

# Criminal Legal News

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## Deceiving Themselves: How Cops' False Belief in Their Ability to Detect Deception From Nonverbal Cues Leads to Miscarriages of Justice

by Casey J. Bastian

"The mistakes of lie detection are costly to society and people victimized by misjudgments. The stakes are really high." — Maria Hartwig, John Jay College of Criminal Justice

**F**OR AS LONG AS HUMAN BEINGS HAVE communicated, many have practiced the art of deception. That people can lie is a fact of everyday life, and lie they will. Research suggests that an average person will tell two lies per day. Research also shows that during a typical 10-minute conversation, 60 percent of people will tell a lie. Obviously, some lie much more frequently than others. The motives are as varied as the actual lies.

The great majority of lies are low-stakes. These are the "little white lies" — about personal attitudes, feelings, and opinions — told to preserve and support social cohesiveness. And while some damage can be caused by these lies, they are generally harmless.

The darker side of deceptions and lies are considered high-stakes. Lies people consider serious, often told to hide significant transgressions such as cheating on a test or an infidelity to a spouse. The most serious of these are told to hide criminal acts and are told for the purpose of self-preservation.

The pertinent question raised is: How can lies be detected as they are being told? Identifying a liar isn't obvious or easy. If you believe it is, you're likely deceiving (lying to) yourself. And this has been a problem for millennia. Human beings simply have a hard time detecting deceit based on nonverbal cues.

Several decades of research reveal that even "experts" struggle to accurately detect deception through nonverbal behavioral cues.

The psychological folklore of body language and physiological reactions revealing deceit just aren't true. Innocent people can convey the identical behaviors of a guilty person in high-stress circumstances — like a criminal interrogation. To make matters worse, nearly 70 percent of everything we "say" or convey is a nonverbal communication. According to Judee Burgoon, Ph.D., and professor of communication at the University of Arizona, "There really is no Pinocchio's nose."

Despite decades of research to the contrary, members of law enforcement and the criminal justice system have a persistent and unshakeable belief that they possess some innate ability honed through years of experience of detecting when a suspect is being deceptive based on nonverbal cues. Nevertheless, data and research have established that, despite their unjustifiably inflated sense of their abilities, the true accuracy rate is little better than "chance," even for them. That is, flipping a coin is just as accurate as they are in being able to consistently identify when someone is being deceptive by scrutinizing nonverbal cues.

But that is a genuine and alarming problem. These professionals hold people's liberty and lives in their hands. Deceiving themselves about the accuracy of their abilities has led to far too many wrongful arrests and convictions. When capital punishment is at stake, it's literally "an issue of life or death."

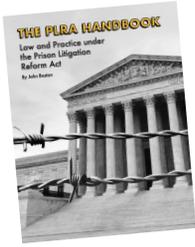
An infamous example of this is the case of 14-year-old Canadian Steven Truscott. He was falsely convicted of raping and murdering Lynn Harper in 1959. The inspector was convinced Truscott was guilty after an initial interview because Truscott was observed

acting "nervously." The inspector's belief that Truscott was a "lying, sexual deviant" led to the boy's conviction and death sentence — overturned only after Truscott experienced the trauma of such an ordeal.

Psychologists Bella DePaulo, of the University of California, Santa Barbara, and Charles F. Bond, Jr., of Texas Christian University, reviewed 206 previous studies on deception detection in 2006. These studies "involved 24,483 observers judging the veracity of 6,651 communications by 4,435 individuals." Neither student volunteer nor law enforcement experts identified true from false communications at a rate higher than 54

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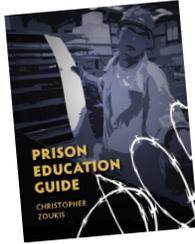
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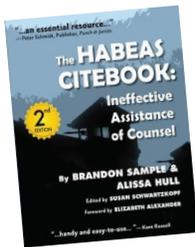
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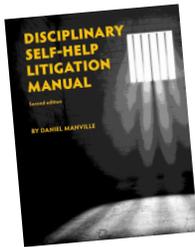
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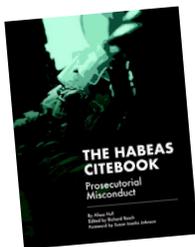
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## Deceiving Themselves (cont.)

percent. Other studies reveal the same results. Even in individual experiments, accuracy ranged from 31 to 73 percent – a 52 percent average. “The impact of luck is apparent in small studies,” said Bond.

Correctly inferring that a person is being deceitful based on nonverbal cues, e.g., speech errors, nervous fidgeting, or gaze aversion, is a continuing mythology that endangers the legitimacy of the criminal justice system, people’s freedom, and even life. These pervasive misconceptions are found globally, across many cultures. “One of the problems we face as scholars of lying is that everyone thinks they know how lying works,” said Hartwig, who is a psychologist and deception researcher at John Jay College of Criminal Justice.

The persistence of nonverbal lie detection myths is intriguing. It is also demonstrably dangerous. Most importantly, it is considered a covert threat to criminal justice systems worldwide, and America is not exempt. The detrimental effects of these discredited, pseudoscientific, and unfounded beliefs are not easy to measure. While we may never know “how many innocent people have suffered unjust punishment” because of wrongful convictions based on these myths, we can be confident “this problem is substantial.”

### What Exactly Is ‘Deception’?

DECEPTION IS OBVIOUSLY A PERVERSIVE, necessary phenomenon in human communication. The result is that the definition of what precisely is “deception” is a subject of debate. It really is not straightforward. You can “deceive” someone but not be “lying.” For example, someone tells you that it’s not going to rain, so you don’t take an umbrella when you leave the house. But that person had misinterpreted the weather report. Now you’re wet. You were deceived but not lied to.

As there is a spectrum of what can be called deceptions, the idea has been studied within multiple disciplines. These include linguistics, philosophy, psychiatry, and social psychology. For our purposes, we focus on finding methods of detecting deceptions that are “lies,” and specifically, those considered high-stakes. A sufficient definition of deception in this context is: “a successful or unsuccessful attempt, without forewarning, to create in another a belief which the communicator considers to be untrue.” With that definition in mind, the terms deception and

lie can be used interchangeably.

### The Need to Detect Deception

AS SOCIETIES EVOLVED, BECOMING MORE cooperative and structured, standards of conduct (laws, regulations, policies, customs) were established. For these standards to be effective, they must be adhered to by each member of the society. It is the only way to ensure stability and effectiveness in established social constructs. Those who violate these standards must be identified, and the violation rectified. This is how mediating the effects of deception came to be viewed as a legal challenge.

To protect individuals within society and society as a whole, citizens rely on the rule of law. A functioning legal system is the foundation of every developed society. To develop trust in such systems it is required that only the culpable are sanctioned. And to do so, those individuals must be correctly identified. When the system gets it wrong – especially in the sphere of criminal law – injustice follows. Unfortunately, the American criminal justice system gets the wrong person far too often. This frequently happens because in an effort to detect the deceptions of the guilty, misconceptions about nonverbal behavioral cues malign the innocent. False and inflated belief in law enforcement officers’ own ability to detect deception from nonverbal cues result in coercive investigations, identification of the wrong suspect, false confessions, and wrongful convictions.

Evidence is mounting that proves law enforcement and the courts know our need to detect deception has created another problem for society. Yet, they continue to promote misconceptions during seminars and in training manuals. Officers, agents, and judges are still “sympathetic to unfounded, discredited, and pseudoscientific claims” regarding deception detection.

### A History of Deception

LONG BEFORE DECEPTION BECAME A LEGAL challenge, deception has been a moral issue. Some believe that a duplicitous serpent coaxed Eve into committing the original sin, enshrining deception as the ultimate source of evil. Aristotle declared that “falsehood is in itself mean and culpable.” German philosopher Immanuel Kant described truthfulness as an “unconditional duty which holds in all circumstances.” Others postulated dissimilar views. The Italian Saint Thomas Aquinas believed a lie told in service of virtue was appropriate. Machiavelli “extolled deceit in the

## Deceiving Themselves (cont.)

service of self.” Divergent perspectives aside, the existence and prevalence of deceit itself is acknowledged by each.

Concerning deception, people share a lot of common traits: they’ll tell lies, be told lies, and are quite hypocritical about both. People lie to appear sophisticated, acclaimed, successful, or ironically, virtuous. Lies are told to protect the feelings of the speaker or another. Some even lie for fun, referred to as “Duping Delight” by some psychologists. Such lies are “little lies of little consequence or regret.” Situations calling for such deceptions are “momentary exigencies” representing a necessary evil of social life producing little guilt, anxiety, or shame. To the deceiver, such lying is innocuous.

However, lies that are anything but innocuous are told quite frequently as well, albeit in relatively smaller numbers. Deceit for the purpose of manipulation, unjust enrichment, or avoiding responsibility for immoral or criminal acts is pernicious towards society. Though the idea of what is “immoral” or “criminal” is relative to a given society, the point remains the same.

Whether superficial or quite consequential, when people lie, it can be psychologically justified by the deceiver. But when they are the victim of deceit, people become quite moralistic, indeed. Then deception becomes wrong and “reflects negatively on the deceiver.” Researchers developed the Moral Psychology Theory that proposes a “double-standard hypothesis” to explain the apparent moral ambivalence towards deception. Deception scholars are exploring this phenomenon in more detail hoping to explain studies that reveal duplicity is considered one of the “greatest moral failings” in spite of the very human tendency to lie.

Out of 555 personality traits, the trait of being a liar was rated as “least desirable.” It follows then that “social logic assumes honest people always act honestly.” Considering the apparent reality, this is a dubious assumption; but social cohesion requires this belief. To declare otherwise and label another’s statement a lie is to “imply that the person who made the statement is a liar.” Such accusations are quite serious, particularly in matters of consequence. Discovery of serious deception can have disastrous consequences for the liar’s identity, reputation, or freedom. Those being deceitful in serious matters will take advantage of this natural deference.

With all this history of interacting with deceit, people are still really bad at accurately detecting it. The problem is that the signs of deception are typically subtle and not primarily revealed in one’s body language.

### The Rise of Pervasive Mythologies

A BELIEF THAT LIES ARE TRANSPARENT AND revealed through nonverbal behavior has been recorded as early as 1,000 B.C. The Chinese believed that a suspect should be given a mouthful of dry rice. If the rice remained dry after a period of time, the suspect was guilty. This is one of the earliest known beliefs that a physiological response arising from fear or anxiety might produce an ascertainable result – in this case, decreased salivation. It is safe to conclude that many innocent people were executed based on this, the world’s first known and flawed, deception detection model.

Records from 900 B.C. reveal it was believed “liars shiver and engage in fidgeting behaviors.” In 1908, German-born American psychologist Hugo Munsterberg postulated that observations of “posture, eye movements, and knee jerks” reveal deception. A famous quote by Austrian psychologist Sigmund Freud is often chided by modern researchers for its now-apparent inaccuracy. Freud claimed “no mortal can keep a secret. If his lips are silent, he chatters with his finger-tips; betrayal oozes out of him at every pore.” As it turns out, sometimes a fidget is just a fidget. But unfortunately, many in the law enforcement community have not yet heard that deception detection based on nonverbal cues has been thoroughly debunked for lacking any scientific basis for such a belief.

Having captivated the human imagination for millennia, deception was destined to attract psychological investigators. There has been extensive research into deception detection, and curiosity is increasing. For example, between 1966-86, there were more than 415 psychology articles written – an average of nearly 21 per year. In 2016 alone, this number was up to 206 new articles prepared and released. Critical discussions of nonverbal lie detection had become necessary because “judgements of nonverbal behavior can be made in every social encounter,” often to someone’s detriment. In 2019, the *Annual Review of Psychology* published its first article about nonverbal behaviors and deception, which firmly declared that “we vastly and consistently overestimate our skills.”

“How can you tell when people are lying?” This question was posed to participants

in 75 countries encompassing 43 languages in one study. In another, the Global Deception Research Team (“GDRT”) interviewed people in 58 countries. Researchers in both studies wanted to know if there are worldwide, pan-cultural stereotypes or if they are culture-specific. The most precise answer is that every culture associates lying with “actions that deviate from the local norm.” But researchers did find some pan-cultural commonalities.

Americans associate 18 different behaviors with deception. The number one stereotype identified in 11,157 responses is known as “gaze aversion,” a belief that liars cannot maintain eye contact. Similar stereotypes are identified by Western Europeans, including those from Britain, Germany, the Netherlands, Spain, and Sweden. Other stereotypical beliefs about deception are: arm, hand, and finger movements; changes in speech rate; making sigh-like sounds; you must know a person to detect deceit; tone of voice; eye-related cues beyond gaze aversions (called “spontaneous saccadic eye movements”); sweating; playing with clothes, hair, or objects; unspecified behavioral changes; and weak arguments and logic. All other cues aside, verbal content revealed by weak arguments and logic are likely the most accurate in detecting deception, certainly more so than nonverbal cues.

The GDRT study revealed a total of 103 beliefs drawn from various cultures. The lowest prevalence of gaze aversion stereotype is found in the United Arab Emirates (“UAE”). The gaze aversion stereotype was identified by 20 percent of respondents in the UAE, placing it eight out of 103 on the GDRT coding system.

Researchers believe the gaze aversion myth is found within many cultures due to neural structures in the human brain. These neural structures are specialized for perceiving eye contact and “are sensitive to gaze direction from birth.” When a mother breaks natural eye contact, this can be perceived as the first sign of disapproval that infants experience. By age three, children know that adults respond with disapproval to intentional lies. This leads to a mental connection between deceit and gaze aversion. So, while this myth may be widely held, we must exercise caution.

Gaze aversion and other nonverbal behaviors are culturally mediated. As to Western cultures, Black Americans are more prone to gaze aversion than white Americans. Native Turkish and Moroccan peoples living in the Netherlands display more gaze aversion than

the native Dutch people. Looking into someone's eyes may be polite in Western cultures, but it is considered quite rude in others. Japanese and Aboriginal Canadian cultures are quintessential examples of such belief systems. Caucasian Canadians view those who avoid eye contact as "being shifty, devious, dishonest, crooked, slippery, untrustworthy, etc." The Aboriginal Canadians customarily avoid direct eye contact because it is considered "rude, hostile, and intrusive." Imagine the problems this caused in early, everyday interactions – and even today when a Caucasian Canadian law enforcement officer questions an Aboriginal Canadian. The latter's desire not to be rude or hostile is the very behavior the former interprets as being deceptive.

Any belief that detecting lies based on observations of nonverbal behavioral cues in any useful, systematic manner on an "individual culture-free basis" seems thoroughly unreliable. As one group of researchers put it: "We may have been looking for a lawfulness in human behavior that exists only in our minds."

### The Search for Viable Detection Methods

AS PEOPLE REALIZED THAT LYING IS PROLIFIC and can have harmful impacts, they tried to

learn how to spot a liar. And yet, in general, they're better at lying than detecting the lie. After thousands of years, this still remains true.

It turns out that "our ancestral environment did not prepare us to be astute lie catchers." Our distant ancestors typically lived in environments lacking privacy. This reduced the prevalence of serious, high-stakes lies. Opportunities to study demeanor and to interpret behavioral cues to detect deceit were too infrequent. Most serious lies were instead "discovered by direct observation or physical evidence," not interpretations of demeanor. Serious misdeeds rarely occurred and didn't go unnoticed. The reputational costs to an individual would have been too great and inescapable. A reliable ability for nonverbal cue lie detection just never developed.

Other researchers argue that a "general deception-detection incompetence" must be "inconsistent with evolutionary theory." This theory suggests that effective detection of deception was critical for the purposes of survival and reproduction as a species. Humans trying to evade discovery of their deceptions were constantly adapting, but the same was likely the case for those trying to detect deception. But this generally involved low-stakes decep-

tions like the location of food stores, not murder. Yet, a small number of costly mistakes should have created the wisdom necessary to detect harmful deceptions. For a variety of reasons, a permanent evolutionary ability to detect deception never materialized. Our evolutionary history has not left us "very sensitive to the behavioral cues relevant to lying."

This inability to detect lies based on nonverbal cues has become more consequential as society evolves. The prevalence of lies has increased in modern societies. There are more opportunities to lie and fewer immediate consequences if detected. Even serious lies about conduct that feel outside the criminal sphere don't necessarily result in permanent reputational damage today. It is much easier to pick up, move, meet new people, and start over (this may be changing back to being more difficult in the information age, but the point remains). It is also easier to conceal evidence of activities about which one might need to lie. Because the evidence of lies is not so evident, demeanor was the primary means by which people tried to make deception detection judgements.

Not only has evolution failed to teach us accurate nonverbal detection methods, culture has left our capacity diminished as

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## Deceiving Themselves (cont.)

well. We've been taught not to identify others' lies. If someone lies to protect their privacy, we're okay with that. For example, as a child, if your parents said they were going to take a "nap," whether this was true or not simply didn't matter. If they deceived you, fine. Being trusting is also helpful in relationship development. Always being suspicious undermines the establishment of "intimacy in mating, friendships, or ongoing work relationships." Trust makes life easier, "so we err on the side of believing the liar."

Often, we want to be misled so "collude in the lie unwittingly" because it is better to not "know" the truth. This applies to many with a cheating spouse. One doesn't want to get caught, and the other doesn't want the marriage to end. As a result, the deceptions aren't "detected." Or, if your wife wants to know your opinion about another woman's looks, even if the answer is obvious, the deceptions are exchanged, and everyone remains happy with what is technically a lie. Even though some would consider these types of lies "serious," the need to tell them and the desire to not detect them serve a vital social purpose.

However, such rationales do not adequately explain why most members of modern criminal justice systems have such a difficult time discerning lies through demeanor. The police don't adopt a "trusting stance" with an accused, in fact, the exact opposite is true. Law enforcement do not collude in their being deceived. They trust no one while investigating

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criminal acts, assuming everyone is lying. And that might be part of the problem. To them everyone "acts" guilty. These are the misunderstandings and ignorance of human behavior that miscarriages of justice are born of: highly suspicious people who believe everyone is lying, who have tremendous power over life and liberty, and who can't accurately detect deceit through demeanor but stubbornly insist they can despite conclusive scientific evidence to the contrary. Confidence does not equate to ability.

A 2003 study revealed police officers overestimate their ability to detect lying. Sixty officers were asked to assess their detection accuracy. Even when performing below chance levels, each assessed their accuracy as "high." When provided feedback that confirmed their detections were effective, any "notion of their abilities increased." Negative feedback caused them to "rate their lie detection abilities lower." What this reveals is that law enforcement is susceptible to their own belief systems. In the real world, this tendency of police to "overestimate their ability to detect deception can change suspicion into certainty and increase the risk for a false confession" as well as remain doggedly fixated on a particular suspect based on little more than investigators' misplaced belief in their alleged ability to detect when a suspect is lying.

### The Turn to Technology

IN 1870, FRANZ JOSEPH GALL DEvised a method called phrenology. The idea was that the shape of the skull could reveal behavioral patterns, including "the tendency to lie" and "engage in criminal behavior." While Gall's method was abandoned as a lie detection method, it did lead to a "medical model of criminal behavior." This model first posited that behaviors are affected by brain malfunctions. As a result, many crimes were reevaluated and likely saved a "multitude of mentally ill people from being unfairly sentenced."

Jean-Hippolyte Michon introduced graphology in 1875. Designed to detect forged signatures, it led to the assumption that certain personality traits are revealed through "peculiarities of handwriting." As a method of lie detection, it was abandoned after WWI. Italian criminologist, physician, and anthropologist Cesare Lombroso created the first modern lie detector in 1881. "Lombroso's Glove" attempted to chart changes in blood pressure. The device was later improved by William M. Marston after WWI and designed to record changes in breathing

and blood pressure during interviews. Based on this, John Larsen and Leonard Keele designed the "Cardio-Pneumo Psychograph" – or simply, the polygraph. A polygraph records changes in blood pressure, galvanic skin response (bioelectric reactivity), and respiratory rate. Polygraph results are based on the outcome of the "relationship between physiological changes which manifest when a person is not telling the truth." The reality is that these physiological changes are varied and evidenced by other states than lying.

By the late 1990s, the polygraph was frequently used in business and law enforcement environments. The need to ensure the polygraph's reliability increased as "growing popularity" and "recurring inaccurate results" were observed. The National Academies of Science ("NAS") tested the polygraph in 2003. The NAS found reliability (of detecting targeted physiological changes) between 81-91 percent and was confirmed by six independent research projects.

But while the polygraph might reliably chart physiological changes, it doesn't "detect" lies, and that's the entire purpose of the polygraph. The device "measures physiological responses postulated to be associated with deception." That is a huge difference. The results of a polygraph examination demonstrate similar emotional responses by those both lying and those telling the truth. The nonverbal responses are measured by the polygraph but must be interpreted by the interviewer. This allows for bias to be introduced. When combined with a well-trained examiner and other verbal analysis techniques, it can be a useful tool. Its limitations are recognized as such, and any results are typically not allowed in court proceedings.

In 1993, research focused on manufactured expressions of pain to create a Facial Action Coding System ("FACS"). FACS is a device measuring any facial expression a human can make. The FACS manual describes how an individual can code each facial Action Unit and was first published in 1978 by Ekman and Friesen. It was eventually renamed the Ekman Micro Expression Training Tool after its inventor. A training program was developed to allow someone to become a self-instructed, certified micro-expression expert. It has never been shown to accurately detect lies.

Another technical method developed was Voice Stress Analysis ("VSA"). VSA measures "fluctuations in the physiological microtremor present in speech." Every muscle in the human

body presents microtremors. Microtremors in the vocal cords have a frequency of around 8-12Hz (a Hertz is a cycle of one per second, so 8-12 microtremors per second). As lying is perceived to be a stressful event and stress causes "microtremor shifts in frequency," VSA is regarded as a potential means to detect false statements. A 2013 study found VSA can "identify emotional stress better than the polygraph." It still doesn't technically detect lies either, though. Further testing of the VSA's reliability in the justice system is ongoing and is viewed as having potential.

While technological methods dependent on physiological responses waxed and waned, the field of neuroscience was developing a variety of detection methods at the "highest levels of mental processes." To measure brain activity, several methods were developed: transcranial magnetic stimulation ("TMS"), functional magnetic resonance imaging ("fMRI"), position emission tomography ("PET"), and Brain Fingerprinting ("EEG wave").

The first EEG wave (electroencephalograph) method was devised in 1924 by Hans Berger. Theoretically, the brain processes unknown or irrelevant information and known or relevant information differently. If details of the crime were present in the brain of a

suspect, this should be "revealed by a specific pattern in the EEG wave." Brain Fingerprinting uses P300 brain response to detect recognition of known information.

In 1995, one of the inventors of EEG wave detection discovered P300-MERMER (Memory and Encoding Related Multifaceted Electroencephalographic Response). P300-MERMER provides a "higher level of accuracy and statistical confidence than the P300 alone." Peer-reviewed publications report "less than 1% error rate in laboratory research."

Brain Fingerprinting does exhibit disadvantages. For this method to be reliably used in criminal investigations, investigators would need a sufficient amount of very specific information about the crime and suspect. This is the only way a suspect's EEG wave readings could be "matched" to a "correct" determination. But if the suspect had captured knowledge of the crime's details from another source, like the investigator, the results would be corrupted. Brain Fingerprinting requires more time and preparation, as well as being more costly, than methods such as the polygraph. This places real limitations on its availability for broad use.

PET and FMRI devices focus, not on the

peripheral nervous system like the polygraph, on the central nervous system – that is, the brain and spinal cord. Expanding the fMRI in 2002, a study used BOLD (Blood Oxygenation Level-Dependent) fMRI to "localize changes in regional neuronal activity during deception." The study subjected 18 students to a Guilty Knowledge Test involving playing cards. Researchers were able to identify significantly different areas of the brain that varied "between the two conditions of telling the truth and lying."

In 2003, Harvard researchers used BOLD fMRI to study localized brain changes in three scenarios: memorized lies, spontaneous lies, and the truth. The researchers observed that each type of lie created brain activity in the "anterior prefrontal cortices bilaterally," areas believed to be involved in retrieving memory. The 2002 and 2003 studies each found that the anterior cingulate cortex is activated by spontaneous lies. Researchers suggest that brain activity "may be related to the conflict associated with inhibiting truth." Lying takes deliberation and intent, and this causes particular measurable brain activity. Further studies identified up to seven areas of the brain that predominately exhibit activity when a lie is being told. This resulted in a 90% accuracy rate in

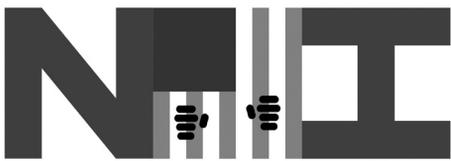
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## Deceiving Themselves (cont.)

early detection studies using this information.

But again, researchers urge caution. Other studies published findings that these methods are “not sufficiently precise” and “lack strong empirical foundation.” A 2008 review identifies the following issues: “problems with replication, large individual brain differences, and unspecified brain regions associated with truth telling.” Several other limitations have become apparent. Lie detection experts using fMRI methods typically describe young, healthy adults, but BOLD activity is altered with age. And these experiments do not specifically answer the “lie or truth” question either. Instead, these methods simply reveal which parts of the brain are activated when lies are told in an experimental setting.

The problem is that in each experiment, using contrived lies and different subjects caused similar activity in different parts of the brain. In other words, it might make inferable data observable, and this might reveal possible deception in one person, but it might not do so in another. Those detecting deceptions would technically need to know how each individual brain functions to accurately determine deception.

And that might be the most significant limitation on lie detection techniques: the human brain itself. Any accusation, right or wrong, will activate parts of the brain. The brain of every individual is so unique that it might be impossible to precisely predict

deception. It is also possible for some to “hide” activity by thinking of complex, different activities like mathematical operations, etc. Researchers call this “self-defense.”

The direct and indirect observation of behavioral, physiological, or neurological nonverbal cues are not found to be wholly and independently accurate methods of deception detection. Not even with the most advanced, modern technological assistance. They are each just different examples of methods for interpreting nonverbal cues.

Awareness of the deficiencies in nonverbal methods has not sufficiently diminished their popularity or use in lie detection. Organizations like the ACLU argue that even if these technologies could reliably detect deception, their use would still be opposed. Their position is that it views “techniques for peering inside the human mind as a violation of the Fourth and Fifth Amendments, as well as a fundamental affront to human dignity.”

### A Demand for ‘Reliable’ Truth Detection Methods

NEW AND VARIOUS METHODS TO DETECT lies in people’s personal and professional lives are very popular. An Internet search related to “ways to catch a liar” yields nearly 10 million references to much-heralded methods. These range from the clearly exaggerated but plausible to some that seem, well, deceptive, with costs ranging from \$19.99 - \$109.99.

For the right price, the following courses are available: Never Be Lied to Again: Advanced Lie Detection Course; How to Get the

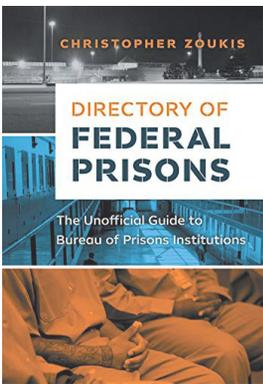
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You can even find those that attempt to draw from equally unreliable law enforcement training methods. Just buy the “Detective’s Guide to Lie Detection and Exposing the Truth” for only \$29.99. It’s quite evident that popular culture reflects an adherence to these false belief systems. The relationship between nonverbal behavior and deception has become big business, but criminal justice professionals need to do better – lives are literally at stake when law enforcement buys into and perpetuates the false belief in investigators’ ability to detect lies based on observing nonverbal cues. In fact, they should be required to use different modern techniques. As it is, these basic mythologies have clearly stunted American police interrogation training. These myths have also become a built-in legal presumption within court proceedings today. When determining witness credibility, judges’ and jurors’ incorrect popular belief systems can distort the credibility determinations and cause miscarriages of justice in worst case examples.

### Popular Methods Used by Law Enforcement

IF YOU GOOGLE “CAN POLICE TELL WHEN someone is lying,” the results imply the answer is yes, when in actuality, the answer is a resounding no. One article is entitled: “Former Detective Reveals How to Tell When Suspects are Lying.” According to Stacey Dittrich, “The 911 call and initial statements are among the most important pieces of evidence should a case go to trial.” Dittrich is a former Ohio police detective, self-styled crime “expert,” and author. “The entire case can build from those few sentences,” says Dittrich, apparently without any self-awareness of how ridiculous that statement is. In other words, a whole case can be built based on unfounded, initial presumptions.

Some examples Dittrich provides are: calls to 911 that are considered “pre-emptive” (it’s “too soon” to be concerned about a missing loved one); a person is too calm or too hysterical; only innocent people answer with just a direct “yes” or “no”; providing too many details (we can presume not enough details



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would make Dittrich suspicious as well); lying about small stuff; saying “huh?”; helping with alternative explanations; and similar content. The only reason such belief systems might be reasonable is because it tends to imply reliance on verbal content as oppose to nonverbal behavior, but they are still subject to myth-based confirmation biases and perceptions of the interviewer.

But the biggest and obvious problem with the foregoing “expert” techniques to determine whether someone’s lying is that it presupposes that all people will behave exactly the same way in a particular situation (violent death of a loved one, accused of a serious crime, witness to a traumatic event, called a liar by cops, etc.) or under certain conditions (extreme stress, terror, emotional trauma, etc.) and deviations from that presupposed standard behavior is indicative of deception and lying. The underlying assumption is so preposterous as to utterly fail the so-called “giggle test,” but there’s certainly nothing amusing about the fact that so many law enforcement officers actually believe it, even if implicitly.

