State Violence, Legitimacy, and the Path to True Public Safety

by David M. Kennedy, Niskanen Center (niskanencenter.org)

Executive Summary: I work with cops, and I support this movement.

Police Violence Is State Violence

Let’s be clear about what’s been happening in the country these last few weeks. Policing is an arm of the state. Police departments and police officers operate under the color of law and as agents of the state, with authority granted by their nation’s citizens. That gives their actions special meaning. George Floyd was—literally—killed by his government. Over and over again in America, Black people have been killed, beaten, and otherwise abused by their government through its agents: the police. In the modern era, Rodney King was beaten by his government. Michael Brown was shot and killed by his government. Walter Scott was shot in the back and killed by his government; his government then falsified the shooting scene and lied about what had happened.

This has always been an outrage. But the last several weeks in America have been transformative for how the nation thinks about and responds to police violence. A short time ago—before a Minneapolis police officer killed George Floyd—it would have been unimaginable that over a thousand professional athletes would call for an end to the doctrine of “qualified immunity” that protects police violence, that NASCAR would ban the Confederate flag, and that PepsiCo would retire Aunt Jemima.

As somebody who has spent the last three decades working with the police to reduce violent crime, I believe that all of this is for good. I’ve been part of developing a violence prevention strategy that has a central role for police in partnership with the community and service providers. It can cut homicides—mostly of young Black men—in half or more. It was the source of the so-called “Boston Miracle” over 20 years ago that reduced young people’s murders by almost two-thirds. It’s the same body of work that has made Oakland, California, a shining star in violence prevention, with homicide and gun violence down by half over the last eight years. I’ve worked with police to shut down street drug markets in ways that keep dealers out of jail, and to prevent domestic violence victims from being killed without making them bear the risk of prosecuting their abusers or the burden of going underground to hide. I have worked arm in arm with police officers who are courageous, creative, and committed to their communities. In short, I know how much good the right kind of policing can do. But I also know how much damage the wrong kind of policing does—and I support sweeping changes to mend that damage.

In the protests of these last weeks, the government has beaten citizens, driven vehicles into protesters, and fired pepper rounds at journalists. Yes, in those same protests, police officers have been shot, police stations burned, and businesses looted. But police violence is fundamentally different from private violence. It is in no way to diminish the wrongness of crimes committed by the public to say: we know that people will do these things—kill, rape, and rob. It is because we know that people will do these things that in democracies there is the social contract: a state monopoly on violence and coercion, which speaks through the law and makes that law operative through institutions, including the police. If a protestor punches you in the face, he has committed a crime. The social contract says that it is wrong, and the state has the
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September 2020

Criminal Legal News
Path to True Public Safety (cont.)

power to stop it. If a police officer punches you in the face, you have been assaulted by your government. It is simply a statement of the human condition to say: people will forever and always kill each other, no matter how hard we try to prevent it. If we say: our government will forever and always kill us, and beat us, and do us violence under the color of law, no matter how hard we try to prevent it, that is fundamentally different. That is an admission and an acceptance of the failure of the state of our democracy, and the American experiment.

Yet, for all of American history, the government has done exactly that to Black Americans. Slavery was violence. Reestablishing slavery after Reconstruction through the criminal justice system and convict leasing was violence. Lynching was violence. Setting dogs and fire hoses on the civil rights movement was violence. As was the FBI trying to drive Martin Luther King Jr. to suicide was violence, and the city of Philadelphia bombing and burning a city block. Zero-tolerance policing, rampant stop-and-frisk, the disparity in crack and powder cocaine sentencing, and mass incarceration were and are the racialized use of the state's coercive power.

Where the government has not done violence to Black people, it has failed to protect them. The homicide rate for Black men ages 18-34 is almost 18 times that of White men the same age. Homicides of Black men and women go unsolved. White men in military garb carrying rifles gather safely at statehouses; Black men going running are hunted down, shot, and killed. Black people fear their government. They have “the talk” with their kids and worry when they go to school and drive their cars. They are unsafe walking, shopping, swimming, sleeping at Yale. They know what asking a White woman to leash her dog can mean. Black police officers, often required to carry their weapons off-duty, fear being killed by their fellow officers.

This is what so misses the point when people who don’t get it say, “But most Black homicide victims are not killed by police.” Most White people are not killed in terrorist attacks; 9/11 and everything like it represents a tiny fraction of the White body count over the last decades. But the United States government completely reoriented national security after 9/11; we’re still at war. Most White kids are not killed in mass shootings, but the country is pouring resources into school safety. Terror and mass shootings cut to the core of what it means to live one’s life, feel safe and secure, and trust that one’s family and loved ones will be safe and secure. And when the mass of White people feels threatened by terror and mass shootings, their country leaps to their defense. Being Black in America has meant knowing that one’s family and loved ones are never safe and secure because your country can hurt you and them at any moment. It has meant being subject to state violence and to the state’s protection of private violence, in a nation forged out of, structured by, and soaked in racism. Black Americans have always known that. White Americans are apparently starting to get it. What is going on now in the nation is a rejection of that arc of history.

The protest movement represents core American values and deserves broad bipartisan support. It is no threat to our efforts to prevent crime and violence; indeed, it represents an opportunity to make those efforts much more successful. That is because it can support the emergence of a fundamentally better way to produce public safety. The evidence from the scholarly literature suggests that the more legitimatize the law and the police are in the eyes of America’s communities, the less we will actually have to use them. And while “law and order” has traditionally been a platform for the political right, this goal—using the state’s coercive power no more than absolutely necessary—is one that conservatives should find easy to embrace. In a very real way, more legitimacy in the realm of policing means less government.

This Is a Crisis of Legitimacy

Legitimacy is a core element in democracy: the belief of the people in the institutions of government and their power to set rules and gain compliance. When people think of the law and of policing, they think of the power of the courts, jail and prison, of the gun and the badge. In fact, that power is trivial compared to voluntary compliance with the law. Most of the time, people do not need to be threatened by the state in order not to kill, rape, and rob. Most people know that when the law says not to do terrible things, the law is right; when they are tempted, they believe that the law has the standing to say, Don’t. Scholars like Tom Tyler point out that even criminals obey the law most of the time: They buy groceries, stop at red lights, and seldom kill the people they’re mad at. Policing research shows very clearly that as legitimacy goes up, violence goes down, voluntary compliance with the law goes up, people call 911 when they need help, and
the like. When legitimacy goes down—as after incidents of police violence—research shows that Black communities withdraw from the police and violence goes up.

Contrary to what many think “high crime” Black communities are deeply law-abiding. Research shows that residents in the most troubled areas of those communities have a very high regard for the law, want their neighbors to obey the law, want to be safe, and even want to have good relationships with the police. But they don’t trust the police, don’t think the police respect them, don’t think the police share their values, think the police are biased, and don’t trust the police to govern themselves.

Scholars have long characterized this as “legal cynicism”: belief in the law, but not in its institutions, especially the police. More recently, scholars like Monica Bell have gone beyond this to a profoundly more dire—and in my experience, more accurate— notion of “legal estrangement.” Bell reminds us that more than 50 years ago, the Kerner Commission found that “police have come to symbolize White power, White racism, and White repression.” Those beliefs are driven by hundreds of years of history and collective memory and experience, present treatment and mistreatment by police, and the vicarious experience of the endless series of police killings. “Much literature has shown that, regardless of how trust is measured or conceived, African Americans, particularly those who are poor or who live in high-poverty or predominantly African American communities, tend to have less trust not only in the police, but also in other governmental institutions, in their neighbors, and even in their intimate partner relationships in comparison to other racial and ethnic groups in the United States,” Bell writes. “Most discussions of African American distrust of the police only skirt the edges of a deeper well of estrangement between poor communities of color and the law—and, in turn, society.”

This is not about every officer or all officers. Policing is full of—and in my personal experience dominated by—good and frequently amazing people who do often extraordinary work under unimaginable circumstances. I have had former public defenders come into my organization, hating the police. Yet as they get to know the officers we work with, they’ve taken me aside to say, “This is really weirding me out; I like them.” That’s not the point. The point is not the tired argument about good officers and bad officers, or “bad apples” or the lack thereof. It is that the institution of policing has been ungovernable. Officers do terrible things, and nothing happens. Departments make terrible choices—Let’s “protect” communities by swamping them with officers and stopping everybody who moves—and there’s no way to stop them. Disrespect is rampant—in many cities, the single most frequent complaint is officers cursing the public—and nothing happens or changes. The Supreme Court of the United States creates case law that makes it nearly impossible to hold officers accountable for killings and shootings. Cities, pressured by the political clout of police unions, give away the powers that would let chiefs fire officers they know are toxic and make departments reinstate the officers they have managed to get rid of. Police union heads sully the names of Black men killed by their members and get reelected. No institution is perfect; doctors kill patients all the time. But when a doctor kills through gross malpractice, the head of his hospital doesn’t throw a press conference to talk about how the dead man had a criminal record and really deserved it.

It is all so familiar that it can take an act of will to see clearly. In Illinois, Gov. Rod Blagojevich tried to sell Barack Obama’s Senate seat and was impeached within a year and in prison not long after. By contrast, in Chicago, police officer Jon Burge spent years torturing over 100 Black men and women. He was caught, honored by the police union, sentenced to federal prison, and quickly released to house arrest. He was then released from house arrest. Jackie Wilson, one of the men Burge brutalized into a confession, served 36 years in prison before a judge released him.

If one works closely with police, as I do, it is a given that many chiefs do not really run their departments. Reform chiefs figure they’ve got maybe three years before they’re driven out. They consciously strategize to leave things so that their successors can hope to build on the work they’ve begun. My community of practice has a proven track record of dramatically reducing violence, a goal you would think the police are interested in. We still spend much of our time trying to figure out how to get departments to just keep doing their work, knowing that often chiefs and mayors can’t or won’t—and that, except in rare instances, nobody really cares about what the Black community wants.

Imagine that the Securities and Exchange Commission’s regulators did their jobs by stopping bankers on the street, pointing them out on the sidewalk, calling them names, and going through their pockets. Imagine if they announced compliance visits by kicking in office doors, and from time to time, got at insider trading by beating investors until they gave up their friends or just gave themselves up. Imagine that EMTs called to accident scenes pulled drivers from their cars and beat them to a pulp. Imagine that they were legally protected in doing all that. Imagine that their...
own leadership and prominent politicians urged them to do it more. And imagine that forever, people had been trying hard to fix it—from both the outside and the inside—and it just didn’t change.

People have been trying. Police commissions: The national Wickersham Commission, appointed by President Hoover in 1929, focused on “the third degree” (confessions obtained through beatings). In the wake of Frank Serpico’s revelations, the famous Knapp Commission formed in New York City in the 1970s, which found systematic corruption in the police department. In the early 1990s, I staffed both the St. Clair Commission in Boston, which savaged the Boston Police Department’s internal controls and leadership, and the Mollen Commission in New York City, which savaged the NYPD’s internal controls and leadership. There have been Department of Justice investigations and consent decrees, voluntary reviews, and agreements through the DOJ’s Office of Community Oriented Policing Services. There have been civilian complaint review boards and police commissioners and inspectors general and auditors. After Michael Brown was killed in Ferguson, there was the President’s Task Force on 21st Century Policing. And training. Dear God, has there been training.

Nothing has fixed it. George Floyd is dead. I’m implicated in that personally; I directed the DOJ’s National Initiative for Building Community Trust and Justice, a marquee Obama administration project that worked in six cities, including Minneapolis. It made a difference, but it did not transform the institution that is the Minneapolis Police Department. A lot of reforms have made a difference, but they have not transformed the institution that is American policing.

People have had it. This is what the protests are about. The institution that is American policing keeps killing Black people, keeps doing terrible things, people keep trying to fix it, and it won’t be fixed. Camden, New Jersey, has been getting a lot of attention lately. Camden is a case of a terminal loss of legitimacy. Policing there was a mess: outrageously corrupt, completely ineffective in a city saturated with open-air drug markets and violence, with a useless accountability system and an intransigent union. A coalition of state and local officials and civic figures said, Enough, dissolved the department, and rebuilt from scratch.

But even though it was a radical move, for a lot of advocates, Camden is most definitely not what they have in mind; they’re not interested in rebuilding police departments at all. As activist Mariame Kaba wrote in The New York Times, “Yes, we mean literally abolish the police.” Any legitimate policing has to create safety, not danger. It has to protect Black lives, not perpetuate and worsen racial harms. It has to conduct itself legally and constitutionally, be committed to and effective in governing its own misbehavior, and be accountable. That’s not what people are seeing. People are saying, Enough. This is what has just happened in Minneapolis, where the City Council voted to eliminate the Minneapolis Police Department. “[N]o amount of reforms will prevent lethal violence and abuse by some members of the Police Department against members of our community, especially Black people and people of color,” the council said.

Pause for a moment and notice how easily—if you are like most of us—you just took in what the council said, and kept on reading. No amount of reforms will prevent lethal violence. An arm of your government will kill you, and we—also your government—can not stop it. Kill you. “We acknowledge that the current system is not reformable—that we would like to end the current policing system as we know it,” council member Alondra Cano said. This is what has moved “defunding the police” from the advocacy slogan and aspiration that it was less than a month ago to the center of American discourse—and to the new reality of figuring out just what that might mean.

Defunding the Police

Under the very best of circumstances, there will always be an irreducible role for state power in public safety. That’s not just facing facts; it’s a good thing. It’s the core social contract. The availability of that power to communities means that they aren’t on their own and don’t have to rely only on their own capacities to be safe. It means that they can get help and protection when they need it, that the potentially dangerous and violent know that and restrain themselves, and that the use of private violence need not risk a descent into faction, retaliation, and vendetta.

Not so protecting communities is disastrous. Yale ethnographer Elijah Anderson explains the “code of the streets” that, in the face of bad policing, drives so much commu-
Community violence: If you disrespect me I have to hurt you, if you hurt my friends I have to retaliate. We don’t go to the police for help. “Lack of police accountability has, in fact, been incorporated into the status system: the person who is believed capable of ‘taking care of himself’ is accorded a certain deference, which translates into a sense of physical and psychological control,” he writes. “Thus, the street code emerges where the influence of the police ends and personal responsibility for one’s safety is felt to begin.” People not protected by the state will do what they need to do to protect themselves: recent research by Michael Sierra-Arévalo found that negative perceptions of police in marginalized communities were linked to higher rates of illegal firearm ownership. Battered women call the police, call the police, call the police, and get no help. A few of them will finally and desperately kill their abuser—and go to prison. In many Black neighborhoods, there is effective impunity for homicide; the clearance rate for Chicago homicides involving Black victims is under 22 percent, less than half that for Whites. Journalist David Bernstein looked at nonfatal shootings in Boston and found that a staggering 96 percent went unsolved. Jill Leovy, in her brilliant book Ghettoside, makes the simple but scorching point that authorities have abandoned Black America to violence. “When violent people are permitted to operate with impunity, they get their way,” Leovy tells us. “No amount of ‘community’ feeling or activism can eclipse this dynamic... That’s what the criminal justice system is for.”

But it’s completely realistic to recognize the “irreducible” role of state power, and advocate and strive for “reduced as far as possible.” The state’s coercive capacity should be welcome in the eyes of the public, do as little harm as possible, and give communities the protections they want in the ways that they want. It should be informed by the awful racist history of America, and configured so as not to perpetuate those harms. The more it lives up to those standards, the more legitimate that function will be, and the less it will need to be used. Black America is over-policed and under-protected. Young Black men are routinely stopped for merely walking down the street, while in the same neighborhoods, killers go free. In my organization’s violence prevention work, we tell police: communities need policing. They just don’t need the policing they’ve been getting.

What that means in the current moment is not at all clear, and won’t be in the immediate future. After the council vote in Minneapolis, a group of prominent activists condemned the council for moving so quickly without community consultation and voiced support for police chief Medaria Arradando. “We can say that we need community policing and say that we are going to work with the Minneapolis Police Department,” one said. The city can’t actually eliminate the department without a charter change requiring voter approval, and has announced a year-long process to rethink public safety in the city. New York and Los Angeles have made commitments to moving money out of their police departments, with-

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vice, fewer than a third of which were for any sort of crime at all. Only about half of those calls that appeared to involve crime could have been about felonies, with officers making fewer than a thousand felony arrests.

But in recent decades, political decisions have removed social support from where they are needed, and put police in their place. Police did not close mental institutions and refuse to replace them with anything else, or defund school counselors and after-school programs, or shut down community centers and summer job programs. They are not making the decisions that make opioid treatment so scarce in a national epidemic. But they get the call when the dual-diagnosis homeless man decompensates, they are stationed in the high school to enforce the idiotic zero-tolerance laws the state legislature passed, they respond when 6:30 in the morning, and they inject the Naloxone when the addict overdoses for the third time in a week. "Police aren't first responders," a friend of mine says. "They're just the last ones standing." Police hate this—they didn't sign up for it and aren't good at it. What's more, they know that they lack the resources for it. Moving money to where it's needed makes all kinds of sense. And a small number of alternative first-responder programs already do replace police with community support and service teams to handle non-criminal emergencies such as overdoses and crises among the homeless. Eugene, Oregon’s Crisis Assistance Helping Out On The Streets (CAHOOTS) organization handles almost twenty percent of the city’s calls at the cost of only a few percent of the police department's budget.

Violence remains. The perennial favorite alternative to policing and prisons is taking money away from the back end that is the criminal justice system to make investments in addressing "root causes:" in family support, education, programs for young people, health care, economic development. We absolutely should do that, as a fundamental matter of equity and justice, but the hard truth is that as a solution to policing, it's not nearly the panacea people want. At best, those changes are slow: Make things better for kids entering school today, and the impact on, say, violence won’t be felt for a decade or more, when those kids enter their high-risk years. Preventive programming around—for example—gangs has been tried for generations; evaluations show nearly complete failure. Economic well-being is no insulator against serious misbehavior: rich people beat their wives, rape their dates, and abuse their kids (and sell and do more drugs than poor people; drugs cost money). And there’s evidence that economic uplift does not reduce crime in communities where there remains a threshold level of belief in the illegitimacy of the police. Scholars David Kirk and Andrew Papachristos found that homicide got worse in certain Chicago neighborhoods even as fundamental economic conditions improved. "We assert that when the law is perceived to be unavailable—for example, when calling the police is not a viable option to remedy one's problems—individuals may instead resolve their grievances by their own means, which may include violence," they wrote.

Happily, more targeted violence-prevention investments clearly work. Sociologist Patrick Sharkey has shown that community-based anti-violence nonprofits reduce, over time, both violence and property crime. Community violence is overwhelmingly driven by very small numbers of people at astronomical risk of both victimization and offending. Street outreach "credible messenger" interventions focused on those people often show...
Path to True Public Safety (cont.)

impact (though they have sometimes proved
to make things worse, which might be fixable
through careful implementation). Programs
that identify and then surround this small
number of people with intensive, customized
support, like the “Advance Peace” initiative
that originated in Richmond, California, can make
a big difference. In New York City, the Mayor’s
Office to Prevent Gun Violence supports a
web of community-based organizations that
conduct community safety planning, promote
nonviolence, intervene in the street cycles of
retaliation, and “beef” that drive violence, and
provide trauma-informed care. It’s almost cer-
tainly a big part of the reason that New York
is now the safest big city in the country, and
continues to get safer even as police stops, ar-
rests, and the number of people the city sends
to jail and prison have plummeted.

