor’s apartment, although later reports said her address was included in a separate warrant because it was believed someone at the home was suspected of accepting packages as part of a drug ring under investigation. No drugs were found in Taylor’s home.

At press time, there had been no charges in Taylor’s death, but two of the police officers involved were on administrative leave, one officer was terminated, and police Chief Steve Conrad was fired after another police-involved fatality.

The March raid began with plainclothes LMPD Sergeant Jonathan Mattingly and officers Brett Hankison and Myles Cosgrove entering Taylor’s apartment using a battering ram. They did not announce their presence or identify themselves, according to witnesses.

Walker believed their home was being invaded. He opened fire with a weapon, wounding Mattingly in the leg. Responding with gunfire, the police struck the sleeping Taylor eight times while firing 20 rounds, killing her and wounding Walker.

Walker was arrested and charged with attempting to murder a police officer. The charge was dropped.

Early reporting on the case by the Louisville Courier-Journal headlined, “LMPD officer shot, woman killed during drug investigation off St. Andrews Church Road,” drew a critique from The Nation, asking whether people read it “and thought the cop was the victim in this encounter? How many people read that and thought that Taylor was either a criminal or mixed up with criminals in some way?”

“Remember,” writes The Nation’s Elie Mystal, “that police reports are the version of events most pleasing to the police. Remember that cops will continue to kill people of color until we choose to hold them accountable.”

The Taylor family responded by hiring civil rights attorney Benjamin Crump to seek redress for their daughter’s killing. Their lawsuit against the three officers is drawing national attention. Crump is also representing the families of George Floyd and Ahmaud Arbery in lawsuits over officer-involved deaths and took on cases for the families of Michael Brown, Trayvon Martin, and Tamir Rice.

Sources: washingtonpost.com, Fox News, thenation.com, the Associated Press

Minnesota Lab Figures Out How to Tell Between Legal Hemp and Illegal Marijuana

by Dale Chappell

Medical marijuana is legal in the state of Minnesota, but recreational use is not. This causes problems for the state’s Hemp Pilot program, which licenses growers of hemp as long as the THC concentration stays below 0.3 percent. If the THC is greater than that, it’s considered marijuana, and it constitutes a crime.

“Since a hemp plant and a marijuana plant are the same species of plant, they would yield the same results” in a lab test for THC, the Midwest Regional Forensic Laboratory at the Anoka County Sheriff’s Office said in a statement. “This made our job difficult as we were unable to determine if an item was from a hemp plant or a marijuana plant with our current methods of testing.”

The lab has figured out a way to differentiate the THC in a hemp plant from a marijuana plant.

The new testing method, which went live March 25, 2020, gives law enforcement and prosecutors scientifically valid information that they need to either arrest someone for possessing marijuana or, much more importantly, not to arrest them if they are merely possessing legal hemp.

Since hemp can be used to make everything from food to lotions to sandals, there have been no regulations on the sale of hemp products. Being able to determine the THC purity level of a product gives law enforcement and the public more control over what’s being done with hemp products, some say.

“The Midwest Regional Forensic Laboratory is the first of eight accredited and publicly funded labs” to begin quantitative cannabis testing in the state, according to the publication Forensic.

Source: forensicmag.com

Small Forensics Lab Finds Niche in Analyzing Tiniest Bits of Evidence

by Dale Chappell

In the show Making a Murderer on Netflix, a forensics lab was tasked with figuring out if microscopic particles on a bullet were bone, as the prosecutor claimed. Turns out it was wood, not bone, lending a hand to the defense’s theory that it was not the bullet that killed the victim.

That lab was Microtrace out of Elgin, Illinois. The father-son team of Skip and Chris Palenik head up the 14-person lab, which thrives on analyzing the tiniest bits of evidence. They do this by using what’s called a field emission scanning electron microscope (“FE SEM”), a high-resolution scope that allows imaging at extreme magnifications.

“Crime labs typically look at particles on the order of 10 to 100 microns,” says Chris Palenik, a multiple-degree holder in chemistry and geology with a Ph.D. in the latter. “We’ve applied SEM analysis to look
at particles smaller than one micron." Most crime labs use tungsten SM, a cheaper option that answers most of the basic questions in forensics.