Marty Tankleff was 17-years-old when he found his parents brutally murdered in the Long Island family home. Investigators claimed Tankleff was too calm about the ordeal (notice how this presupposes there’s a standard or “correct” way all people should behave in this circumstance, so his deviation from that standard is indicative of guilt). Any claim of innocence was disregarded, and Tankleff confessed, was convicted, and sent to prison.

Jeffrey Deskovic was 16-years-old when his classmate was found strangled. Detectives claimed Deskovic was “too distraught and too eager to help” (Tankleff above was too calm for investigators). Clearly, that made Deskovic guilty according to detectives. Deskovic confessed, was found guilty, and sentenced to prison.

Both boys spent nearly two decades in prison, each wrongfully convicted because of scientifically unsupportable beliefs espoused and actively perpetuated by people like Dittrich. The number of wrongful convictions in the U.S. compared to that of Western-European countries may be linked to investigative styles. In Western-European countries, an “information gathering” technique is used. This technique encourages suspects to speak more, and they typically do, as opposed to the accusatory interviews in the U.S. The Western-European technique tells investigators to “solely concentrate on the speech content,” not

on nonverbal cues and behavior.

In the U.S., this “accusatory interview technique” causes suspects to say less and makes the interviewer more dependent on nonverbal cues. “Confrontation is not an effective way of getting truthful information,” observed Shane Sturman, President and CEO of Wicklander-Zulawski & Associates (“WZA”). The WZA organization is one of the “country’s leading law enforcement training organizations.”

It took decades for WZA and similar groups to finally admit what they teach is not effective. Throughout those decades, WZA

taught thousands of investigators the “Reid technique,” created by John E. Reid and Associates. The Reid technique was considered the “Gold Standard” and the “granddaddy” of accusatory, confrontational interview methods. This technique is “guilt presumptive” and “begins with an accusation, a confrontation” focused on nonverbal behaviors. Training of the Reid technique instructs interviewers to “lie about evidence linking [a suspect] to the crime.” A suspect maintaining their innocence is to be “interrupted and redirected to the idea that they’re guilty.” An investigator should convey that “resistance is futile.”

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

**ADVERTISING MATERIAL**

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## Deceiving Themselves (cont.)

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A flyer for a four-day, 36-hour training event held in 2018 at the Austin Regional Intelligence Center described the Reid technique curriculum. Interviewers are taught to consider behaviors reflecting fear or conflict to be “emotional states that would not be considered appropriate from a truthful subject.” Such behaviors include “posture changes,” grooming,” and “eye contact.” The “interrogation process” is covered in the second half of the training. Training covers such topics as: “beginning with how to initiate the confrontation; develop the interrogational theme; stop denials; overcome objections” and work to “stimulate the admission.” The interviewer is taught to pursue the suspect through “various stages of the interrogation process including the Defiant Stage, the Neutral Stage, and the Acceptance Stage.” It’s difficult to understand how these types of interrogation techniques are designed to extract truthful information rather than a confession, regardless of whether it’s true or false.

To the training groups, there is no cause for concern in those instructions. Reid and Associates President Joseph Buckley relentlessly declared “we don’t interrogate innocent people.” What that means exactly is anyone’s guess. Except the whole technique was premised after a wrongful conviction. It would be ironic, except for the fact that the eponymous technique has been used over the years since that first wrongful conviction to produce countless more false confessions and wrongful convictions.

Chicago policeman John Reid created the technique that would eventually have a “near monopoly” on interrogation training in America. Reid interrogated Darrel Parker in 1955, believing Parker had raped and murdered his own wife. After nine-hours of accusatory interrogations, Reid compelled Parker to confess. Parker was innocent. A career criminal named Wesley Peery had committed the crime. Parker was officially exonerated in the summer of 2012 but not until years after Peery had died. The confession had been given to Peery’s attorney but remained hidden due to attorney-client confidentiality. Then in his 80s, Parker said, “At least now I can die in peace.” Parker had finally achieved a legitimate “Acceptance Stage.”

WZA is moving away from traditional methods like the Reid technique. Sturman says it’s a big move for WZA, but the change

has been “coming for quite some time” because research reveals “other interrogation styles to be much less risky.” The move was prompted by research done by the High-Value Detainee Interrogation Group (“HIG”), a federally-funded interagency effort created by the Obama Administration. HIG works to improve means of “advancing the science and practice of interrogation.”

A 2016 HIG report declared: “Empirical observations found that police in the U.S. regularly employ poor interview techniques” that incentivize suspects to “provide incorrect information.” The Reid technique isn’t the only method that needs to be abandoned. In 2018, the Northern California Regional Intelligence Center provided training called “Subconscious Communication for Detecting Danger.” This program was developed by former police chief Steven Rhoads, who operates two outfits called Subconscious Communication Training Institute and Institute for Lies.

Richard Leo is a professor of law and psychology at the University of San Francisco School of Law and is an interrogation expert. Leo calls the subconscious communication training “disturbing.” Leo adds, “I mean, anything can be said to be subconscious. So, the cops can just make it up.”

Jeff Kukucka is particularly concerned with subconscious danger detection. “I would be very concerned that the context of those trainings would just exacerbate the implicit, especially racial, biases that already exist,” says Kukucka. He also holds negative views of “New Tools for Detecting Deception” by Renee Ellroy. Ellroy has adopted the self-styled “Eyes for Lies” persona, claiming she is “one of just 50 people” who can spot deception “with exceptional accuracy.” The “Eyes for Lies” has taught a full spectrum of law enforcement, including the local, state, and federal agency levels.

There is just one problem. “It’s completely bogus,” said Kukucka, an assistant professor of psychology and law at Towson University. Kukucka studies forensic confirmation bias, interrogations, and false confessions. “And what’s maybe more alarming about it ... is that this isn’t new. We’ve known for quite a while that this stuff doesn’t work, but it’s still being peddled as if it does.” Leo and Kukucka aren’t alone.

Steven Drizin is co-director of the Center on Wrongful Convictions at Northwestern University’s Pritzker School of Law. Drizin says training that is based on junk pseudoscience “just furthers the deterioration of the relationship between case officers and people in

the community.” Drizin argues that the police reform movement must include science-based interrogation methods. “Part of the distrust that you see between law enforcement and minority communities stems from the way suspects, witnesses, victims, and family members are treated by detectives during the course of an investigation,” said Drizin.

The initial modern theoretical conceptualization of nonverbal behavior and deception was presented by Ekman and W.V. Frieson in 1969. Their model expanded psychoanalytical methods of early Darwinian and unconscious theories of emotions. Ekman and Frieson hypothesized that an inability to fully suppress emotions associated with deception – anxiety, fear, or delight – could cause nonverbal cues to be displayed. This was the “leakage hypothesis.” These leakage cues were thought to manifest themselves in nonverbal channels such as arms or hands, face, and legs or feet. Ekman’s 1985 leakage theory has been “highly influential in the popular media,” while spawning network television shows that perpetuate dangerous myths to the law enforcement community and general public alike.

Ekman’s theories have since been highly criticized in the scientific community. The primary problem is what emotions exactly is a liar supposed to feel? Or when? Others questioned why a similarly situated truth teller might not experience the same emotions. Ekman confounds both emotion and deception. The idea that liars and truth tellers might experience differing cognitive processes dates back to 1981 paper by M. Zuckerman. Theories that focus on liars’ emotions have been generally rejected since. Despite this understanding, many books, manuals and training seminars rely on discredited pseudoscientific practices. These pervasive techniques don’t stand up to empirical realities but remained beloved by many in law enforcement.

The Behavior Analysis Interview (“BAI”) is a Reid School of Interrogation method widely linked to miscarriages of justice. BAI consists of 15 questions; the technique relies on the myth that liars and truth tellers reveal different nonverbal responses. The only laboratory experiment to test BAI revealed predicted nonverbal responses were not displayed.

Ekman also claimed that “micro expressions” reveal deceptive emotional information. Micro expressions are “fleeting but complete facial expressions” believed to reveal true emotion that cannot be concealed. This is premised on The Seven Universal Facial Expressions of Emotion – happiness, surprise, contempt,

sadness, fear, disgust, and anger – that are immediate, automatic, unconscious, and pan-cultural. Research results, however, do not validate reading of micro expressions as a deception detection method. In the one study of its kind, participants were exposed to 700 video fragments of micro expression. In only 14 video fragments were micro expressions identified; six of those 14 were actually truth tellers.

“When police are trained in false and misleading stuff, they become more confident, so they become more prone to error,” said Leo. “It’s just this loop, this dangerous loop.”

### Victims of This Dangerous Loop

SINCE 1989, 12% OF THE 2,654 EXONERATIONS identified by the National Registry of Exonerations involved a false confession. Over 60% of those convicted of a murder that DNA later proved their innocence had confessed according to the Innocence Project. Prior to DNA testing that can provide definitive proof of innocence, wrongfully convicted persons faced profound skepticism from legal commentators and the courts for decades. The very concept raised a puzzle: How could an innocent person convincingly confess to a crime? Data reveals that of 252 people exonerated, nearly 42 percent had falsely confessed to

rape or murder.

Researchers revealed in 2003 that when innocent people are mistakenly believed to be guilty, “an interrogation style that is even more coercive than those experienced by guilty suspects can occur.” Disbelieving investigators won’t believe an innocent suspect’s denials and are “inclined to double their efforts to elicit a confession.” Many of those suspects are either juveniles, mentally ill, mentally disabled, or borderline mentally disabled – sometimes more than one. This is recurring theme in serious, high-profile cases. A need for an arrest and conviction rips constitutional protections asunder.

Truscott was only 14-years-old when accused of rape and murder. Deskovic was only 16-years-old when he was accused of rape and murder. Tankleff was only 17-years-old when he was accused of murder. Juan Rivera was 19-years-old and was a former special education student when he was accused of raping and murdering 11-year-old Holly Staker. Nichole Harris is a Black woman who was 23-years-old when she was accused of murdering her son. Gary Gauger was 41-years-old when he was accused of murdering his elderly parents.

Deskovic confessed after six hours of

interrogation, three polygraph sessions (interrogators lied and told Deskovic he had failed the tests, showing there’s nothing a suspect can do to satisfy interrogators once they target the suspect as the perpetrator other than confess), and extensive questioning. That was when Deskovic realized he might be guilty. DNA evidence known before trial excluded him. The confession sealed his fate. The DNA would eventually exonerate Deskovic in 2006.

Tankleff was told by detectives that his father “had awakened at the hospital and identified” Tankleff as his attacker. It wasn’t true. Tankleff’s father never regained consciousness prior to dying. This false statement compelled Tankleff to produce a written “narrative,” which he refused to sign. This unsigned narrative was used to convict Tankleff. The real killer was Jerry Steuerman and had been identified by Tankleff to police prior to trial. In 2008, the charges were dismissed, and as of 2020, Tankleff is a lawyer in New York.

Rivera was interrogated for four days. At 3:00 a.m. on the fourth day, a typed confession was signed by Rivera, who was in a padded room, on the floor in a fetal position, and pulling hair from his head. The so-called confession was “so riddled with incorrect and implausible information” that the State’s

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## Deceiving Themselves (cont.)

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Attorney forced detectives to “cure” the inconsistencies. A couple of hours later, “Rivera signed the second confession, which contained a plausible account of the crime.” DNA had excluded Rivera prior to trial, too. And Rivera had been on home confinement with an ankle monitor the day of the crime. Rivera was convicted after three separate trials. It was 20 years before Rivera was freed.

Harris was relentlessly questioned for 27 hours while being “threatened, pushed, called names, and denied food, water, and the use of a bathroom.” Harris’ son, Jacquari, was found with an elastic band around his neck. Harris confessed to strangling the boy with a telephone cord. When detectives realized that didn’t fit the evidence, Harris was prompted to provide a modified confession wherein she had used an elastic band. At trial, Harris testified that the confession was “false and the product of a lengthy and coercive interrogation.” Harris was found guilty and spent eight years in prison for what had actually been a terrible accident. Jacquari had a habit of “playing Spiderman” by wrapping the elastic band around his neck.

Gauger was interrogated all night. The police said Gauger confessed. Gauger claimed any statement was a “hypothetical,” one based on a police theory that Gauger had experienced an “alcoholic blackout.” Only then had Gauger speculated about the crime. Police also lied about a failed polygraph test. Gauger was pardoned in 2002, nine years after the crimes were committed. “Until this happened, I really believed in the criminal justice system,” said Gauger, echoing the sentiment of most who haven’t been subject to the dark arts of police interrogations in America.

As a “confession” trumps all other evidence (despite them being among the most unreliable evidence), even exculpatory DNA evidence, the injustice of an abusive interrogation is often not remediated in the courtroom. Even absent a confession, the psychological folklore of nonverbal cues can influence judges and juries while influencing credibility determinations. This can be significant because “credibility is an issue that pervades most trials, and at its broadest may amount to a decision of guilt or innocence.” And while judges are legally authorized to use demeanor to assess witness credibility, “evidence-based workshops or seminars to mitigate the impact of misconceptions about nonverbal cues to

deception are not mandatory.”

Jurors are left to their own terribly flawed beliefs as well. Technological or expert assistance to aid in lie detection is generally barred in U.S. Courts. We require witnesses to appear in person, and the juries are the “sole judges” of a witness’ credibility. Jurors are instructed to evaluate a witness’ “demeanor upon the stand” and “manner of testifying” when judging truthfulness. According to this belief system, “lay judgement solves the legal problem of deception” because “lie detecting is what our juries do best,” which, of course, is false.

Each of the wrongful convictions discussed involved police interrogators who “knew” they had the correct suspect, and they were completely wrong. They refused pleas of innocence and used coercive interrogation methods and lies about nonexistent events or evidence to secure a false confession. Unfortunately, such techniques and methods are routinely sanctioned by the courts. These nonverbal behavior-based methods are dangerously unreliable psychological interrogation techniques, and resulting confessions are often either “coerced compliant” or “stress compliant.” The beleaguered person just wants the ordeal to end and will leap at the offer of any alternative available, including “realizing” their guilt.

Research has found that there are three primary “interrogation errors” in U.S. methods. First is the “misclassification error” where an innocent person is presumed guilty. There is a double-harm in this: an innocent person is accused and a guilty one is free to roam and victimize. The second is a “coercion error.” This is where the investigator’s lies about evidence, failed polygraph exams, or promises of leniency are used to “stimulate the admission” during the Denial Stage.

The Supreme Court of Hawai’i considered the question of “whether a deliberate falsehood regarding polygraph results impermissibly taints a confession.” *State v. Matsumoto*, 452 P.3d 310 (Haw. 2019). Keith T. Matsumoto was arrested for allegedly inappropriately touching a teenage girl during a tournament at a local high school. Matsumoto denied the charges and agreed to a polygraph. The detective told Matsumoto he had failed the polygraph. Matsumoto then “confessed,” stating he might have accidentally touched the girl. At trial, the polygraph was not discussed, but the confession resulted in Matsumoto’s conviction. The Supreme Court unanimously concluded that the police’s “deliberate falsehood was an extrinsic falsehood that was

coercive per se.” Matsumoto’s conviction was vacated, and the case remanded.

The third error is the “contamination error,” where police shape statements and add details to make the confession more plausible or persuasive, especially to fit the known facts of the case. Contamination errors are compounded by suggestibility and the “misinformation effect.” High-pressure interview techniques increase suggestibility. This is the act of exposing a suspect either inadvertently or deliberately to inaccurate or misleading information. Suspects begin to respond, wanting to appear cooperative or innocent. The young, developmentally disabled, and/or mentally ill are most susceptible to such abusive tactics.

The misinformation effect refers to the creation of false memories after being exposed to misleading information and repeated questioning. Research has shown that memory is quite malleable, even when telling the truth. This effect “can cause people to falsely believe that they saw details that were only suggested to them.” The result is that “original memory traces after exposure to misinformation” often become inaccessible. The lie becomes the truth.

So many mistakes must be made by so many people in the criminal justice system at every level to produce a wrongful conviction – implying that both active and passive acts and omissions must frequently occur. The reality is disturbing and beyond the scope of this article.

It is an incontrovertible fact that accusatory investigative techniques lead to injustice in the form of false confessions and wrongful convictions. No one should be aggressively questioned by law enforcement based on speculative assumptions and especially interrogators’ wholly unjustified, inflated, and false belief in their own ability to determine if a suspect is lying or being deceptive based on nonverbal cues.

### Solving the Problem

RESEARCHERS ARE DEVELOPING PROACTIVE strategies. “The view now is that the interaction between deceiver and observer is a strategic interplay,” said Hartwig. A growing body of evidence demonstrates that the “success of unmasking a deceptive interaction relies more on the performance of the liar than on that of the lie detector.” Individually, no diagnostic cues to deception occur, but a “diagnostic pattern will arise when a combination of cues is taken into account.”

Nonverbal behavior analyses have their place; but it cannot be used in isolation. “A

lot of research is flying in the face of law enforcement training and common beliefs," says Christian Meissner, Ph.D., a professor of psychology at Iowa State University. Meissner adds, "This research has enormous potential to revolutionize law enforcement, military, and private sector investigations."

There has been a reclassification of theories on nonverbal behavior and deception. Hartwig and fellow psychologists Aldert Vrij, of the University of Portsmouth, and Par Anders Granhag, of the University of Gothenburg, examined the classification in "Reading Lies: Nonverbal Communication and Deception."

This updates a field that has undergone significant theoretical developments. These theories are broken down into "mental processes" and "social psychology theories." The idea is that the most beneficial approach to understanding a liar's overt behavior is to examine the internal processes occurring during the creation of a deception.

Researchers are seeking to understand how and why lying is more cognitively taxing than telling the truth. If the suspect is lying, the cognitive effort might then be manifested in nonverbal behaviors. But what the suspect says is the most important component in this

theory. Liars aren't simply telling a story; they must make a convincing impression. Vrij says, "If the interviewer makes the interview more difficult, it makes the already difficult task of lying even harder."

Telling the truth as it happened, truth tellers expect their innocence to become apparent. Liars are likely to feel their credibility is in jeopardy and will feel the need to appear believable. Researchers believe "specific interview protocols are required for clear cases to emerge." Active deception detection requires three things: "gathering information to fact-check the communication content, strategically prompting deception cues, and encouraging admissions and discourage continued deceit." This requires fact-gathering, listening and asking verifiable questions, and collaboration with other involved professionals.

There are many methods and techniques outside those currently utilized in U.S. accusatory interrogation practices. These include: Comparable Truth Baseline ("CTB"); Strategic Use of Evidence ("SUE"); Cognitive Credibility Assessment ("CCA"); Assessment Criteria Indicative of Deception ("ACID"); Criteria-Based Content Analysis ("CBCA"); Reality Monitoring ("RM");

Scientific Content Analysis ("SCAN"); Strategic Questioning ("SQ"); Statement Validity Assessments ("SVA"); Voice Stress Analysis ("VSA"); and PEACE –Preparation and Planning, Engage and Explain, Account, Closure and Evaluate.

Skilled liars can evade detection methods in current models. Such liars are sure to embed lies in truths, not tell blatant lies that are entirely untruthful, and provide unverifiable information. They are often not nervous either, even in high stakes interviews. Methods like PEACE are quite simple. Lying and body language are recognized as having nothing to do with each other, and more details will eventually cause the mental systems to break down. PEACE helps determine which parts are verifiable and which are not. There is no substitute for a thorough and competent investigation, but interrogations should incorporate these methods and techniques. Some appear more promising than others.

SVAs originated in Germany and Sweden and were originally intended to determine the credibility of child witnesses in sexual offense trials. SVAs' core phase consists of 19 criteria to produce CBCA. These 19 points include: mentioning time and space, replication of conversation, recall of interactions, unex-

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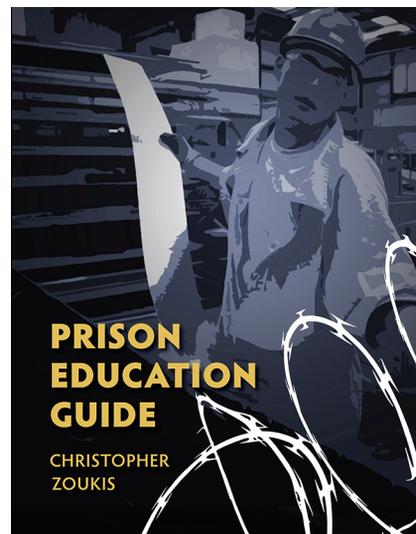
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pected complications, and accounts of mental state. Such criteria are presumed present more in truthful statements. Liars describe “fewer reproductions of conversations” and are less likely to make spontaneous corrections to a story. This is similar to RM criteria in that lies include fewer perceptual, spatial, or temporal details and are less plausible stories generally. Deception detection accuracy rates are found to be around 70 percent using these methods.

The SUE technique takes advantage of the “liar’s dilemma.” According to Ray Bull, Ph.D., and professor of criminal investigations, “They have to make up a story to account for the time of wrongdoing, but they can’t be sure what evidence the interviewer has against them.” Encouraging interviewees to continue talking while slowly revealing evidence allows a guilty suspect to reveal their guilty knowledge. The guilty employ avoidance or denial strategies that truth tellers normally do not. Such observations are anecdotal. Responses vary based on the type of lie, amount of time to prepare, strategy of the interviewer, and the liar’s confidence. This strategy has demonstrated reliability nearly 70 percent of the time. “We are talking significant improvements in accuracy rates,” declared Hartwig.

Information-gathering interview methods are effective because it produces a greater quantity of details, allowing for verbal cues to be analyzed. Expansive verbal and written statements allow for analyses of word counts and word choices, too. “If liars plan what they are going to say, they will have a larger quantity of words,” said Burgoon. “But, if liars have to answer on the spot, they will say less relative to truth tellers.”

Many of the developing methods utilize Strategic Questioning. Unexpected questions surprise liars relying on prepared lies, so they are left “floundering for a response or contradict themselves.” Vrij argues that truth tellers will provide more information if encouraged, liars can’t or won’t. “They might not have the imagination to come up with more or they may be reluctant to say more for fear they will get caught,” says Vrij. How the Fifth Amendment plays into these methods isn’t considered. Until law enforcement begins every investigation based on the presumption of innocence, not a presumption of guilt, it is unlikely any method will fully protect the innocent.

Most important is the training investigators receive. Receiving feedback is imperative. If their beliefs are wrong, receiving delayed or inadequate feedback regarding credibility judgements can perpetuate errors and ham-

per productive investigations. This feedback should be provided in real-time or as soon as possible. Without this critical information, erroneous myths, faulty methods, and injustice will continue.

From myths to miscarriages, it is obvious reforms are needed immediately. As a social psychologist observed, the phenomenon of “belief perseverance” may make change difficult. A perfect example is the U.S. Department of Homeland Security’s Transportation Security Administration (“TSA”). Between 2015-18, 2,251 formal complaints were filed based on improper cultural and behavioral stereotypes. The TSA relies on having detection success by preventing three passengers in 11 years from boarding airplanes. “TSA believes behavioral detection provides a critical and effective layer of security within the nation’s transportation system,” said TSA media relations manager R. Carter Langston. Langston failed to mention that Homeland Security undercover agents successfully smuggle fake explosive devices onto airplanes 95 percent of the time. Such obstinance on the part of any law enforcement agency should be constitutionally unacceptable.

It is well understood these myths are not reliable. Any reliance on nonverbal cues, whether behavioral, physiological, or neurological, needs to be tempered with improved

methods. This is compounded by abusive, accusatory interrogation methods utilized by the U.S. law enforcement that is allowed to lie with impunity to coerce “confessions” and “realized” guilt because the investigator believes “innocent people aren’t interrogated” is abhorrent and evidences a complete break from reality. Judges and jurors need to be instructed that demeanor alone is not a reliable indicator of credibility. This will take enormous focus on training, resources, policy reform, legislative action, and judicial as well as societal awareness.

Hartwig is one of many who declared these “fundamentally misguided” beliefs and detection methods should be abandoned. Their continued use will wreak havoc on the life and liberty of practically all individuals who get ensnared in the U.S. criminal justice system. 📌

Sources: [aclu.org](http://aclu.org); [apa.org](http://apa.org); [assets-us-01.kc-usercontent.com](http://assets-us-01.kc-usercontent.com); [businessinsider.com](http://businessinsider.com); [deliverypdf.ssrn.com](http://deliverypdf.ssrn.com); [frontiersin.org](http://frontiersin.org); [jcjl.pubpub.org](http://jcjl.pubpub.org); [journals.plos.org](http://journals.plos.org); [jstar.org](http://jstar.org); [law.justia.com](http://law.justia.com); [law.northwestern.edu](http://law.northwestern.edu); [law.umich.edu](http://law.umich.edu); [leb.fbi.gov](http://leb.fbi.gov); [maricopa.gov](http://maricopa.gov); [ncbi.nlm.nih.gov](http://ncbi.nlm.nih.gov); [npr.org](http://npr.org); [policechiefmagazine.org](http://policechiefmagazine.org); [researchgate.net](http://researchgate.net); [smithsonianmag.com](http://smithsonianmag.com); [supreme.justia.com](http://supreme.justia.com); [theappeal.org](http://theappeal.org); [theintercept.com](http://theintercept.com); [udemy.com](http://udemy.com)

## New York State Police Are Ramping Up Social Media Surveillance

**O**PEN RECORDS REQUESTS REVEAL THAT the New York State Police (“NYSP”) have been spending money on electronic communication surveillance tools, specifically to gather information from social media and related sites.

According to records requests for expenditures relating to surveillance products purchased by the NYSP, the department has spent at least \$480,000 on programs which collect data from social media websites and others to track activities and “build profiles” on people, most of whom never have and never will commit a crime. The records also show how this program has escalated since Governor Kathy Hochul has taken office.

The NYSP would have New York citizens believe this is a responsibly managed program that furthers the interests of justice and keeps them safe. “These software services and tools have helped eliminate individuals from suspicion and convict others for serious

crimes,” said Beau Duffy, an NYSP spokesperson. “We follow all laws when it comes to gathering evidence to ensure anything relevant to a prosecution can withstand legal scrutiny and be used in court.”

“When these systems are used without any public accountability or oversight, it really raises my alarm bells,” said Albert Fox Cahn, executive director of the Surveillance Technology Oversight Project. “You can use this technology for everything from tracking social media mentions of your own organization for PR purposes to conducting widespread warrantless surveillance.”

Several companies that provide these services to law enforcement have come and gone in the intervening period, often going out of business after some kind of scandal. Two such companies, Geofeedia and Media Sonar once had access to the “fire hose,” the raw data from public postings on sites like Twitter, Facebook, and Instagram. But after

the ACLU revealed that their services had been used to monitor Black Lives Matter protesters, the social media companies cut off their access, citing terms of service violations. Yet, new companies have sprung up offering similar services.

"Ofentimes, police claim to want to look at extremists," said Jessica González-Rojas, a New York assemblyperson who has introduced anti-surveillance legislation. "But it actually turns the tables and investigates people like activists associating with Black

Lives Matter or Muslim Americans going about their day."

The founder of ShadowDragon, Daniel Clemens, said how extensive his company's tools are, "I want to know everything about the suspect: where do they get their coffee, where do they get their gas, where's their electric bill, who's their mom, who's their dad?"

Some New York legislators have stated how this approach erodes freedom and democracy and are introducing legislation to make New York a "surveillance sanctuary

state." Kristen Gonzalez is the chair of the state's Senate technology committee and is sponsoring a bill to overhaul the state's four-decade-old Personal Privacy Protection Law.

"We also can think about what protections we will need in the future," said Gonzalez. "If we want a strong democracy, we need to ensure that our Fourth Amendment rights are being maintained." 🗞️

Sources: [wshu.org](http://wshu.org), [wnbf.com](http://wnbf.com)

## Forensic Genetic Genealogy Has Solved 545 Cases – and Counting

by Douglas Ankney

**A**CCORDING TO TRACEY LEIGH Dowdeswell, forensic genetic genealogy ("FGG") has solved 545 cases as of December 31, 2022. Dowdeswell is a professor of criminology and legal studies at Douglas College in Canada and is the first to put a number on cases solved using FGG. Dowdeswell is also the first to construct a sufficient sample frame for further research into FGG.

The birth of FGG is often tied to the ar-

rest of Golden State Killer Joseph DeAngelo in April of 2018. Since then, investigators across the globe have repeatedly turned to FGG in attempting to solve some of their coldest cases. But FGG is not limited to only identifying perpetrators of crime. Unidentified deceased bodies have been identified, such as Joseph August Zarelli who was previously known as the Boy in the Box and America's Unknown Child.

Dowdeswell wrote in her paper (the "Forensic Genetic Genealogy Project V. 2022"): "I hope that this research will assist in our understanding this burgeoning investigative technique, and provide information to academic and public authorities seeking to better understand forensic genetic genealogy and formulate public policies surrounding its development and use."

The Forensic Genetic Genealogy Project



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can be found on Mendeley Data. There are published profiles on all 545 cases, and there is a user's manual to explain how the data was collected and coded.