Some of the most effective approaches
to violence prevention depend on a
fundamentally different role in policing. The
focused-deterrence interventions I’ve been
part of developing bring together law enforce-
ment, community actors, and service providers
to stop violence among that small number of
groups of people at highest risk in ways that can be
dramatically effective, which greatly reduces the
need for actual enforcement, and that
build legitimacy. The LAPD’s Community
Safety Partnership places very small num-
bers of officers in what used to be dangerous
public housing to work with the community
to prevent violence without making arrests.
Violence has plummeted and—is a key marker
of legitimacy—the rare remaining homicide is
clared almost immediately through commu-
nity support. The PIVOT initiative, piloted
in Cincinnati, uses the investigative skills of
officers out of the law enforcement profes-
sion of the same thing, and a warning shot.
Wherever their hearts and minds may be,
officers with an eye on their own best interests
should be paying attention.

The national cry is absolutely right: You
cannot treat us like this. We will not stand for it.
There is a recent parallel. Over the last decade
or so, from an initial position of deep polar-
ization, a bipartisan consensus has emerged
that another core feature of modern criminal
justice—mass incarceration—is fundamen-
tally wrong. Doing criminal justice in a way
that incarcerates vast numbers of people, with
massive racial disproportion, and causes inca-
culable damage to individuals, families, and
communities has come to be seen as morally
wrong, deeply harmful, and contrary to what
America should stand for as a nation. Un-
derstanding that has not led directly to know
what to do to fix it. Still, it has reset the frame
around prison and incarceration and moved
the country in fundamentally different direc-
tions. Conservatives in red states have been
at the heart of many of these changes. The
same thing is now happening—and should
be happening—around policing.

The powers and structures of the nation
have always been used to do harm to Black
people. The police have always been at the
leading edge of doing that harm. It cannot
continue. There is an enormous amount of
work to do. What is clear is that the nation is
in a different place than it was just a moment
ago. That is a very, very good thing.

About the author: David M. Kennedy is a
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and the National Network support cities
implementing strategic interventions to reduce
violence, minimize arrest and incarceration,
enhance police legitimacy, and strengthen
relationships between law enforcement and
communities. These interventions have been
proven effective in a variety of settings, have
massed a robust evaluation record, and are
widely employed nationally.

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Derek Chauvin could still receive about $50,000 a year in pension partly funded by taxpayers like George Floyd’s surviving family, even if he’s convicted of second-degree murder.

Moreover, qualified immunity would most likely prevent Floyd’s family from successfully suing him.

Chauvin was the police officer in Minneapolis, Minnesota, who pressed his knee into the neck of Floyd for nearly nine minutes while Floyd lay under him suffocating on May 25, 2020. Floyd ended up dying, and Chauvin and three other officers fired. Chauvin was charged with second-degree murder and manslaughter.

Minnesota’s pension fund is created from three sources: employee’s contribution of approximately 11.8% of their own pay, pension investment earnings, and employers (17.7%) of which is paid by the Police Department employing Chauvin and any shortfall is picked up by the taxpaying public. This pension fund is then used to make retirement payments to employees.

Retirement packages are built to allow a person to collect a pension even if that person finds another job. Minnesota also allows police to also avoid paying into Social Security, saving them more money while employed. They receive all of the retirement benefits from the Minnesota Public Employees Retirement Association and not any federal retirement program. Most states have drafted laws that revoke those benefits for any breach of public trust, e.g., any criminal conviction committed while performing duties as a public servant. But Minnesota does not have any such laws.

Liberarian magazine Reason stated that insult in this case was added to injury in that qualified immunity would most likely prevent Chauvin from being sued for his actions. So, while Floyd’s family might not receive any money for his death, they might be paying in part for Chauvin’s retirement while he is incarcerated.

Chris Stewart, attorney for Floyd’s daughter Gianna Floyd and Gianna’s mother Roxie Washington, favors police pension law changes. “Pensions are one of the leading reasons officers are not concerned about being terminated. It’s one of the root causes in some of the most horrific cases we see,” Stewart said in a statement quoted in The New York Times. “The laws must change regarding pensions. If an officer is fired or arrested, they must either lose their pension entirely or have it reduced substantially.”

Source: reason.com, nytimes.com

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How the Courts Are Using Compassionate Release to Fix Unfair Sentences

by Dale Chappell

Who would have predicted that the courts would expand compassionate release to allow non-medical reasons for reducing a sentence, including the chance to fix unfair sentences when no other avenue exists? Now that prisoners can file their own compassionate release motions, instead of waiting for the Bureau of Prisons (“BOP”) to do so, courts are citing “fundamental fairness” concerns to right all kinds of wrongs under compassionate release it couldn’t do before the First Step Act of 2018 opened the door for prisoners to file their own motions.

Compassionate Release: It’s not up to the BOP Anymore

Previously, only the BOP could file a compassionate release motion, and you had to be on your death bed. Literally. Even then, you had a better chance of being struck by lightning and attacked by a shark on the same day. I don’t know what the statistics are for such a confluence of events, but I think it’s probably close to what your odds were for getting compassionate release under the old law.

People were actually dying while the BOP denied compassionate release requests and dragged its feet on others. Fortunately, Congress took notice. Under the First Step Act, Congress pushed the BOP out of the way to allow prisoners to file their own motions, if the BOP refused or ignored their requests. It’s the first substantive change to the compassionate release statute in decades, and it’s been a game-changer.

Under 18 U.S.C. § 3582(c)(1)(A), the so-called “compassionate release” statute, the director of the BOP served as the gatekeeper for compassionate release motions: A court could not reduce a prisoner’s sentence to allow for compassionate release, except “upon motion of the Director of the [BOP].” The First Step Act eliminated this exclusive power of the BOP by adding the words “or upon motion” before the First Step Act, and it still says that only the BOP can file a motion, which mainly focuses on medical reasons – just like the BOP’s policy says.

This contradiction has divided the courts on whether § 1B1.13 was last updated before the First Step Act, and it still says that only the BOP can file a motion, which mainly focuses on medical reasons – just like the BOP’s policy says.

This contradiction has divided the courts on whether § 1B1.13 is still relevant for defining “extraordinary and compelling” reasons.

The court also clarified that once a prisoner files a compassionate release motion in the sentencing court, the BOP “may never weigh in or provide guidance” on whether that motion should be granted or denied. United States v. Haynes, 2020 U.S. Dist. LEXIS 71021 (E.D.N.Y. 2020).

Several courts have recognized that the amended § 3582(c)(1)(A) “vests courts with independent discretion” to grant compassionate release. United States v. Hope, 2020 U.S. Dist. LEXIS 86595 (S.D. Fla. 2020). In fact, “the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion.” United States v. Brown, 411 F Supp. 3d 446 (S.D. Iowa 2019).

And why did Congress take the sole power from the BOP and give some to prisoners? Because the BOP blatantly refused to use its power to file compassionate release motions. In 2013, the Office of the Inspector General (“OIG”), responsible for investigating bad behavior by government agencies, filed a report showing that over a six-year period the BOP filed exactly zero compassionate release motions for non-medical reasons and just 24 for medical reasons. That’s out of 220,000 prisoners in its custody during that time.

When the OIG told the BOP to step it up, it only approved 83 compassionate release requests the next year. United States v. Ebbers, 432 F Supp. 3d 421 (S.D.N.Y. 2020) (explaining the findings of the OIG report).

Extraordinary and Compelling Reasons: Not Just for Illnesses Anymore

While § 3582(c)(1)(A) says courts can reduce a sentence for “extraordinary and compelling reasons,” it doesn’t say what that means. Instead, it points to U.S.S.G. § 1B1.13 under the sentencing guidelines to define what criteria for compassionate release meet that definition. The problem is that § 1B1.13 was last updated before the First Step Act, and it still says that only the BOP can file a motion, which mainly focuses on medical reasons – just like the BOP’s policy says.

This contradiction has divided the courts on whether § 1B1.13 is still relevant for defining “extraordinary and compelling” reasons. United States v. Fox, 2019 U.S. Dist. LEXIS 115388 (D. Me. 2019) (collecting cases on the split among the courts). For example, in United States v. Cantu, 423 F Supp. 3d 345 (S.D. Tex. 2019), the court found that § 1B1.13 “clearly contradicts” the new § 3582(c)(1)(A) amendments under the First Step Act and that because Congress changed the statute to expand the use of compassionate release the guideline “no longer fits with the statute and thus does not comply with the congressional mandate.” See also Haynes, supra (noting “at least twelve other federal district courts” have held § 1B1.13 inapplicable under amended § 3582(c)(1)(A)).

In addition, Haynes pointed out that “the district courts have always had the discretion to determine what counts as compelling and extraordinary” for compassionate release. The courts have never been a “rubber stamp” for the BOP on compassionate release, the court said. Indeed, the First Step Act’s “key change” was “the removal of the [BOP] Director’s role as a gatekeeper.”

In United States v. Millan, 2020 U.S. Dist. LEXIS 59955 (S.D.N.Y. 2020), Judge Loretta A. Preska cited a host of reasons that were “extraordinary and compelling” to grant compassionate release. This included that Millan was “unconditionally rehabilitated” after taking dozens of BOP programs, was remorseful, was a “model inmate,” was a “leader of the religious community” in prison, and worked with at-risk youth. Do you see any medical reasons in there? There weren’t any cited by the judge, yet she granted Millan compassionate release to fix an unfair sentence.

One thing that still stands, however, is that the court must assess the factors under 18 U.S.C. § 3553(a) when reducing a sentence, even for compassionate release. These include (1) the seriousness of the offense, (2) a person’s personal history and characteristics, (3) the need for the sentence to reflect the seriousness of the offense, (4) the need to promote deterrence, (5) the need to protect the public from further crimes by the person [this is the big one the government pounds on], (6) the need to provide rehabilitation to the person, (7) the applicable guidelines range, and (8) the need to avoid unwarranted sentencing disparities among defendants with similar crimes and records. In addition, the sentence imposed must not be greater than necessary to achieve the purposes of sentencing.

The court also has broad discretion on whether to grant compassionate release.
United States v. Chambliss, 948 F.3d 691 (5th Cir. 2020) (establishing the standard for when a court abuses its discretion in granting or denying compassionate release). This means that all of your prison conduct — both good and bad — comes into play.

What the Courts Are Doing With Non-Medical Compassionate Release

Somewhat surprisingly, the courts have used compassionate release to fix unfair sentences and for other relief where no avenue previously existed. Mandatory life sentences for drug offenders and stacked § 924(c) sentences have been overturned under compassionate release, where the courts didn’t have the authority earlier to do so any other way.

Mandatory “Life” Drug Sentences

Under the old “war on drugs” era, Congress gave the government full authority to require a court to sentence repeat drug offenders to life in prison without parole, even if their prior convictions were for mere possession. And the court had no say whatsoever — if the government chose to request such a sentence. While this was harshly criticized by judges across the board, prosecutors successfully convinced Congress that it needed these unfair mandatory sentences to threaten drug offenders into pleading guilty and cooperating with the government. Congress, until now, let the government have its way.

The First Step Act, however, changed some of this by reducing the sentence for those with two prior convictions from life to a minimum of 25 years and by changing the definition of a qualifying prior conviction to match the Armed Career Criminal Act’s “serious drug offense” requirement — which excludes mere possession priors. 21 U.S.C. § 851; 18 U.S.C. § 924(e)(2)(A)(ii). The mandatory minimum sentence for those offenses with only one drug prior was also substantively changed.

With compassionate release, the courts have found the authority to go back and change those § 851 sentences it didn’t want to impose in the first place but had no choice. In Hope, discussed above, Judge Kathleen M. Williams used compassionate release to reduce a life § 851 sentence imposed 30 years ago to “time served.” She cited numerous cases where courts have used compassionate release to reduce sentences under unfair sentencing laws, and she observed that if Hope were to be sentenced today he would’ve faced less time than he’s already served. Judge Williams rejected the government’s argument that Hope didn’t have any health issues, that his federal drug offense didn’t involve crack cocaine (which was the only drug offense change the First Step Act made retroactive), and that the First Step Act’s changes to § 851 weren’t made retroactive by Congress.

“District courts around the country have recognized that defendants are entitled to relief under the First Step Act for extraordinary and compelling reasons including the sentencing disparities occasioned by promulgation of the Act,” she said. “Other courts have found that sentencing disparities like that presented in Mr. Hope’s case, coupled with a demonstration of profound rehabilitation, constitutes ‘extraordinary and compelling’ circumstances sufficient to warrant a sentence reduction.”


Stacked § 924(c) Sentences

Getting quite a lot of attention under non-medical compassionate release have been “stacked” § 924(c) sentences, where the government would pile on § 924(c) charges that would mandate what amounted to a life sentence in order to coerce someone into pleading guilty.

Before the First Step Act, any subsequent conviction under § 924(c) after a first conviction required a 25-year mandatory consecutive sentence for each conviction. So, in the event the government threatened to file more § 924(c) charges on top of the current charges if someone rejected its plea offer, it was legally allowed to do so.

Judges have complained about this practice for years, calling it unfair because it tied their hands and required unreasonably long sentences for arguably unconstitutional (and at least unethical) practices by the government. Under the First Step Act, Congress changed § 924(c) to require that such a conviction must be “final” before a subsequent conviction can require a consecutive sentence. This essentially eliminated the government’s ability to stack § 924(c) sentences. First Step Act, § 403(a).

In Haynes, discussed above, the court called the government out on how it penalized Haynes for rejecting a plea offer and going to trial. Haynes was charged with several bank robberies in the early 1990s and charged with just one “use of a firearm” count under § 924(c). The government made an offer of around eight years if he pleaded guilty, which included just three years for a single bank robbery charge and five years consecutive for the § 924(c) charge. The government threatened in its offer: “If the defendant fails to [take the offer], the government will seek to obtain a superseding indictment charging the ap-
Compassionate Release (cont.)

propriate additional counts under 18 U.S.C. § 924(c).” The government made good on its threat when Haynes went to trial.

The First Step Act took this power away from the government but didn’t make the changes retroactive. Still, Judge Dearie granted Haynes’ compassionate release motion. First, he cited that Haynes’ codefendant, who took a deal and then got out and robbed another bank, would complete his second sentence long before Haynes even completed his first. He also cited that Haynes’ stacked § 924(c) sentence was longer than the average sentence for murder, child pornography, extortion, and terrorist-related offenses — all combined.

The court also noted that Congress said its intention under the First Step Act was “clarification of § 924(c),” which was a “clear message” that Congress never intended that the brutal sentence [Haynes] “is serving be imposed.” Nonretroactivity of the § 924(c) changes, the court said, “simply establishes that a defendant sentenced before the [First Step Act] is not automatically entitled to resentencing.” It wouldn’t be unreasonable for Congress to expect that a court could grant relief for stacked § 924(c) sentences on a case-by-case basis,” the court concluded.

As for the “extraordinary and compelling reasons,” the court said the First Step Act’s “elimination of the § 924(c) sentencing weaponry that prosecutors employed to require [Haynes’] sentence was enough, collecting cases where courts have granted compassionate release for stacked § 924(c) sentences.

In another non-medical compassionate release case, the court in Millan, discussed above, granted relief to undo an unfair life sentence under the “continuing criminal enterprise” statute. Clearly, compassionate release isn’t just for medical reasons anymore.

And compassionate release isn’t just for “release,” either. The statute, § 3582(c)(1)(A), actually says a court “may reduce the term of imprisonment” if it wants to; “release” isn’t required. In Carter v. United States, 2020 U.S. Dist. LEXIS 68343 (D. Md. 2020), Judge Ellen L. Hollander reduced a life sentence to a term of years, over the government’s objections, by granting compassionate release.

Getting Started: Administrative Remedies

While the BOP may be out of the picture for non-medical compassionate release, § 3582(c)(1)(A) still requires that a written request be filed with the BOP for compassionate release before a prisoner can file his own motion in court. The courts are divided over whether you have to exhaust all your administrative remedies before going to court (i.e., the BP-8, BP-9, etc.). Most say you can if you still want to, but you don’t have to and can just wait 30 days to file your motion.

This aligns with the statute, which says that a prisoner can file a motion “after the defendant has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden.” [emphasis supplied]

The government, though, has been winning some arguments in the courts that a prisoner must go through the whole administrative remedy process before filing in court, which can take up to six months. United States v. Arthaloney, 2020 U.S. Dist. LEXIS 89245 (D. Neb. 2020) (“if the warden denied the request within 30 days of receipt, the defendant must exhaust administrative remedies”).

This, however, ignores that there are two separate options for giving the BOP the first chance: (1) exhausting administrative remedies or (2) waiting 30 days. In Millan, the court found that the statutory requirement was satisfied after a 30-day wait from receipt of Millan’s written request to the warden. And it’s the date of the receipt that counts, not when it’s submitted. United States v. Miller, 2020 U.S. Dist. LEXIS 80817 (D. Idaho 2020). It doesn’t have to be a formal request, like a BP-9, and a “copout” suffices as a written request.

But properly exhausting your administrative remedies has its benefits. The First Step Act added a provision, § 3582(d), that the BOP must file an annual report on all compassionate release requests it receives and the outcome of those cases, even if the prisoner filed his own motion. However, the BOP only has to include the data from motions filed in cases where administrative remedies were exhausted. So, still file those BP-9s, BP-10s, and BP-11s, even if you go to court only after waiting 30 days.

To date, no Court of Appeals has addressed whether an emergency can excuse the initial request to the BOP, such as a deadly virus like COVID-19. All the district courts so far have held that it’s statutorily mandated and can’t be waived. But you can file again once you do meet the requirements. And for non-medical compassionate release, administrative remedies may be a waste of time. This is because the BOP’s Program Statement 5050.50 on compassionate release, amended after the First Step Act, still only allows the BOP to move for compassionate release for medical reasons. Could exhaustion be “futile” in these cases? Again, there’s not much in the courts about this yet.

Conclusion

Allowing prisoners to file for compassionate release has given the courts an avenue to fix unfair sentences that they couldn’t fix before the First Step Act. The key seems to be finding a sympathetic judge and then to file your motion in the right way. If your judge didn’t want to impose the sentence he or she did, then find evidence of this in the record to support why granting compassionate release would be an option now.

Seventh Circuit: ‘Especially Compelling Justification’ Required for Same Maximum Sentence on Resentencing

by Dale Chappell

The U.S. Court of Appeals for the Seventh Circuit held on June 19, 2020, that a district court resentencing someone again to the maximum sentence possible and well over double the recommended Guidelines sentencing range (“GSR”) must provide “especially compelling justification” for such a significant increase in the sentence. The holding reiterated the Court’s position that the Guidelines already take into account most details of an offense, and such deviations from the GSR must be rare.

Over 20 years ago, a jury convicted Jerry Jones of two car jackings, armed bank robbery, and using a firearm in furtherance of each of those crimes. The U.S. District Court for the Southern District of Indiana sentenced him to 70 years in federal prison without parole. Recently, Jones filed a “savings clause” petition challenging his sentence, which was granted. However, the same court simply resentenced him to the same 70 years, saying that his crimes were “horrific” and Jones was a “violent predatory individual.”
At resentencing, Jones’ new GSR was just 168-210 months on the substantive counts, plus the use of firearm convictions under the newly revised 18 U.S.C. § 924(c), in light of the First Step Act. His new effective GSR was 348-390 months. The Government had argued for a 40-year sentence, but they got one better: The court imposed the same 70-year sentence, citing Jones’ offense conduct.

On appeal, Jones argued that the district court procedurally erred by failing to justify the 450-month deviation from the new GSR and failed to follow the paradigm under 18 U.S.C. § 3553(a), which mandates that a sentence must be sufficient, but not greater than necessary, to achieve the purposes of sentencing. Reviewing the sentence de novo, the Seventh Circuit agreed — and more.

The Court announced nothing new in finding Jones’ sentence was procedurally unreasonable. Citing a host of its prior cases requiring a district court to fully explain its reasons for imposing a sentence well above the GSR, the Court reiterated that a district court must “adequately explain” any deviation from a GSR. There must be a “compelling justification” for any deviation, and the further a sentence deviates from a GSR, “the more detailed the district court’s explanation must be,” the Court instructed. A significant deviation, like one in Jones’ case, “requires an especially compelling justification,” the Court said.