The lab also has more than 35,000 specimens, ranging from sand, soil, and glass to hair, pigments, dyes, and foods. It helped crack the case of a stolen shipment of cellphones that was replaced with boxes of sand. By breaking down the composition of the sand and cross-referencing with its collection of sand, Microtrace figured out where the sand came from. That’s right: They can tell what beach

$8 Million Settlement for Wrongfully Convicted and Imprisoned Missouri Man

by Kevin Bliss

David Robinson settled out of court with the city of Sikeston, Missouri, for $8 million for a wrongful murder conviction, which forced him to spend 18 years in prison for a crime he did not commit.

Represented by Jonathan Potts, Robinson filed suit against the city of Sikeston after a May 2018 Missouri Supreme Court decision ruling there was “clear and convincing” evidence that Robinson did not shoot Sheila Box outside her Sikeston bar in 2000. Robinson maintained that he was at a family gathering at the time of the shooting. Three of his relatives verified his alibi.

Robinson said he was a troublemaker growing up in Sikeston with a criminal record. He said the police did not like him, and that was the reason they framed him for the murder in 2001.

In 2004, Romanze Mosby confessed to Box’s murder, along with several others. But he refused to sign an affidavit stating such and hung himself in his cell five years later.

Robinson filed two appeals based on Mosby’s confession, but he said the police helped to stop the acquittal on both appeals. He then filed a motion to the state Supreme Court where a judge ruled that there was no physical evidence that linked Robinson to the crime and that two of the witnesses recanted their testimony placing Robinson at the scene of the crime. He reversed the conviction, and the state prosecutor made the decision not to retry Robinson.

Robinson immediately filed a wrongful conviction suit, and a year later, the city of Sikeston settled for $8 million. City Manager Jonathan Douglass said the city would pay $75,500, and

Police Use of Robotic Technology Raises Civil Liberty Concerns

by Douglas Ankney

While Sleepy Hollow had the Headless Horseman, the Massachusetts State Police (“MSP”) had the headless dog. Spot — a one-time member of MSP’s bomb squad — is a semi-autonomous robotic dog that MSP leased for three months from Boston Dynamics.

Fearing the potential abuse of robotics technology and the secretive introduction of the technology into police arsenals, the American Civil Liberties Union of Massachusetts (“ACLU-MA”) called attention to Spot during an interview last November on radio station WBUR. “We just really don’t know enough about how the state police are using this,” said Kade Crockford, director of ACLU-MA’s Technology for Liberty program. “And the technology that can be used in concert with a robotic system like this is almost limitless in terms of what kinds of surveillance and potentially even weaponization operations may be allowed.”

But according to MSP’s contract with Boston Dynamics, Spot cannot be used to physically harm or intimidate people. MSP spokesman David Procopio defended the use of robotic technology, saying, “Robot technology is a valuable tool for law enforcement because of its ability to provide situational awareness of potentially dangerous environments.”

ACLU-MA isn’t primarily worried about Spot but stated the concern is the absence of transparency regarding law enforcement’s rules surrounding the use of robots as well as the lack of legislation protecting civil liberties, civil rights, and racial justice in connection with artificial intelligence.

In Singapore, the four-legged Spot was deployed in a two-week trial in May 2020 to assist with the partial pandemic lockdown, from monitoring social distancing to heeding essentials-only travel, such as grocery shopping or solo exercising. Breaches of lockdown in that country can bring fines and even jail time.
New York Police Act With Impunity During Protests

by Kevin Bliss

Critics say the New York City Police Department ("NYPD") is responding to protestors of George Floyd’s May 25, 2020, death with increased violence and no fear of repercussion. Accusations have been made of beatings, pepper spraying, and threatening protestors with guns. Civilians complain that police illegally cover their shield badge numbers with "mourning bands" used for the commemoration of fallen comrades.

Government watchdog organization Broadcastify, which allows citizens to listen in on police and emergency band radio broadcasts, aired police transmissions as protestors moved June 1 into the 77th Precinct of Brooklyn. A police officer can be heard yelling, "Shoot the motherfuckers." While another responded with, "Don't put that over the air."