Cases were chosen for inclusion only if a public authority confirmed that FGG

was used to clear the investigation and if the investigation was led by a public authority, such as law enforcement or a coroner/medical examiner's office, and used the techniques of genomics, computer database technologies, and traditional genealogy. Cases were included

when family lineages were drawn out to at least three or more generations. Cases using Y-chromosome STR profiles and/or mitochondrial DNA profiles were included. 📄

Source: *forensicmag.com*

## FBI Make-Work Entrapment Schemes: Creating Criminals in Order to Arrest Them

by John and Nisha Whitehead

*"Whoever fights monsters should see to it that in the process he does not become a monster."—Friedrich Nietzsche*

**W**E'RE NOT DEALING WITH A GOVERNMENT that exists to serve its people, protect their liberties and ensure their happiness.

Rather, we are the unfortunate victims of the diabolical machinations of a make-works program carried out on an epic scale whose only purpose is to keep the powers-that-be permanently (and profitably) employed.

Case in point: the FBI.

The government's henchmen have become the embodiment of how power, once acquired, can be so easily corrupted and abused. Indeed, far from being tough on crime, FBI agents are also among the nation's most notorious lawbreakers.

Whether the FBI is planting undercover agents in churches, synagogues and mosques; issuing fake emergency letters to gain access to Americans' phone records; using intimidation tactics to silence Americans who are critical of the government, or persuading impressionable individuals to plot acts of terror and then entrapping them, the overall impression of the nation's secret police force is that of a well-dressed thug, flexing its muscles and doing the boss' dirty work.

Clearly, this is not a government agency that appears to understand, let alone respect, the limits of the Constitution.

Indeed, this same government agency has a pattern and practice of entrapment that involves targeting vulnerable individuals, feeding them with the propaganda, know-how and weapons intended to turn them into terrorists, and then arresting them as part of an elaborately orchestrated counterterrorism sting.

Basically, it works like this: in order to justify their crime-fighting superpowers, the FBI manufactures criminals by targeting vulnerable individuals and feeding them anti-

government propaganda; then, undercover agents and informants equip the targeted individuals with the training and resources to challenge what they've been indoctrinated into believing is government corruption; and finally, the FBI arrests the targeted individuals for engaging in anti-government, terrorist activities.

This is what passes for the government's perverse idea of being tough on crime.

For example, undercover FBI agents pretending to be associated with ISIS have been accused of seeking out online and befriending a 16-year-old with brain development issues, persuading him to secretly send them small cash donations in the form of gift cards, and then the moment Mateo Ventura, turned 18, arresting him for providing financial support to an Islamic terrorist group.

If convicted, the teenager could spend up to 10 years in prison.

Yet as *The Intercept* explains, "the only 'terrorist' he is accused of ever being in contact with was an undercover FBI agent who befriended him online as a 16-year-old... This law enforcement tactic has been criticized by national security researchers who have scrutinized the FBI's role in manufacturing terrorism cases using vulnerable people who would have been unable to commit crimes without prolonged government assistance and encouragement... the Ventura case may indicate that authorities are still open to conjuring terrorists where none existed."

In another incident, the FBI used an undercover agent/informant to seek out and groom an impressionable young man, cultivating his friendship, gaining his sympathy, stoking his outrage over injustices perpetrated by the U.S. government, then enlisting his help to blow up the Herald Square subway station. Despite the fact that Shahawar Matin Siraj ultimately refused to plant a bomb at the train station, he was arrested for conspiring to do so at the urging of his FBI informant and

used to bolster the government's track record in foiling terrorist plots. Of course, no mention was made of the part the government played in fabricating the plot, recruiting a would-be bomber, and setting him up to take the fall.

These are Machiavellian tactics with far-reaching consequences for every segment of the population, no matter what one's political leanings, but it is especially dangerous for anyone whose views could in any way be characterized as anti-government.

As Rozina Ali writes for *The New York Times Magazine*, "The government's approach to counterterrorism erodes constitutional protections for everyone, by blurring the lines between speech and action and by broadening the scope of who is classified as a threat."

For instance, it was reported that the FBI had been secretly carrying out an entrapment scheme in which it used a front company, ANOM, to sell purportedly hack-proof phones to organized crime syndicates and then used those phones to spy on them as they planned illegal drug shipments, plotted robberies and put out contracts for killings using those boobytrapped phones.

All told, the FBI intercepted 27 million messages over the course of 18 months.

What this means is that the FBI was also illegally spying on individuals using those encrypted phones who may not have been involved in any criminal activity whatsoever.

Even reading a newspaper article is now enough to get you flagged for surveillance by the FBI. The agency served a subpoena on *USA Today / Gannett* to provide the internet addresses and mobile phone information for everyone who read a news story online on a particular day and time about the deadly shooting of FBI agents.

This is the danger of allowing the government to carry out widespread surveillance, sting and entrapment operations using dubious tactics that sidestep the rule of law: "we the people" become suspects and potential

criminals, while government agents, empowered to fight crime using all means at their disposal, become indistinguishable from the corrupt forces they seek to vanquish.

To go after terrorists, they become terrorists.

To go after drug smugglers, they become drug smugglers.

To go after thieves, they become thieves.

For instance, when the FBI raided a California business that was suspected of letting drug dealers anonymously stash guns, drugs and cash in its private vaults, agents seized the contents of all the safety deposit boxes and filed forfeiture motions to keep the contents, which include millions of dollars' worth of valuables owned by individuals not accused of any crime whatsoever.

It's hard to say whether we're dealing with a kleptocracy (a government ruled by thieves), a kakistocracy (a government run by unprincipled career politicians, corporations and thieves that panders to the worst vices in our nature and has little regard for the rights of American citizens), or if we've gone straight to an idiocracy.

This certainly isn't a constitutional democracy, however.

Some days, it feels like the FBI is running

its own crime syndicate complete with mob rule and mafia-style justice.

In addition to creating certain crimes in order to then "solve" them, the FBI also gives certain informants permission to break the law, "including everything from buying and selling illegal drugs to bribing government officials and plotting robberies," in exchange for their cooperation on other fronts.

USA Today estimates that agents have authorized criminals to engage in as many as 15 crimes a day (5600 crimes a year). Some of these informants are getting paid astronomical sums: one particularly unsavory fellow, later arrested for attempting to run over a police officer, was actually paid \$85,000 for his help laying the trap for an entrapment scheme.

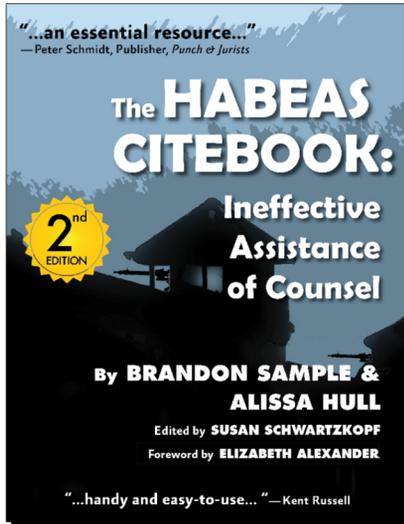
In a stunning development reported by The Washington Post, a probe into misconduct by an FBI agent resulted in the release of at least a dozen convicted drug dealers from prison.

In addition to procedural misconduct, trespassing, enabling criminal activity, and damaging private property, the FBI's laundry list of crimes against the American people includes surveillance, disinformation, blackmail, entrapment, intimidation tactics, and harassment.

For example, the Associated Press lodged a complaint with the Dept. of Justice after learning that FBI agents created a fake AP news story and emailed it, along with a clickable link, to a bomb threat suspect in order to implant tracking technology onto his computer and identify his location. Lambasting the agency, AP attorney Karen Kaiser railed, "The FBI may have intended this false story as a trap for only one person. However, the individual could easily have reposted this story to social networks, distributing to thousands of people, under our name, what was essentially a piece of government disinformation."

Then again, to those familiar with COINTELPRO, an FBI program created to "disrupt, misdirect, discredit, and neutralize" groups and individuals the government considers politically objectionable, it should come as no surprise that the agency has mastered the art of government disinformation.

The FBI has been particularly criticized in the wake of the 9/11 terrorist attacks for targeting vulnerable individuals and not only luring them into fake terror plots but actually equipping them with the organization, money, weapons and motivation to carry out the plots—entrapment—and then jailing them for their so-called terrorist plotting. This is



## The Habeas Citebook (2nd edition) by Brandon Sample and Alissa Hull

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what the FBI characterizes as “forward leaning—preventative—prosecutions.”

The FBI has also repeatedly sought to expand its invasive hacking powers to allow agents to hack into any computer, anywhere in the world.

Suffice it to say that when and if a true history of the FBI is ever written, it will not only track the rise of the American police state but it will also chart the decline of freedom in America: how a nation that once abided by the rule of law and held the government accountable for its actions has steadily devolved into a police state where justice is one-sided, a corporate elite runs the show, representative government is a mockery, police are extensions of the military, surveillance is rampant, privacy is extinct, and the law is little more than a tool for the government to browbeat the people into compliance.

This is how tyranny rises and freedom falls.

The powers-that-be are not acting in our

best interests.

Almost every tyranny being perpetrated by the U.S. government against the citizenry—purportedly to keep us safe and the nation secure—has come about as a result of some threat manufactured in one way or another by our own government.

Think about it.

Cyberwarfare. Terrorism. Bio-chemical attacks. The nuclear arms race. Surveillance. The drug wars. Domestic extremism. The COVID-19 pandemic.

In almost every instance, the U.S. government (often spearheaded by the FBI) has in its typical Machiavellian fashion sown the seeds of terror domestically and internationally in order to expand its own totalitarian powers.

Consider that this very same government has taken every bit of technology sold to us as being in our best interests—GPS devices, surveillance, nonlethal weapons, etc.—and used it against us, to track, control and trap us.

Are you getting the picture yet?

The U.S. government isn't protecting us from threats to our freedoms.

The U.S. government is creating the threats to our freedoms. It is, as I make clear in my book *Battlefield America: The War on the American People* and in its fictional counterpart *The Erik Blair Diaries*, the source of the threats to our freedoms. 📖

ABOUT JOHN W. WHITEHEAD  
Constitutional attorney and author John W. Whitehead is founder and president of The Rutherford Institute. His most recent books are the best-selling *Battlefield America: The War on the American People*, the award-winning *A Government of Wolves: The Emerging American Police State*, and a debut dystopian fiction novel, *The Erik Blair Diaries*. Whitehead can be contacted at [staff@rutherford.org](mailto:staff@rutherford.org). Nisha Whitehead is the Executive Director of The Rutherford Institute. Information about The Rutherford Institute is available at [www.rutherford.org](http://www.rutherford.org).

## Colorado Supreme Court Announces That Introducing New Race-Neutral Justifications on Remand Not Permitted in *Batson* Challenge

by Douglas Ankney

**T**HE SUPREME COURT OF COLORADO ruled that when a party has had an opportunity at trial to present race-neutral justifications for a challenged peremptory strike under the second step of *Batson v. Kentucky*, 476 U.S. 79 (1986), that party is later barred from introducing new race-neutral justifications on remand.

During the jury selection at Theodore Israel Madrid's murder trial, the prosecutor peremptorily struck a prospective Black juror identified as J.T. In response, Madrid raised a *Batson* challenge. The prosecution then offered the following as justification for the peremptory strike:

“Judge, first of all, he's being replaced by another African-American juror. So, I don't think that they can really claim that this is not race neutral. But the real problem is we don't know very much about him. He has a hearing issue it appears, and he's sort of completely non responsive. We have very little information on him from the questionnaire and no time really to have a very detailed conversation with him. Terribly uncomfortable with him where we have very little information.”

The trial court repeated the prosecutor's race-neutral justifications but cast doubt on whether J.T. was hard of hearing. The trial court then espoused its own assessment of J.T., saying J.T. “didn't seem like he wanted to be here ... based on his demeanor” and that J.T. “seemed disappointed that I called his name when he started walking to the front of the courtroom.” Finally, the trial court emphasized that J.T. was replaced by another Black juror, that Madrid was Hispanic and not Black, and that race was not an issue in the strike. The trial court concluded that Madrid failed to make a prima facie showing that J.T. was excluded based upon his race. Consequently, Madrid failed to satisfy step one of his *Batson* challenge, and the court denied the challenge.

The next day, the trial court offered both parties an opportunity to supplement the record from jury selection. The prosecution added nothing to its reasons for peremptorily striking J.T. After the jury convicted Madrid, he appealed.

The Court of Appeals (“COA”) determined that the trial court erred when it found that Madrid failed to make a prima

facie showing of possible racial discrimination under *Batson*. The COA remanded the case “[b]ecause the trial court did not complete the three-step *Batson* analysis” and directed the trial court to “take additional evidence and allow further argument at the request of either party.”

On remand and over Madrid's objections, the prosecution offered additional justifications for the peremptory strike of J.T. The prosecutor testified that after J.T. was called: “I believe there was a sigh. He was slow to take his seat. He did not appear to be delighted to know that he had now been asked to join the People in front of the bar.” After acknowledging that J.T. had “warm[ed] up slightly,” she reemphasized that “he really didn't want to be here for some reason.” When asked directly whether J.T.'s hearing was the reason for the strike, the prosecutor answered “[n]o, absolutely not.”

At the end of the remand hearing, the district court found that the prosecution provided race-neutral reasons for the strike of J. T. and denied Madrid's *Batson* challenge. Madrid appealed again.

The COA reasoned that “where the prosecution articulates its race-neutral reason for striking a potential juror during the *Batson* proceedings at trial, the district court cannot consider or base its ruling on new justifications offered on remand.” The COA also concluded that “it is improper for a trial court to offer its own race-neutral reason for the prosecution’s use of a peremptory strike.” The COA reversed and remanded for a new trial. The Colorado Supreme Court granted the prosecution’s petition for certiorari.

The Court observed “[t]he Equal Protection Clause of the Fourteenth Amendment forbids racial discrimination in jury selection, which includes the use of peremptory strikes to excuse potential jurors based on race.” *Batson*. “To secure this right, the [U.S.] Supreme Court created a three-step test for determining when a peremptory strike has been exercised in a discriminatory manner.” *Id.* The first step requires the objecting party to make a prima facie showing that the challenged peremptory strike was based on the prospective juror’s race. *Id.* The hurdle of step one is “not a high one,” *Valdez v. People*, 966 P.2d 587 (Colo. 1998), requiring only “an inference of racial motivation.” *People v. Rodriguez*, 351 P.3d 423 (Colo. 2015).

Step two shifts the burden of production to the party that exercised the peremptory strike, requiring that party to offer a race-neutral explanation for the challenged strike. *Batson*. “A race-neutral explanation is one ‘based on something other than the race of the juror.’” *Hernandez v. New York*, 500 U.S. 352 (1991). The explanation must simply provide “any race-neutral justification for the strike, regardless of implausibility or persuasiveness.” *People v. Ojeda*, 503 P.3d 856 (Colo. 2022).

In step three, the party challenging the strike may rebut the striking party’s race-neutral explanations. *Batson*. The trial court then considers the persuasiveness of the striking party’s justifications for the peremptory strike in light of any such rebuttal. *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (“*Miller-El I*”). This includes consideration of “all of the circumstances that bear upon the issue of” purposeful discrimination, *Snyder v. Louisiana*, 552 U.S. 472 (2008), such as the striking party’s demeanor, the reasonableness of the proffered race-neutral explanations, and whether the rationales are rooted in accepted trial strategy. *Miller-El I*. “The third step also requires the court to assess whether the striking party’s explanations are pretextual, which

may be inferred if the justifications shift over time or “reek of afterthought.” *Miller-El v. Dretke*, 545 U.S. 231 (2005) (“*Miller-El II*”).

Finally, step three requires the trial court to determine if the party challenging the strike has established purposeful discrimination, i.e., whether the peremptory strike was “motivated



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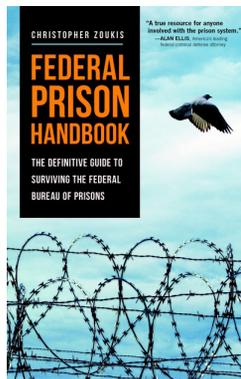
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in substantial part by discriminatory intent.” *Batson*. Because the burden of persuasion remains with the party challenging the strike, the court should sustain a *Batson* challenge only if the challenging party proves by a preponderance of the evidence that the strike was substantially motivated by discriminatory intent. *Ojeda*.

In the present case, the Court observed that the prosecutor’s race-neutral explanations shifted over time. At trial, those explanations relied on J.T.’s unresponsiveness, his apparent hearing problem, and the prosecutor’s dearth of information on him. But on remand, the prosecutor explicitly stated that J.T.’s hearing problem was not an issue. The prosecutor then offered new explanations that mimicked the trial court’s initial observations of J.T.’s seeming unwillingness to be present at the trial.

The Court noted that in *United States v. Taylor*, 636 F.3d 901 (7th Cir. 2011), the Seventh Circuit determined that “*Miller-El II* instructs that when ruling on a *Batson* challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons given after the fact.”

The Court stated that the prosecution disavowed its earlier reliance on J.T.’s purported hearing problem. With regard to the lack of information on J.T., the Court observed that the prosecution had substantially the same amount of limited information on the other jurors that were accepted by the prosecution.

The Court concluded that the COA’s initial remand order was in error by allowing the district court to “take additional evidence and allow further argument at the request

of either party.” Because the district court relied on the prosecutor’s additional explanations for the strike at the remand hearing, the Court could only speculate on how the district court might have ruled on the *Batson* challenge after hearing only the prosecutor’s initial explanations. Such speculation made it impossible for the Court to assess whether a *Batson* violation occurred. Because the Court could not determine that the error injected by the COA’s initial remand order was harmless beyond a reasonable doubt, the Court concluded Madrid was entitled to a new trial.

Accordingly, the Court affirmed the judgment of COA, reversed Madrid’s judgment of conviction, and remanded for a new trial. See: *People v. Madrid*, 526 P.3d 185 (Colo. 2023) (en banc). ❏

## Roadside Drug Tests: Failed Technology From the Failed War on Drugs

by Anthony Accurso

**F**IELD TEST KITS ARE TOUTED AS AN EASY way for law enforcement to determine if an unknown substance is in fact a narcotic. Millions are used each year by police during traffic stops, so they are commonly referred to as “roadside drug tests.” But revelations about the accuracy (or lack thereof) of these tests have called into question their usefulness for law enforcement purposes, causing a push to reform their role in prosecutions and elsewhere.

On the last day of 2015, Dasha Fincher was arrested in Monroe County, Georgia, during a traffic stop. Fincher was a passenger in the vehicle, and officers found an unknown substance attributed to her during a search. Deputies used a roadside drug test kit which indicated the substance contained methamphetamines. She would spend the next three months in jail on a \$1 million bond because of the suspicion that she was a drug trafficker, largely based on the roadside test.

A subsequent lab test would reveal the substance was actually cotton candy. Though there were several reasons why the system failed Fincher, much of her trouble stemmed from the field test kit which misidentified a harmless substance as a narcotic.

### A Known Problem

THE CLARK COUNTY DISTRICT ATTORNEY’S Office in Las Vegas filed motions in March

2017 to vacate and dismiss charges against five defendants convicted of possessing small amounts of cocaine between 2011 and 2013. According to ProPublica, “[a]ll of the defendants, facing possible jail time, pleaded guilty to drug charges. One of the exonerees was sentenced to eight months,” and “[t]he other four received community service or left the state before sentencing.”

In 2010, the Las Vegas Police Department’s crime lab pushed to have the department abandon the test kits used to detect methamphetamine and cocaine. A 2014 report submitted to the U.S. Department of Justice – as part of a federal grant – “detailed how the kits produced false positives.”

The crime labs director, Kim Murga, said in 2016, we “don’t turn a blind eye” to the risk of false positives in these kits, but she also “acknowledged the lab had not tried to more effectively eliminate errors,” according to ProPublica.

This problem isn’t unique to Las Vegas. The National Registry of Exonerations recorded that “[c]ourts have overturned 131 drug convictions in the past 10 years after laboratory analysis determined the alleged drugs were legal substances.”

Other counties have begun looking at the integrity of convictions carried out in their jurisdiction. Houston overturned approximately 250 such convictions. Reporters with the Fox

5 investigation team reviewed Georgia police records from Monroe County and “found that at least 145 people were wrongly charged with felonies after a field test falsely claimed they had drugs.”

“Instead of ecstasy, cocaine, or methamphetamines, people jailed actually had common items like incense, headache powder or cleaning supplies,” reported Fox 5.

The Safariland Group is the largest manufacturer of field test kits and produce the brand of kits used by the Las Vegas police. The company told ProPublica in 2016 that “field tests are specifically not intended to be used as a factor in the decision to prosecute or convict a suspect.”

During a 2017 court hearing, a company representative testified that it keeps a list of 50 legal substances that cause its kits to produce false positives for heroin, cocaine, or methamphetamines. “Court records show chocolate sometimes turns the liquid a similar shade of green as heroin,” according to ProPublica.

### A Rolling Snowball of Errors

PRISON LEGAL NEWS AND CRIMINAL LEGAL NEWS have reported extensively on the frequency with which encounters with police can turn deadly. Malcolm Gladwell’s 2019 book, “Talking to Strangers,” attributes this effect in large part to police training that teaches officers to treat others with intense suspicion,

prompting a hostile response to otherwise seemingly innocuous statements or behavior.

With police primed to be suspicious, officers are less likely to believe that a powdery substance found during a DUI stop is innocuous. Beginning in the 1960s during the early years of the War on Drugs, companies developed the roadside testing kit to assist officers to identify such unknown substances.

“The tests are cheap – 2 apiece or less – and they are enormously convenient for police,” wrote Ryan Gabrielson for ProPublica in 2020. “Officers drop suspicious material in a pouch of chemicals and look for changes in color that might indicate the presence of illegal drugs.”

A positive result on a field test kit can lead to extremely negative outcomes, as this is enough to meet the probable cause standard required to arrest and detain a person on charges of drug possession or trafficking. For many years, in places like Las Vegas, possessing even a small amount of a substance could result in a steep bail amount and a lengthy stay in county jail.

Though proper lab tests are far more reliable and can sort innocuous substances from narcotics, prosecutors “routinely resist efforts to have drug evidence retested in the lab, often

keeping those who fight charges in jail longer.”

Prosecutors for years also made presentations to judges vouching for the reliability of the kits, which predisposed judges to accept their results as authoritative. But we now know better.

“If you’re wondering why the public defender is pleading these cases, it’s because the alternative is horrific,” said Phil Kohn, chief of the Las Vegas Public Defender’s Office, acknowledging that lengthy stays in county jail have the effect of coercing even innocent defendants into accepting a plea deal.

In 2015, the Las Vegas PD made around 5,000 arrests for drug offenses, resulting in 4,600 convictions, with “nearly three-quarters of them relying on field test results, according to an analysis of court data.” Further, the vast majority of these cases do not involve confirmation by a lab test. According to Gabrielson, drug “arrest and lab testing data show the number could be as low as 10 percent.” And, at least in 2015, the department’s policy was to destroy evidence samples after a plea deal was entered in court, making exonerations impossible without the blessing of prosecutors.

The reason Houston was able to exonerate so many people at once hinged on one major difference between Houston and Las

Vegas: Houston retained their evidence samples even after the case was ostensibly closed. Subsequent lab tests revealed the substances in these cases were innocuous.

### Big Statistics

THERE ARE THOUSANDS OF POLICING JURISDICTIONS ranging from small town police to departments with a small army of officers in places like New York City or Los Angeles, and many jurisdictions overlap (county sheriffs and city police patrolling the same area with both conducting traffic stops). In 2011, when the Department of Justice hired a research firm to conduct a national survey, it found that every jurisdiction contacted was using some brand of field test kits. This is, of course, big business for companies like the Safariland Group that make these kits.

“The roadside drug testing devices market in the U.S. was valued at \$298.9 [million] in 2021” and is expected to reach \$498.8 million by 2031. This number also includes alcohol testing using breathalyzers, “accounting for around 62% share” of the market. By inference, this means field test kits represent \$113 million in annual spending by police.

The law enforcement response, however unjust, is intended to address a serious

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problem in the US. The National Institute of Drug Abuse (“NIDA”), one of the National Institutes of Health, collects and publishes statistics on drug use and abuse in the country.

According to NIDA, around 52 million people have used prescription drugs for non-medical reasons at least once in their lifetime, with Vicodin and OxyContin being the most abused prescription drugs among young people.

NIDA’s 2021 National Survey on Drug Use and Health revealed that around 11.7 million people aged 16 years or older drove under the influence of selected illicit drugs, including marijuana. Men are more likely than women to drive under the influence of drugs or alcohol, and the largest age segment who drive after taking drugs is adults between 21 and 25.

Car crashes are the leading cause of death among young people aged 16 to 19 years, and drug use is commonly linked to car crashes. In 2016, 19.7 percent of drivers who drove under the influence tested positive for some type of opioid. Further the “vehicle crash risk associated with marijuana in combination with alcohol, cocaine, or benzodiazepines appears to be greater than that for each drug by itself.” According to the Governors Highway Safety Association, “43.6 percent of fatally injured drivers in 2016 tested positive for drugs and half of those drivers were positive for two or more drugs.”

Behind the statistics are thousands of ruined lives every year, and our society should be taking reasonable steps to address such public health concerns. But using tests with such a high rate of error and subsequently destroying more lives is not the answer.

### **Unaccountable Harms**

THE USE OF FIELD TEST KITS BY POLICE departments could be improved by raising awareness of police and administrators of courts to improve the process. In this way, police and courts are accountable to the communities they serve. Presently, administrators are not accountable to prisoners and rarely are communities sufficiently aware of what happens behind prison walls to force the kinds of change necessary to affect the measure of accountability. Further, prison guards see themselves as law enforcement and use many of the same strategies to surveil oppressed prison populations that police use in communities.

Drugs are as much of a problem in prison as they are in the streets of the poorest com-

munities, possibly because prisons house individuals with higher incidences of poverty and mental health problems.

The prison staff from all over are constantly being convicted of distributing contraband, including narcotics, inside prisons, administrators tend to instead focus on visitation and prisoner mail when hunting for drugs.

How this issue intersects with field test kits is difficult to thoroughly illuminate because of the (intentionally) opaque nature of prisons, but court cases in two states can shine some light on the larger problem.

California Department of Corrections guards were using the kits to test crumbs and shreds of paper, and then, charges were filed when the kits tested positive for heroin and methamphetamine. After several such defendants refused to plead guilty and subsequent lab tests established their innocence, public defenders filed a suit challenging the validity of these kits to support an indictment.

Ruling in early 2018, Judge Christopher Plourd of the Imperial County courthouse in California ruled that the NIK public safety brand test kits made by Safariland Group did “not meet a scientific admissibility standard” and therefore could “not support the grand jury indictment.”

A Massachusetts case ended similarly after MDOC prisoners filed a class action suit. In October 2021, Suffolk County Superior Court Judge Brian Davis granted a temporary restraining order preventing prison officials from using the kits to test incoming mail, including legal mail. His ruling referred to the NARK II brand kits used in MDOC prisons as “arbitrary and unlawful guesswork.” Evidence produced as part of the hearing revealed that subsequent lab tests found 38% of the samples retested did not contain the alleged drug.

“For years, these tests have had this unjustified scientific veneer,” said Des Walsh, founder of the Roadside Drug Test Innocence Alliance. “Finally, we believe the tide is turning with this dawning awareness of the unacceptably high rate of false positives.”

“The net effect of DOC’s continuing use of the NARK II Test,” wrote Judge Davis, “is to both subject a significant number of incarcerated persons to unwarranted punishment, and to broadly chill and inhibit the rights and ability of all incarcerated person within DOC facilities to meaningfully participate in their own legal defense.”

During a hearing on the California case, guards were called to testify about their use of the kits in prison. One guard, David Eustaquio, testified that he had used the kits more than 200 times during his career, yet had no idea about the kits’ accuracy.

“He said he’d never had to explain the results beyond saying the color change meant the test was positive for an illegal drug,” explained ProPublica.

Even when they weren’t referred for additional prosecution, prisoners were subjected to solitary confinement or denied parole eligibility on the basis of these kits, delaying their reentry to communities and harming the relationships with family members. And there is no way of knowing how widespread this problem is without voluntary disclosure from prison officials about the continued use of these kits.

### **Alternatives**

FIELD TEST KITS ARE NOT A GOOD METHOD for detecting illegal substances, but they satisfy the desire for law enforcement to make an on-the-spot determination about whether someone possesses narcotics. This desire sprang from the War on Drugs, which is widely acknowledged to have been a failed endeavor.

However, we now understand that these kits are not accurate and should no longer be used to detain, prosecute, or punish anyone without a confirmatory lab test.

“It’s sloppy work,” said David LeBahn, president of the Washington-based Association of Prosecuting Attorneys. “If they haven’t heard about Houston, people better start paying attention.”

Citizens concerned about the use of field test kits are encouraged to speak to their local prosecutors, who are elected or appointed officials, and make sure they are aware of the liability regarding the continued use of field test kits.

For the purpose of detecting and interrupting drug trafficking, a lab test is going to be more valuable. It allows officers to direct their attention towards persons who actually possess narcotics, even if that attention is somewhat delayed. When officers don’t waste resources hounding and housing innocent people, those resources can be better spent elsewhere.