Here, there was nothing in the record showing the district court gave “respectful consideration” to the GSR and failed “to understand the relation between the Guidelines and the ultimate sentence.” It also failed to give any reason for “ignoring” the Sentencing Commission’s recommendation under the Guidelines.

A statutory maximum sentence “creates a risk of unwarranted disparity with how similar offenders fare elsewhere,” the Court noted. The reason the U.S. Sentencing Guidelines were created was to stop such disparities, and they already take into account offense conduct and even a defendant’s criminal history in recommending a GSR, the Court explained. Saying that Jones’ crimes were “horrific” is not a valid reason to more than double his recommended sentence, the Court chided. “The district court needed to specify the reasons why Jones is different from the vast majority of defendants — many of whom also have criminal histories, are dangerous, and must be incapacitated to protect society,” the Court said.

The Court also reminded that sentencing courts should reserve the statutory maximum for unusual cases. Otherwise, “[they] leave little room for the marginal deterrence of persons whose additional deeds are more serious.” [Note that the Court considered imposing a maximum sentence as being a “marginal deterrence” of future crimes, an interesting view on sentencing by the Court.] The Court said that “if the district court decides that the Guidelines underrepresent reality, it should so state and clarify how it uses those findings” to justify a higher sentence.

Another point the Court made was whether the First Step Act’s change in law for § 924(c) convictions applies to Jones on resentencing. While the Government apparently did argue in a cross-appeal that it didn’t, it then withdrew that appeal and then argued in its reply brief that the new law doesn’t apply to Jones. The Court concluded that this was an “inappropriate request in a reply brief” and that the Government forfeited its argument against applying the First Step Act by withdrawing its cross-appeal. The Court also explained that the law-of-the-case doctrine prevents this issue on remand. In short, the Court implied that the First Step Act would apply to Jones on remand for resentencing.

Accordingly, the Court vacated Jones’ sentence and remanded for another resentencing. See: United States v. Jones, 962 F.3d 956 (7th Cir. 2020).

Writer’s note: Jones pushed for the First Step Act to apply at resentencing for an important reason: Under the changes to § 924(c) by the First Step Act, the consecutive sentences for his “stacked” § 924(c) convictions had to be vacated. That’s because § 403 of the First Step Act modifies § 924(c) so that subsequent convictions could only apply after an earlier § 924(c) conviction “has become final.” This eliminates stacking. This is also important because the Court recognized that a resentencing allows a non-retroactive section of the First Step Act to apply to Jones. However, not all courts are on the same page. Compare Carter v. United States, 2020 U.S. Dist. LEXIS 68343 (D. Md. 2020) (collecting cases that resentencing under § 404 of the First Step Act – crack reduction – is not “plenary” resentencing to allow application of § 403 of the Act), with Randall v. United States, 2019 U.S. Dist. LEXIS 228296 (E.D. Va. 2019) (holding § 404 relief “unbundled” the “sentencing package” to allow application of § 403 and removal of stacked § 924(c) convictions).
**The Warrior Cop Mindset**

*by Ed Lyon*

Police officers have traditionally been referred to and thought of as keepers of the peace. Most licensing authorities call them peace officers. During the years, monikers like “Blue Knights” and “New Centurions” have been used to characterize police officers. Unfortunately, people tend to forget that a centurion is loosely thought of as a Roman soldier, and knights started out as horse mounted warriors. Soldiers and warriors are trained to fight, not keep the peace. U.S. General George S. Patton once stated that soldiers do not die for their country – they make the other side’s soldiers die for their country. Soldiers and warriors’ mission is to fight and kill; that’s not the mission for police officers, at least in theory.

Somewhere along the timeline to the present day, the warrior mentality inherent in the monikers has taken root in the psyche of America’s cops. It is not confined to street cops, either. It flows upward through command ranks, sometimes all the way to treetop levels, where decisions are made to foot the bill for additional training that turns average police officers into “warrior cops.”

Far from being the licensed peace officers they were originally commissioned to be, they are more soldier than police officer today, more suited to the war-torn streets of Afghanistan than Anytown, U.S.A.

There are over 18,000 law enforcement entities in the U.S. According to the nonprofit newsmagazine The Trace, a sampling of the companies offering them “warrior mentality” types of confrontational training include: (1) Blue Shield Tactical Training (specializing in tactical knife fighting), (2) Bulletproof Warrior (trains Minneapolis cops), (3) Dolan Consulting Group (teaches ways to use force to avoid “false evidence of racial disparities”), (4) Dynamic Solutions Training Group, (5) Government Training Institute, (6) Precision Rifle Workshop (sniper training), (7) Real World Tactical, (8) Security Systems International (among curriculum is a class called “Radical Islam,” teaching “how the cultural seeds of Radical Islam are inherent in the historical development” of that faith), and (9) Triple I Solutions (narcotics enforcement and how “to shake down areas normally considered ‘taboo to search.’”

In addition, courses in spin doctoring are offered by training companies such as Cop PRotect in California, PolicePR (specializes in “unconventional law enforcement public relations” and will, if requested, actively assist a besieged police department with “damage control”), and Arizona’s Police Social Media (teaches police departments the use of “Guerrilla Tactics to fight lies, rumors & false narratives”).

Tuition for these training courses range from $300 to $1,200, according to The Trace. Some cops pay these fees themselves, but more often than not, police departments foot the bill from their yearly budgets. Some warrior cop training schools like the Government Training Institute accept items from civil asset forfeitures as a form of payment. The federal government also has grant funding available for departments to pay for their cops to attend these schools.

It does not help the growing warrior cop mindset that the federal government sells surplus military equipment on the cheap to police departments or even provides for free through grants. Much of this hardware goes to SWAT-type units that have been used disproportionately in communities of color. CLN reported (February 2019, p.21) that public support for militarized police departments is rapidly ebbing as they fail to improve public safety. This is particularly true in Black and Hispanic neighborhoods, according to a recent study by the American Civil Liberties Union.

These courses prepare cops for potential violence. In a recent Harvard Law Review article, former cop and current law school professor Seth Stoughton wrote that attendees “are taught that they live in an intensely hostile world. A world that is, quite literally, gunning for them. Death, they are told, is constantly a single, small misstep away.”

There is an irreconcilable dichotomy between peace officers and warriors. If a cop aspires to be a warrior, his or her place is in a military organization, not a civilian police department.

Source: thetrace.org

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**Seventh Circuit: Admissions to Pretrial Services Cannot Be Used to Prove Guilt**

*by Dale Chappell*

In a case of first impression, the U.S. Court of Appeals for the Seventh Circuit held that an accused’s admissions during a pretrial services (“PTS”) interview for bail are confidential and cannot be used at trial to prove guilt.

The case came before the Court after Michael Chaparro was found guilty by a jury on three charges relating to accessing and transporting child pornography, all on separate dates. The investigation began in August 2014 when an IP (internet protocol) address sharing child pornography was traced back to a billing address for Chaparro’s grandmother’s house in Illinois. Four months later, local law enforcement armed with machine guns executed a search warrant at the house, but Chaparro wasn’t there. When he showed up later during the search, the smartphone he had in his possession was seized, along with two computers, all of which contained child pornography. He was eventually charged in March 2016, and he went to trial.

The question the Government had to answer at trial was exactly who had used the two computers at the house to access the child pornography. One of the computers was last used in early 2014, and the other hadn’t been powered up in over 15 months. Additionally, the computer that law enforcement connected to in order to get the IP address was never found. So, the Government had to prove somehow that Chaparro used those two computers during the time frame for the two charges related to them (the charge in connection with his cellphone was not at issue).

Chaparro never told law enforcement that he lived at his grandmother’s house during the dates the two computers were accessed there. While some evidence showed he had stayed at the house, it was unknown when and for how long. At trial, the defense called Chaparro’s uncle who testified that he had lived with a girlfriend during those times in question, which hurt the Government’s case.
However, at a PTS interview to determine if he should be set free on bail, Chaparro admitted that he had lived at his grandmother’s house “for three years prior to his arrest.” The Government called the PTS officer to testify before the jury in order to impeach the uncle, using Chaparro’s admission. Over both the defense’s and officer’s objections, the court allowed the officer’s testimony. Chaparro was convicted on all counts and sentenced to over 18 years in federal prison without parole. He appealed.

**PTS Admissions Are Confidential**

Under 18 U.S.C. § 3153(c)(1), statements made during a PTS interview “shall be used only for the purpose of a bail determination and shall otherwise be confidential.” The statute specifically says that PTS information “is not admissible on the issue of guilt in a criminal judicial proceeding.” The Seventh Circuit said the reason for the confidentiality of PTS information is because it’s “essential to the reliability” of the report to the judge determining bail, which is usually processed in a matter of hours.

Confidentiality is also important, the Court said, because “defendants already perceive danger in cooperating with pretrial services.” Allowing confidential statements in court to prove guilt would “corroborate these fears” and interfere with the court’s decisions. Therefore, the Court recognized a “strong policy favoring confidentiality” of statements to PTS.

The Court also cited due process concerns in that Chaparro invoked his right to not incriminate himself, thus putting the burden on the Government to prove his case without his help. The Court found that Chaparro’s statement about living with his grandmother “amounted to an admission” and was a “crucial fact” the Government had to prove to convict on two of the counts.

**Exceptions to PTS Confidentiality**

The Government convinced the district court that it needed to use Chaparro’s statement to impeach his uncle’s testimony that Chaparro was living with a girlfriend, and not his grandmother, during the dates of the alleged offenses. Relying on cases that have created a judge-made exception to the confidentiality rule for impeachment purposes, the court allowed the PTS officer to testify that Chaparro had told him otherwise.

While the statute does include some exceptions to PTS confidentiality, impeachment is not one of them. But several other Circuits have held that impeachment could still be an exception, the Seventh Circuit acknowledged. Without joining those Circuits, the Seventh Circuit assumed for purposes of Chaparro’s case that there was an impeachment exception to the PTS confidentiality rule.

But the kind of impeachment exception the district court granted here was not a valid exception, the Court said. “Nearly every case recognizing an impeachment exception to pretrial services confidentiality approved impeaching a witness by his or her own prior inconsistent statements,” the Court noted. “Impeachment by contradiction,” what the Government said it did here, requires substantive facts that the jury had to believe as true in order to impeach the uncle. “The problem is that contrary substantive evidence can impeach only if the jury accepts it as substantially true,” the Court explained.

Impeachment by contradiction is a “misnomer,” the Court continued. It really provides substantive evidence “in another guise.” Chaparro’s residency was “central to the government’s case,” so it definitely went to the “issue of guilty,” prohibited by § 3153(c)(1). The Court reiterated that a witness’s own statements may be used to impeach their testimony as an exception to PTS confidentiality, “not some other person’s contradictory account” — and not a statement by the defendant that “helped the government’s case significantly.” The Government had to prove Chaparro was the user of those two computers on certain dates. It couldn’t do that without his admission to PTS that he lived at his grandmother’s house on those dates.

**The Remedy**

While Chaparro was sentenced to three identical concurrent prison terms, vacatur of two of the convictions affected his Guidelines sentencing range (“GSR”). Under U.S.S.G. § 2G2.2, Chaparro faced severe enhancements because of the two convictions related to the computers. His base offense level was increased by seven points because of those convictions: two for distribution of child pornography from one of the computers and five for having over 600 images total (his cellphone had only two images). As a first-time offender, this brought Chaparro’s GSR from 210-262 months down to 97-121 months without those two convictions.

Accordingly, the Seventh Circuit reversed two of Chaparro’s child pornography convictions and remanded for resentencing, even if the Government chooses not to retry him on those other two counts. See: United States v. Chaparro, 2020 U.S. App. LEXIS 11559 (7th Cir. 2020).

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**If You Write to Criminal Legal News**

We receive numerous letters from prisoners every month. If you contact us, please note that we are unable to respond to the vast majority of letters we receive.

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Please do not send us documents that you need to have returned. Although we welcome copies of verdicts and settlements, do not send copies of complaints or lawsuits that have not yet resulted in a favorable outcome.

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SCOTUS: Counsel’s Failure to Uncover and Present Evidence in Mitigation at Capital Sentencing Requires Remand for Prejudice Determination

by Douglas Ankney

The Supreme Court of the United States ("SCOTUS") remanded Terence Tramaine Andrus’ case to the Texas Court of Criminal Appeals ("TCCA"), directing the TCCA to address Strickland prejudice in light of the correct legal principles.

Andrus, 18, was high on marijuana and PCP when he attempted a carjacking. He shot and killed the driver of the car and a bystander. He was charged with capital murder.

At trial, his attorney – former Fort Bend County prosecutor James “Sid” Crowley – declined to present an opening statement. Then, after the State rested its case, the defense immediately rested as well. In his closing argument, Crowley conceded Andrus’ guilt and informed the jury that the trial would “boil down to the punishment phase ... that’s where we’ll be fighting.”

After the jury convicted Andrus, the trial proceeded to the penalty phase. Once again, Crowley made no opening statement. The State offered as evidence in aggravation that Andrus had displayed aggressive and hostile behavior while he had been confined in a juvenile detention center; that he had tattoos indicating gang affiliation; and that he had hit, kicked, and thrown excrement at prison officials while awaiting trial. Crowley made no material objections to the State’s evidence.

As evidence in mitigation, Crowley first called Andrus’ mother. Her testimony painted a picture of a wonderful childhood with Andrus having an “excellent” relationship with his siblings and grandparents. She insisted that Andrus did not have access to drugs in her home; that she would have counseled him if Andrus did not have access to drugs in her home; that she would have counseled him if Andrus had not been using drugs in the home. This made it appear as if Andrus was lying.

The jury sentenced Andrus to death, and his judgment was affirmed on appeal. He then filed a state habeas petition alleging ineffective assistance of counsel. During an eight-day evidentiary hearing, Andrus presented what the trial court described as a “tidal wave of information in mitigation.”

The evidence revealed that beginning from when Andrus was six years old, his mother engaged in prostitution and used drugs in front of her five children. She sometimes rented a motel room where she “binged on drugs,” staying gone for a week or more while the children fended for themselves. Often, there wasn’t enough food to eat.

When Andrus was around age 12, he assumed responsibility for his younger siblings in his mother’s absence. He also cared for his older brother who had special needs. Andrus cleaned for them, put them to bed, cooked meals, make sure they got ready for school, and helped them with their homework. He was “a protective older brother” who “kept on [them] to stay out of trouble.” His siblings testified that he was “very loving, very caring,” and he “liked to make people laugh” because it hurt him “to see people cry.” During this period, one of his mother’s many boyfriends raped his younger sister and another boyfriend was shot and killed, apparently over drugs. The environment and the strain of being a 12-year-old parental figure was a bit much for him. It caused him to develop mental disorders, and he was diagnosed with affective psychosis.

The reason he’d been confined as a juvenile was he had acted as a lookout while his friends robbed a woman of her purse. He was 16 and was placed in a detention center run by the Texas Youth Commission ("TYC"). While in the custody of TYC, he was placed on heavy doses of psychotropic medication that had serious side effects. He spent long periods in isolation for infractions like reporting to staff he was hearing voices telling him to do bad things. He attempted suicide and harmed himself numerous times.

After 18 months, TYC transferred him to adult prison. It was shortly after his release from there that he attempted the carjacking. While awaiting trial, he had slashed his wrists and used the blood to write a message on the wall, begging the world to “[j]ust let [him] die.”

At the hearing, Crowley testified that he didn’t present this evidence because he was unaware of it. He said he hadn’t met the mother or father until they appeared to testify. He didn’t get in touch with Dr. Roache until just before voir dire. Roache averred that he was “struck by the extent to which [Crowley] appeared unfamiliar” with pertinent issues.

Crowley didn’t become aware of the prison counselor until midway through trial. He prepared none of the witnesses, nor did he go over their testimony before calling them to the stand.

Materials prepared by a mitigation expert well before trial pointed out that his mother had told an investigator she had taken out a $50,000 life insurance policy on Andrus, which she would collect if he was executed. An investigator warned Crowley that she would be a hostile witness.

The materials also contained evidence of Andrus’ mental illness and his attempted suicides.


The Court observed that to “prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show counsel’s performance was deficient and that his counsel’s deficient performance prejudiced
him.” Strickland. To demonstrate deficiency, a defendant must show that counsel’s performance fell below an objective standard of reasonableness as defined by prevailing professional norms. Id. Prejudice requires a showing that, absent counsel’s deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. Id. Counsel has a duty to undertake a thorough investigation of a capital defendant’s background. Porter v. McCollum, 558 U.S. 30 (2009). Counsel must make reasonable investigations or make a reasonable decision that makes a particular investigation unnecessary. Wiggins v. Smith, 539 U.S. 510 (2003).

In the instant case, SCOTUS concluded that Crowley’s performance was deficient because he failed in his duty to undertake an investigation that would have uncovered the aforementioned mitigating evidence and present it to the jury. He didn’t speak with any of the witnesses prior to trial to thoroughly look into Andrus’ background. Further, Crowley had been informed of Andrus’ mental disorders and attempted suicides, yet he failed to investigate those avenues, “ignor[ing] pertinent avenues for investigation of which he should have been aware.” Porter.

Additionally, Crowley’s ignorance of Andrus’ history relating to his time in TYC custody prevented him from effectively challenging the State’s aggravation evidence. To sentence Andrus to death, the State had to prove he presented a future danger to society. Crowley failed to show that Andrus’ violent, aggressive behavior had been directed at himself. Crowley’s failure to uncover and present the voluminous evidence could not be justified as a tactical decision because his ignorance of the evidence made it impossible for him to make a reasonable decision not to present it. Williams v. Taylor, 529 U.S. 362 (2000).

Having concluded that Crowley’s performance was deficient, SCOTUS turned to the prejudice prong of the Strickland test. In Texas, imposition of the death penalty requires a unanimous decision of the jury. Tex. Code Crim. Proc. Ann., Art. 37.071. Consequently, Andrus had to show only “a reasonable probability that at least one juror would have” voted differently regarding Andrus’ “moral culpability.” Wiggins. In assessing whether Andrus had made such a showing, the TCCA was supposed to consider “the totality of the available mitigation evidence — both that

But the TCCA’s one-sentence denial left it unclear whether that court had undertaken a prejudice analysis.

Accordingly, SCOTUS vacated the judgment of the TCCA and remanded for that court to address the prejudice prong of Strickland in a manner not inconsistent with SCOTUS’ opinion. See: Andrus v. Texas, 2020 U.S. LEXIS 3250 (2020).
The Supreme Court of Indiana held that a defendant cannot be forced to unlock her smartphone because doing so would violate her Fifth Amendment right against self-incrimination. The Court also provided a detailed rationale against extending the "foregone conclusion" exception of Fisher v. United States, 425 U.S. 391 (1976), to compelling a defendant to unlock a smartphone.

Detective Bill Inglis believed Katelin Seo was responsible for sending up to 30 harassing calls or text messages to "D.S." on a daily basis. The substance of the messages was consistent, but the messages came from different, unsigned numbers. Inglis suspected Seo placed the calls using an app or internet program to disguise her phone number.

As a result of Inglis' investigation, Seo was charged with several offenses. Inglis arrested her and took possession of her locked iPhone. When Seo was asked for her password, she refused to provide it. Inglis then obtained two warrants. The first authorized a forensic download so that law enforcement could search for "incriminating evidence." The second "compelled" Seo to unlock the device under threat of "the contempt powers of the court" if she refused to do so. Seo refused to unlock her iPhone, and the State moved to hold her in contempt.