Human rights activists said this is just another example of a long pattern of violence without fear of repercussion that is prevalent in law enforcement. While being called to protect and serve the public, police are instead engaging in combat with protestors.

A group of New York public defenders issued this statement June 2: "The disturbing videos and reports of the violent attacks by NYPD on protestors and the media, while traumatizing to watch, are all too familiar to us. They mirror the stories we hear every day of police acting with impunity, targeting, attacking, beating, lying, abusing, and disrespecting Black and brown people in the communities we serve in all five boroughs."

NYPD Commissioner Dermot Shea and Mayor Bill de Blasio, while condemning the police who killed Floyd in Minneapolis, sided with New York police in their efforts against protestors.

Meanwhile, the Civilian Complaint Review Board is still under coronavirus protocols and must do most of its work remotely. Because of such constraints, the panel is still clearing cases from before the onset of the pandemic. This, and the Patrolmen’s Benevolent Association’s uncooperative stance, have effectively stalled any investigations.

Even when investigations are completed, results have been kept from the public. Until recently, a state law referred to as "50-a" made all personnel records of police, including internal investigations, misconduct complaints and body camera footage "confidential and not subject to review."

New York Governor Andrew Cuomo signed a repeal of 50-a on June 12, thanks to the efforts of such groups as Justice Committee and Communities United For Police Reform.

Will making police records transparent hold more officers accountable? Source: theintercept.com, northjersey.com, vox.com

News in Brief

California: A series of racist and anti-Muslim posts on social media allegedly has ties to a private group of active and retired San Jose Police officers calling themselves 10-7ODSJ, a reference to the police code for "off duty," mercurynews.com reports. In June 2020, four of them were placed on leave while the police department investigates. News of the group surfaced in an anonymous blog post on Medium, an online platform, alleging the postings "included disparaging comments about Black Lives Matter protestors and Muslims," KCBS Radio reports. San Jose Mayor Sam Liccardo, Police Chief Eddie Garcia and the San Jose Police Officers’ Union condemned the group. So did the D.A. "No one who expresses these types of disgusting, racist comments should ever wear a badge," District Attorney Jeff Rosen offered in a statement. "This Office’s Conviction Integrity Unit will immediately begin a comprehensive review of every case in which these officers — active or retired — played a role. Anyone who writes this kind of trash has no role in our criminal justice system."

Raj Jayadev, a member of a local police watchdog group that supports diverting police funds from police to community programs, told KCBS Radio: "This wasn't necessarily just about four rogue, racist police officers, this was about institutional racism that was protected by the department for years."

Colorado: A memorial for Elijah McClain, a 23-year-old Black man who died in a police encounter, did not receive the dignity it deserved. As mourners gathered in late June 2020 for a peaceful vigil, police arrived in riot gear and deployed pepper spray. Said MSNBC journalist Chris Hayes: "People congregated to pay tribute to him, to call for accountability for his death, and to play their violins in his honor. And then Aurora police basically recreated the dynamic of McClain's death."

"The young man who taught himself to play guitar and violin died Aug. 24, 2019, after going to buy iced tea for his brother at a nearby convenience store. Walking home, he was stopped by cops because a 911 caller said he was waving his hands and wearing a ski mask. An officer who insists McClain reached for an officer's gun, restrained McClain in a now-banned carotid hold. Paramedics were called but McClain "went into cardiac arrest on the way to the hospital, and was taken off life support on August 30," thecut.com reports.

"His family said at the time that he was brain dead, and covered in bruises." No charges were filed against the officers as of June. McClain had no weapon.

Delaware: Gov. John Carney signed an executive order in June 2020 to ban the use of chokeholds by law enforcement in the state, including Delaware State Police and Capitol Police. Order No. 41 also "increases community engagement; requires additional de-escalation and implicit bias training; and increases the availability of crisis intervention services for law enforcement officers," delawarebusinessnow.com reports. "Carney’s order also will formally prohibit executive branch law enforcement agencies from sharing mugshots of minors, except when public safety is at risk; require transparency around use-of-force protocols; and mandate participation in the national use-of-force database."