Regarding the issue of drugged driving, oral fluid test kits – which use a laser to detect drugs or their byproducts in saliva – are more reliable than, and as portable as, a breathalyz-

er. These can detect drugged drivers without having to test random substances found in a person's vehicle.

It is long past time when these test kits should have been retired from widespread

use. Any legitimate law enforcement purpose is better served by using tests that are accurate, instead of relics designed decades ago to prosecute the War on Drugs. As with every war, there are far too many in-

nocent casualties of war, and in this case, the perpetrators are field test kits. 📖

Sources: [propublica.org](http://propublica.org); [aclu.org](http://aclu.org); [nida.gov](http://nida.gov); [transparencymarketresearch.com](http://transparencymarketresearch.com); [wbur.org](http://wbur.org)

## Arizona Supreme Court Announces 'Person' in Self-Defense Statute Applies Only to Defendant, Not Victim as Well

by Douglas Ankney

**T**HE SUPREME COURT OF ARIZONA held that the word "person" in the state's self-defense justification statute, A.R.S. § 13-404(A), applies only to a defendant's conduct, not the victim's as well.

Jordan Christopher Ewer and two others confronted two people identified as "Gilbert" and "Emily." Ewer drew his gun, and Emily threatened to hit him with a golf club. The two groups threw rocks at one another. Ewer and his companions backed away from the scene. Emily and Gilbert pursued them, and Ewer fired in their direction. Gilbert was struck in the back and died at the scene. Ewer was charged with second degree murder.

Prior to trial, Ewer requested the jury be

instructed using the Revised Arizona Jury Instructions ("RAJI") for justified use of deadly force in self-defense – RAJI 4.04 and 4.05; defense of a third person – RAJI 4.06; and crime prevention – RAJI 4.11. The State proposed that the word "defendant" in each of the instructions be replaced by the word "person." The State argued that the jury could apply the justification instructions to Gilbert's conduct as well as to Ewer's. Over Ewer's objection, the trial court obliged the State's requested modifications to the jury instructions.

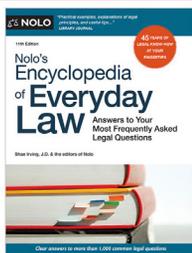
In its closing argument, the State informed the jury that the justification instructions applied equally to the conduct of Ewer and Gilbert and that "if [Gilbert's]

conduct was lawful, then [Ewer] is not justified." The jury convicted Ewer on all counts, and he appealed.

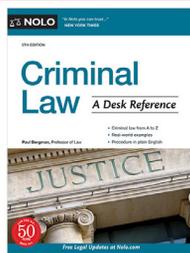
The Court of Appeals ("COA") concluded that the justification presumptions do not apply to the victim's conduct and the State's argument applying them to the victim was improper. Finding that the error was not harmless, the COA reversed and remanded for a new trial.

The Arizona Supreme Court granted review because the issue is of statewide concern and likely to recur. The Court observed "§ 13-404(A) states that a person is justified in threatening or using physical force against another when and to the extent a reasonable

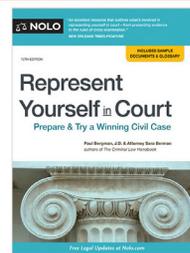
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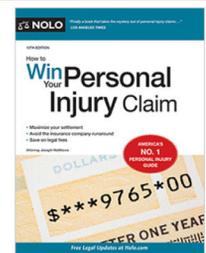
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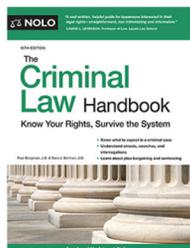
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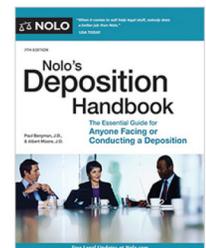
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person would believe that physical force is immediately necessary to protect [one]self against the other's use or attempted use of unlawful physical force.” While A.R.S. § 13-105(30) defines “person” as a “human being” (which could refer to either a defendant or a victim), RAJI 4.04 states the defense applies to a “defendant,” the Court stated.

To resolve this inconsistency, the Court “considers the context of § 13-404(A) and related statutes on the same subject to properly discern the statutory definition.” See *Molera v. Hobbs*, 474 P.3d 667 (Ariz. 2020). The Court’s “task in statutory construction is to effectuate the text if it is clear and unambiguous.” *BSI Holdings, LLC v. Ariz. Dep’t of Transp.*, 417 P.3d 782 (Ariz. 2018). To do so, the Court interprets “statutory language in view of the entire text, considering the context and related statutes on the same subject.” *Molera*. (Note: although not expressly stated by the Court, this is a canon of statutory construction known as “*in pari materia*,” i.e., on the same subject)

In the related justification statutes of Title 13 of Arizona Revised Statutes, Chapter 4, “the use of ‘person’ clearly reflects a focus on an individual accused of a crime and subject to criminal prosecution.” See §§ 13-401 to -403 to -411. Section 13-401(A) “makes clear that a ‘person[s]’ conduct is only justified for certain crimes and the defense ‘is unavailable in a prosecution’ for other crimes.” Likewise, § 13-401(B) states “justification, as defined in this chapter, is a defense in any prosecution for an offense pursuant to this title.”

Similarly, §§ 13-402 to -403 and -405 to -411 all use the word “person” in the “common, contextual theme” of providing “a putative defendant in a criminal prosecution with the ability to lawfully use physical force to protect oneself or a third person from the threatened unlawful use of force by another person, as well as the ability to use force to prevent another person from committing certain enumerated crimes,” the Court explained. Finally, A.R.S. § 205(A) states in pertinent part “if evidence of justification pursuant to [A.R.S. §§ 13-402 to -421] is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.”

The Court determined from the context of the related statutes that the word “person” refers to a criminal defendant and not to a victim. Consequently, the Court concluded “because ‘person’ in § 13-404(A) applies to a defendant in a criminal prosecution, the trial

court erred when it modified the standard RAJI justification instructions.”

The Court found additional error, stating “the prosecutor’s argument to the jury that ‘if [Gilbert’s] conduct was lawful, then [Ewer] is not justified’ was incorrect as a matter of law. Even if the victim’s conduct is justified, the defendant could still reasonably but mistakenly believe that use of force against the victim was necessary,” explained the Court. A.R.S. § 13-204(A)(2).

The Court concluded that the COA reached the right conclusion but had done so by relying on *State v. Abdi*, 248 P.3d 209 (Ariz. Ct. App. 2011). The Court disagreed

with *Abdi* because the *Abdi* Court improperly relied on the legislative history in its interpretive analysis, which isn’t considered when the proper “legal interpretation can be determined from the plain statutory text and the context of related statutes.” See *SolarCity Corp. v. Ariz. Dep’t of Revenue*, 413 P.3d 678 (Ariz. 2018).

Accordingly, the Court vacated paragraphs 17-21 of the COA’s opinion, reversed the trial court’s judgment, and remanded to the trial court for proceedings consistent with its opinion and the remainder of the COA’s opinion including vacatur of Ewer’s convictions and hold a new trial. See: *State v. Ewer*, 523 P.3d 393 (Ariz. 2023). 🏛️

## Hawaii Supreme Court: Defendant’s Due Process Rights Violated by Prosecutor Asking Witness to Tell Grand Jury Defendant Exercised Right to Remain Silent

**T**HE SUPREME COURT OF HAWAII HELD that a prosecutor flagrantly violated a defendant’s Hawaii due process right to a fair and impartial grand jury hearing by adducing evidence during a grand jury proceeding to show the defendant invoked his constitutional right to remain silent.

The Court’s opinion was issued in an appeal brought by Troy D. Borge, Jr., after his motion to dismiss an indictment was denied by the circuit court. Borge was criminally charged for a November 5, 2019, incident at the P’ia Youth and Cultural Center. The State alleged Borge struck the victim on the head several times with a piece of wood, resulting in serious injuries.

A grand jury on November 22, 2019, indicted Borge for attempted second-degree murder. That indictment was dismissed on April 13, 2020, due to the State improperly presenting hearsay testimony regarding an eyewitness’ statements to police and statements to the victim’s treating physician. The matter was presented a second time to a grand jury, which again returned an indictment on June 29, 2020, for attempted second-degree murder.

Borge moved on July 17, 2020, to dismiss that indictment. He argued the prosecutor committed prosecutorial misconduct before the grand jury in violation of his due process rights by improperly eliciting testimony that he had exercised his right to remain silent.

At the grand jury proceeding, the pros-

ecutor asked detective Dennis Clifton, “And you didn’t take any statement from Mr. Borge?” Clifton responded, “We attempted to question him, but he requested to speak to an attorney.” The circuit court on September 3, 2020, denied Borge’s motion to dismiss the indictment.

On December 7, 2020, Borge entered a no contest plea to the lesser included offense of assault in the first degree. He reserved his right to appeal the denial of the motion to dismiss. The circuit court imposed a 10-year prison sentence and ordered restitution of \$1,461,444.01 for the victim’s medical bills. The Intermediate Court of Appeals (“ICA”) affirmed, and Borge timely appealed. The Hawaii Supreme Court granted certiorari.

The Court began its discussion by noting that Article I, section 5 of the Hawaii Constitution provides that no person shall be deprived of liberty without due process of law. The Court stated it has recognized that due process of law requires a fair and impartial grand jury proceeding. *State v. Rodrigues*, 629 P. 2d 1111 (Haw. 1981). Prosecutorial misconduct that undermines the fundamental fairness and integrity of the grand jury process is presumptively prejudicial. *State v. Wong*, 40 P. 3d 914 (Haw. 2002). Under Hawaii law, “prosecutorial misconduct ... refers to any improper action committed by a prosecutor, however harmless or unintentional.” *State v. Williams*, 456 P. 3d 135 (Haw. 2020).

The Court noted that it has repeatedly

recognized the importance of the constitutional right against self-incrimination. See, e.g., *State v. Mainaauo*, 178 P.3d 1 (Haw. 2008). Article I, section 10 of the Hawaii Constitution secures this right: “nor shall any person be compelled in any criminal case to be a witness against oneself.” In fact, the state Supreme Court treats this right as “sacrosanct.” See *Brown v. Walker*, 161 U.S. 591 (1896) (“The reprobation of compulsory self-incrimination is an established doctrine of our civilized society.”); *Havard v. State*, 94 So.3d 229 (Miss. 2012) (“A defendant’s right against self-incrimination is not only sacrosanct, but is commonly known across this land.”).

The Hawaii Supreme Court has held that the right against self-incrimination bars the prosecution from adducing evidence of or commenting on a defendant’s invocation of their right. See *State v. Beaudet-Close*, 468 P.3d 80 (Haw. 2020). Importantly, the Supreme Court has held that the prosecution is prohibited from directly or indirectly implying guilt by getting a witness to testify regarding a defendant’s decision to exercise their right to remain silent. *State v. Tsujimura*, 400 P.3d 500 (Haw. 2017). In situations where the prosecution runs afoul of the forgoing prohibition, the Supreme Court applies the following test: “whether the prosecutor intended for the information elicited to imply the defendant’s guilt or whether the character of the information suggests to the factfinder that the defendant’s prearrest silence may be considered as inferential evidence of the defendant’s guilt.” *Id.*

This case implicates the *Tsujimura* test. While the prosecutor may not have known Clifton would respond as he did, the prosecutor knew Borge had refused to make a statement. “If a grand juror had asked that question, the prosecutor or grand jury counsel would have needed to inform the jury that it was not a proper question,” the Court wrote.

“It is difficult to understand why, in any grand jury proceeding, a prosecutor would ask an officer whether he obtained the defendant’s statement when the answer is ‘no,’” it added.

The Court ruled: “in the grand jury context, the test is whether the prosecutor intended for the information elicited to imply probable cause exists or whether the character of the information suggests to the jurors that the accused’s silence may be considered as inferential evidence to find probable cause.”

Applying that test, the Court concluded that regardless of whether the prosecution anticipated Clifton’s response, “the character of the evidence clearly indicates its presenta-

tion was improper.” The prosecution extracted testimony from the witness that Borge refused to give a statement before the grand jury. The Court declared that the “prosecutor should not have posed the question in the first place” and that the “question and answer constituted a flagrant violation of Borge’s due process rights.” Thus, the Court held that the circuit court abused its discretion by denying Borge’s motion to dismiss the indictment.

Accordingly, the Court vacated the judgments and orders of the circuit court and ICA and remanded to the circuit court with instructions to dismiss the indictment. See: *State v. Borge*, 526 P.3d 435 (Haw. 2023).

## Second Circuit: Second-Degree Kidnapping Under New York Penal Law § 135.20 Not Categorically a Crime of Violence

by Douglas Ankney

**T**HE U.S. COURT OF APPEALS FOR THE Second Circuit held that kidnapping in the second degree under New York Penal Law (“NYPL”) § 135.20 is not categorically a crime of violence pursuant to 18 U.S.C. § 924(c)(3)(A).

In June 2021, the Second Circuit affirmed the judgment against Thamud Eldridge that included a conviction for kidnapping in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) predicated on kidnapping in the second degree under NYPL § 135.20 (Count 5); a conviction for attempted

Hobbs Act robbery or conspiracy to commit Hobbs Act robbery (Count 6); and a conviction for possessing and brandishing a firearm in the furtherance of a crime of violence in violation of § 924(c)(1)(A)(ii) (Count 7). The

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jury verdict did not specify whether the Count 5 conviction or the Count 6 conviction was the underlying crime of violence supporting the Count 7 conviction. Eldridge had argued that it did not matter because none of his convictions qualified as a crime of violence. The U.S. Supreme Court vacated the judgment and remanded to the Second Circuit for further consideration in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022).

On remand, the Second Circuit observed that, in light of *Taylor*, attempted Hobbs Act robbery does not qualify as a crime of violence. Additionally, conspiracy to commit Hobbs Act robbery is not a crime of violence. *United States v. Davis*, 139 S. Ct. 2319 (2019).

With regard to a conviction for second-degree kidnapping under NYPL § 135.20, the Court employed the modified categorical approach in determining it is not a crime of violence. Under the modified categorical approach, the Court first looks to the charging papers or other documents in the record to determine the underlying crime that the defendant was charged with committing. *Gray v. United States*, 980 F.3d 264 (2d Cir. 2020). The Court next identifies the minimum criminal conduct necessary for a conviction under that particular statute. *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018). The Court looks only to the elements of the offense as defined in the statute and not to the facts of the particular defendant's case. *Id.* The Court then considers whether the minimum criminal conduct necessary to violate the statute amounts to a crime of violence defined by § 924(c)(3)(A) as any felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”

The Court observed that under NYPL § 135.20, a defendant is guilty of second-degree kidnapping when he or she “abducts another person.” Under New York law, “abduct” means “to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found or (b) using or threatening to use deadly physical force.” NYPL § 135.00(2). And under NYPL 135.00(1), “restrain” is defined as: “To restrict a person’s movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with the knowledge that the restriction is unlawful.

A person is so moved or confined ‘without consent’ when such is accomplished by (a) physical force, intimidation or deception, or (b) any means whatever, including acquiescence of the victim....”

Based upon the above definitions, the Court concluded that a defendant could be convicted of second-degree kidnapping under NYPL § 135.20 if he or she used deception to hold a victim in a place where it was unlikely the victim would be found. Since deception does not require “the use, attempted use, or threatened use of physical force,” as defined

under § 924(c)(3)(A), NYPL § 135.20 is not categorically a crime of violence. Thus, the Court ruled that none of Eldridge’s convictions qualify as a predicate crime of violence to support a conviction under § 924(c)(1)(A).

Accordingly, the Court vacated his conviction on Count 7, remanded to the U.S. District Court for the Western District of New York for resentencing on all of Eldridge’s remaining convictions, and affirmed its earlier ruling in all other respects. See: *United States v. Eldridge*, 63 F.4th 962 (2d Cir. 2023). 📌

## California Supreme Court Announces Warrantless Search Parole Condition Does Not Dissipate Taint of Unlawful Detention and Subsequent Search, Suppresses Evidence

by Anthony W Accurso

**I**N RESOLVING A SPLIT AMONG THE STATE Courts of Appeal, the Supreme Court of California held that, unlike an outstanding arrest warrant, a condition of a suspect’s parole allowing for warrantless and suspicionless searches does not dissipate the taint of an unlawful detention and that any evidence obtained as a result of the subsequent search must be suppressed.

Officer Matthew Croucher of the San Jose Police Department responded to a report of a possible vehicle burglary in a business parking lot on an evening in January 2017. A security guard on the premises “told him she had seen two suspicious individuals on bikes shining flashlights into parked cars.”

After finding nothing suspicious in the commercial lot, Croucher then drove through an adjacent lot. He noticed one of the vehicles was occupied by Duvan Anthony McWilliams, who “did not appear to be sleeping, just hanging out.”

Croucher called for backup, then approached the vehicle, and instructed McWilliams to exit, ostensibly for “safety reasons.” A records check showed McWilliams was “on active and searchable [California Department of Corrections] parole.” Croucher then conducted a search of McWilliams and the vehicle, “from which he seized a firearm, drugs, and drug paraphernalia.”

After being charged, McWilliams filed a suppression motion, arguing the seizure and search was unreasonable and all evidence obtained as a result must be suppressed. The

trial court denied the motion, finding the 911 call and the security guard’s reporting suspicious activity provided reasonable suspicion to support the search.

The Court of Appeal affirmed in a divided opinion. It held that, though the seizure was improper—as the parties by then agreed—“the officer’s discovery of the parole search condition sufficiently attenuated the connection between the officer’s unlawful detention of McWilliams and the evidence seized during the search.”

The Supreme Court certified the case on appeal, in part, to resolve a split among the state Courts of Appeal on the issue of whether the discovery of a parole search condition following an unlawful detention of a suspect sufficiently attenuates the taint of the unlawful detention so that any evidence discovered during the subsequent search is admissible.

The Court began its analysis by reiterating that the Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures.” The principal mechanism to enforce this right is the exclusionary rule, which serves as “a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation.” *Davis v. United States*, 564 U.S. 229 (2011). The exclusionary rule requires the suppression of both “primary evidence obtained as a direct result of an illegal search or seizure” and “evidence later discovered and found to be derivative of an illegality,”

known as “fruits of the poisonous tree.” *Segura v. United States*, 468 U.S. 796 (1984).

However, there are exceptions to the exclusionary rule. One exception is the attenuation doctrine, which holds that “[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” *Utah v. Strieff*, 579 U.S. 232 (2016).

When making a determination on the applicability of the attenuation doctrine, courts employ a three-factor test first set forth in *Brown v Illinois*, 422 US 590 (1975): “(1) the temporal proximity between the unlawful conduct and the discovery of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.”

The defendant must first establish a Fourth Amendment violation, but once that has been satisfied, the prosecution has the burden of establishing admissibility of the evidence under this exception. *Id.*

The Court noted that the current case is similar to *People v. Brendlin*, 45 Cal.4th 262 (2008), and *Strieff*. Both cases involved an unlawful detention that arose from police misconduct, and in both cases, the officer was alerted to an arrest warrant for the suspect. Upon conducting a search incident to arrest, officers discovered illegal contraband.

In *Brendlin*, the officer initiated a traffic stop on a hunch that the temporary permit in the window might belong to another vehicle, which constituted an unlawful stop. The officer ran a records check on the occupants of the vehicle and discovered an outstanding no-bail arrest warrant for Brendlin. The officer conducted a search incident to arrest and found drugs on him.

Applying the *Brown* factors, the court acknowledged that the first factor of temporal proximity weighed against attenuation but explained that it placed little weight to that factor because the timeline matched the typical investigatory stop scenario. The second factor weighed heavily in favor of attenuation because an arrest on a valid warrant and associated search is an intervening event that “tends to dissipate the taint caused by an illegal traffic stop.” *Id.* The *Brendlin* Court explained that a “warrant is not reasonably subject to interpretation or abuse,” and that the arrest warrant “supplied legal authoriza-

tion to arrest defendant that was completely independent of the circumstances that led the officer to initiate the traffic stop.” Finally, the court didn’t view the officer’s conduct purposeful or flagrant, so the third factor also favored attenuation.

Similarly, in *Strieff*, a police detective unlawfully stopped Strieff after he observed him leaving what he believed to be a drug house. Upon a records check, the detective discovered Strieff had an outstanding arrest warrant, arrested him, and searched him incident to arrest. He found drugs on him.

Applying the *Brown* factors, the U.S. Supreme Court determined that the first factor weighed against attenuation. However, the second factor weighed heavily in favor of attenuation. The *Strieff* Court explained that the warrant was valid, predated the detective’s investigation, and was completely unrelated to the investigatory stop. It further explained a “warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provision.” Thus, the *Strieff* Court concluded that the detective’s arrest of Strieff was simply a “ministerial act” that was independently required by the pre-existing arrest warrant. It added that once the detective was authorized

to arrest Strieff, “it was undisputedly lawful to search Strieff as an incident of his arrest to protect” the detective. *Strieff*. The third factor also favored attenuation because the detective “was at most negligent” in performing the unlawful stop, according to the *Strieff* Court.

Turning to the present case, the Court observed that like in both *Brendlin* and *Strieff*, the officer unlawfully seized McWilliams. In contrast to those cases, a records check did not turn up an arrest warrant for him; instead, it revealed that he was on parole and subject to warrantless, suspicionless searches.

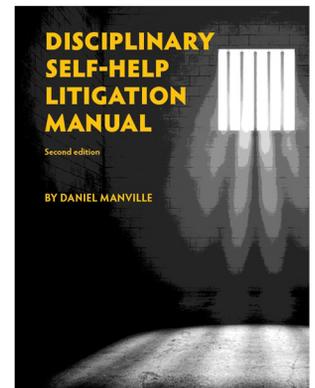
The Court applied the *Brown* factors and stated that the first factor can be quickly addressed by noting this factor only favors attenuation if “substantial time” passes between the unlawful act and when the evidence is seized. *Strieff*. No substantial time elapsed in this case, so the first factor doesn’t favor attenuation, according to the Court.

The Court stated that the primary issue in this case is whether the discovery of the parole search condition dissipates the taint of the unlawful initial stop like the arrest warrant in *Brendlin* and *Strieff*. At the outset of its analysis of this specific issue, the Court declined to adopt a blanket rule that discovery of a parole search condition can never consti-

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tute an intervening circumstance attenuating the link between the unlawful police conduct and a subsequent search. Instead, the Court stated that it “suffices for us to conclude that the discovery of the parole search condition had no considerable attenuating effect under the circumstances of this case.”

In reaching its conclusion, the Court explained that an outstanding arrest warrant is materially different than a parole search condition. As the *Strieff* Court stated, arresting a suspect upon discovering that they have an outstanding arrest warrant is merely the performance of a “ministerial act that was independently compelled by the pre-existing warrant.”

In contrast, the Court explained that a parole search condition isn’t a mandate by a

court to perform a ministerial act; rather, it “merely authorizes a suspicionless search of the parolee for purposes of monitoring the parolee’s rehabilitation and compliance with the terms of parole.” It doesn’t “compel further action of any sort,” the Court stated, adding that the decision to search is “largely within law enforcement’s discretion.” See *People v. Reyes*, 19 Cal.4th 753 (1998). The Court found it significant that there was an “absence of compulsion to continue the interaction after [the] initial unlawful detention.” Therefore, the Court determined that the second *Brown* factor weighs against attenuation.

Finally, with respect to the third *Brown* factor, the Court stated that the detective “offered no basis ... for believing McWilliams was involved in the suspicious parking-lot

activity he had set out to investigate.” The Court determined that the detective’s decision to detain McWilliams “was purposeful and further supports applying the exclusionary rule to deter this type of unconstitutional conduct.” See *Brown*.

Thus, after applying the *Brown* framework to the facts of this case, the Court ruled that “the People have not carried their burden of establishing the attenuation doctrine applies here” and that the evidence discovered after McWilliams’ unlawful detention is inadmissible.

Accordingly, the Court reversed the judgment of the Court of Appeal and remanded for further proceedings consistent with its opinion. See: *People v. McWilliams*, 524 P.3d 768 (Cal. 2023). 📖

## SCOTUS Announces Proper Remedy for Venue and Vicinage Clause Violations Is Retrial in Proper Venue, Not Barring Retrial

by Richard Resch

**T**HE SUPREME COURT OF THE UNITED States unanimously held that a conviction that is reversed based on a judicial determination that the Venue Clause and the Vicinage Clause of the Sixth Amendment were violated due to a trial held in an improper venue does not adjudicate the defendant’s culpability, and thus, the Double Jeopardy Clause of the Fifth Amendment is not triggered and does not prohibit retrying the defendant in the proper venue.

Timothy Smith is a software engineer and fishing enthusiast from Mobile, Alabama. In 2018, he came across a company called StrikeLines that utilizes sonar equipment to locate private, artificial reefs that people build to attract fish. The company sells the geographic coordinates of the reefs to interested fishing enthusiasts.

Smith apparently objected to this business model because StrikeLines was profiting, unfairly in his opinion, from the work of private reef builders. He used an application to secretly obtain portions of the company’s reef coordinate data and offered it to others online. StrikeLines eventually contacted him, and Smith offered to remove the online data as well as fix the company’s security flaws in exchange for coordinates to “deep grouper spots” that he was unable to get from the company’s website. The negotiations broke down, and StrikeLines contacted law enforcement.

He was indicted on various theft of trade secrets charges in the Northern District of Florida. Prior to trial, he moved to dismiss the indictment for lack of venue under the Constitution’s Venue Clause, Art. III, § 2, cl. 3, and the Vicinage Clause, Amdt. 6, arguing that venue was improper because he accessed the data from Mobile (located in the Southern District of Alabama) and the company’s servers were located in Orlando (located in the Middle District of Florida).

The U.S. District Court for the Northern District of Florida denied Smith’s motion to dismiss without prejudice, concluding that disputed venue is a factual issue that needs to be resolved by the jury. Following the jury’s guilty verdict, Smith moved for a judgment of acquittal due to improper venue. See Fed. Rule Crim. Proc. 29. The District Court denied the motion, reasoning that StrikeLines suffered the effects of Smith’s crime at its headquarters in the Northern District of Florida. Smith timely appealed.

The U.S. Court of Appeals for the Eleventh Circuit held that venue was indeed improper for the trade secrets charge but concluded that he could be retried in the proper venue. Smith timely appealed again.

The U.S. Supreme Court granted certiorari to answer the question of whether “the Constitution permits the retrial of a defendant following a trial in an improper venue and

before a jury drawn from the wrong district.”

The Court began its analysis by reviewing the general Retrial Rule, which provides that the appropriate remedy for prejudicial trial error, in nearly all instances, “is simply the award of a retrial, not a judgment barring reprosecution,” stated the Court. See, e.g., *United States v. Morrison*, 449 U.S. 361 (1981). The Court noted that it has recognized a single exception to this general rule, and that’s for violations of the Speedy Trial Clause. *Barker v. Wingo*, 407 U.S. 514 (1972). But for violations of every other Clause of the Sixth Amendment, the Supreme Court has applied the general rule, except for the Vicinage Clause, which it had not yet addressed with respect to this issue. It does so now.

The Venue Clause states that the “Trial of all Crimes ... shall be held in the State where the ... Crimes shall have been committed.” Art. III, § 2, cl. 3. The Court stated that nothing in “the language that frames this requirement suggests that a new trial in the proper venue is not an adequate remedy for its violation.”

Smith argued that the core purpose of the Venue Clause is to prevent the defendant from having to endure the hardships of a trial in a distant and improper venue. The Court flatly rejected that argument, reasoning that the text of the Clause itself belies the argument that the Venue Clause is in any way concerned with the burden placed on the defendant based on

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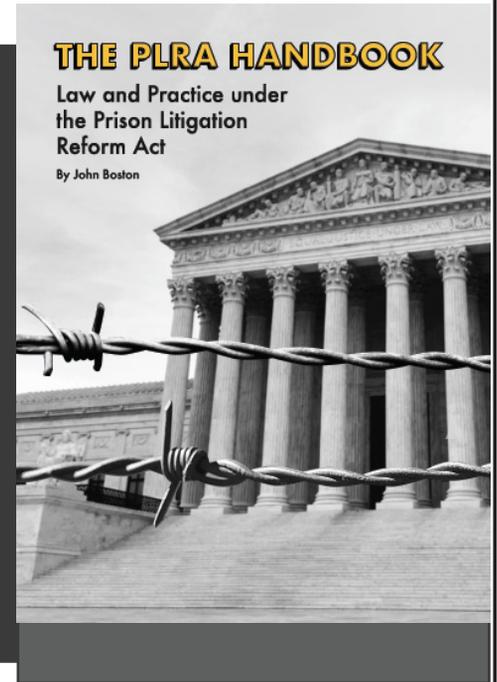
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venue. It pointed out that venue lies “in the State where the ... Crimes shall have been committed,” not where the defendant resides or where it would be most convenient for the defendant.

For example, if a New York resident were to commit a crime in Hawaii, venue would be in Hawaii where the crime was committed, not New York where the defendant lives, yet the Venue Clause mandates that proper venue is in the state in which the crime occurred (Hawaii which is the less convenient venue in the scenario) – thus establishing that the Venue Clause does not take convenience of the defendant into account, the Court reasoned.