At the ensuing hearing, Seo argued that forcing her to unlock the iPhone would violate her Fifth Amendment right against self-incrimination. The trial court disagreed, concluding that "[t]he act of unlocking the phone does not rise to the level of testimonial self-incrimination." The trial court found Seo in contempt but stayed its order pending her appeal. A divided panel of the Indiana Court of Appeals reversed the contempt order. The Indiana Supreme Court granted transfer, vacating the decision of the Court of Appeals.

The Court observed "[t]he Fifth Amendment's Self-Incrimination Clause protects a person from being 'compelled in any criminal case to be a witness against himself.'" The Clause means the State must produce evidence against an individual through "the independent labor of its officers, not by the cruel, simple expedient of forcing it from his own lips." Estelle v. Smith, 451 U.S. 454 (1981). The privilege protects an individual from being compelled to provide even a link in the chain of evidence needed for prosecution. Hoffman v. United States, 341 U.S. 479 (1951).

But this constitutional protection only applies to compelled testimonial evidence and not to all compelled inculminating evidence. Hiibel v. Sixth Judicial District Court, 542 U.S. 177 (2004). Evidence is testimonial if the accused's communication either explicitly or implicitly relates a factual assertion or discloses information. Doe v. United States, 487 U.S. 201 (1988). While the most common form of testimony is verbal or written communications, physical acts can also have a testimonial aspect (such as nodding the head in response to a question). Fisher. When the government compels a suspect to produce physical evidence, that act is testimonial if it implicitly conveys information. United States v. Hubbell, 530 U.S. 27 (2000). But the information implicitly conveyed by the physical act must be information the prosecution did not already know. Fisher. If the prosecution already knows the information, then the "foregone conclusion" exception applies. Id.

The State argued that the foregone conclusion exception applied in Seo's case because it already knew the implicit information Seo would provide by unlocking her phone, viz., that she "knows the password and thus has control and use of the phone." The Court disagreed, reasoning that the act of giving law enforcement an unlocked smartphone communicates to the State, at a minimum, that (1) the suspect knows the password, (2) the files on the device exist, and (3) the suspect possesses those files. This communication is protected by the Fifth Amendment unless the State can show it already knows this information.

In Fisher, the IRS had subpoenaed several taxpayers' documents that were in the possession of their attorneys. The attorneys argued that complying with the subpoena violated their clients' right against self-incrimination. The Supreme Court of the United States ("SCOTUS") ruled that producing the documents could be testimonial if the act conceded the existence, possession, or authenticity of the documents produced. But if the government could show it already knew this information, then the testimonial aspects were a "foregone conclusion," and complying with the subpoena became a question "not of testimony but of surrender." Since the government in Fisher already knew the documents existed, knew who possessed the documents, and could confirm the authenticity through the accountants who had prepared them, SCOTUS ruled that complying with the subpoena did not rise to inculminating testimony within the Fifth Amendment's protection. Fisher was the first, and only, decision from SCOTUS to find that testimony implicit in an act of production was a foregone conclusion.

The Indiana Supreme Court explained that Fisher, Hubbell, and United States v. Doe, 465 U.S. 605 (1984), stand for the principle that when a suspect produces documents he is communicating that the documents exist, that he has possession of the documents, and the documents are authentic. The foregone conclusion exception requires the government to show it already knew this information before the foregone conclusion exception can apply. Thus, while the contents of the documents themselves are not protected by the Fifth Amendment, the act of producing them does communicate factual assertions that are protected by the Fifth Amendment.

In the instant case, the State failed to demonstrate that any particular files existed on the device or that Seo had possession of them. Inglis confirmed that he would be fishing for "incriminating evidence." While there are apps and programs available that will disguise a sender's phone number (e.g., Google Voice, Pinger, etc.), Inglis stated he did not know which particular app or file he was searching for. He wanted to search the phone to find which, if any, of those types of apps were on the phone, and then he would know which one Seo had used. Consequently, the foregone conclusion exception does not apply because Seo's act of producing her unlocked smartphone would provide the State with information it did not already know.

The Indiana Supreme Court concluded that forcing Seo to unlock her iPhone for law enforcement would violate her Fifth Amendment right against self-incrimination. Thus, the Court reversed the trial court's order finding Seo in contempt and instructed that court to dismiss the citation.

The Court then provided a rationale that
The Supreme Court of California reversed a judgment of the Court of Appeal by holding that a defendant need not be released from custody in order to demonstrate living an “honest and upright life,” a prerequisite to having his conviction expunged.

Misael Vences Maya was convicted of his latest conviction (of several) for DUI and possession of a controlled substance. Under Penal Code § 1203.4a(a), which contains the “honest and upright life” requirement.

Maya had been in immigration custody – in evaluating whether the district court committed error in denying Maya’s expungement. See: People v. Maya, 460 P.3d 1216 (Cal. 2020).

Thus, the Court concluded that the Court of Appeal erred because it is possible for a defendant to demonstrate an honest and upright life while in custody.

Accordingly, the Court remanded the case to the Court of Appeal to determine whether the district court committed error in denying Maya’s expungement. See: People v. Maya, 460 P.3d 1216 (Cal. 2020).
Third Circuit: District Court Must Personally Address Defendant During Sentencing

by Douglas Ankney

T he U.S. Court of Appeals for the Third Circuit reaffirmed that a district court must personally invite a defendant to allocate at the time of sentencing.

A jury convicted Michael Scripps of seven counts of wire fraud for fraudulently transferring millions of dollars from the bank accounts of his mother and uncle into his own account. At sentencing, the U.S. District Court for the Eastern District of Pennsylvania indicated several times that Scripps could address the court to explain his actions. For example, the judge said to Scripps’s attorney, Michael Dezsi: “I haven’t heard acknowledgement just yet — maybe we’ll get there — of [Scripps’s] own responsibility for the choices he has made.... And he can tell me about them if he wants.”

Later, the judge asked Dezsi, “Does [Scripps] want to talk to me?” Dezsi told the judge he would confer with Scripps before doing that. As the hearing continued, the judge instructed Dezsi to “speak with [Scripps] about whether he wishes to speak to me.” Finally, just before imposing sentence, the judge again asked Dezsi if Scripps wished to speak. Dezsi said to the judge: “Your Honor, having discussed it - the matter with my client, he’s opting not to address the court.... He will not be making a statement.”

The judge concluded, “There’s nothing in this record from which I could fairly conclude there’s any remorse whatsoever.” The judge sentenced Scripps to the maximum prison term of 108 months.

Dezsi also represented Scripps on appeal. The judgment was affirmed. Scripps then filed a § 2255 motion alleging, inter alia, that Dezsi was ineffective for not appealing the district judge’s failure to personally address Scripps during sentencing. The district court denied the motion without conducting a hearing, and Scripps appealed.

The Third Circuit observed, “Rule 32 [of the Federal Rules of Criminal Procedure] protects a defendant's right to allocution. Specifically, the rule requires that courts 'address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence.’ In United States v. Adams, 252 F.3d 276 (3d Cir. 2001), the court ruled that when a trial judge asks a defendant’s lawyer if the defendant wishes to exercise his right of allocution, it does not satisfy the requirement that the district court personally address the defendant. The court supported its reasoning in Adams with the Supreme Court’s ruling in Green v. United States, 365 U.S. 301 (1961), wherein the High Court instructed that courts are to ‘leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.”

In the instant case, the Court determined that it made no difference that the judge had personally instructed Dezsi to ask Scripps if he wanted to speak to the judge: “Our controlling law and the text of Rule 32 make clear that courts must personally address the defendant and that no substitute for such personal address will be permitted.”

But the Third Circuit could not legally conclude that Dezsi’s assistance on appeal was constitutionally deficient. Dezsi could have had a strategic reason for not raising the issue. But because the record did not conclusively show that Scripps was not entitled to relief on his motion, the district court was required to hold a hearing. United States v. McCoy, 410 F.3d 124 (3d Cir. 2005). The district court’s failure to do so was an abuse of discretion. United States v. Lilly, 536 F.3d 190 (3d Cir. 2008).

Accordingly, the Court vacated the order denying Scripps’s § 2255 motion and remanded for further proceedings consistent with the Court’s opinion. See: United States v. Scripps, 961 F.3d 626 (3d Cir. 2020). [1]

Seventh Circuit Explains ‘Conduct That is Part of Common Scheme or Plan’ for Sentencing Purposes

by Douglas Ankney

T he U.S. Court of Appeals for the Seventh Circuit explained the meaning of conduct that is “part of the same course of conduct or common scheme or plan” when a district court determines whether it is relevant conduct for sentencing purposes.

On January 22, 2018, Tom Lewis was released from prison. Five days later, he was in Wisconsin calling a methamphetamine (“meth”) supplier in California on behalf of Roberta Draheim. The two planned to purchase just under 50 grams of meth, and Lewis gave $400 to Draheim for his half of the purchase. Unbeknownst to Lewis, Draheim was under surveillance, and her phones were tapped. Police intercepted the package of meth when it was shipped. It contained just over 28.6 grams of pure meth or “ice.” On February 4, 2018, when it was shipped, it contained just over 28.6 grams of pure meth or “ice.” On February 4, 2018, while still awaiting delivery of the package of ice, Draheim purchased just under two grams of mixed “street” meth from Lewis. The next day, police arrested Draheim, and Lewis was arrested three days later.

Lewis was indicted for meth distribution under 21 U.S.C. §§ 841, 846 which carry a maximum penalty of 20 years in prison. But in February 2019, he entered into a plea agreement with the Government to resolve his case by pleading guilty to a lesser charge of using a telephone to facilitate a drug crime in violation of 21 U.S.C. § 843(b) (which carries a maximum penalty of four years in prison), and the ice distribution charge was dismissed. The guilty plea was related solely to Lewis’ selling of the two grams of meth to Draheim and completely unrelated to the purchase of the 28.6 grams of ice.

When the probation office prepared Lewis’ presentence report (“PSR”), it included the 28.6 grams of ice in addition to the two grams of meth when calculating his base offense level to arrive at a Guidelines range of 70 to 87 months. Without the 28.6 grams of ice, Lewis’ Guidelines range would have been 15 to 21 months. Lewis objected.

The U.S. District Court for the Western District of Wisconsin overruled the objection and adopted the PSR’s recommendation on the grounds that Lewis used a phone in both instances for possession and distribution of meth, which made the ice purchase...
a continuation of the defendant’s practice of obtaining methamphetamine and repackaging it for sale.” This made it part of the same course of conduct or common scheme, meeting the definition of relevant conduct. Lewis was sentenced to 36 months in prison, and he appealed.

The Seventh Circuit observed that when calculating a defendant’s base offense level under the Guidelines “the sentencing court must consider types and quantities of drugs not specified in the counts of conviction but that were part of the same course of conduct or common scheme or plan as the convicted offenses.” United States v. Ortiz, 431 F.3d 1035 (7th Cir. 2005). “For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi.” U.S.S.G. § 1B1.3(a)(2), cmt. n. 5(B)(i). They are part of the same course of conduct if they are an ongoing series of offenses. § 1B1.3(a)(2), cmt. n. 5(B)(ii).

“[T]he relevant conduct or aggregation rule grants the government a fearsome tool in drug cases...” United States v. White, 519 F.3d 342 (7th Cir. 2008). It permits prosecutors to indict on relatively minor offenses and then seek enhanced sentences later by asserting the defendant has committed other more serious crimes for which he was not prosecuted. Ortiz. For that reason, the Seventh Circuit has recognized important limits on prosecutorial discretion regarding the use of relevant conduct to avoid abuse. Id. Furthermore, relevant conduct does not encompass offenses that are similar in kind to the offense of conviction if they do not bear the required relationship. Id. The mere fact that a defendant has engaged in other drug transactions won’t justify treating those transactions as relevant conduct for sentencing purposes. United States v. Purham, 754 F.3d 411 (7th Cir. 2014). There is no relevant conduct when the offenses involve different drugs, a smaller scale operation, and significantly smaller drug quantities. Ortiz.

The Court determined that Lewis’ use of a phone in both transactions was not a compelling connection to meet the commonality requirement. Further, the Court rejected the assertion that the ice purchase was a continuation of any common practice by Lewis when he had just been released from prison. And the ice purchase involved a significantly larger quantity of pure meth than did the sale of the mixture. Also, in the former transaction, Lewis and Draheim were the purchasers of meth from a national distributor located across the country, but in the latter transaction, Lewis was the seller of a small amount to Draheim in a local street-level sale.

Finally, the Court was mindful of the “limits” on the prosecutor’s discretion in Ortiz, suggesting the enhanced sentence based on relevant conduct was abusive because the prosecutor had secured Lewis’ guilty plea to a lesser offense by dismissing the charge related to the ice but then sought the enhanced sentence based on the conduct related to the ice.

The Court concluded that the district court should not have added Lewis’ dismissed drug quantities to his base offense level as relevant conduct, and its calculation to the contrary constituted error.

Accordingly, the Court vacated Lewis’ judgment and remanded for resentencing without the additional offense levels based on the relevant conduct. See: United States v. Draheim, 958 F.3d 651 (7th Cir. 2020).
Police Body Cams Are not a Cure-All

by Ed Lyon

George Floyd’s death at the knees of Minneapolis, Minnesota, police was the straw that broke the proverbial camel’s back as far as police brutality. People are fed up with reports of abuse, assault and deaths at the hands of police.

There is a growing movement to defund police departments or at least reduce their budgets to divert funding to underserved community needs.

Police response? No, do not defund us. Instead, give us millions of dollars more. We will buy body cameras to fix all of the problems people are complaining about.

Academia weighed in on the issue through a 2016 University of Cambridge study on 2,000 U.S. and U.K. cops. They observed a huge drop in complaints about police resulting from the ‘digital witness’ of the camera, which caused positive improvements by everyone.

However, a trial study evaluating 2,224 Metropolitan officers in Washington, D.C., came to the opposite conclusion, reporting in 2019 that ‘cameras did not meaningfully affect police behavior on a range of outcomes, including complaints and use of force.’

Daniel Lawrence, a principal research associate at the Urban Institute’s Justice Policy Center in Washington, D.C., identifies three important factors concerning the effectiveness of body cams: (1) When do police turn them on? (2) How often is the recording reviewed and by whom? (3) Will police be held accountable for what the body cam does show?

An unactivated body cam is of no use. If no one reviews body-cam video, it is of no use. If there is no accountability, again it is of no use.

New York City rolled out a pilot program for police body cameras several months after the July 2014 death of Eric Garner, 43, whose last words ‘I can’t breathe’ became a rallying cry against police brutality. Garner, an unarmed Black man, died after plain clothes officer Daniel Pantaleo pulled him down in a choke hold during an arrest for allegedly selling unlicensed cigarettes. The grand jury would not indict Pantaleo for Garner’s death after seeing bystander video. Gwen Carr, Garner’s mother, called the body-cam program a ‘waste of money.’

Texas Southern University researcher Howard Henderson pointed out that Minneapolis cop Derek Chauvin knew he was being recorded the entire time he had his knee on George Floyd’s neck. That knowledge did not deter Chauvin.

Sure, body cams might help in certain situations in combating the scourge of police brutality, but until police are truly and consistently held accountable, body cams are basically just budget-swelling political theater props.

Source: vice.com, abcnews.go.com

Hawai‘i Supreme Court Announces Police Officers May Not Testify That Driver Appeared Intoxicated, Overruling Toyomura

by Douglas Ankney

On June 30, 2020, the Supreme Court of Hawai‘i announced that, going forward, police officers are not permitted to testify in expert or lay capacity that a driver appeared intoxicated, overruling State v. Toyomura, 904 P.2d 893 (Haw. 1995).

Maxwell F. Jones was convicted following a bench trial of operating a vehicle under the influence of an intoxicant (“OVUII”) in violation of Hawai‘i Revised Statutes (“HRS”) § 291E-8(a)(1) (Supp. 2014).

During Jones’ trial, arresting officer Joshua Wong testified as an expert for the State. He testified, over objection, that because Jones “failed” standard field sobriety tests (“SFST”), Jones was intoxicated. On cross-examination, Wong was asked whether “the conclusion of intoxication is not based on the field sobriety test, but the conclusion of intoxication is based upon what further testing is done at the police station, blood or breath or whatever.” Wong answered, “No, because if the person refuses to take a test, then how would we come to the conclusion that they’re intoxicated?”

In his appeal to the Intermediate Court of Appeals (“ICA”), Jones raised numerous assignments of error challenging Wong’s testimony. The ICA affirmed Jones’ conviction, and the Hawai‘i Supreme Court granted Jones’ certiorari application.

While the Court was addressing the merits of Jones’ appeal, it revisited the issue of allowing police officers to testify that a driver appeared intoxicated.” The Court first concluded that “[t]o the extent the ICA stated that an officer’s lay opinion testimony can be based on SFST results, this conclusion was erroneous under existing law.” While officers may base their lay opinion that an arrestee was not sober on their lay observations of the arrestee (e.g., physical condition and coordination), Hawai‘i Rules of Evidence (“HRE”) Rule 701 prohibits basing a lay opinion on their “assessment of the results of the” SFST. State v. Bebb, 53 P.3d 1198 (Haw. App. 2001). An opinion based on such an assessment would not be based on the officers’ perception. Id. In Toyomura, the Court ruled that if sufficient foundation was laid, an officer could testify as an expert that a suspect was intoxicated, and the officer could offer a lay opinion that a driver was intoxicated based on general observations of the driver’s coordination.

But in State v. Vliet, 983 P.2d 189 (Haw. 1999), the Court ruled that HRE Rule 704 prohibits a witness, whether in a lay or expert capacity, from expressing an opinion that simply tells a factfinder what result to reach. HRE Rule 704 also does not allow a witness to give legal conclusions. Vliet. Based on that, the Vliet Court ruled that an officer’s testimony that a defendant’s state of sobriety “would have been over the legal limit” was impermissible. His testimony that the defendant “did poorly, he would be driving poorly too” was also impermissible.

The Court determined that there was no qualitative distinction between the testimony in Vliet and testimony that a driver was intoxicated or appeared intoxicated. Both invade the province of the factfinder, and both are legal conclusions.

The Court observed that Webster’s Third International Dictionary defines “intoxicated” as “being under the marked influence of an intoxicant: drunk, inebriated.” The ultimate issue to be decided by the factfinder in an OVUII case is whether a person drove “while under the influence of alcohol in an amount sufficient to impair the person’s normal faculties or ability to care for the person and guard against casualty...” HRS § 293E-61(a)(1). When a witness tells the...
**FBI Expands Ability to Surveil Social Media and Cellphone Location Data**

by Douglas Ankney

On May 26, 2020, demonstrations around the nation erupted over the police killing of George Floyd. Shortly afterwards, the FBI signed an expedited agreement to extend its relationship with Dataminr, The Intercept reported.

Dataminr is a company that monitors social media and has already had contracts with the FBI exceeding $1 million. A spokesperson for Dataminr said in a statement, “Dataminr provides the FBI with First Alert, a product that delivers breaking news alerts on emergency events, such as natural disasters, fires, explosions and shootings.”

But, The Intercept has learned that since the protests began, FBI agents have questioned one individual for simply tweeting in jest that they were members of the far-left, violent activist group “Antifa.” Other protest organizers have reported being questioned in their homes by the Joint Terrorism Task Force within hours of posting an event on social media.

A few days after extending its agreement with Dataminr, the FBI modified its agreement with Venntel, Inc., a technology firm that maps and sells the movements of millions of Americans. It purchases bulk location-tracking information, including cell-site location data, and sells it mostly to government agencies. Neither Venntel, nor its parent company Gravy Analytics, nor the FBI would comment on the contract modification.

But Mary Zerkel, coordinator of the American Friends Service Committee’s (“AFSC”) Communities Against Islamophobia, said, “We are deeply concerned that the FBI is further expanding their surveillance capacity. The FBI has for decades used surveillance and racial profiling to target Muslims, immigrants, people of color, activists in general and Black activists in particular. AFSC itself has a substantial FBI file.”