England: A screening of 525 of Hampshire's police staff found that nearly 70 percent of them are overweight. According to the BBC, an email from Chief Superintendent Lucy Hutson "warned staff of the health risks following a recent health screening program. However, the force insisted the screening included only 8% of its staff, that it’s "not representative of our workforce as a whole" and that the unit has "very low sickness rates."

Meanwhile, research underway during the lockdown has found obesity "doubles the risk of needing hospital treatment for coronavirus," dailymail.co.uk.

Florida: Former Palm Beach County Sheriff’s Deputy Robert “Bobby” Simeone...
FLORIDA: Former Miami Gardens Officer Jordy Yanes Martel is under fire for excessive use of force after bystander cellphone video showed his encounter January 14, 2020, with Safiya Satchell outside Tootsie’s Cabaret. Satchell was accused of being disrespectful of wait staff. Yanes was charged with four counts of battery and official misconduct. Video shows that Yanes reached into Satchell’s SUV, dragged her out and pressed “his knee on her neck” and twice stunned her with a Taser, the Miami Herald reports, leaving her with cuts, bruises and abrasions. Yanes also was charged with misconduct for “filing two reports containing false details” about his interaction with Satchell as an off-duty cop. “He had arrested her on charges of battery on a cop and resisting with violence — charges that have since been dismissed.” The former cop’s defense attorney alleges Yanes “was ‘punched in the mouth’ by a woman who was ‘clearly intoxicated.” Yanes was booked and released from the Turner Guilford Knight Correctional Center.

FLORIDA: As thousands protest for criminal justice reform, one police chapter made a pitch to troubled cops. According to a June 8, 2020, CNN report, the Brevard County chap-ter of the Fraternal Order of Police addressed officers and also determines the basic training required to become an officer.” John-

IOWA: A man going door to door in Nevada, Iowa, while carrying a large sword was handcuffed, tased by police and died, Ames Tribune reports in June 2020. Jason James Kruczic, 51, was instructed by officers to drop the sword but he reportedly said: “It stays in my hands.” As paramedics arrived to remove the Taser barbs and treat him, Kruczic stopped breathing. He was then transported to Story County Medical Center, where he died, according to police. “He was just a good guy — he wasn’t going to hurt anybody,” said Samantha Axley, 33, who knew him.

KANSAS: After witnessing police abuse in 2005, Brandon Johnson went on to become a Wichita City Council member and a police reform advocate, kansas.com reports. In June 2020, Governor Laura Kelly tapped him to helm the Kansas Commission on Peace Of-

MASSACHUSETTS: A police officer who gave support on social media to her niece taking part in a Black Lives Matter rally has lost her job. “Florissa Fuentes, who had recently joined the Springfield Police Department’s Special Victims Unit, was fired on June 19 after a May post she made while not on duty,” according to thehill.com. The image on Instagram, Masslive.com reports, “showed her niece protesting in Atlanta. Flames leap up in the background and her niece holds a sign that reads: “Shoot the F--- Back.” A friend’s sign reads: “Who do we call when the murderer wears the badge?” Later, Fuentes removed the post but said she had “no malicious intent.” Commissioner Cheryl Clapprood said “the post was hurtful to many of her co-workers.” Fuentes, who was on workplace probation, was given a choice to resign or be fired on the heels of attending a police department united rally and photo shoot in Springfield. “I felt used,” she told Masslive.com. “The commissioner waved at me from her car while I was there. They all knew what was happening.”

MICHIGAN: On June 28, 2020, a peaceful rally and march in southwest Detroit against police brutality took an unexpected turn. According to the Detroit Free Press, “a Detroit police officer drove an SUV through a crowd of protesters after they surrounded the vehicle and began pounding on it. With the overhead lights flashing, the officer behind the wheel gunned the accelerator, sending protesters flying onto the pavement while others scurried out of the way as the vehicle lurched through the crowd. At one point, the SUV jerked to a stop and then sped away with at least two protesters on the hood, throwing them to the ground a dozen yards later. One of the men thrown from the hood clutched his leg and limped after he stood up. The other man appeared unharmed. Both men continued to march back to Patton Park.” The rear window on the police car was smashed, the newspaper reports, and both incidents are being investigat-
ed. Speakers from civil rights and other groups talked of inequalities and the need for solidarity.