Turning to the Vicinage Clause, the Court stated that it “provides no stronger textual support for [Smith’s] argument.” That Clause guarantees “the right to ... an impartial jury of the State and district wherein the crime shall have been committed.” Amdt. 6. According to the Court, the Vicinage Clause just reinforces the coverage of the Venue Clause “because, in protecting the right to a jury drawn from the place where a crime occurred, it functionally prescribes the place where a trial must be held.” *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

The Court stated that the Vicinage Clause differs from the Venue Clause in two ways: “it concerns jury composition, not the place where a trial may be held, and it narrows the place where the trial is permissible by specifying that jury must be drawn from ‘the State and district wherein the crime shall have been committed.’” Amdt. 6. However, neither of these differences supports a different and broader remedy for its violation than awarded for a Venue Clause violation, i.e., retrial in the proper venue, according to the Court.

It explained that *Glasser v. United States*, 315 U.S. 60 (1942), is the most analogous case to the current one. The *Glasser* Court determined that retrial is the most appropriate remedy when a defendant is tried before a jury that does not represent a fair cross-section of the community. The Court explained that there “is no reason to conclude that trial before a jury drawn from the wrong geographic area demands a different remedy than trial before a jury drawn inadequately from within the community.”

Failing to convince the Court that the Venue and Vicinage Clauses should not be subject to the general Retrial Rule based on a textual analysis or precedent, Smith turned to a historical analysis to persuade the Court.

That argument similarly failed. The Court stated that neither it nor Smith can cite to a single court opinion “barring retrial based on a successful venue or vicinage objection in either the centuries of common law predating the founding or in the early years of practice following ratification.” In fact, the historical record shows that courts permitted retrial following trials in an improper venue or in front of improperly constituted juries. Thus, the Court concluded “we have no reason to doubt that the retrial rule applies.”

Finally, Smith argued that the Double Jeopardy Clause of the Fifth Amendment bars his retrial, reasoning that the Court of Appeals’ ruling that venue was improper on his motion to acquit must lead to the same result as a jury’s general verdict of acquittal, i.e., categorically precluding retrial for the same offense.

Once again, the Court rejected his argument, explaining that a judicial determination on venue is “fundamentally different” than a jury’s general verdict of acquittal. It explained that the Court of Appeals’ ruling on venue “did not adjudicate Smith’s culpability,” in contrast to a jury’s verdict of acquittal. The Court further explained that culpability “is the touchstone” in determining whether retrial is allowed under the Double Jeopardy Clause. *Evans v. Michigan*, 568 U.S. 313 (2013). Thus, the Court ruled that because the Court of Appeals’ decision did not adjudicate Smith’s culpability, the Double Jeopardy Clause was not triggered, and so, it does not bar his retrial.

Accordingly, the Court affirmed the judgment of the Court of Appeals. See: *Smith v. United States*, 143 S. Ct. 1594 (2023). 🏛️

## SCOTUS Announces § 924(c)(1)(D)(ii)’s Consecutive Sentence Mandate Not Applicable to § 924(j) Sentences

by Richard Resch

**I**N A UNANIMOUS DECISION, THE SUPREME Court of the United States held that § 924(c)(1)(D)(ii)’s prohibition on concurrent sentences does not extend to sentences imposed under a different subsection of the statute, viz., § 924(j), and thus, when multiple convictions – including a § 924(j) conviction – are involved, sentencing courts are free to run the sentences concurrently or consecutively.

In 2002, a group engaged in drug-dealing murdered a rival dealer. Efrain Lora was accused of serving as a lookout during the shooting. He was convicted of aiding and abetting in violation of 18 U.S.C. § 924(j)(1), which criminalizes the actions of a “person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm,” where the death is the result of murder. Lora was also convicted of conspiracy to distribute drugs in violation of 21 U.S.C. §§ 841 and 846.

During sentencing, Lora argued that the U.S. District Court for the Southern District of New York had discretion to run his § 924(j) concurrently with his conspiracy sentence, but the District Court ruled that it did not have the discretion to run the sentences concurrently. It explained that Second

Circuit precedent provides that § 924(c)(1)(D)(ii)’s bar on concurrent sentences is applicable to § 924(j) sentences, not limited to § 924(c) sentences, and thus, his two sentences are required to run consecutively. See *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019). The District Court sentenced Lora to 30 years in prison, 25 years for the conspiracy count and 5 years on the § 924(j) count, to run consecutively.

He timely appealed, and the Second Circuit affirmed, which deepened the Circuit split on the issue of whether § 924(c)(1)(D)(ii)’s bar on concurrent sentences is applicable to § 924(j) sentences. The U.S. Supreme Court granted certiorari to resolve the split.

The Court began its analysis by reviewing the federal statutory framework that criminalizes the use, carrying, and possession of a firearm in committing specific crimes. At issue in this case are subsections

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See page 54 for more information.**

(c) and (j) of § 924.

Subsection (c) makes it a crime to use or carry a firearm “during and in relation to any crime of violence or drug trafficking crime” or to possess a firearm “in furtherance of any such crime.” § 924(c)(1)(A). Section 924(c)(1)(A)(i) imposes a five-year mandatory minimum for a conviction under § 924(c)(1)(A). Subsection (c) progressively mandates longer mandatory-minimum sentences as the seriousness of the offense increases.

Subsection 924(c)(1)(D)(ii) provides that “no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person.”

The Court noted that subsection (j) was added decades after subsection (c) was enacted. Subsection (j) similarly sets forth offense elements and corresponding penalties. For example and relevant to the present case, § 924(j) provides: “A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall – (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life...” Notably, subsection (j) does not contain a consecutive-sentence mandate like subsection (c) does.

The Court pointed out that subsection (c)’s bar against concurrent sentences applies to a “term of imprisonment imposed on a person *under this subsection*,” i.e., subsection (c). § 924(c)(1)(D)(ii) (emphasis supplied). The Court explained that by its “plain terms, Congress applied the consecutive-sentence mandate only to terms of imprisonment imposed under *that* subsection [that is, subsection (c)]. And Congress put subsection (j) in a *different* subsection of the statute.” (emphasis supplied) In closely examining the construction of subsection (c) and each word therein, the Court reasoned that “by echoing the phrase ‘term of imprisonment’ and referring inwards to ‘this subsection,’ § 924(c)(1)(D)(ii) points to the terms of imprisonment prescribed within subsection (c).”

Turning to subsection (j), the Court explained that a sentence imposed under that subsection is not subject to the consecutive-sentence mandate of § 924(c)(1)(D)(ii). Bemused by the apparent confusion on this issue, the Court declared: “To state the obvious again, subsection (j) is not located within subsection (c). Nor does subsection (j) call for imposing any sentence from subsection (c). Instead, subsection (j) provides its own

set of penalties.” See §§ 924(j)(1)-(2). The Court explained that a defendant sentenced under subsection (j) does not receive a “term of imprisonment imposed” under subsection (c), as is required in order for the sentencing regime of subsection (c) to apply. Thus, the Court held that “§ 924(c)(1)(D)(ii)’s consec-

utive-sentence mandate does not apply” to a subsection (j) sentence.

Accordingly, the Court vacated the judgment of Court of Appeals and remanded the case for further proceedings consistent with its opinion. See: *Lora v. United States*, 143 S. Ct. 1713 (2023).<sup>14</sup>

## Ninth Circuit Announces State Habeas Petition Remains ‘Pending’ for Purposes of AEDPA 1-Year SOL While State Relief Remains Open Regardless of Whether Petitioner Utilizes It

by Richard Resch

**T**HE U.S. COURT OF APPEALS FOR THE Ninth Circuit held that a postconviction relief (“PCR”) application in Arizona is “pending as long as a state avenue of relief remains open, whether or not a petitioner takes advantage of it” and thus tolls the Antiterrorism and Effective Death Penalty Act of 1996’s (“AEDPA”) one-year statute of limitations period – 28 U.S.C. § 2244(d)(1) – for filing a federal habeas petition under 28 U.S.C. § 2254.

In 2013, Paul Melville was convicted of two counts of armed robbery and four counts of aggravated assault. He was sentenced to an 18-year prison term. His convictions were affirmed on direct review by the Arizona Court of Appeals on July 29, 2014. The Court summarized the key dates as follows:

**July 29, 2014** - Conviction affirmed by Arizona Court of Appeals on direct appeal

**September 26, 2014** - PCR petition signed by Melville and delivered to prison officials for mailing to Maricopa County Superior Court

**September 29, 2014** - Expiration of extension of time to petition the Arizona Supreme Court for review of affirmance by Arizona Court of Appeals on direct review of conviction (no such petition was filed)

**October 1, 2014** - PCR petition stamped as filed in Maricopa County Superior Court

**April 18, 2017** - Arizona Court of Appeals granted review of denial of PCR petition by Superior Court but denied relief

**June 1, 2017** - Expiration of extension of time granted by Arizona Court of Ap-

peals to move that court for reconsideration of its denial of PCR relief (no such motion was filed)

**June 7, 2017** - Arizona Court of Appeals mandate issued

**June 1, 2018** - Federal habeas petition signed by Melville and delivered to prison officials for mailing to federal district court

**June 4, 2018** - Federal habeas petition stamped as filed in federal district court

On June 1, 2018, Melville filed a habeas petition in the U.S. District Court for the District of Arizona. A magistrate judge issued a Report and Recommendation (“R&R”). The R&R concluded that the petition was untimely because the state Court of Appeals affirmed his convictions and sentences on July 29, 2014, so his judgment became final on September 2, 2014, following the expiration of the 35-day period under state law to seek review in the state Supreme Court.

The District Court adopted the R&R and determined that Melville’s federal habeas petition was untimely because: “As the limitations period was triggered on September 2, 2014, the Magistrate Judge concluded that 29 days of the limitations period ran between September 2, 2014, and October 1, 2014, when Melville filed his PCR petition, statutorily tolling the limitations period. The remaining limitations period began on June 7, 2017, and expired on May 9, 2018, 336 days after the appeals court issued its mandate finalizing its order denying PCR relief.” Melville timely appealed.

The Court began by noting it reviews

de novo a District Court's determination to deny a habeas petition as time-barred. *Flemming v. Matteson*, 26 F.4th 1136 (9th Cir. 2022).

The Court stated that the District Court got key dates wrong. First, the District Court concluded that Melville's conviction became final on September 2, 2014, but that is not correct. The Court pointed out that the Arizona Supreme Court issued an order granting Melville an extension to file his petition for review until September 29, 2014, and that is the date his judgment became final under federal law, which states that a judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A).

Second, the District Court miscalculated the date on which Melville initiated his state postconviction proceeding, viz., October 1, 2014. But again, that is not the correct date. The Court explained that the District Court failed to apply Arizona's Prison Mailbox Rule for pro se postconviction review filings, which holds that a petition is deemed filed on the date the prisoner delivers it to prison officials for mailing. *State v. Rosario*, 987 P.2d 226 (Ariz. Ct. App. 1999); *Orpiada v. McDaniel*, 750 F.3d 1086 (9th Cir. 2014). The record indicates that Melville signed and dated his notice of postconviction relief on September 26, 2014, so that is the date he is deemed to have filed his state postconviction petition for relief, the Court declared. *Butler v. Long*, 752 F.3d 1177 (9th Cir. 2014) (per curiam) ("We assume that [the prisoner] turned his petition over to prison authorities on the same day he signed it and apply the mailbox rule.").

Third, the Court stated that the Prison Mailbox Rule also applies to pro se federal habeas petitions. *Porter v. Ollison*, 620 F.3d 952 (9th Cir. 2010). So once more, the District Court's determination that Melville filed his federal petition on June 4, 2018, the date of the court clerk's stamp, was incorrect. Under the Prison Mailbox Rule, he filed it on June 1, 2018, the date it was placed in the prison's mailing system, the Court stated.

With the matter of the correct dates resolved, the Court turned its attention to the actual legal question in the case: "When did Melville's state PCR application cease to be 'pending' under § 2244(d)(2), ending the statutory tolling period and starting the clock on the one-year period within which Melville had to file the federal habeas petition?"

The Court stated that the U.S. Supreme

Court has instructed that the term "pending" for purposes of § 2244(d)(2) means "until the application has achieved final resolution through the State's post-conviction procedures." *Carey v. Saffold*, 536 U.S. 214 (2002). Consequently, to determine when a state postconviction application is no longer "pending" for purposes of statutory tolling, the relevant state laws and procedures must be examined. *Id.*

Applying the foregoing rule to the present case, the Court concluded that Melville's postconviction relief application ceased to be pending on June 1, 2017. It explained that the state Court of Appeals denied his petition for postconviction relief on April 18, 2017, and under state law, he received an extension of time to file a motion for reconsideration until June 1, 2017. Although he never actually filed a motion, "he could have done so properly and timely under Arizona law and procedure," the Court explained. Thus, the Court concluded that June 1, 2017, was when Melville's state postconviction petition ceased to be pending because that was the date on which the petition had "achieved final resolution through the State's post-conviction procedures." *Carey*.

The Court rejected the State's argument

that Melville's petition ceased to be pending on April 18, 2017, when the state Court of Appeals denied his petition because Melville never filed a motion of reconsideration. The Court explained: "The Arizona Court of Appeals' decision to grant an extension of time for reconsideration deferred a final resolution of Melville's post-conviction petition because a state avenue for relief remained open, *whether or not Melville took advantage of it.*" (emphasis supplied)

The Court summarized the governing dates by stating Melville's convictions became final on September 29, 2014; he initiated state postconviction proceedings on September 26, 2014; statutory tolling began immediately; the AEDPA one-year limitations period began to run on June 2, 2017 – the day after his state postconviction petition ceased to be pending; he filed his federal habeas petition on June 1, 2018, which was the final day he could timely file the petition. Thus, the Court held that Melville's federal habeas petition was timely filed.

Accordingly, the Court reversed the District Court's order dismissing Melville's petition as untimely filed and remanded for further proceedings. See: *Melville v. Shinn*, 68 F.4th 1154 (9th Cir. 2023). 🏠

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# Seventh Circuit: Postconviction Relief Petition Still Pending in Illinois Court 20 Years After Filing Entitles Petitioner to Seek Federal Habeas Relief Without First Exhausting State Remedies

by Richard Resch

**T**HE U.S. COURT OF APPEALS FOR THE Seventh Circuit held that because petitioner's Illinois postconviction relief petition had been pending in state court for over 20 years, state postconviction remedies proved "ineffective," entitling him to seek federal habeas relief under the terms of 28 U.S.C. § 2254(b)(1) without first waiting for further relief in Illinois courts.

In 1999, two separate juries convicted James Evans of murder and soliciting murder. He received sentences of 60 years for the former and 47 years for the latter to run consecutively. The convictions were both affirmed on direct appeal. In 2003, Evans filed a petition for postconviction relief in state court, claiming that he was innocent and that the prosecution engaged in serious misconduct during both prosecutions.

After nearly 20 years, the state courts still have not resolved Evans' petition for postconviction relief due, in large part, to the conduct of the State. For example, in December 2008, Evans requested copies of audio recordings that he claims were manipulated by the prosecution; the court ordered the State to "provide all copies" of the recordings to Evan. But it failed to comply and would continue to do so for the next two-and-a-half years, and even then, it did not produce all the recordings. In September 2011, the court ordered the State to produce the remaining recordings. The State claimed that it was not in possession of the missing tapes, but they should have been easily located and produced because the trial court had copies. However, two more years passed before the clerk's office granted Evans permission to review the exhibits. Evans alleged that some recordings were still missing.

The foregoing is just one example of the multitude of delays and missteps that occurred in Evans' 20-year quest to have his postconviction claims heard on the merits. In 2018, he sought a writ of mandamus from the Illinois Supreme Court, directing the State to comply with discovery requests and the court to adjudicate his case, but the Supreme Court denied his motion.

In 2019, more than 16 years after he first sought postconviction relief in state court,

Evans filed a petition in federal court under § 2254 for postconviction relief, arguing that the exhaustion required of § 2254(b)(1) is inapplicable to him because the state postconviction process had proven ineffective for him due to the inordinate delays. He also argued that the delays have prejudiced his case because two witnesses who would have supported his claims of prosecutorial misconduct have died since he first sought state postconviction relief. In response, the State placed nearly all the blame for the delays on Evans. The U.S. District Court for the Southern District of Illinois agreed with the State's position and dismissed Evans' petition for failure to exhaust state court remedies. He timely appealed.

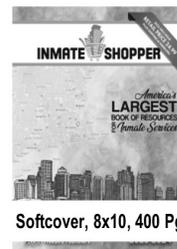
The Court began its analysis by noting that the federal habeas statute requires state prisoners to exhaust state habeas remedies before seeking federal postconviction relief. See § 2254(b)(1). That is, if a state provides a process for state habeas or state postconviction relief, state prisoners are required to exhaust those procedures before they are eligible to seek federal postconviction relief. See *Lane v. Richards*, 957 F.2d 363 (7th Cir. 1992).

However, the Court stated that the "exhaustion requirement is neither ironclad nor unyielding," explaining that Congress anticipated that there would be rare cases in which there is "an absence of available State corrective process" or where the state remedies are "ineffective to protect the rights of the state prisoner." § 2254(b)(1)(B). Governing case law in the Seventh Circuit holds that state remedies can be "ineffective" or "unavailable" for purposes of § 2254(b)(1)(B) by a delay that is both inordinate and caused by the state. See *Carter v. Buesgen*, 10 F.4th 715 (7th Cir. 2021); *Lane*.

The *Carter* Court concluded that Marvin Carter's four-year wait for Wisconsin courts to rule on the merits of his direct appeal was both "extreme" and also attributable to the State. In *Carter*, the court clerk's office neglected to send necessary documents for months, and the Court of Appeals granted the public defender's multiple requests for extensions "in rote fashion." Although it was Carter's own counsel who persistently requested extensions, the

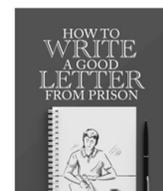
*Carter* Court faulted the "systemic deficiency" of the State's entire judicial system because no one intervened, not the public defender's office, attorney general, or the courts. Consequently, the *Carter* Court concluded that Wisconsin's appellate process was "ineffective to protect

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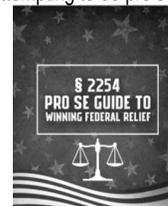
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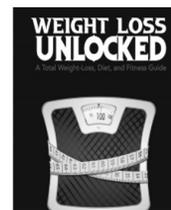
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rights secured by the United States Constitution” and permitted Carter to proceed directly to federal court under § 2254.

Turning to the present case, the Court pointed out that the *Carter* Court characterized the four-year delay experienced by Carter as “extreme and tragic.” Notably, the Seventh Circuit has ruled similarly with respect to even shorter delays of three-and-a-half years, see *Lowe v. Duckworth*, 663 F.2d 42 (7th Cir. 1981), and even 17 months, see *Dozie v. Cady*, 430 F.2d 637 (7th Cir. 1970) (per curiam). The determinative question is whether the delay in Evans’ case is “meaningfully attributable to the state,” the Court stated. It concluded that it was “in both a narrow and broad sense.”

Regarding the narrow sense, the Court stated that the, at least, three-year delay during discovery in turning over the requested recordings “would qualify as inordinate by itself.” In contrast to the District Court, the Court attributed responsibility for the “unjustifiable” delay to the State, which missed multiple deadlines to turn the recordings over to Evans and “failed to explain why it took so long to comply with a routine discovery request.” The Court explained that it could rule that Evans was subjected to an unjustifiable delay based solely on this three-year production delay alone. See *Mucie v. Missouri State Dep’t of Corr.*, 543 F.2d 633 (8th Cir. 1976) (ruling ineffective state process where “it appears the state has been unnecessarily ... dilatory). However, the added two-year delay for the court clerk to grant Evans permission to review the exhibits to his two cases is also attributable to the State, according to the Court. See *Carter*.

Turning to the broad sense, the Court declared that “Evans experienced a breakdown in the state’s postconviction process.” It did not base this characterization solely on the 20-year delay but also on the “general lack of action or urgency by all involved.” The Court chided prosecutors for “allowing the case to linger indefinitely, and the state court ... seems to have done nothing to move things along despite recognizing the barriers to relief Evans faced.” See *Story v. Kindt*, 26 F.3d 402 (3d Cir. 1994) (concluding a state process was ineffective where the state court “neglected [the petitioner’s] case for almost eight years” due to outdated docket management procedures).

The Court acknowledged that some of the delay was attributable to Evans and his counsel. However, it rejected the State’s attempt to “turn § 2254(b)(1)(B) into a mechanical accounting exercise. The proper analysis cannot come from dividing up calen-

dars or tallying delays in an Excel spreadsheet.” The Court reiterated what the *Carter* Court had to say about the delay in that case: “The length of the delay should have sounded an alarm bell within the [state] courts ... [and] even in the Attorney Generals’ office.” But instead, the State insisted on blaming Evans

while “disclaiming its own responsibility for this procedural failure,” the Court stated. Thus, the Court concluded that “Illinois’s postconviction remedies proved ‘ineffective’ for Evans.”

Accordingly, the Court, “with an accompanying sense of urgency,” vacated

and remanded the case to the District Court with instructions to review Evans’ petition, consistent with its opinion. See: *Evans v. Wills*, 66 F.4th 681 (7th Cir. 2023). 📖

## Eleventh Circuit Announces Definition of ‘Controlled Substance Offense’ in Guidelines § 4B1.2(b) Does Not Include Inchoate Offenses and Expressly Overrules Precedent Holding to the Contrary

by Douglas Ankney

**T**HE U.S. COURT OF APPEALS FOR THE Eleventh Circuit, sitting en banc, held that the definition of “controlled substance offense” for purposes of the career offender sentencing enhancement under U.S. Sentencing Guideline (“USSG”) § 4B1.2(b) unambiguously excludes inchoate offenses like conspiracy and attempt, and therefore, the commentary notes are inapplicable. The Court expressly overruled prior precedent that held to the contrary, viz., *United States v. Weir*, 51 F.3d 1031 (11th

Cir. 1995), and *United States v. Smith*, 54 F.3d 690 (11th Cir. 1995).

Brandon Romel Dupree pleaded guilty to possession of a firearm after having been convicted of a felony in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); conspiracy to possess with intent to distribute heroin and cocaine in violation of 21 U.S.C. § 846; and carrying a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A)(i).

The Presentence Investigation Report (“PSR”) revealed that Dupree had two previous convictions for controlled substance offenses. And the PSR identified Dupree’s current § 846 conspiracy conviction as a third controlled substance offense. Together, these three offenses qualified Dupree for the career offender enhancement of USSG § 4B1.1(a). With the enhancement, Dupree’s advisory sentencing Guidelines range was 211 to 248 months’ imprisonment. Without the enhance-

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ment, his sentencing Guidelines range was 144 to 165 months' imprisonment.

Dupree objected to application of the enhancement, arguing that his conspiracy conviction is not a "controlled substance offense" as defined by USSG § 4B1.2(b); consequently, he is not a career offender because he does not have three qualifying predicate offenses.

The U.S. District Court for the Middle District of Florida overruled Dupree's objection, but based on mitigating factors, it varied downward from the Guidelines range and sentenced him to 106 months' imprisonment. Dupree appealed.

A panel of the Eleventh Circuit rejected his argument based on the holdings of *Weir* ("conspiracy to possess marijuana was a controlled substance offense within the meaning of the career offender enhancement") and *Smith* ("Application Note 1 to ... § 4B1.2 constitutes a binding interpretation of the term-controlled substance offense"). The Eleventh Circuit granted Dupree's petition for a rehearing en banc to revisit circuit precedent.

The Court observed § 4B1.2[(b)] provides: "The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, distribution, or dispensing of a controlled substance ... or the possession of a controlled substance ... with intent to manufacture, import, export, distribute, or dispense."

"The commentary in Application Note 1 to § 4B1.2 adds that the term 'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2(b) cmt. n.1. Dupree argued that since § 4B1.2(b) unambiguously excludes inchoate offenses, the Court must not defer to the commentary's broader definition that includes inchoate offenses. (Inchoate crimes involve: "A step toward the commission of another crime, a step in itself being serious enough to merit punishment." Inchoate Offense, *Black's Law Dictionary* (11th ed. 2019). "The three inchoate offenses are attempt, conspiracy, and solicitation." *Id.*)

In *Stinson v. United States*, 508 U.S. 36 (1993), the Supreme Court explained that the "Sentencing Reform Act of 1984 ... created the Sentencing Commission ... and charged it with the task of establishing sentencing

policies and practices for the Federal criminal justice system." "The Sentencing Commission promulgate[d] the guidelines by virtue of an express congressional delegation of authority for rulemaking." *Id.* The Supreme Court then analogized the Guidelines' commentary to "an agency's interpretation of its own legislative rules." *Id.*

The Supreme Court "determined that the commentary should receive the same level of deference given to an agency's interpretation of its own rules," as first described in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). When "considering how to treat an issuing agency's interpretation of a regulation, a court initially should consider whether 'the meaning of the [regulation] is in doubt.'" *Id.* If "the regulation is ambiguous, the court can then consider the issuing agency's interpretation of the regulation." *Id.* "At that point, the court should afford the agency's construction of its own regulation 'controlling weight' unless it is 'plainly erroneous or inconsistent with the regulation.'" *Id.*

The Supreme Court "explained that the Sentencing Commission could resort to the commentary to interpret the Guidelines only 'if the guideline which the commentary interprets will bear the construction.'" *Stinson*. "When the 'commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.'" *Id.*

The Supreme Court reaffirmed *Seminole Rock* in *Auer v. Robbins*, 519 U.S. 452 (1997), concluding that "the Secretary of Labor's interpretation issued by the Department of Labor was 'controlling' because it was not 'plainly erroneous or inconsistent with the regulation.'" But in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), the Supreme Court revisited *Auer* and clarified that "only if a regulation is genuinely ambiguous should *Auer* deference be applied." In determining whether ambiguity exists, "courts first must exhaust all the traditional tools of construction." *Id.* The Supreme Court "declared, in no uncertain terms, that '[i]f uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means – and the court must give it effect, as the court would any law.'" *Id.* Because the Supreme Court did not overrule *Stinson* in *Kisor*, the Eleventh Circuit harmonized *Stinson* and *Kisor* by concluding that "*Kisor's* gloss on *Auer* and *Seminole Rock* applies to *Stinson*."

Applying those principles to USSG

§ 4B1.2(b)'s definition of "controlled substance offense," the Court reasoned the "definition does not mention conspiracy or attempt or any other inchoate crimes. The exclusion of inchoate crimes from the definition of what the term 'means' is a strong indicator that the term does not include those offenses. A definition which declares what a term means excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124 (2008). The Court agreed with the en banc Sixth Circuit's observation when that circuit overruled its precedent to the contrary: "To make attempt crimes part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself – no term in § 4B1.2(b) would bear that construction." *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019). Instead, the Commission purported "to add an offense not listed in the guideline." *Id.*

The Court further reasoned that in USSG § 4B1.2(a)(1) (the "sister subsection" to 4B1.2(b)), the Sentencing Commission defined "crime of violence" to include "any offense ... that has as an element the use, attempted use, or threatened use of physical force against the person of another." This demonstrates that the Sentencing Commission "knew how to include attempted conduct in addition to the conduct itself when it meant to do so," according to the Court. "A drafting body such as the Sentencing Commission 'generally acts intentionally when it uses particular language in one section ... but omits it in another.'" *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383 (2015). "This 'interpretive canon ... applies with particular force' where the provision that includes specific language is in 'close proximity' to the provision that excludes it." *Id.* Consequently, because § 4B1.2(b) is not ambiguous in its exclusion of inchoate offenses, the Court determined that it owed no deference to the interpretation supplied by the Commentary.

The Court concluded that "[t]he definition of 'controlled substance offense' in § 4B1.2(b) of the Sentencing Guidelines does not include inchoate offenses like conspiracy and attempt. To the extent that this holding conflicts with our prior precedent, that precedent is overruled. The district court erred by sentencing Dupree as a career offender because his conspiracy conviction under 21 U.S.C. § 846 was not a controlled substance offense."

Accordingly, the Court vacated Dupree's sentence and remanded for resentencing consistent with its

opinion. See: *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc).

*Writer's note:* The Court observed in a footnote that the circuit courts are “sharply divided” on this issue. The Third and Sixth Circuits sitting en banc and panels of the Fourth and D.C.

Circuits have held that inchoate crimes do not qualify as controlled substance offenses under the Guideline. In contrast, panels of the First, Second, Seventh, and Ninth Circuits along with an en banc Eighth Circuit have reached the opposite conclusion. The panels from the First and Ninth Circuits suggested they

would have ruled differently if not constrained by precedent, and the Fifth Circuit vacated its holding that a defendant’s conspiracy convictions qualify as controlled substance offenses and will address the question en banc. See opinion for citations to the foregoing opinions from the various circuits. 📖

## Kansas Supreme Court Announces Legislature Intended to Tie One Unit of Prosecution to Multiple Items of Drug Paraphernalia Under K.S.A. 2016 Supp. § 21-5709(b)(1) and (b)(2)

by Douglas Ankney

**T**HE SUPREME COURT OF KANSAS HELD that the Legislature intended to tie a single unit of prosecution to multiple items of drug paraphernalia in K.S.A. 2016 Supp. 21-5709(b)(1) (“§ 21-5709(b)(1)”) and K.S.A. 2016 Supp. § 21-5709(b)(2) (“§ 21-5709(b)(2)”).