Few regulations exist to restrict location tracking data that many phone applications collect and monetize. While the U.S. Supreme Court held in Carpenter v. United States, 138 S. Ct. 2206 (2018), that law enforcement authorities need a warrant to obtain cell-site location data from service providers, many experts worry the ruling won’t apply to third-party data brokers like Venntel.

Source: theintercept.com

**Activists Seek Accountability by Pushing NYC to Make Footage From Traffic Cams Available for Archiving**

by Douglas Ankney

NYC Mesh is a free community-owned internet service provider in New York City that is operated by a group of activists. The activists’ new project involves archiving hundreds of gigabytes of the city’s surveillance camera footage in an effort to hold police accountable.

Aakash Patel, a volunteer for NYC Mesh, posted in a blog: “Currently, to witness and document an incident using the [Department of Transportation (“DOT”)] footage, you have to be watching the right camera at the right time and be ready to take a screenshot. The archive makes it possible to review footage after an event has taken place. By making this resource available to the public, we are providing another source of visual evidence.”

But there are some snags. For one, the DOT is hindering access to the information. For the first couple of days, Patel was able to archive more than 200 gigabytes of video each day. Then it slowed considerably.

As of June 2020, the archive included feeds from only two boroughs, Brooklyn and Manhattan. “I actually submitted a request to the city ... to get a formal feed of the cameras, as they would provide a news agency, and no one has gotten back to me,” Patel informed Motherboard in an online chat. “We need someone from the DOT to help us expand this to the whole city.”

NYC Mesh developed the project by writing a tool that archives an image from every public camera each time the feed gets updated, which varies from one to 30 seconds. The data are then loaded on Google Drive in bundles organized by hourly folders. The folders come with text files containing information about the camera ID, the borough it’s in, and its specific location.

While the DOT provides public access to live streams of the cameras on its website, it doesn’t make recorded data available. Patel argues, “If the government can access all of this footage to monitor citizens then we should have access to monitor the police.”

Source: vice.com

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**Federal Post-Conviction and Habeas**

- Resentencing
- Motions for new trial
- Rule 35

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SCOTUS Announces Large Portion of Oklahoma Remains Tribal Land in Which State Lacks Jurisdiction to Try Native Americans

by Douglas Ankney

T he Supreme Court of the United States (“SCOTUS”), in a 5-4 decision, ruled in favor of a defendant who argued that the State of Oklahoma (“Oklahoma”) lacked jurisdiction to prosecute him because he is a Native American, and his alleged crime occurred on tribal land. The decision has the potential for far reaching and profound implications for many, as it could result in hundreds of other convictions being overturned as prisoners argue that Oklahoma lacked subject matter jurisdiction to try them as well.

In 1997, Oklahoma convicted Jimcy McGirt of raping, molesting, and sodomizing a 4-year-old girl. He was sentenced to life plus 1,000 years in prison. He subsequently filed, pro se, a post-conviction petition arguing that Oklahoma lacked subject matter jurisdiction to try him because he was an enrolled member of the Seminole Nation of Oklahoma, and his charged offenses occurred on the Creek Reservation. Oklahoma courts rejected his arguments, and SCOTUS granted certiorari.

Justice Neil Gorsuch, joined by Justices Elena Kagan, Ruth Bader Ginsburg, Sonia Sotomayor, and Stephen Breyer, wrote that the appeal rested on the federal Major Crimes Act (“MCA”), 18 U.S.C. § 1153(a). The MCA provides that within “the Indian country … a[n] Indian who commits” certain enumerated offenses “against the person or property of another Indian or any other person … shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.” Consequently, state courts generally have no jurisdiction to try Indians for conduct committed in Indian country. Neagonisott v. Samuels, 507 U.S. 99 (1993). Such cases, depending in general on the nature of the offense committed, are tried either in the federal courts or in tribal courts. The key question to resolving McGirt’s claim was: Did he commit his crimes in Indian country?

Indian country includes, among other things, “all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.” 18 U.S.C. § 1151(a).

Oklahoma conceded that McGirt’s crimes occurred on land that Congress described as the Creek Reservation in the Treaty Between the United States and the Creek Nation of Indians, June 14, 1866, 14 Stat. 786. The land area covered much of Northeastern Oklahoma and included most of the present-day city of Tulsa. But Oklahoma argued that the land once given to the Creeks was no longer a reservation. And Oklahoma courts had rejected any suggestion that the lands in question remained a reservation.

After concluding that “there can be no question that Congress established a reservation for the Creek Nation,” Justice Gorsuch wrote, “[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties.” Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). But that power belongs to Congress alone, and SCOTUS will not lightly infer a breach once Congress had established a reservation. Solem v. Bartlett, 465 U.S. 463 (1984). States have no authority to reduce federal reservations lying within their borders because the U.S. Constitution, Art. I, § 8 and Art. VI, cl. 2, grants Congress the sole authority to regulate commerce with Native Americans and directs that federal treaties and statutes are the “supreme Law of the Land.”

Similarly, courts have no proper role in the adjustment of reservation borders. “[O]nly Congress can divest a reservation of its land and diminish its boundaries.” Solem. In the past, Congress has passed legislation that “[e]xplicitly reference[d] ... cession” or an “unconditional commitment ... to compensate the Indian tribe for its opened land.” Id. Congress had also used language directing that tribal lands shall be “restored to the public domain.” Hagen v. Utah, 510 U.S. 399 (1994). Congress had also spoken of a reservation as being “discontinued,” “abolished,” or “vacated.” Matte v. Arnett, 412 U.S. 481 (1973). Disestablishment of a reservation does not require any particular form of words. Hagen. But it does require that Congress clearly express its intent to do so with an “[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.” Nebraska v. Parker, 577 U.S. 481 (2016).

In an attempt to show that Congress had done exactly that, Oklahoma first argued that the General Allotment Act of 1887 (“Allotment Act”) demonstrated Congress’ intent to disestablish the reservation. That is, when Congress initially established the reservation, the land was given to the Creek Nation to be communally owned. Under the Allotment Act, Congress required that the land be broken up into tracts owned by individual members of the tribe, which could then be sold to members and non-members of the tribe.

But SCOTUS has repeatedly rejected this argument, explaining that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. Mattz. The Allotment Act did no more than provide a way for non-Indian settlers to own land on the reservation. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962).

Oklahoma next argued that in the Curtis Act of 1898 (“Curtis Act”), Congress disestablished the reservation when it abolished the Creek’s tribal courts, diminishing their sovereignty over the land. The Curtis Act transferred all pending civil and criminal cases from the tribal courts to the U.S. Courts of the Indian Territory. But SCOTUS rejected that argument as well because the Curtis Act just as plainly provided that the Creek Nation retained power to collect taxes, operate schools, and legislate through tribal ordinances. Further, in 1936, Congress authorized the Creek to adopt a constitution and bylaws, enabling the Creek government to resume many of its previously suspended functions. Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988). The Creek Nation has since done exactly that.

Unable to find an explicit act of Congress to support its position, the State next argued that historical practice and demographics proved disestablishment. The State went so far as arguing that when approaching the question of disestablishment, SCOTUS was required to follow three steps: (1) examine the laws passed by Congress, (2) examine con-
temporary events at the time those laws were passed, and (3) examine the demographics. The Court flatly rejected this proposal, observing “[w]hen interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us.” New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019). Only when an ambiguous term appears in a statute will the Court look to contemporaneous usages, customs, or practices to shed light on the meaning of the term. The State had shown no ambiguous terms in the relevant statutes. Neither SCOTUS nor any court may favor a contemporaneous practice instead of the laws Congress passed.

Oklahoma argued, based on a passage from Solem, that “[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, [SCOTUS] ha[s] acknowledged that de facto, if not de jure, diminishment may have occurred.” But the Court rejected this as taking the quote from Solem out of context. Solem itself found that arguments of that sort were of “no help” in resolving the dispute.

Oklahoma next argued that since its acceptance into the Union as a State in the early part of the 20th century, it had prosecuted Indians for crimes committed on Indian allotments because Oklahoma believed the MCA did not apply to Oklahoma. Since it has been longstanding practice, it constitutes evidence that the MCA doesn’t apply to Oklahoma. But SCOTUS explained that the MCA is clear and observed “Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for decades, until state courts finally disavowed the practice in 1989.” State v. Klindt, 782 P.2d 401 (Okla. Crim. App. 1989). Since Oklahoma itself had come to recognize the practice as wrong, why should SCOTUS consider it evidence that the MCA doesn’t apply, the Court asked rhetorically.

Finally, SCOTUS rejected Oklahoma’s last argument, viz., a ruling against the State would be too high of a price. According to Oklahoma, if SCOTUS ruled that the Creek reservation was never disestablished, other tribes might vindicate similar treaty promises. Half of Oklahoma’s land and up to 1.8 million of its residents would wind up within Indian country. An adverse ruling would unsettle an untold number of convictions and frustrate the State’s ability to prosecute crimes in the future. “Thousands” of convicted persons like McGirt “wait[ed] in the wings” to challenge the basis of their state-court convictions, the State warned.

But Justice Gorsuch pointed out that the MCA applies only to certain offenses committed by or against Indians on Indian territory. Oklahoma could still prosecute crimes committed in Indian country where the defendant and victim are not Native Americans. Only 10% to 15% of Oklahoma’s population identifies as Native American. The vast majority of Oklahoma’s prosecutions would be unaffected by the Court’s decision.

As for those defendants already convicted, again, the Court’s ruling applies only to Native Americans convicted of crimes in Indian country. Many of them might wish to finish their state sentences rather than risk a longer sentence in federal court. Defendants who do choose to challenge their state convictions will face significant procedural hurdles and federal limitations in post-conviction review proceedings. In any event, the MCA—which Oklahoma has ignored—provides that only the federal government may try a Native American for major crimes committed in Indian Country. “[T]he magnitude of a legal wrong is no reason to perpetuate it,” the Court chided.

Justice Gorsuch concluded: “[M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking…. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.” Accordingly, the Court reversed the judgment of the Court of Criminal Appeals of Oklahoma.

Chief Justice John Roberts, Jr., joined by Justices Clarence Thomas, Brett Kavanaugh, and Samuel Alito, Jr., authored a dissenting opinion. He accused the Majority of “discover[ing] a Creek reservation that spans three million acres and includes most of the city of Tulsa.”

According to the Chief Justice, no one knew of this reservation for the past century, and “the Court’s reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State — 19 million acres that are home to 1.8 million people, only 10% to 15% of whom are Indians. Across this vast area, the State’s ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out.”

The dissenting opinion argues that no reservation existed in Oklahoma past statehood, citing Hagen, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). However, Chief Justice Roberts was unable to point to any explicit statement where Congress disestablished the Creek reservation, writing instead that “the notion that express language in an Act is the only method by which congressional action may result in disestablishment is quite inconsistent with our precedents.” (Internal quotations omitted.)

One of Chief Justice Roberts’ main concerns was: “[T]he Court’s decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades. This includes convictions for serious crimes such as murder, rape, kidnapping, and maiming. Such convictions are now subject to jurisdictional challenges, leading to potential release of numerous individuals found guilty under state law of the most grievous offenses.”

Roberts argued that the Majority’s reliance on procedural bars to post-conviction challenges didn’t account for the fact that “issues of subject matter jurisdiction are never waived and can therefore be raised on collateral appeal.” Wallace v. State, 935 P.2d 366 (Okla. Crim. App. 1997). He added that if a convicted prisoner were successful, the federal government would be able to re-prosecute only some of those crimes due to lack of resources, passage of time, dead witnesses, and fading memories. And in the cases of defendants with sentences like McGirt’s, it wasn’t likely they would “adopt a strategy of running out the clock on their state sentences.” See: McGirt v. Oklahoma, 2020 U.S. LEXIS 3554 (2020).

Writer’s note: Regarding governance of the area ruled to be a Creek Nation reservation, Justice Gorsuch pointed to a long and mutually beneficial relationship between the Tribes and Oklahoma in coming to agreement regarding all sorts of issues. Oklahoma Attorney General Mike Hunter released a statement before the case was decided, stating: “Regardless of the outcome in this case, I want to assure both tribal and non-tribal citizens, my office will work with our tribal partners to uphold our longstanding mutually beneficial relationship to benefit all Oklahomans.”

Additional source: kosu.org
Nationwide Police Misconduct Database Available to Public

by Kevin Bliss

USA Today, in conjunction with the Chicago-based nonprofit Invisible Institute, has compiled the largest database of instances of police misconduct — and it's accessible by the public. The database contains disciplinary records for over 85,000 police officers for the past 10 years. These include "more than 30,000 officers who were decertified by 44 state oversight agencies."

Amidst a call for more transparency in police departments across America, journalists from USA Today and its affiliated newsrooms began filing requests under open records laws. They compiled 200,000 incidents of misconduct, 110,000 internal affairs investigations, and 30,000 decertifications from the nation's 100 largest police forces and their surrounding departments. The latter was done to track movement of disciplined police among departments.

Police unions and legislators have conspired to enact special protections for records, keeping them from public scrutiny. They claim certain information if released could place police and their families in jeopardy. USA Today said it published these records to give the public an opportunity to examine departments and police misconduct as well as to identify police who have been decertified yet continue to work in law enforcement. It addresses the concerns that particular departments or individual police officers target minorities and needlessly employ excessive use of force. Still, certain states' privacy laws, such as California's, which also employs the largest number of police in the nation, are so stringent that records could not be obtained for the database.

Co-chair of the 2014 White House Task Force on 21st Century Policing, Laurie Robinson, said transparency of police departments is critical to establishing trust between the agencies and the public. "It's about the people who you have hired to protect you," she said. "Traditionally, we would say for sure that policing has not been a transparent entity in the U.S. Transparency is just a very key step along the way to repairing our relationships."

Dan Hils, president of the Fraternal Order of Police in Cincinnati, said the public should reflect on the fact that there are more than 750,000 law enforcement members nationwide. "The scrutiny is way tighter on police officers than most folks, and that's why sometimes you see high numbers of misconduct cases," he stated. "But I believe that policemen tend to be more honest and more trustworthy than the average citizen."

USA Today said President Trump's administration has developed a policy that turns a blind eye towards police misconduct. Jeff Sessions, as Attorney General in 2018, said the Justice Department was going to leave policing to the local authorities, that federal probes hurt crime-fighting.

USA Today found most misconduct cases were minor infractions, but still, tens of thousands of cases were for serious offenses: 22,924 for excessive use of force; 3,145 for sexual misconduct; 2,307 for domestic violence; 2,227 for "instances of perjury;" and 418 for obstructing justice. Database records reveal that police have beaten people, planted evidence, harassed women, lied, stole, dealt drugs, and drove drunk.

Records show that while fewer than 10% of police have been disciplined for any reason, many have multiple disciplinary reports in their records. The current database contains records of 2,500 police officers who have 10 or more disciplinary reports and 20 who have 100 or more, yet they still retain their badges. In addition, it lists 5,000 police officers who are on Brady lists, many not permitted by prosecutors to testify in court due to previous perjury claims. The Rev. Al Sharpton said, "Until the law is upheld and people know they will go to jail, they're going to keep doing it, because they're protected by wickedness in high places."

Source: usatoday.com

California Court of Appeal Holds Canizales Decision Limiting Kill Zone Theory Applies Retroactively

by Matt Clarke

The Court of Appeal of California, Second Appellate District, held on June 16, 2020, that the California Supreme Court's decision limiting the kill zone theory in prosecutions for attempted premeditated murder applies retroactively. The court reversed 11 convictions each for two habeas petitioners.

Juan Marshall Rayford and Dupree Antoine Glass were each convicted of 11 counts of attempted willful, deliberate, premeditated murder and one count of shooting at an inhabited building and found true gang and firearms enhancements. The trial court sentenced each to 11 consecutive life sentences for the attempted murders and 20 additional years for each count on the firearms enhancements. It stayed the sentences on the gang enhancements and shooting at an inhabited dwelling.

The convictions stemmed from a 2004 shooting at the house of Sheila Williams, where she lived with her three daughters, Donisha, Shaddona, and Shontel.

Glass was 17 years old; Rayford was 18. Glass was friends with Donisha and a frequent guest who was considered a "member of the family." Rayford went to school with one of Sheila's daughters.

There was a party for friends and family at the house. Glass and Perry, Sheila's 17-year-old nephew, began to argue. Glass gathered people, including Rayford, to confront Perry outside, but Donisha and Shaddona got Perry into a car and drove him to their grandmother's house where they left him.

Glass and Rayford left but returned with three cars full of young men. They stood in the front yard and demanded that Perry come out and take a beating.

Sheila came out to the front yard along with others from the party. She told Glass that Perry was not there, but Glass insisted that Perry come out. Sheila tried to corral the children who had come out and send them back to the house. She told Glass there would be no fight as she retreated toward her house.

One of the men who accompanied Glass ran past Sheila and punched one of Sheila's neighbors. Gunfire broke out. Donisha saw Rayford fire the first round "straight up into the air." Glass started shooting "directly toward the house" into the front window from...
his position about 33 feet in front of Sheila. Eight rounds hit all over the house, one of which grazed the back of a girl who was in a second-story bedroom. Another round struck one of Sheila’s neighbors in the leg as he was retreating toward the house.

At trial, the court gave the jury an instruction that a “person who primarily intends to kill one person, may also concurrently intend to kill other persons within a zone of risk,” which it called the kill zone. The prosecution’s theory was that Sheila and the two people who were shot were the primary targets and basically the other people in front of the house were in the kill zone. The Court of Appeal affirmed the attempted murder convictions but vacated the gang and firearms enhancements.

Attorney Annee Della Donna assisted Glass and Rayford in filing petitions for a writ of habeas corpus. The Court of Appeal noted that, in People v. Canizales, 442 P.3d 686 (Cal. 2019), the California Supreme Court held that, to establish a specific intent to kill under the kill zone theory, the jury must conclude that the circumstances of the attack on the primary target, including the type and extent of force used, “are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm” with the intention of killing everyone in that area to ensure the death of the primary target. The Canizales Court cautioned that there would be relatively few cases where it would be appropriate to apply the kill zone theory and used bombings and spraying a crowd with assault rifle fire as examples, explaining that “the use or attempted use of force that merely endangered everyone in the area is insufficient to support a kill zone instruction.”

The Court of Appeal next determined that Canizales should be applied retroactively on post-conviction habeas review. In doing so, it leaned heavily on the approach taken by the California Supreme Court in In re Martinez, 407 P.3d 1 (Cal. 2017), and People v. Mutch, 482 P.2d 633 (Cal. 1971), essentially holding that Canizales is not a new rule but rather a vindication of the original meaning of the statute that neither expressly overturned past precedent nor disapproved specific decisions of the Court of Appeal and thus should apply retroactively. The Court stated that it would “reach the same conclusion” using the federal standard of Teague v. Lane, 489 U.S. 288 (1989), as the change ushered in by Canizales is substantive.

Applying Canizales to the case at hand, the Court held that the evidence supported a reasonable alternative that Glass and Rayford did not intend to kill everyone in front of the house but instead acted with conscious disregard of the risk of serious injury to those people. For instance, Glass stood directly in front of Sheila but did not fire at her — instead directing his fire toward the front window. Rayford fired into the air, at least initially. Further, the eight bullets recovered from the house were not aimed at a specific area but hit all over the house, and there was no evidence that Glass or Rayford aimed at any specific person.

Because the evidence did not exclude every inference except that Glass and Rayford intended to kill everyone in front of the house, the kill zone theory could not be used to obtain the convictions. The error in using the kill zone theory was not harmless beyond a reasonable doubt. Accordingly, the Court granted the petitions, and all of the attempted premeditated murder convictions were vacated with the cases returned to Superior Court for further proceedings.