NEVADA: Assembly Bill 236 is expected to shrink the number of non-violent offenders
News In Brief (cont.)

and parole/probation violators that Nevada incarcerates through various changes and greater access to treatment and diversion programs, according to Nevadaappeal.com. “The law makes significant changes to Nevada’s burglary statutes, recognizing for example breaking into an unoccupied vehicle isn’t nearly as serious as burglarizing an occupied home. It also raises the dollar amount needed to qualify as a felony theft from $650 to $1,200.” Another bill provides “compensation for people who were wrongfully convicted and deprived of their freedom.” Bill “AB267 would compensate those wrongfully imprisoned up to 10 years with $50,000 a year, up to 20 years $75,000 a year.” The legislation “was the product of nearly two years’ work with thousands of hours of staff time donated by the Crime and Justice Institute.”

New York: New police accountability measures in the state include a ban on chokeholds in the wake of protests over George Floyd’s death in Minneapolis. The executive order, signed by Governor Andrew Cuomo, calls for police departments to “develop a plan that reinvents and modernizes police strategies and programs” by “April 1, 2021, including bias awareness and use of force. Local departments must engage the public in their plans and receive the approval of local officials to be eligible for state funding,” npr.org reports. The Rev. Al Sharpton, who was present at the signing, credited protesters. “We were told, ‘You start with demonstration to lead to legislation and then reconciliation.’ Without the legislation, the demonstration is just an exercise,” Sharpton was quoted by npr.org.

New York: NYPD has suspended police officers who were filmed clashing with protesters. “A police inspector who was filmed hitting a peaceful protester in the back of his head with a metal baton during a demonstration is being charged with assault,” abcnews.go.com reported, citing Philadelphia District Attorney Larry Krasner’s announcement in June 2020. In addition, “NYPD Commissioner Dermot Shea announced disciplinary action against officers who were filmed assaulting protesters during last weekend’s demonstrations in the city.”

Oregon: Six police reform bills supported by Governor Kate Brown in June 2020 are bound for approval. The legislation was put forth by the People of Color Caucus. The only bill receiving “pushback from police unions” was the arbitration bill, KATU.com reports. “The bill deals with law enforcement discipline. It would ensure disciplinary actions can’t be reversed by an outside arbitrator.” House Bill “4203 limits use of force if it restricts a person’s ability to breathe,” KATU.com reports. Other bills deal with tear gas and reporting police who act unethically.

Texas: One-fourth of the Houston Forensic Science Center staff were reported “out of commission due to COVID-19,” according to chron.com on June 30, 2020. That means “the Houston Forensic Science Center is dangerously close to having to limit its responses to crime scenes,” according to chron.com, quoting Dr. Peter Stout, the agency CEO and president. “Of 200 total staff, 10 have tested positive for the novel coronavirus,” he said June 29. “Another 12 are self-quarantining while they await test results. None of the exposures appear to have been transmitted through their work.” The agency manages the city’s forensic laboratory and crime scene unit, which operates 24/7. With people off work, the demand is great on the smaller unit remaining and “tired people make mistakes,” Stout said.

Vermont: Reform might be on the horizon as the state Senate passed a bill in June 2020 to ban chokeholds by cops and adopt use-of-force guidelines. Police also would have to comply with racial data reporting requirements under a second bill, WCAX.com reports. “While the Legislature had been considering similar proposals for some time, they were given new urgency in the aftermath of George Floyd’s killing. Both bills still need to be considered by the House,” WCAX.com reports.

Virginia: Alexandria Police Officer Jonathan B. Griffin was arrested June 30, 2020, for unjustified use of force, according to alexandriava.gov. Police announced “a misdemeanor charge of assault and battery in connection with a January incident where a person taken into protective custody for a health evaluation was forced to the ground.” Griffin was placed on leave.

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