After Amber Dial reported to the Miami County Sheriff’s Office that Justin Burke Eckert had beaten her, officers executed a search warrant at his home and found a tent, nine grown marijuana plants, and more than 25 drug paraphernalia objects – including propane, a blower, rolling papers, two bongos, and three fans. Ultimately, Eckert was charged with eight felony counts of possession of paraphernalia with intent to manufacture, cultivate, and plant marijuana under § 21-5709(b)(1). He was also charged with 21 misdemeanor counts of possessing drug paraphernalia to store and to introduce marijuana into the human body under § 21-5709(b)(2).

The trial court dismissed four of the misdemeanor counts. A jury found Eckert guilty of numerous offenses related to the assault on Dial as well as guilty of all the drug paraphernalia counts. The trial court sentenced Eckert to 362 months’ imprisonment. For each felony paraphernalia possession conviction, Eckert was sentenced to 11 months’ imprisonment to run concurrent to all other sentences.

On appeal, Eckert raised several issues, including that his convictions for possessing drug paraphernalia were multiplicitous. The Court of Appeals concluded that the evidence supported a single felony drug paraphernalia conviction under § 21-5709(b)(1) and a single conviction for misdemeanor drug paraphernalia possession under § 21-5709(b)(2). The Court of Appeals reversed seven felony drug paraphernalia convictions and 16 misdemeanor drug paraphernalia convictions. The

Kansas Supreme Court granted the State’s cross-petition for review.

The Court observed “multiplicity is the charging of a single offense in several counts of a complaint or information.” *State v. Thompson*, 200 P.3d 22 (Kan. 2009). “The principal danger of multiplicity is that it creates the potential for multiple punishments for a single offense, which is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.” *Id.* When analyzing claims of multiplicity, “the overarching inquiry is whether the convictions are for the same offense. There are two components to this inquiry, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one?” *State v. Schoonover*, 133 P.3d 48 (Kan. 2006).

Because all of Eckert’s drug paraphernalia convictions arose from the same conduct, the Court’s focus was on the second inquiry: whether the conduct constituted one or more offenses by statutory definition. When, as here, the double jeopardy issue arises from multiple violations of a single statute, the unit of prosecution test is applied to answer the inquiry. “Under the unit of prosecution test, ‘the statutory definition of the crime determines what the Legislature intended as the allowable unit of prosecution. There can be only one conviction for each unit of prosecution.’” *Schoonover*.

K.S.A. 2016 Supp. § 21-5709 provides: “(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to: (1) Manufacture, cultivate, plant, propagate, harvest, test, analyze, or distribute a controlled substance; or (2) store, contain, conceal, inject, ingest, inhale or otherwise

introduce a controlled substance into the human body.” If the Legislature used the word “paraphernalia” as a singular noun, then each item would be a unit of prosecution, according to the Court. But if paraphernalia was used as a plural noun encompassing more than one item, then only one unit of prosecution is allowed regardless of the number of items.

The Court stated: “In construing K.S.A. 2016 Supp. 21-5709(b), we begin with its plain language, giving common words their ordinary meaning. But in construing the plain language of the statute of conviction, we also must construe the definitional statute applicable to all crimes involving controlled substances, including the drug paraphernalia crimes here.” *Bruce v. Kelly*, 514 P.3d 1007 (Kan. 2022). “The definitional statute defines ‘drug paraphernalia’ to mean ‘all equipment and materials of any kind that are used ... in ... cultivating, growing ... producing, processing, preparing ... or otherwise introducing into the human body a controlled substance in violation of this act.’” K.S.A. 2021 Supp. 21-5701(f).

Both the word “paraphernalia” and “equipment” are “designated as a noncount or mass noun in ordinary usage.” *Collins Dictionary*. A “mass noun” is “a noun that denotes a homogeneous substance or concept without subdivisions and that in English is preceded in indefinite singular constructions by ‘some’ rather than ‘a’ or ‘an.’” *Merriam-Webster Dictionary*. “[I]t is a noun which, in some contexts, is neither singular nor plural, but instead is an ‘aggregation’ which is taken as an indeterminate whole.” Bryan Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* (2016).

The Court concluded that “the term drug paraphernalia as used in K.S.A. 2016 Supp. 21-5709(b) is an uncounted, mass noun that does not make a distinction between singular

and plural forms.” Consequently, the Court could “not discern from the plain language of the statute whether the Legislature intended one unit of prosecution for each separate single item of paraphernalia or one unit of prosecution for multiple items of paraphernalia in indeterminate numbers.”

Since the statute is ambiguous, the Court employed the rules of statutory construction. *State v. Arnett*, 413 P.3d 787 (Kan. 2018). A court “must construe a statute to avoid unreasonable or absurd results.” *Id.* If “drug paraphernalia” meant a defendant could be prosecuted separately for each item of paraphernalia, then he could be charged with 1,000 counts based on possession of 1,000 plastic baggies in a roll of baggies.

In the present case, the State charged two of the felony counts based on possession of a propane tank and one based on possession of the blower. But the State could have just as reasonably charged one count for possession of a heater. After all, Eckert had possessed multiple fans but was charged with only one felony based on possession of fans. And the same was true for the misdemeanor counts. Three counts were based on three empty storage containers, but the State could reasonably have charged one count based on empty storage containers. Conversely, even though Eckert was in possession of multiple rolling papers, the State charged only one count based on rolling papers. Interpreting drug paraphernalia singularly would permit the State “unfettered discretion to file as many or as few drug paraphernalia possession charges as it wants based on how it arbitrarily groups or separates items.” That is an unreasonable, absurd, and arbitrary result, concluded the Court.

Additionally, the rule of lenity provides that “[a]ny reasonable doubt about the meaning [of a criminal statute] is decided in favor of anyone subjected to the criminal statute.” *State v. Williams*, 368 P.3d 1065 (Kan. 2016). “If ... there are two reasonable and sensible interpretations of a criminal statute, the rule of lenity requires the court to interpret its meaning in favor of the accused.” *State v. Coman*, 273 P.3d 701 (Kan. 2012).

The Court stated that the “term ‘drug paraphernalia’ in K.S.A. 2016 Supp. 21-5709(b)(1) and (b)(2) is ambiguous regarding the unit of prosecution within each subsection. Applying canons of traditional statutory construction, we conclude the Legislature intended to tie a single unit of prosecution to multiple items of paraphernalia in indeterminate numbers.”

Accordingly, the Court affirmed the Court of Appeals’ finding of multiplicity and its decision to reverse all but one

felony and one misdemeanor possession conviction. See: *State v. Eckert*, 522 P.3d 796 (Kan. 2023). 📌

## Mississippi Supreme Court: Court of Appeals Improperly Permitted State to Supplement Record on Appeal in Reviewing Habitual Offender Determination

by Douglas Ankney

**T**HE SUPREME COURT OF MISSISSIPPI, sitting en banc, held that the Court of Appeals (“COA”) improperly permitted the State to add to the record on appeal and the evidence presented to the trial court was insufficient to sustain a finding that Lorenzo Manuel was a habitual offender.

Manuel was convicted by jury of second-degree murder and aggravated assault for his role in the shooting death of Justin Shannon and the wounding of Keandria Mitchell. At his sentencing, the prosecution offered two prior sentencing orders into evidence and asked the circuit court to sentence Manuel as a habitual offender. Both orders stated Manuel had pleaded guilty to a charge of selling hydrocodone. When the judge asked if the two orders were identical, the prosecutor pointed out that one order had a case number of 08-1180 and the other had 08-1181. The judge then asked if the prosecution had anything further, and the prosecutor answered: “No, Your Honor, other than the fact that I believe that we’ve presented evidence that shows that he has been charged with two different felonies arising out of separate charges, separate times, and sentenced to a term of one year or more.”

The judge concluded, “the State has proven, and I so find beyond a reasonable doubt, that you have previously been convicted of at least two felonies on charges separately brought and arising out of separate incidents and at different times and that you have been sentenced to separate terms of one year or more.” The judge sentenced Manuel to 40 years on the second-degree murder conviction and 20 years for aggravated assault to be served consecutively, without suspension, reduction, or possibility of parole.

Manuel challenged the habitual offender finding for the first time on appeal, asserting that the State failed to prove that the two prior offenses arose out of separate incidents at different times. In response, the State moved

under Mississippi Rules of Appellate Procedure (“MRAP”) Rule 10(e) to supplement the record with copies of Manuel’s indictments that revealed one drug sale allegedly occurred on August 20, 2008, and the other occurred on August 26, 2008. The COA granted the State’s unopposed motion. The COA referenced the indictments when concluding “Manuel’s prior convictions clearly arose out of separate incidents at different times’ as required by the statute.” The COA affirmed Manuel’s judgment, and the Mississippi Supreme Court granted his petition for writ of certiorari on the challenge to his habitual offender sentence.

The Court observed because “Manuel failed to challenge the habitual offender sentence before the trial court, he relies on the plain error doctrine, which allows this Court to address an issue that was not raised in the trial court.” *Conners v. State*, 92 So.3d 676 (Miss. 2012). Determining whether plain error occurred requires the Court to “determine if the trial court has deviated from a legal rule, whether that error is plain, clear[,] or obvious, and whether the error has prejudiced the outcome of the trial.” *Green v. State*, 183 So.3d 28 (Miss. 2016). Additionally, the error must have “resulted in a manifest miscarriage of justice” or “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Hall v. State*, 201 So.3d 424 (Miss. 2016). Under the doctrine of plain error, the Court may recognize an “obvious error which was not properly raised by the defendant and which affects a defendant’s fundamental, substantive right.” *Shinstock v. State*, 220 So.3d 967 (Miss. 2017). “An accused has a fundamental right to be free of an illegal sentence.” *Grayer v. State*, 120 So.3d 964 (Miss. 2013). A “sentence is not illegal unless it exceeds the maximum statutory penalty for the crime.” *Id.*

Manuel was sentenced to 40 years for second degree murder, which is the maximum penalty for the crime under Miss. Code Ann.

§ 97-3-21(2) (Rev. 2020). And Manuel's consecutive 20-year sentence is the maximum penalty for aggravated assault under Miss. Code Ann. § 97-3-7(2)(a). The Court held in *Grayer* that the habitual offender enhancement "without suspension, reduction, or possibility of parole combined with the maximum sentence of the substantive crime 'exceeds the maximum statutory penalty for the crime.'"

At the time of Manuel's sentencing, the habitual offender statute read: "Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution ... shall be sentenced to a maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation." Miss. Code Ann. § 99-19-81 (Rev. 2015).

In interpreting the phrase "separate incidents at different times" of § 99-19-81, the Court "has remarked that the 'events should be sufficiently separate that the offender's criminal passions may have cooled so that he has time to reflect.'" *Pittman v. State*, 570 So.2d 1205 (Miss. 1990). "Conversely, two offenses committed in rapid succession do not suggest the same repetitiveness of criminal design such that the offender may be thought predictably habitual thereafter." *Id.*

The circuit court relied on the sentencing orders for its finding that Manuel was a habitual offender. "When reviewing the sufficiency of the evidence, [the Court] ask[s] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of [§ 99-19-18] beyond a reasonable doubt." *Brent v. State*, 296 So.3d 42 (Miss. 2020). The Mississippi Supreme Court did not consider the indictments that were added to the record on appeal. MRAP 10(e) provides: "If anything material to either party is omitted from the record by error or accident or is misstated in the record ... either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed."

In the present case, the indictments were not entered into evidence in the trial court and they were not accidentally omitted from the

appellate record. According to the Court, the addition of the indictments to the record was error, observing: "Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal." MRAP 10(f).

The Court concluded that from the two sentencing orders considered by the trial court, it was impossible to discern if the crimes occurred in rapid succession or if Manuel's passions had cooled between offenses, that is, "no rational trier of fact could

have found the essential elements of [§ 99-19-81] beyond a reasonable doubt." Without the habitual offender finding, Manuel's sentence was in excess of the maximum statutory penalty and illegal. Thus, the Court ruled "Manuel was prejudiced by this error and that this error seriously affects the fairness of judicial proceedings."

Accordingly, the Court vacated Manuel's sentence and remanded for resentencing in the trial court for the substantive crimes only because the double jeopardy provision of the Mississippi Constitution prohibited the State from getting a second chance to prove habitual offender status. See: *Manuel v. State*, 357 So.3d 633 (Miss. 2023) (en banc). 

## California Court of Appeal: Counsel and Sentencing Court's Misadvisement of Plea's Immigration Consequences Require Relief From Conviction

by David M. Reutter

**T**HE COURT OF APPEAL OF CALIFORNIA, Second Appellate District, vacated a defendant's conviction after finding the immigration consequences were not understood when he entered a plea of no contest to a domestic violence charge, which was an aggravated felony under federal immigration law that required deportation.

The Court's opinion was issued in connection with Cesar Alfredo Villalba's appeal of the denial of his motion brought pursuant to Penal Code § 1473.7(a). Villalba was charged on January 26, 2017, by felony complaint with inflicting corporal injury on his spouse. The complaint also alleged great bodily injury on the victim. Villalba waived a preliminary hearing on April 26, 2017, and negotiated a plea agreement that provided for the no contest plea in return for the striking of the great bodily injury allegation and a suspended sentence conditioned upon 365 days in county jail, five years felony probation, a protective order, and 52 weeks of domestic violence classes and fines.

After assuring Villalba understood the terms and conditions, the trial court said, "I don't know if this applies to you or not. I don't need to know. I just need to advise you that if you're not a citizen of the United States, your plea of no contest will result in your deportation, denial of naturalization,

denial of citizenship, denial of reentry into the country." Villalba affirmed he understood that advisement.

His request in March 2021 for early probation termination was denied, as was his November 2021 motion for a nunc pro tunc motion to reduce the jail time imposed to 364 days.

In 2018, the California Legislature amended § 1473.7 to allow a defendant who is no longer in criminal custody to file a motion to vacate a conviction or sentence where "[t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence."

"Under federal law, a noncitizen convicted of a crime of domestic violence is deportable," the Court noted. "A crime of violence for which the term of imprisonment is at least one year is an 'aggravated felony.'" 8 U.S.C. § 1101(a)(43) (F). Removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided in the U.S. See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Villalba was convicted of crime of violence. Therefore, it is an "aggravated felony" under federal law if it carries a term of impris-

onment of at least one year. Whether or not the state classifies the crime as a misdemeanor or felony is of no consequence, for federal law focuses upon the term of imprisonment of at least one year. *Habibi v. Holder*, 673 F.3d 1082 (9th Cir. 2011).

Villalba in January 2022 filed his motion under § 1473.7 to have his conviction vacated. The prosecution did not oppose the motion, which was argued and denied on January 21, 2022, on grounds a proper advisement was given as to immigration consequences. Villalba appealed.

On appeal, Villalba argued that his defense counsel misadvised him by saying he would not be deported if his offense were later reduced to a misdemeanor and that the sentencing court misadvised him by stating the deportation consequences may not apply to him. He asserted that he misunderstood the immigration consequences of the plea and would not have agreed to it if he had correctly understood the consequences. Villalba's sentencing counsel testified at the hearing. He stated it was likely and possible that he told Villalba that "if he completed probation and reduced the felony to a misdemeanor that his conviction would no longer be deportable because it would be a misdemeanor with a maximum of 364 days in jail." That was an inaccurate statement of law.

Under federal law, "[a] conviction vacated for reasons 'unrelated to the merits of the underlying criminal proceedings' may be used as a conviction in removal proceedings whereas a conviction vacated because of a procedural or substantive defect in the criminal proceedings may not." *Prado v. Barr*, 949 F.3d 438 (9th Cir. 2020).

The Court concluded that Villalba was misadvised and would have suffered adverse immigration consequences if he later had the offense or time in custody reduced.

It then turned to determine if he was prejudiced as a result. The Court found Villalba came to the U.S. as a child with his parents, attended middle and high school in Los Angeles, met his citizen wife in 2003, later married her and raised six children, remains married, became a permanent resident, only had a single prior offense of driving under the influence of alcohol, and has strong support of an employer and family and friends. His deep ties to the U.S. corroborated his claim that his ability to remain in the country with his family was his paramount concern, the Court determined.

The Court stated that the uncontradicted

evidence, "coupled with the sentencing court's confusing and contradictory advisement that its warning of certain deportation might not apply to [Villalba]," rendered it reasonably probable that he would have rejected the plea had he been correctly advised of the immigration consequences. Thus, the Court ruled that Villalba established prejudicial error entitling

him to relief under § 1473.7.

Accordingly, the Court reversed the order denying Villalba's motion to vacate his conviction and remanded the case to the superior court with instructions to grant the motion and to vacate the conviction. See: *People v. Villalba*, 2023 Cal. App. LEXIS 209 (2023). ❏

## Fifth Circuit Announces Statute Prohibiting Firearm Possession by Person Subject to Domestic Violence Restraining Order Is Unconstitutional in Light of *Bruen*

by Douglas Ankney

**T**HE U.S. COURT OF APPEALS FOR THE Fifth Circuit held that the federal statute which prohibits the possession of firearms by a person subject to a domestic violence restraining order, 18 U.S.C. § 922(g)(8), is unconstitutional in light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

Zackey Rahimi was indicted for possessing a firearm while under a domestic violence order in violation of 18 U.S.C. § 922(g)(8) after officers from the Arlington, Texas, Police Department executed a search warrant at his home and found a rifle and a pistol. Rahimi moved to dismiss the indictment on the ground that the statute is unconstitutional, but he acknowledged that *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020), foreclosed his argument.

The U.S. District Court for the Northern District of Texas denied his motion, and he pleaded guilty. On appeal, a panel of the Fifth Circuit agreed that *McGinnis* foreclosed Rahimi's argument. While Rahimi's petition for a rehearing en banc was pending, the U.S. Supreme Court decided *Bruen*. The panel withdrew its opinion and ordered supplemental briefing on the impact of *Bruen* on Rahimi's case. Rahimi then contended that *Bruen* overruled circuit precedent and that under *Bruen*, § 922(g)(8) is facially unconstitutional.

To begin its analysis, this panel of the Fifth Circuit observed "[u]nder the rule of orderliness, one panel of the Fifth Circuit may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *In re Bonwillian Marine Serv., Inc.*, 19 F.4th 787 (5th Cir. 2021). "The

Supreme Court need not expressly overrule our precedent. 'Rather, a latter panel must simply determine that a former panel's decision has fallen unequivocally out of step with some intervening change in the law.'" *Id.*

In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Court concluded § 922(g)(8) was constitutional as applied to the defendant: "*Emerson* first considered the scope of the Second Amendment right as 'historically understood,' and then determined – presumably by applying some form of means-end scrutiny *sub silentio* – that § 922(g)(8) [was] 'narrowly tailored' to the goal of minimizing 'the threat of lawful violence.'" *McGinnis*. That is, when analyzing laws that might implicate the Second Amendment, the Fifth Circuit first asked if the conduct at issue fell within the protection of the Second Amendment. If it fell outside the scope of the Second Amendment, the law was constitutional. If it fell within the scope of the Second Amendment, the Fifth Circuit then applied either intermediate scrutiny or strict scrutiny (the *McGinnis* Court expressly applied means-end scrutiny). But *Bruen* expressly repudiated the "means-end scrutiny." Because *Bruen* "fundamentally changed" the analysis of laws implicating the Second Amendment, the panel concluded the Fifth Circuit's prior precedent is obsolete.

The Court explained that under *Bruen*'s framework, courts must determine whether "the Second Amendment's plain text covers an individual's conduct." If so, then the "Constitution presumptively protects that conduct," and the government "must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* "Only then may a court conclude

that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* (Note: both *Bruen* and *D.C. v. Heller*, 554 U.S. 570 (2008), left intact the constitutionality of statutes like 18 U.S.C. § 922(g)(1) that prohibit convicted felons as a group from possessing firearms because it is purportedly "well-rooted in the nation's history and tradition of firearm regulation.") The burden is on the government to point to "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Bruen*.

Because Rahimi's possession of the rifle and pistol easily fall within the scope of the Second Amendment, the question turned on whether § 922(g)(8) is "consistent with 'the historical tradition that delimits the outer bounds of the right to keep and bear arms.'" *Bruen*.

In pertinent part, § 922(g)(8) makes it unlawful "for any person who is subject to a court order that[:] (A) was issued after a hearing of which such a person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened physical force against such intimate partner or child that would reasonable be expected to cause bodily injury ... to ... possess in or affecting commerce, any firearm or ammunition..."

The Court distilled the key features of the statute to be: "(1) forfeiture of the right to possess weapons (2) after a civil proceeding (3) in which a court enters a protective order based on a finding of a 'credible threat' to another specific person, or that includes a blanket prohibition on the use, of threatened use [sic], of physical force, (4) in order to protect that person from 'domestic gun abuse.'"

In arguing in favor of the statute being constitutional, the Government first proffered the English Militia Act of 1662 ("Militia Act") as an historical analog to § 922(g)(8). The Militia Act permitted officers of the Crown to "seize all arms in the custody or possession of any person" whom they "judge[d] dangerous to the Peace of the Kingdom."

But the Court observed that the Militia

Act was used by King Charles II and King James II to disarm political opponents. Nelson Lund, "The Past and Future of the Individual's Right to Arms," 31 Ga. L. Rev. 1 (1996). The later Declaration of Rights restricted the reach of the Militia Act "in order to prevent the kind of politically motivated disarmaments pursued by Charles II and James II." And this provision in the Declaration of Rights "has long been understood to be the predecessor to our Second Amendment." Consequently, the Militia Act is not our Nation's historical tradition.

The Government next pointed to laws in several colonies and states that disarmed classes of people considered dangerous, e.g., slaves, Native Americans, and those refusing to take an oath of allegiance. Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," 25 *Law & Hist. Rev.* 139 (2007). The Court also rejected these as analogous to § 922(g)(8) primarily because the former laws disarmed classes of people to preserve political and social order and the latter disarmed a person in order to protect another identified person from the threat of "domestic gun abuse."

The Government also offered laws from the Massachusetts Bay Colony, the State of Virginia, and the colonies of New Hampshire and North Carolina that prohibited the offense of "going armed to terrify the King's subjects." *Bruen*. But none of these "regulations could suffice to show a tradition of public carry regulation." *Id.* Further, those laws disarmed an offender only upon crimi-

nal conviction after criminal proceedings; whereas, the orders contemplated under § 922(g)(8) are issued after civil proceedings without the attendant rights of counsel and other safeguards of criminal proceedings, the Court reasoned.

Lastly, the Government pointed to historical surety laws. Under common law, "an individual who could show that he had 'just cause to fear' that another would injure him or destroy his property could 'demand surety of the peace against such person.'" 4 William Blackstone, *Commentaries on the Laws of England* 252 (1769). If the party of whom surety was demanded refused to post surety, he was forbidden from carrying a weapon in public absent a special need. *Bruen*. While the surety laws were closer to being analogous to § 922(g)(8) than the Government's other proffers, they fail because § 922(g)(8) prohibits possession of any firearm whereas surety laws allowed possession and only prohibited public carrying of firearms if the person refused to post surety. Consequently, historical surety laws did not impose a comparable burden on the Second Amendment right of armed self-defense as § 922(g)(8) does.

The Court concluded that the "Government fail[ed] to demonstrate that § 922(g)(8)'s restriction on Second Amendment rights fits within our Nation's historical tradition of firearm regulation." Thus, the Court held that the statute is facially unconstitutional.

Accordingly, The Court vacated Rahimi's conviction. See: *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023). 🏠

## Record High Exonerations in 2022

by Jordan Arizmendi

**T**HE MOST EXONERATIONS IN ONE YEAR occurred in 2022. According to the Nation Registry of Exonerations' 2022 Annual Report, the 233 people exonerated in 2022 lost an average of 9.6 years of their life as a result of their wrongful incarceration.

Alarming but not shocking, the report detailed that at least 195 of the 233 exonerations claimed official misconduct to be the cause of their wrongful imprisonment. In addition, 59% of the 233 exonerations included wrongful convictions when no actual crime had even occurred – child sex abuse, drug possession, murder, for example.

Of the 233 exonerations, 81 were for homicide charges; 16 were for sexual assault,

12 of those included children; 20 were for violent crimes other than homicides or sexual assault, such as robbery or attempted murder; and 166 defendants were exonerated for non-violent crimes.

Among the exonerations, 195 were as a result of official misconduct; 54 involved mistaken witness identification; 31 were for convictions based on a false confession; 184 involved false accusations; 44 included false or misleading forensic evidence; and 56 were caused by ineffective assistance of counsel.

One interesting facet illustrated in the report's conclusion was the sharp increase of exonerations occurring when no crime had been committed. The Registry began

in 1989. Every year since then, exonerations in no-crime cases made up roughly 30% of the yearly totals. Since 2008, however, about half of exonerations were for

no-crime cases. The report stated that most no-crime exonerations are for drug possession wrongful convictions. Troublingly, almost all such cases

are the result of corrupt police officers. 

Sources: *National Registry of Exonerations 2022 Annual Report*

## Your Texts, Emails, and Location Are Available to Law Enforcement, Regardless of How Law-Abiding You Are

by Jo Ellen Nott

**Y**OUR ATTACHMENT TO INTERACTING with social media and browsing the internet on your cellphone allows the government and law enforcement wide-open access to a disturbing amount of information about you. Even if you are not a user of social media and just carry a device around to make and receive phone calls, you are still being caught up in an ever-widening surveillance dragnet. If you are unlucky, it could make you collateral damage in a criminal investigation. In the best of cases, your personal information could merely end up in a government database to possibly be used against you in the future.

The public would be well advised to know that recent reports about the Secret Service, Immigration and Customs Enforcement, and the FBI use of our personal data should make us all uneasy. In the words of J.D. Tuccille, civil liberties, and government overreach pundit: “Our mobile devices constantly snitch on our whereabouts.”

Those federal agencies are aware of the rules regarding cellphone tracking and data collection but either work around them or purchase data from businesses that profit from selling our electronic whereabouts. The use of our data revealed in the recent reports proves again that our addiction to mobile devices provides the government with “the most cost-effective surveillance system ever invented.” We gladly foot the bill to be surveilled 24/7 because Facebook, Instagram, Candy Crush, dating apps, and the ability for our bosses and family to ping us at any time seem essential to a 21st century life.

The first report dealt with cell site simulators (“CSS”), which fool your phone into giving your location to individuals other than your cellphone service provider. The Office of the Inspector General of the Department of Homeland Security published a report on February 23, 2023, stating that “The United States Secret Service and U.S. Immigration and Customs Enforcement, Homeland Security Investigations (ICE HSI) did not always

adhere to federal statute and cell site simulator (CSS) policies when using CSS during criminal investigations involving exigent circumstances.”

Cell site simulators simulate cellphone towers and trick phones within their range into connecting and revealing their location. The technology is also known as StingRay and was developed by the Harris Corporation in Florida. Another name for CSS is dirtboxes – a name derived from the company who makes them — Digital Receiver Technology (“DRT”). Could the name be any more appropriate for a device that captures the data of innocent citizens who just happen to be in the area that law enforcement is working to find or track a suspect?

Under existing policy, a court must authorize the use of a CSS through a warrant. The February 2023 OIG report said that agencies do get a warrant when required, but policy becomes excessively relaxed when the circumstances are “exigent” or requires immediate action. Under those circumstances, law enforcement is required to get a less invasive pen register order. Applications for a pen register order must be made within 48 hours of their use, making them authorized surveillance but after the fact.

It is of concern that the OIG found in several investigations from 2020 to 2021, the Secret Service did not obtain pen registers orders nor did ICE and HSI. The OIG also found that those agencies did not document supervisory approval for the deployment of CSS, nor did they document data deletion after the mission was completed.

Matthew Guariglia from the Electronic Frontier Foundation has written that “The federal government, and in particular agencies like HSI and ICE, have a dubious and troubling relationship with overbroad collection of private data on individuals.”

The second report refers to the March 8, 2023, Senate Intelligence Committee hearing in which location data collected from internet

advertising was the topic. This data does not reveal your current location but rather where you have been. When questioned by Senator Ron Wyden (D-OR) about adtech location data, FBI Director Christopher Wray responded by saying the agency does not “currently purchase commercial database information that includes location data derived from internet advertising.” Then, reassuring absolutely no one, Wray offered to discuss the FBI’s use of adtech location data in a closed session.

Adtech is software and tools used to target digital advertising campaigns. To target potential customers more effectively, the apps we use on our mobile devices store a fair amount of data about us, our activities, and our previous locations that are tied to a unique ID. That ID is called a mobile advertising identifier.

Mobile advertising identifiers are supposed to be anonymous, and smartphone owners can supposedly reset them or disable them entirely, according to Warzel and Thompson of the *New York Times*. The writers said their research revealed, however, that “the promise of anonymity is a farce.” The IDs can be matched with other databases using tech tools available on the market.

The Supreme Court ruled in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that “the Government will generally need a warrant to access [cell-site location information].” Nevertheless, Government agencies work around the mandate of *Carpenter* by purchasing adtech because it is not cellphone company location data but rather marketing data openly available.

In 2023, courts are considering cases involving geofence warrants. With that type of warrant, law enforcement seeks data on whoever was carrying a device in a certain area at a certain time. Electronic Frontier Foundation litigation director Jennifer Lynch argues that these warrants are “unconstitutional ‘general warrants’ because they do not require law

enforcement to show probable cause that any one device was somehow linked to the crime under investigation.”