Wrongfully Convicted Virginians Now Have Chance to Prove Innocence Due to Amendments to Writ of Actual Innocence

by Douglas Ankney

Perhaps now those who are actually innocent in Virginia will be able to prove their claims, thanks to legislation signed by Governor Ralph Northam. The Writ of Actual Innocence was created in Virginia in 2004. Only four wrongfully convicted persons have obtained relief under the law's stringent requirements. But the new legislation, the Innocence Project reports, lifts hurdles to proving one’s innocence by:

(1) “Removing the one-writ limit: Previously, people were limited to filing” only one petition for a writ of actual innocence based on non-biological evidence, even when new evidence of innocence was later discovered.

(2) “Removing the bar on guilty pleas: Even though 1 in 10” (10%) of all DNA exonerees had pleaded “guilty to crimes they did not commit,” Virginia’s law did not permit those who had pleaded guilty to even petition for a writ of actual innocence.

(3) “Creating a reasonable burden of proof: The law previously required the petitioner to establish by ‘clear and convincing evidence’ that no rational juror would have found guilt beyond a reasonable doubt. Now the burden of proof is changed to ‘a preponderance of the evidence.’

Parolee Darnell Phillips testified before the legislature on the need to amend the law. In 1990, Phillips was convicted of raping a 10-year-old girl in Virginia Beach. In 2001, new DNA testing procedures on a hair excluded Phillips as the perpetrator, but his petition was rejected on procedural grounds. More than 10 years later, DNA testing on additional items recovered by the Virginia Beach Police Department also excluded Phillips. And the victim stated she had not actually been able to identify her attacker but that she had identified Phillips only because of lies told to her by police. In spite of this compelling evidence, the Supreme Court of Virginia denied Phillips’ petition for a writ of actual innocence because the DNA testing had been done at a private laboratory, and the Court did not believe the evidence met the high standard of “clear and convincing” proof of innocence. Phillips ultimately served 27 years in prison before being paroled.

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Sixth Circuit: Prosecutor’s Improper Comments and Counsel’s Failure to Object Require New Trial

by Dale Chappell

The U.S. Court of Appeals for the Sixth Circuit held on May 15, 2020, that a prosecutor’s improper comments to the jury during a murder trial, and counsel’s failure to object to those comments, were grounds for granting habeas corpus relief, requiring a new trial.

In 2007, Linda and Todd Stermer were headed for divorce after Todd found out she was having an affair. During an argument, the house caught fire, and Todd died from burns and being run over by Linda with her vehicle. She was charged with his murder. The prosecution’s argument at trial was that Linda had set the fire and then ensured Todd was dead by running him over after he exited the house engulfed in flames. The defense theory was that Todd either intentionally set the fire and accidentally burned himself or that it was all an accident.

Linda never testified at trial, but the prosecutor used her statements to investigators to discredit her defense and show that her statements were contradictory. Before giving those statements to the jury, the prosecutor called Linda a liar at least five times and then closed by calling her a “diabolical, scheming, manipulative liar and a murderer.” The prosecutor also bolstered the credibility of witnesses against Linda, saying things like, “she [the witness] certainly appears a very credible person” and saying the jailhouse informants who testified that Linda confessed to the murder to them in jail had “no intention to lie.”

Linda’s lawyer never objected to any of this. She was convicted of murder and sentenced to mandatory life in prison without parole. After her state appeals were exhausted and her state habeas petitions denied, she pursued habeas relief in federal court.

The U.S. District Court for the Eastern District of Michigan held an evidentiary hearing on Linda’s ineffective assistance of counsel (“IAC”) claims for failure to object to the prosecutor’s statements, failure to obtain an arson expert to rebut the State’s arson expert, and IAC of state appellate counsel for failing to challenge any of this on direct appeal. After hearing testimony from Linda, her previous lawyer and an arson expert obtained by federal habeas counsel, Judge Arthur Tarnow found that the state court had erroneously denied habeas relief and granted Linda’s federal habeas petition, ordering a new trial or her release.

The State appealed, arguing that the district court erred in holding an evidentiary hearing because the Antiterrorism and Effective Death Penalty Act (“AEDPA”) requires the district court to give “deference” to the state court’s decision on the merits, which preceded the district court from considering any new evidence and only the evidence the state court had before it in denying Linda’s state claims (the state court never held an evidentiary hearing, and state habeas counsel never supplemented the record to support her claims). The Sixth Circuit agreed with the State but still found that Linda was entitled to relief, despite the AEDPA’s restrictions.

AEDPA Deference

In a lengthy discussion on deference to the state court’s decision under the AEDPA, the Court recognized that if the state court decided Linda’s claims on the merits, the federal court could only grant relief if the state court’s decision was
“contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States” or was an “unreasonable determination of facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d).

Even without the expanded record by the evidentiary hearing held in the district court, the Sixth Circuit found that the state court unreasonably applied “clearly established federal law” by the U.S. Supreme Court regarding Linda’s prosecutorial misconduct and IAC claims relating to that error. In Darden v. Wainwright, 477 U.S. 168 (1986), the Supreme Court ruled that if a prosecutor’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process,” a new trial is required.

The Supreme Court has also ruled that improper prosecutorial bolstering of witnesses renders a trial unfair, in that it conveys an impression the prosecutor knows evidence not given to the jury, and the prosecutor’s opinion “carries with it the imprimatur of the government and may induce the jury.” United States v. Young, 470 U.S. 1 (1985).

Applying this “clearly established federal law” by the Supreme Court to Linda’s case, the Court found that the comments may have affected the jury’s decision. The State’s case was “weak” and largely circumstantial, the Court said. While a prosecutor may call a defendant a “liar,” emphasizing discrepancies between the evidence and the defendant’s testimony, “misconduct occurs when a jury could reasonably believe that the prosecutor was, instead, expressing a personal opinion as to the witness’s credibility,” the Court explained. In other words, the prosecutor’s own assessment of Linda’s story ran “directly afoul” of Supreme Court precedent, denying her a fair trial.

Despite the deference required by the AEDPA, the state court’s decision was contrary to clearly established federal law, and thus the federal court was empowered to grant Linda relief under § 2254(d).

Counsel’s Failure to Object
Linda’s prosecutorial misconduct claim was intertwined with her IAC claim for counsel’s failure to object to those comments. Under Strickland v. Washington, 466 U.S. 668 (1984), she had to show that counsel’s failure to object wasn’t only unprofessional but that “the result of the proceeding would have been different” absent the error. The Court found that when counsel fails to object to a significant error, “there is little a defendant can do other than rely on his or her attorney to lodge an appropriate and timely objection,” and the failure to do so “can have devastating consequences for an individual defendant.”

“Prosecutorial misconduct in closing arguments is far more likely to affect the jury’s deliberation and verdict,” the Court noted. “Had Stermer’s counsel objected, there is a reasonable probability that the outcome of her trial would have been different,” the Court concluded.

The Court also explored her other IAC claims and found they also would have affected the outcome of her trial. However, the Court found that the failure to obtain an arson expert claim was procedurally barred, and the appellate counsel IAC claim was moot anyway, given she was entitled to a new trial on the prosecutorial misconduct claim.

Accordingly, the Sixth Circuit affirmed the grant of habeas relief to Stermer and upheld the grant of a new trial. See: Stermer v. Warren, 959 F.3d 704 (6th Cir. 2020).
Second Circuit: Justice for Victims of Trafficking Act Applies on Per-Offender, not Per-Count Basis
by David M. Reutter

The U.S. Court of Appeals for the Second Circuit ruled that 18 U.S.C. § 3013 provides for an assessment to be applied on a per-offender basis, not a per-count basis.

Before the Court was the appeal of Paul Haverkamp. He exchanged over 400 messages on the social media app KIK with an FBI undercover agent from March 17, 2017, through April 23, 2017. Haverkamp also sent the agent about 35 image and video files and shared a link to a cloud storage account that contained hundreds of files of child pornography, which included infants and toddlers.

A search warrant was executed at Haverkamp’s apartment in July 2017. At that time, he made incriminating statements. He pleaded guilty in June 2018 to two counts: (1) distribution and receipt of child pornography and (2) possession of child pornography.

The U.S. District Court for the Southern District of New York sentenced him to 121 months in prison followed by five years’ supervised release. It also imposed a $200 mandatory special assessment under 18 U.S.C. § 3013 and a $10,000 assessment under § 3014. A condition of the supervised release required Haverkamp to submit to computer monitoring to alert the probation office to any “impermissible or suspicious activity” on any electronic device he uses.

Haverkamp made several arguments on appeal, with the first challenging the substantive reasonableness of his sentence. The Second Circuit found the district court properly considered the “nature and circumstances of the offense.” It noted the volume of messages, images, and video, as well as Haverkamp’s solicitation of child pornography from minors over social media “as well as his admission that at one point in time he had sexual relations with a 14-year-old boy.” The Court found no manifest injustice in the sentence.

Haverkamp’s next challenge concerned the $10,000 assessment under § 3014. That assessment was applied by the district court on a “per-count” basis, rather than a “per-offender” basis, which would have limited the assessment to $5,000.

Haverkamp did not object to the assessment in the district court, so plain error review applied. The Second Circuit applied a “relaxed” form of plain error to this sentencing context review, citing United States v. Matta, 777 F.3d 116 (2d Cir. 2015), because “the cost of correcting an unpreserved error is not as great as in the trial context.”

Turning to the merits of the claim, the Court determined the Justice for Victims of Trafficking Act amended § 3014. The Court concluded from the plain statutory language that the relevant provision directs courts to “assess an amount of $5,000 on any non-indigent person or entity convicted of an [eligible] offense.”

The Second Circuit compared § 3014 to § 3013 and concluded Congress knew how to distinguish multiple amounts from an amount. Section 3013(a) is divided into “subsections, providing for distinct and nominal charges depending on whether an offense is an infraction, misdemeanor, or felony, and then further divided based on the class of misdemeanor,” the Court observed. “[I]t would not make sense to read § 3013 as imposing only one assessment on a given defendant.” United States v. Pagan, 785 F.3d 378 (2d Cir. 1986). In contrast, § 3014 “authorizes a single assessment: $5,000 if a defendant is convicted of an eligible offense,” the Court explained.

As to Haverkamp’s challenge to the condition of supervised release, the Second Circuit determined that the complained-of computer monitoring was reasonably related to the nature of Haverkamp’s offense.

Accordingly, the Court affirmed in part and vacated in part and remanded for proceedings consistent with its opinion. See: United States v. Haverkamp, 958 F.3d 145 (2d Cir. 2020).

Fourth Circuit: Sentencing Procedurally Unreasonable Where Special Condition Not Explained and Mitigation Argument Not Addressed
by Matt Clarke

The U.S. Court of Appeals for the Fourth Circuit held that a criminal sentence was unreasonable where the district court failed to offer an explanation for a special condition of supervised release requiring addiction treatment, and the court failed to address the defendant’s nonfrivolous mitigation arguments. The sentence was vacated.

Jamil Lewis, 36, was arrested in his North Carolina residence on state charges involving sexual crimes against a minor. Police discovered a handgun in plain view in his residence, and due to a previous felony conviction, he was charged with possessing a firearm as a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924. He pleaded guilty without a plea agreement.

The U.S. District Court for the Eastern District of North Carolina had received a federal probation office’s presentence report calculating his offense level as 17 and category as VI, with a Sentencing Guidelines range of 51 to 63 months. The report also noted that Lewis denied “ever drinking alcohol or using illicit substances” and no information to the contrary had been found.

Lewis submitted “character” letters from his mother and the mother of one of his children, Sydney Campbell. His mother described him as having “no past criminal history” and gave reasons for mitigation. Campbell wrote that he was a good father who worked to support his family and said his “grave mistake” of committing the sex crime was done because he thought he was “doing the work of the Lord.” She also asked the court to help Lewis with his drug addiction and explained that he used drugs when he was “down, or angry” or “whenever he just can’t seem to get things right.”

At the sentencing hearing, defense counsel argued Lewis should receive a sentence at the low end of the range because he had not committed a serious offense since 2010, maintained employment, and met his obligations to family and church. The prosecutor countered that he was a gang member with a long and violent criminal history who had threatened...
his family with a gun.

The court mentioned the letters, discounting the mother’s for its false representation of his criminal history, and expressed confusion about Campbell’s “religion-based excuse for Lewis’s sexual misconduct.” The court described them as “not helpful” for sentencing purposes.

The court sentenced Lewis to 63 months’ imprisonment, followed by three years of supervised release, explaining that Lewis had many juvenile convictions that were not being factored into calculating the range and said the sentence was needed to reflect Lewis’s dangerousness, protect the public from him, and promote respect for the law.

The court recommended that he be given “the most intensive drug treatment or treatment for addiction or dependency that the Bureau [of Prisons] can make available. It also imposed a special condition of supervised release requiring him “to participate in a treatment program for addiction or dependency.” Aided by Assistant Federal Public Defender Jaclyn L. DiLauro and Federal Public Defender G. Alan DuBois, Lewis appealed.

The Fourth Circuit noted that a district court is required to give an explanation for a sentence even when it falls within the Guidelines range and must also address a defendant’s nonfrivolous mitigation arguments. Gall v. United States, 552 U.S. 38 (2007). The Court explained that these requirements also apply to any special conditions of supervised release. United States v. McMiller, 954 F.3d 670 (4th Cir. 2020).

In this case, the district court abused its discretion when it failed to explain the special condition, which could only have been based on Campbell’s discounted letter, and failed to address defense counsel’s mitigation arguments, the Court concluded. Therefore, the Court ruled that the sentence was procedurally unreasonable.

Accordingly, the Court vacated the sentence and remanded for resentencing. See: United States v. Lewis, 958 F.3d 240 (4th Cir. 2020). [4]

Hawai‘i Supreme Court: Showing Jury Video of Defendant Declining Officer’s Request to Reenact Crime Violates Right to Remain Silent

by Douglas Ankney

The Supreme Court of Hawai‘i held that showing a video to the jury of a defendant declining an officer’s request to reenact the crime violated the defendant’s right to remain silent.

Anthony G. Beaudet-Close had an altercation with Luke Ault. Ault sustained life-threatening injuries, was hospitalized, and was in a coma.

Detective Walter Ah Mow videotaped his interrogation of Beaudet-Close. The video opened with Ah Mow confirming with Beaudet-Close that he had turned himself in and that he had reviewed the Advice of Rights form with Ah Mow. Beaudet-Close verbally waived his right to an attorney and his right to remain silent before signing the form.

Beaudet-Close then described the altercation: He had been walking to a gas station when a man approached him, saying, “There you are, we got some shit to settle.” The man identified himself as Ault and lunged at Beaudet-Close with a knife. Beaudet-Close said he punched Ault once and kicked him seven to eight times, including two or three kicks to the head. When Ault was on the ground, apparently unconscious, Beaudet-Close kicked the knife from Ault’s hand and then called police. But Beaudet-Close was scared, so he left when he heard the sirens approaching.

Ah Mow requested Beaudet-Close to participate in a video reconstruction of the altercation “because I want your side of the story.” Ah Mow told Beaudet-Close that he did not have to participate. Beaudet-Close stated he was scared for himself and his family because Ault had come after him due to his ex-girlfriend, and now, Ault’s friends would come after him for revenge. Ah Mow then asked Beaudet-Close again if he would reenact the altercation on video. Beaudet-Close replied, “Right now I’m not comfortable with that,” and again expressed to Ah Mow that he feared for his family. Ah Mow ended the interrogation.

Beaudet-Close was charged with second-degree attempted murder and first-degree assault.

At trial, defense objected twice when the State moved to place the videotape of the interview into evidence. The trial court overruled the objections, and the videotape was shown to the jury.

That same day, defense moved for a mistrial, arguing that showing the video to the jury violated Beaudet-Close’s rights against compelled self-incrimination under article I, section 10 of the Hawai‘i Constitution because Beaudet-Close had invoked his right to remain silent when he declined to participate in the video reconstruction of the altercation. The trial court denied the motion.

Beaudet-Close was convicted of the attempted murder and was sentenced to life in prison. The Intermediate Court of Appeals (“ICA”) affirmed, holding that Beaudet-Close had not invoked his right to remain silent, and the trial court did not err in admitting the video. The Supreme Court of Hawai‘i granted discretionary review.

The Court was persuaded by Hurd v. Turhune, 619 F.3d 1080 (9th Cir. 2010), in holding that Beaudet-Close had invoked his right to remain silent. In Hurd, the defendant waived his rights and told police he had offered to loan his gun to his estranged wife. When he attempted to load it for her, the gun discharged, fatally injuring her. When the police asked him to reenact how the shooting occurred, he refused. At trial, the prosecutor did not play a video of Hurd’s interrogation, but he told the jury that Hurd had refused to reenact the shooting. The Ninth Circuit explained that “a suspect may invoke his right to remain silent at any time during questioning and that … silence cannot be used against him at trial.” The Ninth Circuit vacated Hurd’s conviction because the error was not harmless.

The Hawai‘i Court further observed that article I, section 10 of the Hawai‘i Constitution similarly provides for a defendant’s right to remain silent. And the prosecution is prohibited from commenting on a person’s exercise of that right. State v. Tsurimaru, 400 P.3d 500 (Haw. 2017). Introduction of the video infringed upon Beaudet-Close’s right to remain silent. State v. Domingo, 733 P.2d 690 (Haw. 1987). Because the jury could have concluded that Beaudet-Close’s refusal to reenact the altercation meant he had something to hide, the error was not harmless. Id.

The Power of Filming Police

by Jayson Hawkins

A string of recent polls suggests a dramatic shift in American public opinion about the use of force by police, especially against people of color. The Washington Post released a poll in early June that found 69% of Americans believe the killing of George Floyd by Minneapolis police is indicative of systemic problems in law enforcement, while 29% contend it’s an isolated incident.

Six years ago, a poll taken after a similar killing showed that only 43% of Americans saw a wider trend of excessive police violence.

The new acknowledgment of problems in policing seems to cut across many social boundaries. Three-quarters of Americans support the protests sparked by Floyd’s killing, including a majority of Republicans and independents. A June poll released by Monmouth found that a strong majority of Americans, including half of White Americans, think police officers are more likely to mistreat Blacks than Whites.

The New York Times described this shift in opinion as a “drastic change,” and it is not necessary to look far afield to discover the impetus behind the change. While the influence of social justice activists and advocates for criminal justice reform should not be discounted, the most potent catalyst for changing public opinion has been very simple — a seemingly endless stream of shocking videos showing episodes after episode of unjustifiable police violence.

Video evidence is compelling. It removes many of the clouds that can distort firsthand accounts, and video changes the victim of violence from a faceless stranger into someone whose humanity is undeniable. It is a very different experience, for example, to read about a police officer kneeling on George Floyd’s neck, as compared to watching nearly nine minutes of the non-chalance of the officer while Floyd pleads for his life.

The video of Floyd’s killing is an example of a remarkable transformation in American society over the last 20 years. Cameras have gone from an anomaly to omnipresence. Nearly everyone in America has a camera in his or her pocket and added to that is the astonishing network of traffic cameras, security cameras, dashboard cameras, and every other kind of camera imaginable.

Compare, for instance, the remarkable circumstances that allowed the beating of Rodney King to be filmed to the three bystanders who filmed Floyd’s murder. The ubiquity of cameras has transformed America into a place where nearly every public act is preserved, including public interactions with the police.

Police have, not surprisingly, tried to resist being included in this new reality. Early on, police would try to intimidate citizens with cameras or even try to destroy the video. Police unions protested dashboard and body camera for years, and in some jurisdictions, they succeeded.