Some good advice for all of us: When

you leave your home to do something you wish to remain private, consider leaving your cellphone behind. If you decide to carry it, know that you are carrying a tracking beacon

readily available to law enforcement. 

Source: *The Intercept*, Office of the Inspector General Department of Homeland Security, [reason.com](http://reason.com)

## California Supreme Court Announces Proof of First Degree Poison Murder Requires Showing Defendant Deliberately Gave Victim Poison with Intent to Kill or Inflict Injury Likely to Cause Death

by Douglas Ankney

**I**N A CASE OF FIRST IMPRESSION, THE Supreme Court of California clarified that proof of first-degree murder by means of poison requires the prosecution to show that the defendant deliberately gave the victim poison with the intent to kill the victim or to inflict injury likely to cause death.

Heather Rose Brown placed her sleeping five-day-old daughter, Dae-Lynn Rose, face down on the bed between her and Dae-Lynn's father, Daylon Reed. While the three of them slept, Dae-Lynn stopped breathing. When Brown awoke and discovered her baby was warm but not breathing, she directed Reed to call 911. The 911 dispatcher instructed Brown in administering CPR until paramedics arrived. Unfortunately, Dae-Lynn was pronounced dead upon arrival at the hospital.

An autopsy report revealed that Dae-Lynn died from exposure to methamphetamine and heroin. Brown admitted that she and Reed smoked both heroin and methamphetamine but not in the same room as Dae-Lynn. However, she fed Dae-Lynn breast milk and baby formula shortly before she died.

Brown was prosecuted for first degree murder on the theory that Brown poisoned her newborn daughter by feeding her breast milk after smoking methamphetamine and heroin. The superior court instructed the jury that the “defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison. Poison is a substance applied externally or introduced into the body that can kill by its own inherent qualities.”

The jury convicted Brown of first degree poison murder of Dae-Lynn, and she was sentenced to 25 years to life for that count. Brown argued on appeal that the jury instruction on the first degree poison murder was incomplete because it did not inform the jury that Brown must administer the poison willfully, deliberately, and with premeditation.

The Court of Appeal rejected Brown's

argument, ruling “it appears the People need only prove that the killing was caused by administration of poison, and that the killing was done with malice. Such a killing is first degree murder as a matter of law.” The California Supreme Court granted further review.

At the outset of its analysis, the Court noted that it has never addressed the issue of whether there is a mental state component of first degree poison murder. The Court stated in order to “resolve this dispute, we begin with an examination of the statutory language in its historical context. Penal Code § 187 defines ‘murder’ as ‘the unlawful killing of a human being ... with malice aforethought.’” (Note: all statutory references are to the California Penal Code)

First degree murder includes all “murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing...” § 189(a). All murder that is not of the first degree is “of the second degree.” § 189(b).

“California’s first murder statute, enacted in 1850, defined murder as ‘the unlawful killing of a human being, with malice aforethought, either express or implied’ and provided only one penalty for murder: death.” Garfield & Snyder, *Compiled Laws of California* (1853). “In 1856, the Legislature amended the statute to designate two degrees of murder.” *People v. Wiley*, 554 P.2d 881 (Cal. 1976). “Death remained the only punishment for first degree murder; second degree murder was punishable by a term of imprisonment ‘not less than ten years and which may extend to life.’” *Wiley*. “When dividing the common law offense of murder into two degrees, the Legislature reserved for the first-degree types of murders that are ‘cruel and aggravated’ and thus ‘deserving of greater punishment’ than other malicious or intentional killings, which

are punishable only as second-degree murder.” *People v. Sanchez*, 24 Cal. 17 (1864). The 1856 amendment designated as first-degree murders those “perpetrated by means of poison, or lying in wait, torture, or by any other willful, deliberate and premeditated killing.” 1 Hittell, *General Laws of California from 1850 to 1864* (1870). This language remained substantially unchanged by the Legislature in § 189, according to the Court.

In doing so, “the Legislature intended to require ‘something more’ than the showing of a malicious or intentional killing required for second degree murder – something equivalent in turpitude to willfulness, deliberation, and premeditation.” *Sanchez*. For example, in *People v. Heslen*, 163 P.2d 21 (Cal. 1945), the Supreme Court concluded that “the requirement of an intent to cause pain and suffering” is implicit in the word “torture.” And in *People v. Steger*, 546 P.2d 665 (Cal. 1976), the Supreme Court further elaborated that first degree “murder by means of torture” is “murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain.” And as to the mental state required in first degree murder by lying in wait, “the period of lying in wait must be sufficient to show the defendant had ‘a state of mind equivalent to premeditation or deliberation.’” *People v. Stevens*, 363 P.3d 41 (Cal. 2007).

In the present case, the standard instruction given by the trial court defined poison as “a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.” However, the Court noted, “the use of a substance that is inherently capable of killing does not in and of itself render a murder particularly reprehensible.” *People v. Watson*, 637 P.2d 279 (Cal. 1981). In fact, one court observed, a “fundamental tenet of toxicology is that the ‘dose makes the poison’ and that all chemical agents, including water, are harmful if consumed in large quan-

ties, while even the most toxic substances are harmless in minute quantities.” *Mancuso v. Consolidated Edison Co. of New York*, 56 F. Supp. 2d 391 (S.D.N.Y. 1999).

The Court concluded: “The knowing administration of a substance capable of causing death – even under conditions demonstrating a conscious disregard of that risk – does not show a state of mind equivalent to ‘willful, deliberate, and premeditated killing.’” § 189(a). “Like a murder by means of torture or lying in wait, a murder by means of poison is first degree murder when evidence of how the defendant carried out the poisoning demonstrates a mental state that is the functional equivalent of proof of premeditation,

deliberation, and intent to kill.” *Sanchez*. And it announced: “We now clarify that to prove a murder by poison is in the first degree, the prosecution must show that the defendant deliberately gave the victim poison with the intent to kill the victim or inflict injury likely to cause the victim’s death.”

Applying the newly announced rule to the present case, the Court stated that the instructions allowed the jury to convict Brown of first degree murder without finding she deliberately gave Dae-Lynn poison with the intent to kill her or inflict injury likely to cause her death. In fact, the instructions “permitted the jury to convict Brown of first-degree murder even if they believed

Brown fed her baby the breast milk with the intent to bond with her, nourish her, treat her illness, or soothe her. Such a conviction would not reflect a jury finding that, in giving the victim poison, the defendant acted with the ‘calculated deliberation’ or ‘coldblooded intent’ ... required to elevate a murder to the first degree.” *Steger*. Thus, the Court ruled the error to be prejudicial.

Accordingly, the Court reversed the judgment and remanded to the Court of Appeal with instructions to return the case to the superior court for further proceedings consistent with its opinion. See: *People v. Brown*, 524 P.3d 1088 (Cal. 2023). 🏠

## The Daniel Buffington Dilemma: Does His Expert Witness Testimony Satisfy *Daubert*?

by Jo Ellen Nott

**T**WENTY-SEVEN STATES IN THE U.S. HAVE the death penalty. Those states and the federal government carry out the sentence by injecting a lethal mix of one, two, or three drugs as their execution of choice. Death by lethal injection, however, is not always humane, and its opponents point to it as an unconstitutionally cruel and unusual punishment. Understandably, the specific protocols used in the different states are widely challenged prior to each execution as the public grapples with reports of botched executions causing prolonged agony and suffering.

These challenges fall heavily on the judiciary, as judges must now evaluate the credibility of medical experts and complex scientific testimony before admitting it as evidence. The U.S. Supreme Court’s landmark decision in *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993), established the standard for admitting scientific testimony in federal courts.

Under *Daubert*, judges are mandated to consider four factors before admitting expert testimony into evidence: (1) the theory can and has been tested, (2) the theory has been subject to peer review, (3) the error rate is known, (4) and the theory has gained acceptance in the scientific community. The mandates present a considerable challenge for judges hearing death penalty cases and their appeals because the science of death by lethal injection is complex and constantly evolving. Some capital punishment experts say that

lawyers and judges are not always prepared to make these critical *Daubert* evaluations.

Daniel Buffington, a Florida-based pharmacist who provides expert witness testimony in cases involving lethal injection, has been the subject of important challenges made by defense attorneys for death row clients. He has earned at least \$345,534 for his services since 2015, testifying in seven states about the efficacy of lethal injection cocktails.

In a 2017 Ohio case, however, defense lawyers for death row clients challenged Buffington. He had provided written testimony saying the prisoners would not feel pain from the injections of three drugs. The lawyers argued that Buffington was unqualified to testify in a hearing because he had not administered general anesthesia or conducted research on midazolam, the key sedative in the execution protocol.

The judge rejected the motion to bar Buffington’s testimony. When the prisoners’ lawyers challenged the pharmacist again in court, the judge held firm, defending Buffington’s testimony: “He’s certainly better able to understand and explain induction of anesthesia than I am. I have no experience of induction of anesthesia except having had anesthesia induced on my own body and watching it with my wife and my son, and that’s far less than this witness has.” The judge admitted Buffington as an expert witness and allowed his testimony.

Legal experts recognize this as a critical

weakness in the judicial system: “Not only does the law rely on lawyers to scrutinize experts, but judges must also evaluate many technical issues for themselves such as whether a forensic technique is legitimate science or whether a certain drug will anesthetize a prisoner.” These experts are concerned that jurists are not always well prepared, nor do they have the capacity to evaluate testimony based on *Daubert*’s standard.

Patrick Schiltz, chair of the advisory committee on evidence rules for the Judicial Conference of the United States, told ProPublica that “Sometimes we have really, really hard technical issues and it is a criticism of *Daubert* that it asks the judges to do something



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that judges aren't particularly well suited to do."

When a trial takes place in front of a judge instead of a jury, judges can allow experts to testify and then decide later how much weight to give their testimony. ProPublica reports that this has happened at least twice in method of execution cases where states have hired Buffington.

In cases not related to lethal injection, some judges have also challenged Buffington's credentials, pointing out inadequate research behind his opinions and attempting to testify beyond the scope of a pharmacist. In 2018, a

judge disqualified him an expert writing that "Dr. Buffington is not competent to testify regarding the standard of care – or breach thereof – by medical doctors, nurses, osteopathic physicians, or physician's assistants, as these are different professions from that of a pharmacist."

In another case, a judge in 2017 said Buffington's testimony "lacked sufficient evidence or analysis to back up the pharmacist's conclusions. Buffington's opinion is entirely without any intellectual rigor or any indicia of reliability." The judge excluded Buffington's testimony in a case about regulatory compli-

ance for a medication guide.

The Judicial Conference knows there is a need to assist judges in applying the rules, and to that end, the Conference proposed amendments to the Federal Rules of Evidence in 2022. The Conference clarified language to emphasize the responsibility judges have as gatekeepers of expert testimony. The amendments will become law in December 2023 if the Supreme Court approves, and the 118th Congress passes them. 📖

Sources: *ProPublica*, *Death Penalty Info*

## Current Volume of Digital Evidence Challenge the Criminal Justice System to Do Better

by Jo Ellen Nott

**I**N AN OPEN ACCESS ARTICLE FIRST PUBLISHED online on April 20, 2023, in *The International Journal of Evidence & Proof*, researchers from England and New Zealand discuss the challenges defense attorneys face when accessing and reviewing evidence from phones and computers.

The largest challenges identified after surveying 70 criminal law attorneys were (1) gaining access to data complicated by limited or late access, (2) the time needed to access and identify the relevant information because of the large volume of material, (3) the ability to use the data in the format provided, and (4) the difficulties processing and understanding data. Defense attorneys are hampered by tight turnaround times when confronted by these challenges.

Attorneys responding to the survey mentioned that even 1GB of data provides "unmanageable amounts of evidence to review." This places defense attorneys at a disadvantage when they cannot examine all the evidence presented by the prosecution and are forced to rely on summaries the prosecution has prepared.

Because of the volume of material and the usual time constraints defense counsel must contend with, they cannot perform independent checks. The inability to independently fact check can lead to omitting important details that "could lead to miscarriages of justice," according to the study's authors.

Even if expert witnesses for the defense are found to interpret the digital data despite budget and time constraints, "access to other relevant data held by the police depended largely on the goodwill of the prosecution

and would typically occur too late to be able to undertake any meaningful analysis."

Another stumbling block in the process is that digital evidence provided to defense teams "often lacked detail and context or was so heavily redacted that it was impossible to follow."

Researchers Dana Wilson-Kovacs, Rebecca Helm, Beth Gowns, and Lauren Redfern recommend "more clarity and transparency around the collection and analysis of digital evidence and the streamlining of the format and presentation of information" due to its increasing use in criminal trials.

If the criminal justice system can learn

to manage digital evidence more quickly and effectively, it will help ensure that justice is served. Survey respondent Professor Helm advised: "There is a widespread need to raise the levels of understanding of digital evidence by all, including how it is gathered and when and how it may be challenged. Improving lawyers' own digital literacy is key to ensuring they can adequately represent the interests of their clients." 📖

Source: *University of Exeter News*

## A Surveillance Scam by Any Other Name Is But a Parasite

**D**ATA BROKERS, SUCH AS SHOTSPOTTER, Fog Data Science, and Flock Safety bill themselves as surveillance companies assisting law enforcement in its quest to keep communities safer. But in actuality, they seemingly bilk taxpayers by selling bulk information to police agencies who may then use the information in violation of the rights of those taxpayers.

At a debate in a Detroit City Council meeting over whether to spend \$7 million to expand the City's contract with ShotSpotter, an exasperated Detroit Police Chief James E. White described ShotSpotter as "nothing but an investigative lead. It has no video. It has no voice recordings. It responds to the percussion of a gunshot, period." While White intended to prove that ShotSpotter was not a "mass surveillance tool," his comment revealed what

many had known for weeks: ShotSpotter's microphones do nothing more than record entire neighborhoods on behalf of the police.

The company blankets neighborhoods with microphones that purportedly detect only sounds above 120 decibels. If the sound is believed to be a gunshot, police are dispatched to the area. In a nutshell, ShotSpotter profits by collecting information on loud sounds and selling it to police departments. (But isn't it cheaper when people in the community simply phone police to report suspected gunfire?)

Flock Safety markets automatic license plate readers ("ALPRs") to police departments and homeowners' associations. While there is little evidence to support the notion that this "always-on surveillance" helps solve crime, Flock Safety reports that more than 400,000

vehicles were identified by their cameras in just the first 30 days of 2023. Of those, 4,490 (about 1%) “lit up the hot list of numbers to watch.” But it’s unknown why particular plates are added to this “hot list” because police are not forthcoming with the information.

Flock Safety has a privately owned database of millions of drivers’ locations that is sold to police without demonstrating the information solves crime. Apparently, there are few, if any, safeguards to prevent abuses such as a jealous deputy using ALPRs to track his ex’s new love interest or an en-

tire agency staking out who visits Planned Parenthood and when.

And Fog Data Science purchases cell phone location data, repackages it, and sells it to police and homeland security agencies. The data can be searched, allowing law enforcement to track the location of specific phones backward and forward in time. The company claims it has billions of data points from over 250 million devices dating back to 2017. Again, the potential for abuse is staggering. And even if the judiciary requires warrants based on probable cause, it is widely known

that rules prohibiting abuse do not prevent abuse.

Taxpayers foot the bill for these technologies to be used in their communities and thereby pay for the privilege of having their privacy invaded by these same technologies and their rights potentially violated. These companies, like parasites, feed off their host. It’s time for some buyer’s remorse. 🦋

Source: *theappeal.org*

## Police Departments Conspire with Boards to Secretly Install License Plate Cameras Without Consent of Residents

by Benjamin Tschirhart

**F**LOCK SAFETY” SOUNDS INNOCUOUS, LIKE a company that might provide security for chicken farmers. However, this company has nothing to do with fowl. But make no mistake; what they do is foul. Speaking to the people of Lakeway, Texas, Mayor Thomas Kilgore felt compelled to make the disclosure that “a surveillance system has been installed in the city of Lakeway.” Usually, when a community installs a system like this, they have some knowledge of it – not this time. “We find ourselves with a surveillance system, with no information and no policies, procedures or protections.”

As the mayor, the people of Lakeway probably ought to expect that the mayor’s office might know *something* about the eight

license plate readers that had been installed on roads in the town, both public and private. He didn’t. He only learned about the existence of the cameras after they had already been in place, capturing people’s movement for around six months. The executive branch of the city had taken no part in the decision. That honor had been claimed by the Rough Hollow Homeowners Association and its governing body, “Legend Communities,” which signed a deal in January 2021 granting local police access to the data collected by the system.

Residents of Lakeway (who already had their information sent to the police about a dozen times in six months) were not comforted by Legend Communities’ Chief Operating Officer Bill Hayes, who insisted that his purpose for installing the covert system to spy on local residents – without their knowledge or consent – was to be a “partner with the city.” “We didn’t go out there thinking we were being Big Brother,” said Hayes. But of course, a flood is nothing more than a multitude of single raindrops. Big Brother is not one person or entity but many, all acting in service of a controlling, authoritarian purpose.

Flock is part of that flood. “Typically,” says Director of Marketing Meg Heusel, “when we work with agencies, we start with neighborhood HOAs.” But in reality, the police are Flock’s point of entry. Sales reps entice police with images of a vast trove of data about private citizens, including their vehicle plate numbers, state, vehicle type, make, color, registration status, decals, and other details which they cannot legally gather, unless private citizens volunteer it. Flock

representatives emphasize the enormous help this information will provide to police in making arrests. And here, they aren’t wrong. In Raleigh, North Carolina, police say that in the first six months, the system gave them 116 “wanted person” alerts and yielded 41 arrests.

Flock’s strategy works. So far, over 200 HOAs around the country have purchased their systems. In addition to providing local data, these systems are also linked to the nationwide Flock database, which is stored on Amazon Web Services servers and is accessed by law enforcement agencies around the country. The ACLU of Northern California found more than 80 agencies across multiple states sharing license plate database information with U.S. Immigration and Customs Enforcement, in violation of several state laws.

But this is where Flock’s concern with legal compliance apparently ends. “Flock does not determine what a crime is. We’d expect that local law enforcement will enforce those laws as they are legally or socially required.” Of course, when it comes to obtaining information about citizens, the government has made it abundantly clear that laws are no obstacle to their goals.

Flock (along with their primary competitor Vigilant Solutions) has cultivated a “totally inappropriate relationship” with law enforcement agencies, according to the Electronic Frontier Foundation, “co-opting government agencies to promote their product.” These law enforcement agencies pressure HOA boards to purchase Flock systems, sometimes even offering grants to assist the HOA in paying for the equipment.



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These grants, of course, come with strings attached; in Rancho Palos Verdes, California, where 14 HOAs have received grants to install cameras, the conditions include allowing police to “locate, review and download video recordings and readings.”

Predictably, the HOA leaders push their invasive projects through with little regard

for the people they are meant to serve. David Appell, a resident of a gated community that installed a Flock system recalls that “They were very belligerent and opaque in how they went about it.” Appell’s recollection might contain a frightening prediction. If states do not proactively move to regulate the use of these cameras and systems, more Americans

can look forward to the same experience in the near future. “They wouldn’t let anyone opt out. The administration was in their hands.” The residents of Lakeway managed to get their cameras removed; the next community might not be so fortunate. 🗞️

Source: *theintercept.com*

## Police Unions Continue Overt and Covert Actions Designed to Weaken Oversight Boards

by Douglas Ankney

**T**HE GROUP “VOTERS FOR OVERSIGHT AND Police Accountability” (VOPA) apparently amassed the 25,000 signatures needed in Austin, Texas, to have a referendum entitled “Austin Police Oversight Act” added to the ballot. But there was already an “Austin Police Oversight Act” on the ballot seeking to open police records to public access and to give the city’s office of police oversight an active role in the investigations of officer misconduct.

However, the VOPA version differed in two significant ways: (1) it was funded almost entirely by a police union – the Austin Police Association had contributed nearly every penny of the campaign’s \$300,000 and (2) the VOPA version would keep particular misconduct records hidden from public eyes and give the board only a passive role in investigations.

Austin is not an outlier. In January 2023, a city councilor in Albuquerque, New Mexico, proposed abolishing the oversight board to replace it with a smaller, less powerful civilian panel. A state legislator told the *Albuquerque Journal* it was a “done deal.” Abigail Cerra, former chairperson of the Minneapolis Police Oversight Commission, acknowledged the importance of oversight groups as an important check on police authority: “Without any such check or oversight, people like Derek Chauvin [the officer who murdered George Floyd] are allowed to abuse their position with impunity.”

Minneapolis was another one of the cities where the oversight structure was weakened in the past few months, prompting Cerra to resign in frustration. She said that a weakened board “can lull people into thinking there is some level of accountability when there isn’t.”

Police unions also undermine the authority of oversight agencies by having allies elected to fill vacant board positions. Chicago’s WBEZ reported in January 2023 that the largest local police union is spending money

“in an attempt to extend the union’s power into a domain created specifically to oversee the officers who make up the union’s membership.”

The Executive Director of the National Fraternal Order of Police, Jim Pasco, strongly opposes oversight boards, believing civilians don’t have the knowledge to evaluate police actions. “It would be akin to putting

a plumber in charge of the investigation of airplane crashes,” said Pasco.

Yet, it is this author’s observation that while most civilians are not plumbers, the majority can discern if the toilet is working properly or not. 🗞️

Source: *themarshallproject.org*

## Holding Bad Cops Accountable Is the Way Forward in Police Reform

by Douglas Ankney

**T**HE CONTINUOUS REFRAIN OF “POLICE reform” touting “better training” and laws banning actions such as chokeholds seems to echo endlessly. In 2021, the U.S. House of Representatives passed the George Floyd Justice in Policing Act (“Act”), but it died in the Senate. However, even if the Act’s ban on chokeholds had become law, it would not have saved the life of Tyre Nichols.

Nichols was savagely beaten to death by Memphis police officers using every assault imaginable other than the chokehold. Amid the calls for “professionalizing the police” by raising the current 650 hours of training to match Finland’s 5,500 hours – or by requiring police officers to have a college degree – is Noah Smith.

On his Substack, Smith admits that there are not “good causal studies on the impact of total hours of police training on police brutality” but argues there is some evidence suggesting particular subtypes of training are effective. Yet, one of those subtypes was the de-escalation training undergone by the officers who killed Nichols.

And while diversity in a police force is a politically correct move, it does little to prevent

police brutality as shown by the fact that Nichols was a Black man beaten to death by Black police officers. So, what is the way forward in a nation where the citizenry is more discontent than ever with abusive and deadly police? A time tested and proven method in America is stiff consequences and accountability. The swift firing of the officers responsible for killing Nichols followed by charges of murder did more to cause other officers to stop and think than any amount of additional training or education ever will.

Unfortunately, criminal prosecutions of bad cops are rare. Furthermore, cops are repeatedly shielded from being held accountable in civil court due to the judicially created doctrine of “qualified immunity.” Basically, qualified immunity gives cops a green light to violate a person’s constitutional rights and then claim that it was unknown to police that their particular conduct violated a right. When misbehavior is seldom punished, bad cops will continue to behave badly, dangerously, and deadly. 🗞️

Source: *reason.com*

# SCOTUS Announces First Amendment Requires *Mens Rea* of Recklessness for ‘True Threats’ Conviction

by Richard Resch

**T**HE SUPREME COURT OF THE UNITED STATES held that criminal liability for true threats, which are not protected by the First Amendment, requires proof that the defendant had a subjective understanding of the threatening nature of the statements and further held that a mental state of recklessness is sufficient because it provides enough breathing space for protected speech without sacrificing too many of the benefits of enforcing laws prohibiting true threats.

Billy Counterman sent hundreds of Facebook messages to a local singer and musician, C.W., over a two-year period despite the fact they had never met. C.W. did not respond to any of Counterman’s messages and blocked him numerous times, but he created new Facebook accounts and resumed sending her unwanted messages. The messages ranged from the mundane – “I am going to the store would you like anything?” – to the unsettling – “Fuck off permanently” and “Staying in cyber life is going to kill you.”

The barrage of messages affected C.W.’s daily existence. Believing that Counterman was threatening her life, she had “a lot of trouble sleeping” and suffered from severe anxiety. Consequently, she no longer walked alone, reduced her social activity, and canceled some performances. She eventually contacted the police.

The State charged Counterman under Colo. Rev. Stat. § 18-3-602(1)(c) (2022), which makes it unlawful to “[r]epeatedly ... make[ ] any form of communication with another person” in “a manner that would cause a reasonable person to suffer emotional distress and does cause that person ... to suffer serious emotional distress.” The State’s sole evidence against Counterman were his Facebook messages.

Counterman sought to have the charge dismissed on First Amendment grounds, arguing that his messages do not constitute “true threats” and thus cannot serve as the basis for a criminal prosecution. The trial court assessed the issue under the state’s “reasonable person standard.” *People v. Cross*, 127 P.3d 71 (Colo. 2006). Under that standard, the State must prove that a reasonable person would view Counterman’s message as threatening, but the State need not prove

that he possessed any kind of “subjective intent to threaten” C.W. *In re R.D.*, 464 P.3d 717 (Colo. 2020). Under the totality of the circumstances, the trial court ruled that Counterman’s messages rose to the level of a “true threat,” and thus, the First Amendment does not bar prosecution. A jury found him guilty.

Counterman timely appealed. The Colorado Court of Appeals affirmed, and the state Supreme Court denied review.

The U.S. Supreme Court granted certiorari, observing that courts “are divided about (1) whether the First Amendment requires proof of a defendant’s subjective mindset in true-threat cases, and (2) if so, what *mens rea* standard is sufficient.”

The Court began its analysis by noting that true threats of violence are not protected by the First Amendment. *Virginia v. Black*, 538 U.S. 343 (2003). True threats belong to that category of speech upon which restrictions are permitted because the speech provides “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest” in prohibiting it. *United States v. Stevens*, 559 U.S. 460 (2010).

The other “historic and traditional categories” of unprotected speech are (1) incitement – statements intended to result in “imminent lawless action” and likely to do so, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); (2) defamation – false statements of fact causing harm to one’s reputation, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and (3) obscenity – valueless material appealing “to the prurient interest” and describing “sexual conduct” in “a patently offensive way,” *Miller v. California*, 413 U.S. 15 (1973).

The Court stated that the “true” distinguishes true threats from mere hyperbole or other statements that do not communicate a genuine likelihood of violence will ensue when taken in context, e.g., “I am going to kill you for showing up late.” *Watts v. United States*, 394 U.S. 705 (1969) (*per curiam*). True threats are serious expressions communicating that the speaker means to “commit an act of unlawful violence.” *Black*. The speaker’s awareness and intent that their statement conveys a threatening message are

not relevant in determining whether a statement is a threat, the Court explained. See *Elonis v. United States*, 575 U.S. 723 (2015). Whether a statement is a threat depends on “what the statement conveys” to the person on the receiving end of the statement, not the mental state of the speaker. *Id.*

However, the Court explained that because of the concern about the chilling effect on protected speech, the First Amendment may still impose a “subjective mental-state requirement” that would have the effect of “shielding” some true threats from criminal liability. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Restrictions on speech that have the potential to cause speakers to engage in “self-censorship” for fear of inadvertently crossing over the line to prohibited speech or out of worry about the expense of becoming entangled in the legal system are frowned upon by the Supreme Court. See *Gertz*.

The Court further explained that in order to protect against speakers exercising self-censorship and steering well clear of even lawful speech approaching the “unlawful zone,” the requirement of a culpable mental state for imposing criminal liability is “an important tool to prevent” such self-censoring behavior. *Speiser v. Randall*, 357 U.S. 513 (1958). But this protection comes at a cost: “It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought,” according to the Court. See *Mishkin v. New York*, 383 U.S. 502 (1966).

This “strategic protection” is part of the precedential case law for other categories of unprotected speech. *Gertz*. For example, the Supreme Court has held that defamation has “no constitutional value, *id.*,” yet a public figure must prove the speaker acted with “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Supreme Court has determined that the First Amendment “requires that we protect some falsehood in order to protect speech that matters.” *Gertz*.

Similarly, with incitement, the First Amendment prohibits civil or criminal punishment unless the speaker’s words are

“intended,” not just likely, to produce imminent lawless action. *Hess v. Indiana*, 414 U.S. 105 (1973) (*per curiam*). This *mens rea* requirement helps prevent a law from chilling “mere advocacy” of illegal acts, which is protected First Amendment speech. *Brandenburg*.

Finally, the same holds true for obscenity. That is, the First Amendment requires proof of a defendant’s mental state – awareness of “the character and nature” of the materials distributed – in order to impose criminal punishment for obscenity. *Hamling v. United States*, 418 U.S. 87 (1974). The Court explained that material constitutes obscenity regardless of the “purveyor’s mental state,” but punishment for “distribution without regard to scienter would ‘have the collateral effect of inhibiting’ protected expression.” *Smith v. California*, 361 U.S. 147 (1959).

Turning to the present case, the Court stated that the reasoning that applies to the other unprotect categories of speech also favors “requiring a subjective element in a true-threats case.” The Court rejected a solely objective standard based on how “reasonable observers would construe a statement in context” because it would “discourage the ‘uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.” *Rogers v. United States*, 422 U.S. 35 (1975). Thus, the Court’s concern for not chilling “non-threatening expression” compelled it to hold: “the State must prove in true-threats cases that the defendant had some understanding of his statements’ threatening character.”

The Court then turned to the issue of which type of subjective standard should be adopted. It chose the least culpable level of *mens rea* and easiest to prove, *viz.*, recklessness. In the context of threats, recklessness means that the speaker is aware “that others could regard his statements as” threatening violence and “delivers them anyway.” *Elonis* (Alito, J., concurring in part and dissenting in part). The Court reasoned that recklessness is the appropriate *mens rea* because such defendants “have consciously accepted a substantial risk of inflicting serious harm,” and recklessness offers sufficient “breathing space” for protected speech, “without sacrificing too many of the benefits of enforcing laws against true threats.”

Applying the newly adopted standard to the present case, the Court concluded that Counterman’s conviction violates the First Amendment because he was prosecuted in

accordance with an objective standard. The State only had to establish that a reasonable person would understand his Facebook statements as threats but did not have to show that he had any awareness that his statements could be understood that way by others. Thus, the Court held Counterman’s

prosecution violates the First Amendment.

Accordingly, the Court vacated the state Court of Appeals’ judgment and remanded the case for further proceedings consistent with its opinion. See: *Counterman v. Colorado*, 2023 U.S. LEXIS 2788 (2023). 📖

## Did You Know Popular Video Doorbells Are Equipped with Facial Recognition?

Jordan Arizmendi

**T**HE NEXT TIME YOU ARRIVE AT A DOOR that is equipped with a camera, as you glance into that lens, be cognizant that someone, somewhere could be analyzing your identity with facial recognition technology. *Consumer Reports* tested a number of security camera brands and video doorbells that offer facial recognition, such as Bosma, Blurams, Eve, Eufy, Google Nest, Logitech, Netatmo, and WeMo. Although the study concludes that such cameras are not connected to massive facial databases, hence, alone, they do not pose significant privacy concerns; however, they still can potentially invade our privacy.

The Amazon Ring Doorbell Pro, for example, interacts with Amazon Alexa to play prerecorded greetings to visitors, plus they can leave messages. However, Amazon recently admitted that there could be “emergency” instances, when police can get warrantless access to Ring devices without the owner’s permission. In that case, all it takes is a police officer’s skewed definition of the word “emergency” for them to gain access to one’s private videos. Amazon has also admitted to sharing user video with law enforcement.

Google Nest is a streaming service for all your home devices. Imagine possessing the ability to stream video content to any television, to instantly play a song on any speaker, and to view a photograph on any screen in your residence. For just \$6 a month, Google Nest users can upgrade to Nest Aware, which adds indoor and outdoor security cameras.

With Nest Aware, every second filmed is saved online for 30 days. Users can go back through the footage to inspect any person that might have walked in front of that camera in the last month. However, a hardware-level feature in Nest Aware allows the device to distinguish faces. As a result, these home cameras can take a picture of the

pizza delivery guy, run a facial recognition algorithm on the face, and obtain personal information on the unsuspecting guy for simply delivering a pizza.

Some home security cameras send the recorded facial recognition data to the manufacturers’ servers. As such confidential information drifts aimlessly through the cloud, a data broker can purchase it or a police officer can examine it. The fine print in the policies of cameras from Eufy and Google Nest explains that in the case of an “emergency,” any footage that a user records and saves in the cloud can be given to law enforcement without consent.

Even cameras not equipped with facial recognition software can still infringe on our privacy. Amazon Ring cannot distinguish faces. But once Amazon hands over the footage captured on a Ring to law enforcement, they can analyze the footage with their own facial recognition software.

Big tech and law enforcement have a somewhat peculiar relationship. For example, according to a *Vice* report, Amazon is using police departments, like the one in Lakeland, Florida, to advertise its surveillance cameras. In return, the police department gets free Ring products, plus a chance to view footage from these cameras.

Clearview AI compiled a database of billions of facial images from the internet. A law enforcement agent uploads an image taken from a security camera and will find matches in this enormous facial database.

Big Tech and surveillance-state law enforcement are a perfect match made for a dystopian nightmare that’s increasingly become a reality. 📖

Sources: [consumerreports.org](https://www.consumerreports.org); [androidpolice.com](https://www.androidpolice.com); [eff.org](https://www.vice.com); [vice.com](https://www.vice.com)

# Research on Persistence of Touch DNA Will Help Investigators Collect More Usable Samples

by Jo Ellen Nott

**T**HE NATIONAL INSTITUTE OF JUSTICE (“NIJ”) is the research, development, and evaluation agency of the U.S. Department of Justice. Its motto, “strengthen science, advance justice,” informs all its activities. One crucial area of forensic science it has helped strengthen through grants is DNA research and development. Since the late 1980s, law enforcement demands for tools and technologies of DNA testing have continued to exceed what is available in their jurisdictions.

In 2018, the Forensic Technology Working Group at NIJ asked for studies that would “provide foundational knowledge and practical data” about the persistence of DNA left on surfaces versus DNA collected from individuals via bloodstains or visible fluids at crime scenes or found on victims. The Massachusetts Institute of Technology Lincoln Laboratory received an NIJ grant to quantify how long touch DNA would persist on different surfaces under varying conditions. Scientists at South Dakota State University then took the Lincoln Lab findings and created predictive models of how touch DNA degrades.

Issues that forensic scientists face when dealing with touch DNA are many: low quantity of useable DNA, high variability in the amount left by one person, high variability in the amount left from person to person, and, most importantly, the degradation of DNA and the many factors that cause it to break down over time.

The researchers conducted experiments to answer two crucial questions: (1) How do surface type, environmental condition, and exposure time affect DNA touch evidence? and (2) Does the stability of touch DNA samples differ from control DNA samples?

In their experiments, the scientists put control DNA and touch DNA samples on steel bolts and cotton fabric. They exposed the samples to varying temperatures and humidity conditions and UV light exposure. Exposure time was 14 days for control DNA and seven days for touch DNA.

The scientists fit their observations of the changes in the DNA samples to a linear, mixed effects model and found that:

- ♦ The amount of DNA left by touch varied more than in the control samples.
- ♦ DNA samples degraded less on stain-

less steel than fabric.

- ♦ DNA samples degraded more in high temperature and low humidity.

- ♦ DNA samples were more stable at low temperatures.

UV light had the biggest effect on DNA degradation on both materials to the extent that samples exposed to UV light were too highly degraded to be useful in a forensic analysis.

The takeaway for forensic labs and law enforcement is that investigators can recover more useable DNA in cool and dry indoor environments than hot and humid outside conditions. They will also recover more useable DNA from stainless steel objects than

from fabric.

A challenge for the researchers was the low and variable quantities of touch DNA they were provided to analyze. Because of this, they were not able to evaluate the level of DNA degradation as well as they hoped to. In future experiments, they plan to increase the initial amount of touch DNA to obtain more accurate degradation results.

The NIJ reports that “these studies provide the most comprehensive information to date on the persistence of touch DNA evidence.”

Source: *National Institute of Justice*

## News in Brief

**CALIFORNIA:** THE DISTRICT ATTORNEY for Los Angeles County, George Gascón, announced that a police officer in San Fernando was charged with theft. *CBS News* reported that the officer, Jeffrey King, 37, was handed charges on June 6, 2023, of misdemeanor petty theft, felony extortion, and felony second-degree robbery. The charges resulted from an investigation by the LA County Sheriff’s Dep. Internal Criminal Investigations Bureau and were spawned from accusations that King stole from an arrestee on June 21, 2022. King had been responding to a call of potential domestic violence when he confiscated money and cellphones from the male arrestee. He later turned in only the phones to a department supervisor. The amount of money that was stolen was not clear at the time of the June 8 reporting, but it was clear that prosecutors were contending that the victim never got his money back, and the confiscated cash was never turned in as evidence.

**Colorado:** KDVR in Denver reported that a former police officer in Loveland was fired for “unnecessary use of force.” Body camera footage of the May 20, 2023, offense was released by the Loveland PD in the weeks following the assault carried out by former officer, Russell Maranto, 28, on Angelia Hall, 59. Hall was in police custody at an emergency room during the incident. She had been walking into and out of traffic

and speaking in unintelligible ways when police took her into “protective custody.” She can be seen in the released footage cursing at nurses and police officers alike. She then spits at Maranto, who is near her and responds by punching her in the face. The other officer in the room can then be seen grabbing a hold of Hall and separating the two. Hall was charged with third-degree assault against Maranto, and he was fired three days after the incident.

**Delaware:** The veteran police chief of Bethany Beach, Michael Redmon, was placed on administrative leave after being arrested for a DUI incident in the early hours of the morning on May 30, 2023. *Delaware Online* reported that Redmon was given a ticket during the incident, released to someone sober, and was charged with DUI. He was placed on administrative leave on May 31, 2023.

**Florida:** WPLG in Miami reported that a police officer in Miami-Dade County was arrested for assaulting a man with whom she was romantically involved. The officer, Anna Elicia Perez, 34, was at Miller’s Ale House in Palmetto Bay on May 26, 2023, with the victim and his 7-months-pregnant girlfriend, Mila Zuloaga, 35, when the three of them began arguing over the man’s “infidelity.” At some point during the disagreement, the two women began physically assaulting the man in the body and face, giving him a bruised lip in the process. They were both charged with

misdemeanor battery, and Perez was placed on administrative leave.

**Idaho:** On May 18, 2023, a former state police trooper in Kootenai County pleaded not guilty to charges of murder and domestic battery toward his wife. *Law & Crime* and KREM in Spokane, Washington, reported that the former officer, Daniel Charles Howard, 57, had previously been accused of assaulting and killing his wife, Kendy Wilkins, 48, in 2021. The murder was not Howard's first instance of accused criminality. In 2014, he was sentenced on counts of malicious injury to property, aggravated assault, and first-degree stalking. Those offenses were related to his actions after finding out Wilkins was cheating on him. His actions included accusing the man, a friend, and neighbor of theirs, of the "ultimate betrayal." Howard went on to harass the man and caused property damage by pouring syrup in his cars and stealing his mail and guns. The effect was to contribute to the man's moving from Idaho to Washington in part out of fear of Howard. He was sentenced for those crimes, and on Nov. 14, 2014, he resigned from the state police. Then he was accused of murdering Wilkins on Feb. 2, 2021. After the death, their daughter publicly stated that Howard had claimed to find Wilkins naked in the bathtub, having committed suicide with a gun in their home. Their daughter cast doubt on the suicide story and claimed that Howard was physically and emotionally abusive toward Wilkins.

**Indiana:** *The Huffington Post* reported that a man named Chaz Foy was hired as a Marion police officer on June 5, 2023, and was fired on June 7, 2023. Foy's two-day stint in the Marion PD came to a swift end after a local news organization brought his past racist social media posts to the Marion police chief's attention. The posts included one in which Foy appeared to label a drawing of a black man as "Martin Looter King" and another in which he seemed to express an appreciation for the murder of George Floyd by Minneapolis police officers in 2020. Marion Chief of Police Angela Haley said in statement that the posts were "not in keeping with the standards of the Marion Police Department."

**Illinois:** *ProPublica* reported that a former Chicago police officer lied to judges repeatedly to evade paying 44 driving tickets. The officer, Jeffrey Kriv, was charged on Jan. 31, 2023, with lying to 23 judges, claiming in many of his traffic ticket hearings that

various imagined girlfriends had stolen his car. He also presented seemingly real police incident reports backing up the claims of auto theft. Yet he did not tell the court that he was a police officer himself. But his alleged behavior was not new. Just 8 hours after being hired in 1996, Kriv was accused of breaking a man's car window with a flashlight while directing traffic. He then went on to have a career filled with abusive, bullying, rude, and offensive behavior toward members of the public. In the flurry of accused misconduct, he was even momentarily charged with contempt of court after insulting a judge whose ruling he didn't like. He was also accused of punching a woman while she was handcuffed. During his time as a cop, he racked up some 92 complaints of misconduct and even the target of complaints from fellow officers. But he constantly evaded official punishment. His cruel and lawless behavior continued for years before the emergence of his many car-thefting girlfriends in Dec. 2013. Between 2015 and 2022, Kriv was the subject of some 51 traffic tickets. He paid just two of them. He was found out after the Chicago Office of Inspector General got a tip about his lies in court. He was eventually barred from giving testimony in Cook County, but he continued on as a police officer until January 2023, the same month he received two more speeding tickets. He'd kept around \$3,665 in his pockets as a result of his lies.

**Kentucky:** WLWT in Cincinnati, Ohio, reported on May 26, 2023, that a police officer in Ripley, Ohio, was charged with homicide after a police chase he was conducting ended with a fatal crash. The officer was reportedly one Caleb Savage. He behaved recklessly and negligently on March 12, 2023, when he chased Ryan Mitchell during an attempted traffic stop. Mitchell was affiliated with a property damage investigation. During the chase, they were headed along KY 3056. Savage passed into Kentucky from the Ohio side of the border. During the chase near Maysville, Mitchell lost control of his vehicle and crashed, resulting in injuries that soon took his life. After the crash, Savage drove back to Ripley, neither checking on Mitchell nor calling in help. Kentucky State Police indicated that he was charged with leaving the scene of an accident, failing to render aid, and reckless homicide.

**Maryland:** It was announced on May 19, 2023, that a former Rockville police officer was sentenced for the possession and distribution of a vast amount of child

pornography. *USA Today* reported that the former officer, Daniel Morozewicz, 38, who was also a member of the Maryland National Guard, had previously pleaded guilty to possessing more than 12,300 pieces of child pornography, including depictions of the abuse of toddlers, from 2020 – 2021. He both downloaded and distributed the content, including to undercover police officers, before being arrested in March 2021 at a mass vaccine clinic while on duty as a member of the national guard. He also attempted to obstruct justice by trying to get rid of the illicit material on his devices. He was sentenced to a fine of \$14,000 and a prison sentence of 3-and-half-years. He will then spend the rest of his life on supervised release.

**Michigan:** The Michigan Department of the Attorney General reported on May 31, 2023, that the former Chief of Police in Hartford was charged with a single misdemeanor and eight felony counts. The former officer, Tressa Beltran, 57, who retired as chief in early 2023, was charged with counts relating to drug crimes and corruption in office. She was accused by the state of engaging in a scheme to use her position to extort individuals for various "controlled substances" so that she could possess and sell them. She received three varying counts of substance possession, a count of extortion, a count of using a computer to commit a crime, a count of larceny in a building, a count of delivery or possession of a controlled substance, a count of misconduct in office, and a count of embezzlement. The investigation into her conduct was carried out in large part by the Van Buren County Sheriff's Office, and the charges were announced by Michigan Attorney General Dana Nessel.

**Missouri:** KSDK in St. Louis reported that a police officer in Jefferson County was

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charged on June 6, 2023, with DWI in a single-vehicle crash that resulted in the death of his wife. The former officer, Colby McCreary, was involved in a vehicle crash while off duty in the early morning of April 30, 2023, that killed Savannah McCreary. He was driving their Jeep at close to 87 mph when they drifted off the road and struck a rocky embankment, sending the vehicle onto its side and throwing them out. The incident was reportedly responded to by Festus police, and the couple were soon taken to a hospital for treatment. Mrs. McCreary was later pronounced dead at the facility. Responding officers reported no signs of impairment at the scene of the crash. But a hospital toxicology test found that Mr. McCreary had a blood alcohol level of .17%. For his role in the incident, he was handed counts of first-degree involuntary manslaughter and DWI resulting death.

**New Jersey:** The Chief of Police in Manville was indicted for sexually assaulting his supervisees, the *International Business Times* reported on June 14, 2023. The officer, Thomas Herbst, 55, was accused in the filing of assaulting on numerous occasions, three women, some of whom worked under him, between 2008 and 2021. He engaged in sexually explicit behavior while on duty, including exposing himself and inappropriate touching. The behavior initially began with coercive sexual advances, using his position to manipulate his victims. His actions escalated into rape. He was also accused of looking for sex from the wife of a subordinate as payment for a promotion. For his crimes, he was handed counts of official misconduct, a pattern of official misconduct, criminal sexual contact, and sexual assault. He was initially arrested in April 2023, and was soon suspended.

**New Mexico:** KOAT in Albuquerque reported on June 12, 2023, that a state police officer was arrested for sexually assaulting a member of the New Mexico National Guard. The officer, Isaiah Cheromiah, had been placed on leave in May 2023 after accusations of the offense became known. He was accused of assaulting a female member of the state National Guard while she and a number of others were on deployment. Cheromiah, who was then with the Grants PD, had been hanging out with members of the National Guard while they had time off in the evenings of July 2022. It was on one of these nights that the incident occurred. He committed the assault while she was asleep. She had alcohol Cheromiah had given her beforehand. Cheromiah was hired by the state police months later in Nov. 2022 and

was charged with sexual assault after investigation initiated in the wake of his placement on administrative leave.

**New York:** On June 8, 2023, a former NYPD officer was arrested and federally charged with aiding a group of robbers who stole from Asian Americans. WNBC in New York City and the *New York Post* reported that the former officer, Saul Arismendy De La Cruz, 31, was accused of accepting payments to assist the group in evading arrest. The conspiracy lasted from 2017 to 2022 and saw De La Cruz helping the robbers stay out of prison while they targeted Asian Americans, many business owners, stealing property including jewelry and money, and wielding weapons, including guns. They committed robberies outside of New York City as well. De La Cruz was suspended without pay in Nov. 2022 for an unrelated shooting incident. He then retired in Dec. 2022. De La Cruz and the robbers were charged with racketeering conspiracy and could face as much as two decades in prison.

**Pennsylvania:** The former Chief of Police in Greensburg was charged in Westmoreland County on May 25, 2023, with stealing a bag full of drugs from the evidence room of his own police department. *Trib Live* reported that the former chief was Shawn Denning, 42, and he took a backpack full of psilocybin mushrooms and steroids from the evidence chamber. The backpack, which was part of an investigation being conducted by Denning and others, was found to have been incorrectly marked as destroyed. A portion of the evidence against Denning includes accounts from other officers. One of the other officers claimed they saw the steroids on Denning's desk. He was charged with evidence tempering, conspiracy, and theft. Yet by the time of the charges, Denning had already resigned after federal law enforcement arrested him for being a "go between" in schemes to smuggle drugs across state lines. He was accused of connecting people for drug deals and passing along information between parties, including what kinds of drugs were up for sale.

**South Carolina:** WHNS in Greenville reported that the Chief of Police in Easley resigned on June 15, 2023, after getting into a fight with a man and calling him a racial slur in front of the man's family. The now former police chief was Stan Whitten, and he was put on leave before resigning. He'd been accused of cursing, using racial insults, and flashing his badge while confronting a man on June 10, 2023. Why? The man had asked him to

move his truck so that his family could exit a boat ramp. There were seven children in the man's company, and witnesses recounted them looking scared during the incident. Whitten, who admitted to drinking alcohol, claimed that the man had physically assaulted him, but the man denied it, saying that Whitten's visible abrasions came from his falling over during the incident. Responding police officers asked Whitten why he shouted slurs at the man and his family, to which he responded, "Because I can."

**Tennessee:** A former police officer in La Vergne was indicted on June 6, 2023, in connection with a nonfatal shooting. The former officer, Gavin Schoeberl, 24, was charged with aggravated assault and reckless endangerment after opening fire in his own apartment for an unreported reason on April 6, 2023, and accidentally hitting a neighbor through his wall. Schoeberl had at one point been put on a week's unpaid suspension after a sex scandal came to light and rocked the La Vergne PD. In that scandal, officers were accused of a pattern of sexual behavior with one another, including showing each other nude photos and having sex on property of the city and while on duty. One incident involved a hot tub party where nude images were exchanged. [See: CLN; March 2023; p. 50]

**Texas:** KTRK in Houston reported that a police officer in the city was fired on June 20, 2023, after being charged with shooting his wife in the face. The now former officer, Galib Chowdhury, 31, was accused of shooting his wife, Sadaf Iqbal, in the eye on June 12, 2023. She survived, and has since gone public, accusing him of attempting to cover it up. Iqbal claimed that when she came home that day, she found the door to their apartment open and Chowdhury inside waiting for her. He pinned her against the wall, and she began pleading. He asked, "You think I can't kill you" and pulled out an AR-15. Investigators found texts from hours before the shooting in which he appears angry, and Iqbal claimed that he had accused her of cheating on him. She claimed that after the shot was fired, Chowdhury seemed apologetic and called the police but told them an intruder had broken in and tried to get her to join in the lie. But before long, Iqbal came out accusing him of shooting her. Iqbal, who was blinded in the eye, claimed to still love Chowdhury but thought it was important to tell the truth and encourage other abused women to speak up. Chowdhury was charged with "aggravated assault with serious bodily harm." 🗞️

# Human Rights Defense Center Book Store

FREE SHIPPING on all book orders OVER \$50 (effective 9-21-2022 until further notice). \$6.00 S/H applies to all other book orders.

**Prison Profiteers: Who Makes Money from Mass Incarceration**, edited by Paul Wright and Tara Herivel, 323 pages. **\$24.95**. This is the third book in a series of Prison Legal News anthologies that examines the reality of mass imprisonment in America. Prison Profiteers is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. **1063**

**Prison Education Guide**, by Christopher Zoukis, PLN Publishing (2016), 269 pages. **\$24.95**. This book includes up-to-date information on pursuing educational coursework by correspondence, including high school, college, paralegal and religious studies. **2019**

**The Habeas Citebook: Ineffective Assistance of Counsel, 2nd Ed. (2016)** by Brandon Sample, PLN Publishing, 275 pages. **\$49.95**. This is an updated version of PLN's second book, by former federal prisoner Brandon Sample, which extensively covers ineffective assistance of counsel issues in federal habeas petitions. **2021**

**Prison Nation: The Warehousing of America's Poor**, edited by Tara Herivel and Paul Wright, 332 pages. **\$54.95**. PLN's second anthology exposes the dark side of the 'lock-em-up' political agenda and legal climate in the U.S. **1041**

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**Deposition Handbook**, by Paul Bergman and Albert Moore, 7th Ed. Nolo Press, 440 pages. **\$34.99**. How-to handbook for anyone who conducts a deposition or is going to be deposed. **1054**

**All Alone in the World: Children of the Incarcerated**, by Nell Bernstein, 303 pages. **\$19.99**. A moving condemnation of the U.S. penal system and its effect on families" (Parents' Press), award-winning journalist Nell Bernstein takes an intimate look at parents and children—over two million of them - torn apart by our current incarceration policy. **2016**

**Everyday Letters for Busy People: Hundreds of Samples You Can Adapt at a Moment's Notice**, by Debra May, 287 pages. **\$21.99**. Here are hundreds of tips, techniques, and samples that will help you create the perfect letter. **1048**

**Protecting Your Health and Safety**, by Robert E. Toone, Southern Poverty Law Center, 325 pages. **\$10.00**. This book explains basic rights that prisoners have in a jail or prison in the U.S. It deals mainly with rights related to health and safety, such as communicable diseases and abuse by prison officials; it also explains how to enforce your rights, including through litigation. **1060**

**Spanish-English/English-Spanish Dictionary**, 2nd ed., Random House. 694 pages. **\$15.95**. Has 145,000+ entries from A to Z; includes Western Hemisphere usage. **1034a**

**Writing to Win: The Legal Writer**, by Steven D. Stark, Broadway Books/Random House, 303 pages. **\$19.95**. Explains the writing of effective complaints, responses, briefs, motions and other legal papers. **1035**

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**Beyond Bars, Rejoining Society After Prison**, by Jeffrey Ian Ross, Ph.D. and Stephen C. Richards, Ph.D., Alpha, 224 pages. **\$14.95**. Beyond Bars is a practical and comprehensive guide for ex-convicts and their families for managing successful re-entry into the community, and includes information about budgets, job searches, family issues, preparing for release while still incarcerated, and more. **1080**

**Directory of Federal Prisons: The Unofficial Guide to Bureau of Prisons Institutions**, by Christopher Zoukis, 764 pages. **\$99.95**. A comprehensive guidebook to Federal Bureau of Prisons facilities. This book delves into the shadowy world of American federal prisoners and their experiences at each prison, whether governmental or private. **2024**

**Merriam-Webster's Dictionary of Law**, 634 pages. **\$19.95**. Includes definitions for more than 10,000 legal words and phrases, plus pronunciations, supplementary notes and special sections on the judicial system, historic laws and selected important cases. Great reference for jailhouse lawyers who need to learn legal terminology. **2018**

**The Best 500+ Non-Profit Organizations for Prisoners and Their Families**, 5th edition, 170 pages. \$19.99. The only comprehensive, up-to-date book of non-profit organizations specifically for prisoners and their families. Cross referenced by state, organization name and subject area. Find what you want fast! **2020**

**Criminal Law: A Desk Reference**, by Paul Bergman, 5th Ed. Nolo Press, 456 pages. **\$44.99**. The book offers clear, plain English explanations of the law accompanied by real-world illustrations. **1101**

**Blue Collar Resume**, by Steven Provenzano, 210 pages. **\$16.95**. The must have guide to expert resume writing for blue and gray-collar jobs. **1103**

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**Prisoners' Self-Help Litigation Manual**, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 928 pages. **\$69.95.** The premiere, must-have "Bible" of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Includes detailed instructions and thousands of case citations. Highly recommended! **1077**

**How to Win Your Personal Injury Claim**, by Atty. Joseph Matthews, 9th edition, NOLO Press, 411 pages. **\$34.99.** While not specifically for prison-related personal injury cases, this book provides comprehensive information on how to handle personal injury and property damage claims arising from accidents. **1075**

**Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.**, by Mumia Abu-Jamal, 286 pages. **\$16.95.** In Jailhouse Lawyers, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned advocates who have learned to use the court system to represent other prisoners—many uneducated or illiterate—and in some cases, to win their freedom. **1073**

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

**Disciplinary Self-Help Litigation Manual**, by Daniel Manville, 355 pages. **\$49.95.** By the co-author of the Prisoners' Self-Help Litigation Manual, this book provides detailed information about prisoners' rights in disciplinary hearings and how to enforce those rights in court. Includes state-by-state case law on prison disciplinary issues. This is the third book published by PLN Publishing. **2017**

**The PLRA Handbook: Law and Practice under the Prison Litigation Reform Act**, by John Boston, 576 pages. **Prisoners - \$84.95, Lawyers/Entities - \$224.95.** This book is the best and most thorough guide to the PLRA provides a roadmap to all the complexities and absurdities it raises to keep prisoners from getting rulings and relief on the merits of their cases. The goal of this book is to provide the knowledge prisoners' lawyers – and prisoners, if they don't have a lawyer – need to quickly understand the relevant law and effectively argue their claims. **2029**

**Federal Prison Handbook**, by Christopher Zoukis, 493 pages. **\$74.95.** This leading survival guide to the federal Bureau of Prisons teaches current and soon-to-be federal prisoners everything they need to know about BOP life, policies and operations. **2022**

**Locking Up Our Own**, by James Forman Jr., 306 pages. **\$19.95.** In Locking Up Our Own, he seeks to understand the war on crime that began in the 1970s and why it was supported by many African American leaders in the nation's urban centers. **2025**

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**The Habeas Citebook: Prosecutorial Misconduct**, by Alissa Hull, 300 pages. **\$59.95.** This book is designed to help pro se litigants identify and raise viable claims for habeas corpus relief based on prosecutorial misconduct. Contains hundreds of useful case citations from all 50 states and on the federal level. **2023**

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**Caught: The Prison State and the Lockdown of American Politics**, by Marie Gottschalk, 496 pages. **\$27.99.** This book examines why the carceral state, with its growing number of outcasts, remains so tenacious in the United States. **2005**

**Encyclopedia of Everyday Law**, by Shae Irving, J.D., 11th Ed. Nolo Press, 544 pages. **\$34.99.** This is a helpful glossary of legal terms and an appendix on how to do your own legal research. **1102**

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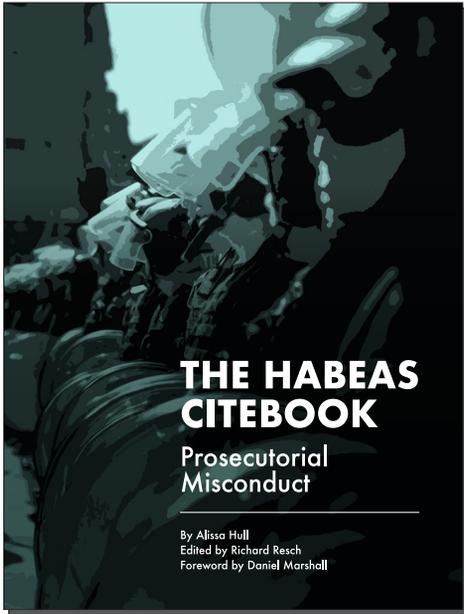
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# The Habeas Citebook: Prosecutorial Misconduct

By Alissa Hull

Edited by Richard Resch

*The Habeas Citebook: Prosecutorial Misconduct* is part of the series of books by Prison Legal News Publishing designed to help pro se prisoner litigants and their attorneys identify, raise and litigate viable claims for potential habeas corpus relief. This easy-to-use book is an essential resource for anyone with a potential claim based upon prosecutorial

misconduct. It provides citations to over 1,700 helpful and instructive cases on the topic from the federal courts, all 50 states, and Washington, D.C. It'll save litigants hundreds of hours of research in identifying relevant issues, targeting potentially successful strategies to challenge their conviction, and locating supporting case law.

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

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

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