It is not difficult to understand why police do not like cameras. Far too often, videos of police encounters have shown discrepancies between what police say happens and what the film shows.

After the video became public, Minneapolis police said Floyd died from a “medical incident.” In Buffalo, police said a 70-year-old protester tripped and fell; video showed he was pushed down by two officers while standing passively in front of a police skirmish line. Texas police said the officer who pulled Sandra Bland out of her car was threatened, but dashcam video showed the officer grew enraged because Bland refused to extinguish her cigarette.

The weight of video evidence is beginning to tell. Without this evidence, discipline was a rarity and prosecutions almost non-existent. Now, however, officers caught on video are being disciplined and even charged. The officers who pushed the protester in Buffalo were suspended, and the officers involved in Floyd’s murder have all been charged.

The lesson is clear — video is the key to holding police accountable, especially in communities that are routinely overpoliced and more likely to suffer from excessive force. Video also is critical in the continuing campaign to create widespread political pressure for policing reform.

Source: reason.com

Extending the Surveillance State During the Pandemic

by Anthony W. Accurso

Police departments are using the coronavirus pandemic to expand their use of surveillance tools in the name of public health and safety. Privacy advocates are concerned about the encroachment of the carceral state on civil liberties, especially in predominately Black and Brown communities.

In New York City, police were ordered to enforce social distancing, often increasing interactions between police and citizens at a time when doing so can jeopardize the lives of both groups. But these measures are being deployed unequally, with minority communities bearing the brunt of such tactics. A breakdown of arrests and summonses by the Brooklyn district attorney’s office shows 35 of the 40 people arrested for social distancing violations from March 17 to May 4 are Black.

“It would be great if the mayor would take a stronger stance because we know that equal policing has not and will not happen, so we need more leadership in this area,” said Simone Gamble of Justice Committee, a NYC-based police reform group that teaches citizens how to monitor police by offering “cop-watch trainings,” and during the pandemic they advocate social distancing and wearing mask and gloves.

It is exactly this kind of counter-surveillance that produced viral images recently of NYPD officers “handing out masks to crowds of white park-goers while violently attacking and arresting several Black and Latino residents for not properly distancing themselves,” according to truthout.org.

“(The NYPD) is taking this moment to be emboldened in their attacks on our communities and using social distancing enforcement as cover,” Gamble says.

Indeed, police departments are embracing new technologies during this period. This has, in part, been fueled by Congress’ third COVID-19 stimulus bill, which allocates more than $1 billion for the Department of Justice, $850 million of which it grants to local law enforcement agencies that can use the funds to obtain surveillance technologies.

Several agencies have deployed drones to broadcast announcements at parks, beaches,
and homeless camps to enforce social distancing and stay-at-home orders. Some departments have signaled interest in outfitting drones with thermal imaging cameras to detect feverish persons in public, raising concerns by civil liberties groups.

Kentucky had been using GPS-enabled ankle monitors to enforce 14-day quarantines. West Virginia implemented a similar program, a benefit to prison profiteer GEO Group whose devices will be used in the program. Hawaii is considering deploying ankle monitors as well.

Companies like Clearview AI and Planatir have been fielding calls about developing new technologies to enforce social distancing and quarantines, according to Reuters, as law-enforcement agencies seek to expend their tools.

Facial recognition software, enabled by data sets culled from social media networks (sometimes in violation of user agreements), has been used to monitor people who have tested positive for COVID-19. States such as Alabama, Florida, and Massachusetts are sharing such data with first responders, who could use this data as a pretext to subject citizens to unwarranted searches and surveillance, which would be illegal at any other time and may be illegal even now. Some 911 agencies are using this information to flag addresses of persons who have tested positive when they make emergency calls.

This is at a time when crimes are at a historic low. NYPD crime statistics show a 28.5% drop in crimes in April 2020 compared to April 2019. Chicago reported a drop of 30% over the same period, though gun violence in June 2020 soared. Police accountability activists are pushing local lawmakers to reallocate policing budgets toward social services and essential services like education and health care.

But we may have already gone down the road to ever-greater surveillance as tech companies and law enforcement work together to “reimagine” aspects of society.

“We saw what happened after 9/11 in terms of the Patriot Act and all kinds of enhanced policing and surveillance that went on under the guise of safety and the guise of security, and now we have a situation ... that gives an entree to law enforcement and the judicial system to take liberties with policing procedures,” said Flint Taylor, founding member of the People’s Law Office in Chicago. “We have to guard against what will no doubt be racially motivated attempt to further encroach on people’s civil liberties.”

Source: truthout.com

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Georgia Supreme Court: Counsel’s Failure to Inform Defendant of Absolute Right to Withdraw Plea Prior to Sentencing Ineffective Assistance

by David M. Reutter

The Supreme Court of Georgia held a habeas corpus petitioner was denied the effective assistance of counsel due to counsel’s failure to advise him of his absolute statutory right to withdraw his guilty plea prior to sentencing.

Morocco Jacobi Wilkey was indicted in 2014 for possession of methamphetamine with intent to distribute. He went to trial in April 2015, and on the third day of trial, while his co-defendant was testifying for the State, Wilkey elected to enter a guilty plea.

At his April 28, 2015, sentencing hearing, but before his sentencing, Wilkey’s plea counsel informed the court that, since trial, it was learned that the co-defendant had an outstanding felony warrant for the sale of methamphetamine since “August of last year.” Despite the fact the co-defendant sat in the courtroom multiple times for trial, “the warrant was not executed, nor was that information turned over to the defense at trial and that her testimony was that she was just a user, that she didn’t sell drugs, and that’s why the drugs [at issue] were not hers.”

Counsel also stated, and no one disagreed, that Wilkey had 30 days to file a motion to withdraw his plea.

The court admonished that the failure to execute the warrant was “unprofessional” and a violation of a law enforcement officer’s duty to execute it. The court said it would consider the matter when it came up, but it proceeded to sentence Wilkey to 15 years in prison and 15 years on probation.

Wilkey filed a motion to withdraw his plea within 30 days, but it was rejected as untimely because it was not filed within the same term of the court as the sentence was entered. Brooks v. State, 804 S.E.2d 1 (Ga. 2017). Wilkey filed a petition for habeas corpus on June 21, 2018.

That petition raised three grounds: (1) the guilty plea was involuntarily entered due to the failure to disclose the co-defendant’s open arrest warrant prior to the plea, (2) trial court’s failure to properly inform him of the deadline to file motion to withdraw plea, and (3) counsel was ineffective for failing to inform him of the right to withdraw the plea for any reason prior to sentencing and improperly advising him on the deadline to file such a motion.

The habeas court granted the petition after holding an evidentiary hearing, finding all claims were well founded. Warden Dennis Nelson appealed that result on May 22, 2019. He challenged the habeas court’s determination that Wilkey received ineffective assistance of counsel.

In its June 29, 2020, order, the Georgia Supreme Court said “a defendant’s right to effective assistance of counsel regarding his guilty plea prior to sentencing [under OCGA § 17-7-93(b)] and whether he should peruse such a remedy.”

The Court noted that at the sentencing hearing plea counsel said she was aware of new information “that certainly would have had an effect” on her advice to her client. Yet, she allowed sentencing to proceed. The Court found this substantially affected Wilkey’s rights.

Prior to sentencing, Wilkey had a statutory right to withdraw his guilty plea for any reason. After the court imposed the sentence, he could withdraw the plea “only to correct a manifest injustice. Graham v. State, 797 S.E.2d 459 (Ga. 2017). This imposed an unnecessary burden on Wilkey,” the Court stated. “No reasonable lawyer would allow sentencing to go forward under these circumstances,” the Court concluded.

Nelson conceded plea counsel provided Wilkey with “bad advice about plea withdrawal options.” Nonetheless, Nelson argued that performance was not prejudicial because the trial was essentially over, and Wilkey could not show he would have continued with the trial. The Court rejected that position. It found the record supports the habeas court’s “factual and credibility findings” that “Wilkey would have withdrawn his guilty plea prior to sentencing and continued with trial.” Finding this issue dispositive, the Court did not address other issues in the habeas petition.

Guard Your Digital Privacy to Keep Your Real Self Safe
by Anthony Accurso

It’s no secret that our digital devices, especially our phones, are collecting troves of data about us — our preferences, habits, and movements. Many of us understand this is the price we pay for “free” services, such as email by Google and social networking by Facebook. What many of us did not expect is that our government, mostly in the form of law enforcement, would obtain this data, find ways to deanonymize it, and use it to suppress lawful protests.

The ACLU has obtained data showing that one company, Geofeedia, was packaging data from the phones of people protesting the killing of Freddie Gray in the custody of Baltimore police. Since then, multiple stories have emerged about the Department of Homeland Security, including its sub-department ICE, using similar data to circumvent the law to catch drug smugglers and immigrants without papers.

Legislators seem either unwilling or unable to help solve this problem. The most aggressive legislation to date, the California Consumer Privacy Act (“CCPA”), was supposed to prevent the selling of consumer data without permission and require apps that collect location data to obtain user permission before doing so. The “requirement” turned out to be more of a “suggestion,” and data mining companies have taken advantage of the law’s definition of the word “sell” to call what they do “sharing” instead, while continuing to monetize the “sharing” of our data.

So what is a tech-savvy consumer who wishes to continue protesting (or other legal activities) without being tracked? The answer is to understand how these mechanisms work and to work around them.

First of all, your phone is tracking you by associating “probabilistic data” with your “deterministic data.” The latter is any username, or other ID, that can be tracked back to your real name. The former are bits of data (i.e., purchases, location pings, and call metadata) that can be assembled with or without an ID into a dataset that reveals private details or that can be linked back to your name.

What this means is that logging out of apps tied to your name, deleting said apps, or wiping your phone will not likely prevent you from being tracked if you continue to do the same things (shopping) from the same places (home or your commute).

The easiest way to avoid being tracked is to use a cheap, disposable cellphone just during whatever activity you don’t want tracked. If you must log into an app to coordinate activity, do so under an account not linked to your name. Keep this “burner” phone away from your other devices (laptop, phone, or smart TV), because these are likely already associated with the real you and will “ping” the burner phone often enough to associate it with you. Finally, keep the burner phone physically isolated when not in use (electromagnetically shielded bag or room), so it doesn’t associate your location with other data linked to your identity.

Be aware of the ways your phone can collect data and share with other devices. NFC and Bluetooth protocols will collect data about other devices nearby, and advertising screens (like in the Minority Report, except that they’re real and already in use) will use these protocols to ID your devices. GPS is not the only location information gathered either. Point-of-sale data is linked to physical location, and your device can get a location fix from WiFi just as easily as GPS, except WiFi works better indoors than GPS does. Anything you do can and will be recorded, even when your phone is off or in airplane mode; it just won’t get uploaded to the data companies until you turn your phone back on or turn airplane mode off.

Keeping yourself safe online and in the real world may depend on vigorously guarding your privacy. Staying inititally invisible all the time may be nearly impossible, but staying private just long enough to be effective is merely difficult and certainly manageable with the right know-how. Now you know how. [1]

Source: gizmodo.com

by Matt Clarke

On June 8, 2020, the U.S. Court of Appeals for the Second Circuit announced that federal courts are directed to use the categorical approach “to identify felony drug offenses for sentencing enhancement purposes . . .,” rather than a circumstance-specific analysis, and vacated a drug defendant’s sentence and remanded for resentencing.

In the U.S. District Court for the Northern District of New York, Jeremy L. Thompson pleaded guilty to one count of conspiracy to distribute and possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a) (1), 841(b)(1)(B), and 846.

The Government had filed a sentencing enhancement information citing his prior conviction for attempted criminal sale of a controlled substance in the fifth degree, in violation of New York Penal Law § 220.31, which criminalizes the sale of hundreds of controlled substances listed in N.Y. Pub. Health Law § 3306.

Thompson admitted to the prior conviction but contested whether a § 220.31 conviction qualifies as a predicate “felony drug offense,” as required by § 841(b)(1)(B) to trigger enhancement under the categorical approach which, he argued, the district court was required to use. Under the categorical approach, a conviction may not be used for enhancement if the state statute of conviction criminalizes any substance not criminalized by an analogous federal statute. Since the sale of human chorionic gonadotropin is criminalized under § 220.31, but not under federal statute, § 220.31 convictions cannot be used for enhancement under the categorical approach.

Noting that neither the U.S. Supreme Court nor the Second Circuit has definitively required the use of the categorical approach to identify a prior “felony drug offense,” as defined in 21 U.S.C. § 802(44), the district court rejected the categorical approach and ruled that, since the state conviction involved cocaine, it could be used for enhancement. Aided by Rochester attorney James L. Riotto, II, Thompson appealed.

The Second Circuit noted that the
Congress Unsure of Internet Data Collected by Government as PATRIOT Act Heads for Reauthorization by Dale Chappell

As Congress looks to renew the PATRIOT Act, some members of Congress and privacy advocates are concerned about privacy issues because Congress has no idea what internet data the government has been collecting on citizens.

In a letter sent by Oregon Senator Ron Wyden to Acting Director of National Intelligence Richard Grenell, he asked if the numbers disclosed by the government in its annual transparency report listing “unique identifiers” included its collection of web browsing, search histories, and emails from citizens and organizations.

Under § 215 of the PATRIOT Act (codified at 50 U.S.C. § 1861, with 11 lengthy subsections), the government is allowed to conduct mass surveillance of organizations, businesses, and citizens, all in the name of “national security.” But the data disclosed by the government in its report fails to say how those identifiers related to collected on web browsing and emails.

Wyden wrote in the letter that while clarification on this point “may help put into context the scale of the government’s collections of email communications, I’m concerned it does not necessarily apply to web browsing and internet searches.” He said the “ambiguity [in the government’s report] creates the likelihood the Congress and the American people may not be given the information to realize the scale of warrantless government surveillance of their use of the internet.”

In May, Wyden co-sponsored an amendment to the PATRIOT Act, called the Wyden-Daines Privacy Amendment, which would explicitly ban federal agencies from using the Act to collect internet data without a warrant. But that proposed amendment failed by one vote after several senators who would have voted for it didn’t show up to vote.

Now, the reauthorization bill is going before the House, and privacy advocates are calling on House Speaker Nancy Pelosi to resurrect the Wyden-Daines amendment. Over 50 organizations have signed a letter to Pelosi asking that the amendment be re-added to the bill.

Source: vice.com

What to Do if You’re Pepper-Sprayed by Dale Chappell

With law enforcement targeting anyone and everyone during recent demonstrations, here are a few tips from some experts on what to do if you’re pepper-sprayed.

The most important tip, they say, is not to take a shower — yet. If you do, the pepper spray will run to your genitals and make things worse. Instead, take care of some initial things, like removing contact lenses, finding your asthma inhaler (if needed), and flushing your face with water.

Pepper spray is an oil extracted from peppers called oleoresin capsicum. It’s the stuff that makes peppers hot. “It will stick to your skin like super glue,” says Dr. Ernest Brown, a family doctor in Washington, D.C. He advises to use Milk Of Magnesia diluted with equal parts water to wash out your eyes. It’s an antacid found in most drug stores and usually sold in a blue bottle. If you don’t have this on hand, he says that tear-free baby shampoo also works.

Irrigation should be done for at least 15 minutes and with a device that uses pressure. A syringe or even a squirt gun works. When you’re ready to take a shower after flushing your eyes, do so in your clothes. Leave your underwear on until the very end to avoid the pepper oil from soaking your genitals. Wash and rinse that area last.

When handling your contaminated clothes, wear gloves. The pepper oil is still on them and must be laundered out and done so separate from other laundry.

Having a game plan beforehand is strongly advised, says one journalist who has had military experience with pepper spray. If sprayed, don’t run. Your eyes will involuntarily shut and running would be dangerous. Sit down until you can find water to flush your eyes. A tight-fitting mask also will help reduce the spray’s effect.

While pepper spray is painful, it usually subsides within two hours, the experts say.

Source: poynter.com

categorical approach requires looking at the elements and nature of an offense rather than the particular facts of the crime. The Court concluded that the text of § 841(b)(1)(B) concerns whether a defendant has a prior conviction for a felony drug offense, not the underlying factual details. It and § 802(44), which defines “felony drug offense,” focus on the statute of conviction, not the underlying facts.

The Court agreed with the Eighth Circuit, which held in United States v. Brown, 398 F.3d 1013 (8th Cir. 2010), that the statutory text does not support having a conviction under a state statute that sometimes counts toward enhancement and sometimes not, depending on the facts of the case. The legislative history of § 841(b)(1)(B) also shows that Congress intended for the categorical approach to be applied. Further, adopting a circumstance-specific analysis would require a fact-intensive determination by the sentencing court, “even to the point of requiring a separate trial on the question,” the Court observed.

Therefore, the Court explicitly adopted the categorical approach, which it had previously mentioned in McCoy v. United States, 707 F.3d 184 (2d Cir. 2013) (per curiam), as its “long-accepted” practice.

Under the categorical approach, it quickly became clear that the conviction under § 220.31 could not be used to enhance the sentence because § 220.31 criminalizes the sale of drugs not criminalized by federal statute and thus is broader than its federal analog. Since there is no categorical match, the state conviction cannot be used to enhance Thompson’s sentence, the Court ruled.

Accordingly, the Court vacated Thompson’s sentence and remanded the case to the district court for resentencing. See: United States v. Thompson, 961 F.3d 545 (2d Cir. 2020).

Editor’s note: In the opinion, the Court explains that, after a thorough analysis, both the Seventh and Eighth Circuits have adopted the categorical approach with respect to “§ 841(b)(1)(A),” which mirrors § 841(b)(1)(B), and § 802(44).” Additionally, without explaining their rationale for doing so, the First, Third, and Ninth Circuits “have also applied the categorical approach to identify felony drug offenses,” the Court notes. In contrast, only the “Sixth Circuit, in an unpublished opinion that cites no authority and provides no rationale, has declined to apply the categorical approach to identify felony drug offense,” according to the Court. For case citations, see the opinion.
Kev in Baker and Sean Washington, having served nearly 25 years on a double murder sentence and facing life in prison, never gave up hope because they each knew that eventually someone would believe that the evidence in their case was flawed — that someone was The Last Resort Exoneration Project.

The Last Resort Exoneration Project, headed by Lesley C. Risinger and her husband, D. Michael Risinger, worked tirelessly for nearly a decade to attack the credibility of the evidence, utilizing every resource available, including investigators, ballistic analysts, forensic pathologists, and a host of other experts.

Lesley Risinger had previously won the exoneration of two men in two previous cases without the luxury of faulty DNA analysis, and she did so prior to attending law school. Her husband, John J. Gibbons Professor of Law Emeritus at Seton Hall University School of Law, is considered one of the foremost evidence scholars in the United States. Together, they make up The Last Resort Exoneration Project. Leslie, who understands the complexity of exoneration where no DNA exists, stated, “without DNA evidence the road to justice and freedom is uphill—and it’s a very big hill. But if the DNA exonerations have taught us anything, it’s that the system can be fundamentally flawed, and all too often innocent men and women pay the ultimate price.”

Baker and Washington were convicted of a 1995 double murder near a Camden, New Jersey, housing complex after testimony was made by one of the suspects, Sean Washington, reporting the murders himself. And finally, the existence of a video clip from a television newscast, which actually corroborated the alibi of Kevin Baker.

Several teams combined their efforts to assist in the exoneration. Defendant Baker was represented by the Risingers and The Last Resort Exoneration Project; Washington was represented by Lawrence Lustberg of Gibbons PC.

After a thorough review of all of the findings of these innocence representatives, the New Jersey Appeals Court unanimously overturned the lower court’s decision. The Camden County Prosecutors Office confirmed, “in consultation with the Office of Public Integrity and Accountability within the Attorney General’s Office,” the Prosecutor’s office agreed to “dismiss the indictment against [the two men] and retract its notice of intent to appeal this case to the New Jersey Supreme Court.”

Counting the two individuals from this case, and an individual each from two separate cases, The Last Resort Exoneration Project now boasts that it has successfully freed four innocent individuals from custody. With regard to Washington and Baker, D. Michael Risinger commented, “it’s taken nearly ten years of our lives and the help of many, but it’s done.”

Risinger goes on to note, “the world has changed significantly while these two men were buried under an unjust verdict and a life sentence.”

Sources: Seton Hall University (shu.edu), nj.com

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Tenth Circuit Vacates Conviction, Rules Waiver of Trial Counsel Not Knowingly Made

by Dale Chappell

The U.S. Court of Appeals for the Tenth Circuit held on June 15, 2020, that a district court’s failure to fully advise a defendant of the elements of the charges and the correct penalty he faced amounted to his waiver of trial counsel not knowingly made.

Randy Hamett, a carpenter by trade, was charged with kidnapping and several firearm offenses in the U.S. District Court for the Northern District of Oklahoma. He was appointed counsel and elected to go to trial, during which he requested to forgo counsel and represent himself. The trial judge then held a hearing and warned Hamett of the risks of trial without a lawyer. When the judge asked if he understood the elements of the charges the Government had to prove, Hamett told the judge he did not and asked for those elements. The judge, however, refused to give them to him and said they were in the jury instructions; the judge also said he was not going to give Hamett time to read them.

The judge allowed Hamett to proceed pro se, and the jury convicted him of every count. He was then sentenced to 20 years in federal prison without parole, well below his Guidelines range but admittedly a “life” sentence for Hamett, who was 62 at the time. He appealed and argued that his waiver of counsel was not knowingly made because the

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judge failed to apprise him of the elements of the charges against him.

While a criminal defendant has the right under the Sixth Amendment to counsel, he also has the right to represent himself. The Supreme Court has held that a waiver of counsel must be knowingly and voluntarily made. This means that the defendant must be “aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Faretta v. California*, 422 U.S. 806 (1975). A district court does this by what’s called a “Faretta hearing” and must advise of (1) the nature of the charges, (2) the statutory offenses faced, (3) the range of punishment, (4) possible defenses to the charges, and (5) “all other facts essential to a broad understanding of the whole matter.”

In the present case, the trial judge not only failed to advise of the elements of the charges, but he refused to do so.

The Tenth Circuit rejected the Government’s argument that Hamett must have been aware of the elements from his arraignment and when he had a lawyer. No assumptions can be made about the knowing nature of a waiver, the Court said, and the warnings under *Faretta* must be specific. General warnings aren’t enough, the Court explained.

The Court also rejected the notion that because Hamett eventually did learn the elements and did an adequate job of defending against them that his waiver was knowing. The Court recognized that whether actions taken by a defendant after a waiver of counsel could render a waiver knowingly made is an open question in the Tenth Circuit. But it said that it was “dubious” as to whether this would matter. It’s the defendant’s understanding at the time of the waiver that counts, not anything that happens after the waiver, the Court instructed.

And even if Hamett’s previous lawyers had advised him of every factor to satisfy the *Faretta* hearing requirements, it was the trial judge who was required to ensure Hamett’s understanding of those factors, the Court said. The fact that standby counsel was appointed to help Hamett during the trial also did not cure the trial judge’s failure to cover these essential factors, the Court said.

While there may be some exceptions to a proper *Faretta* hearing, the Court noted that none existed here. For example, some exceptions have been made where the criminal defendant was a lawyer himself or where the defendant showed that he understood criminal procedure by filing motions before the waiver. But Hamett, a carpenter and equipment operator, was not trained in the law and did not show any signs of being knowledgeable of the law, the Court noted.

“In sum, considering the rigorous restrictions on the information that must be conveyed to a defendant before permitting him to waive counsel at trial, we conclude that the district court’s warnings did not adequately ensure that Mr. Hamett was aware of the dangers and disadvantages of self-representation,” the Court concluded.

Accordingly, the Tenth Circuit vacated Hamett’s conviction and remanded for a new trial. See: *United States v. Hamett*, 961 F.3d 1249 (10th Cir. 2020).

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**Colorado Supreme Court: Plea Proviso in § 18-1-409(1) Doesn’t Bar Appeal on Manner in Which Sentence Imposed**

*by David M. Reutter*

The Supreme Court of Colorado held that the “plea proviso [in Colo Rev. Stat. § 18-1-409(1) (2019)] does not preclude an appeal related to the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which the sentence was imposed.”

Before the Court was the appeal of Christopher David Sullivan. He accepted a plea agreement that provided he plead guilty to 40 substantive charges, including first degree burglary, aggravated robbery, aggravated motor theft, menacing with a deadly weapon, first degree assault, resisting arrest, and possession of weapon by a previous offender. The charges stemmed from a lengthy chase following a routine traffic stop. The district court sentenced him to 77 years’ imprisonment, which was within the 70- to 85-year range of the plea agreement.

During sentencing, the court misstated the statutory range on count 15, aggravated motor theft in the first degree, as three to 12 years instead of two to six years. No one caught the error at sentencing. On appeal, Sullivan argued that the district court had chosen the low end of what it believed to be the applicable range, but it had in fact sentenced him to the midpoint of the correct sentencing range. He urged that had the court been properly advised that it would have imposed a lower sentence on that count.

The court of appeals affirmed. At issue was the applicability of § 18-1-409(1), which creates a right for every defendant convicted of a felony and not sentenced to death to “one appellate review of the propriety of the sentence.” The statute includes a plea provision that bars an appeal “if the sentence is within the range agreed upon by the parties pursuant to a plea agreement.” The appellate court ruled that the plea proviso barred Sullivan’s appeal because the appeal involved the manner in which the sentence was imposed, not the “propriety of the sentence.”

The Colorado Supreme Court granted review of the question of whether §18-1-409(1) precludes nonconstitutional challenges in the manner in which a legal felony sentence within the stipulated range from a plea agreement is imposed.

It noted that the statutory phrase “propriety of the sentence” was first addressed in its opinion in *People v. Malacara*, 606 P.2d 1300 (Colo. 1980). In *Malacara*, the Supreme Court interpreted § 18-1-409(1) to be understood as providing the right of one appellate review of “(1) the propriety of the sentence, having regard to the nature of the offense, character of the offender, and public interest, and (2) the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.”

The Court recognized that the legislature used the term “propriety of the sentence” when it created the plea proviso in 1999. There was no basis to conclude the General Assembly ascribed a different meaning to that phrase than the one the Supreme Court had ascribed to it in *Malacara* and that legislative body is presumed to have acted in full knowledge of the Supreme Court’s interpretation of the phrase in *Malacara*.

The appellate court relied on *People v. Bloom*, 251 P.3d 482 (Colo. App. 2010) (which the Supreme Court noted in the present case “followed *Lassek* without analysis”), and *People v. Lassek*, 122 P.3d 1029 (Colo. App. 2005), to support its ruling. According to *Lassek*, since the cases cited in *Malacara* involve[d] constitutional issues,” the Supreme Court concluded that only
Plea Proviso (cont.)

constitutional challenges to the propriety of the sentencing proceeding may be brought under § 18-1-409(1).

The Court flatly rejected this position, stating: “But nothing in Malacara corroborates this view.” In fact, the Court announced: “Because the decisions of the court of appeals in Bloom and Lassek are inconsistent with [the Supreme Court’s determination in Malacara], we now overrule them.”

The Court held “that the plea proviso does not preclude an appeal related to the manner in which the sentence is imposed, including the sufficiency and accuracy of the information on which the sentence was based.” It ruled that although “Sullivan’s sentence on count 15 fell within the range included in his plea agreement, his appeal is not barred by the plea proviso.”

Accordingly, the Court reversed the judgment of the court of appeals and remanded the case so that the court of appeals can consider the merits of Sullivan’s claim. See: Sullivan v. People, 465 P.3d 25 (Colo. 2020).

Sixth Circuit Grants Habeas Relief for Defendant Shackled During Murder Trial Without On-the-Record Justification

by David M. Reutter

The U.S. Court of Appeals for the Sixth Circuit granted conditional habeas corpus relief to a Michigan prisoner who alleged that the use of shackles upon him during trial was unconstitutional and prejudiced his guilt determination. The majority of the Court’s opinion focused on the proper standard to determine if the error was harmless.

Ervine Lee Davenport was charged with first-degree murder in the January 13, 2007, death of Annette White. At trial, he claimed self-defense, but the jury found him guilty as charged. “During the trial, Davenport had one hand cuffed, as well as shackles around his waist and ankles,” the Sixth Circuit noted. There also was a privacy curtain around the defense table. Defense counsel referred to the trial court’s “policy regarding the shackles” and requested they be removed during jury instruction. The court denied that request, and it made no on-the-record justification for the shackling.

On direct appeal, one of the issues Davenport raised was that “he was denied his due process rights when the trial court required him to wear shackles during the trial.” The appeals court affirmed, finding Davenport had “not shown that his restraints were visible to the jury” and thus he had “not demonstrated prejudice.” The Michigan Supreme Court reversed for a determination to be made by the trial court of whether “the jury saw the shackles” and if so to determine if the State could “demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict.”

The trial court held an evidentiary hearing that involved all 12 jurors testifying. Five of them said they saw the shackles, two others recalled other jurors commenting about the shackles, and the others either did not recall seeing them or said they did not notice them. All of them said the shackles were not a deliberation issue and did not affect their verdict.

The trial court relied on that testimony to deny relief, and the appellate court affirmed that ruling in 2012. Davenport filed a federal habeas corpus petition, which was denied. Acting pro se, Davenport appealed.

On appeal, the State conceded to constitutional error. It, however, argued the error was harmless. The bulk of the Sixth Circuit’s opinion focused on the standard of review to apply in such a situation.

The State argued the Court must undertake a two-prong harmless error analysis. First, it asserted the Court is required under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) to find that the state court’s conclusion “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.” The burden is on the State to show the state court did not apply the harmless-error review standard in an “objectively unreasonable” manner. Chapman v. California, 386 U.S. 18 (1967).

Next, the Court must find the shackling had a “substantial and injurious effect or influence in determining the jury’s verdict.” Miller v. Esparza, 540 U.S. 12 (2003).

In contrast, Davenport argued that the only question before the Court was whether the shackling “had a substantial and injurious effect or influence in determining the jury’s verdict.” That standard was announced in Brecht v. Abrahamson, 507 U.S. 619 (1993).

The majority agreed with Davenport, finding Brecht “subsumes” AEDPA’s unreasonableness inquiry, as the Supreme Court found in Davis v. Ayala, 135 S. Ct. 2187 (2015). The dissent sided with the State. The majority, however, found binding precedent in Ruelas v. Wolfenberg, 580 F.3d 403 (6th Cir. 2009), resolves the issue. The Ruelas Court said it “makes no sense to require formal applica-
the violent nature of the charge, the Court
determined that the State failed to carry its
burden to show the shackling did not have a
‘substantial and injurious effect or influence
in determining the jury’s verdict,” the Court
concluded.

Accordingly, the Court granted Davenport
a conditional writ of habeas corpus that
will result in his release if he is not retried
within 180 days of date of this opinion. See:
Davenport v. MacLaren, 964 F.3d 448 (6th Cir. 2020).

New York Police Continue Pattern of Arrests
of Low-Level Crime During COVID-19 Crisis

by Derek Gilna

A rrest statistics and eyewitnesses
seem to show that the New York City
Police Department is continuing its pattern
of making low-level arrests for non-violent
crime in low income areas of the city during
the COVID-19 pandemic, which had killed
23,592 people in the city as of August 11.
Many of these arrests are made by officers
failing to wear masks and gloves and not
practicing ‘social distancing.’

On a Friday night in April 2020, police
arrested a child selling chips and candy at a
Harlem subway station, grabbing and restringing
him after he failed to obey commands to
stop. The arrest came hours after the allegedly
violent arrest, filmed by onlookers, of a man
who refused to leave a different subway station
when told to disburse.

“Government and businesses are drasti-
cally modifying practices to limit physical
contact, and yet that practice has not been
implemented by NYPD,” said the Legal Aid
Society, in a letter to Mayor Bill de Blasio and
Police Commissioner Dermot Shea.

“We are deeply concerned that our New
York City government officials have not modi-
fied or reassessed how the NYPD interacts
with already vulnerable communities,” it said.

“In every aspect of life, we are expected to act
responsibly in order to flatten the curve.... In
cities across our country, elected officials are
directing police to use discretion, make only
‘necessary contacts’ and to slow down arrests.
Mayor de Blasio has made no such similar
request of the NYPD.”

As pedestrian and vehicle traffic has been
dramatically reduced, so have arrests, but many
of those arrests are now over more minor, non-
violent offense and ‘quality of life’ violations,
like failure to follow social distancing rules.

Jennvime Wong, a staff attorney for
Legal Aid’s Cop Accountability Project told
The Intercept: “What we are concerned with
the most is that the NYPD is utilizing their
resources for low-level enforcement of quality
of life offenses rather than concentrating and
reallocating their resources to what should ac-
tually be a priority in this pandemic. Low-level
enforcement like a kid selling candy on a sub-
way car should not be a policing priority ever
and especially in the middle of a pandemic....
These are issues that could be better addressed
with community alternatives, with public
health alternatives, connecting somebody to
resources. It’s not something that is best
addressed with policing and criminalization.”

Legal Aid also noted: “The NYPD has
not changed its protocols even in light of this
rapidly spreading virus, where the infection
rate amongst NYPD personnel is eight times
that of New York City, and 10 times higher
than the rest of New York state.”

Wong continued: “It’s endemic of the
overall over reliance on police in American cul-
ture to solve all of our societal ills,” said Wong.

“And in this case, to try to police our way out
of this pandemic, which we just can’t.”

Source: theintercept.com

Report: Attorney Appointment a ‘Pay For
Play’ Arrangement in Texas County

by Kevin Bliss

G eorgetown Law professor Neel
Sukhatme and Texas Criminal Justice
Coalition lawyer Jay Jenkins conducted a
study of judges and their assignment of legal
representation to indigent defendants in Har-
riss County, Texas. They found it a “pay for
play” arrangement, which they said promotes
cronyism.

In the 1960s, the U.S. Supreme Court
ruled that all defendants have a constitutional
right to adequate representation in the case
Gideon v. Wainwright. Individual states were
left with the decision of how to implement
this new system, and most states allow judges
to appoint public defenders from a rotational
selection. But that system has not resulted in
as random a selection as anticipated.

Sukhatme studied more than 29,000 cases
in Harris County between 2005 and 2018. He
examined the relationships between assign-
ments, fees, and attorney bar records against
data on elections and campaign contributions.
The results showed that defense attorneys who
donated to the appointing judges’ campaigns
were assigned more cases and thus had higher
earnings than other attorneys.

“What we find is shocking,” said the
study, which appears in The Duke Law Journal.
“While donor and nondonor attorneys appear
similar in terms of their education and experi-
ence, on average, judges assign their donors
more than double the number of cases they
assign to nondonors.”

The system used in Harris County to as-
sign legal representation to indigent defendants
is the same as most other counties in the nation.
So, the study suggests that this abuse is more
widespread than in just this one county. It
identified that the increase in appointments for
attorneys only occurred with judges to whom
the attorney made campaign contributions. In
addition, these appointments cannot be based
on the exceptional talent of the attorney, as the
study shows that the clients of the donor attor-
neys on average were more likely to be convicted
and received longer sentences.

The study goes on to make suggestions to
circumvent this system, such as establishing
an independent public defender’s office where
judges do not make the appointments.

But whatever changes are made,
Sukhatme believes the current system is not
productive. “A system in which attorneys buy
cases from judges runs counter to the common
notions of legal ethics and justice,” the study
aptly concludes.

Source: nytimes.com
Hawai'i Supreme Court: Dog Sniff Unrelated to Initial Traffic Stop Requires Suppression of Evidence

by Dale Chappell

The Supreme Court of Hawai‘i held on June 9, 2020, that a dog sniff search based on reasons unrelated to the original purpose of a proper traffic stop was an unconstitutional search and vacated the judgment affirming a drug conviction.

When Cheri Numazawa called 911 to report her purse was stolen by Larry Ikimaka, Kauai Police (“KPD”) stopped Ikimaka’s truck, and he admitted he had the purse. He said he would give it back to her, and she didn’t want to press charges. Neither was formally arrested, and Numazawa left after KPD refused to return her purse, claiming the truck and everything in it was “evidence.” Because Ikimaka stuck around at the scene, KPD officers read him his right to remain silent, which he elected to do, even though he wasn’t under arrest.

A dog sniff hours later alerted to drugs in the truck, and KPD used this to obtain a search warrant for the truck and its contents. KPD found drugs and paraphernalia in the truck, and in the purse they found more drugs and money. Both Numazawa and Ikimaka were then arrested on various drug charges. They went to trial, and KPD officers testified that they requested a dog sniff of the truck because both Ikimaka and Numazawa were well known as drug users. The prosecutor also got a KPD officer on the stand to testify that Ikimaka’s attempts to cut the purse and take an arrest for that offense proved his intent to possess the drugs in the truck. The prosecutor asked a KPD officer on the stand, “As a police officer, would you say that Larry Ikimaka had intent to possess drugs, had knowledge of the drugs, if he stated ‘Just arrest me and don’t take my truck?’” The officer responded, “Yes.”

Such testimony, the Court said, “expressed a legal conclusion” by the officer. The statute requires that the State to prove that Ikimaka had “knowingly” possessed the drugs. The officer’s testimony “told the jury what result to reach” and was “imbued with an aura of expertise,” the Court concluded.

Accordingly, the Hawai‘i Supreme Court vacated the decision affirming Ikimaka’s conviction and remanded to the trial court. See: State v. Ikimaka, 465 P.3d 654 (Haw. 2020).

Hawai‘i Supreme Court Announces Trial Courts Have Duty to Obtain Knowing and Voluntary Waiver of Penal-Responsibility Defense

by Douglas Ankney

The Supreme Court of Hawai‘i announced that, going forward, trial courts have a duty to obtain a knowing and voluntary waiver of the penal-responsibility defense.

In June 2014, Michael Glenn was charged with Terroristic Threatening in the First Degree. Upon motion of defense counsel, the circuit court appointed three doctors to evaluate Glenn to determine his fitness to proceed and his penal responsibility. Two of the three doctors found him unfit to proceed and opined that at the time of the offense his mental illness prevented him from being penally responsible. (In Hawai‘i, lack of penal responsibility means a person either lacks the capacity to appreciate the wrongfulness of the person’s conduct or to conform the person’s conduct to the requirements of law. Hawai‘i Revised Statutes (“HRS”) § 704-400.)

At a subsequent fitness hearing in October 2014, defense counsel informed the circuit court that Glenn himself did not believe he had a mental illness, and he disagreed with the conclusion that he was unfit to proceed. Glenn also stated he did not want to assert a defense based on lack of penal responsibility. Nevertheless, the circuit court found him unfit to proceed and committed Glenn to the Hawai‘i State Hospital (“HSH”). The doctors’ subsequent reevaluations were substantially similar. But in September 2015, HSH informed the circuit court that Glenn...
had the capacity to assist his attorney, knew his charge, the available pleas and possible penalties, and the roles of various courtroom personnel. At a subsequent fitness hearing, on Glenn’s request, the circuit court found him fit and set a trial date.

At Glenn’s trial, he presented a defense of self-defense. None of the doctors who evaluated him testified. The defense neither proposed an instruction on lack of penal responsibility nor objected to its omission. The jury found him guilty, and he was sentenced to five years in prison.

On appeal to the Intermediate Court of Appeals (“ICA”), Glenn argued, inter alia, that the circuit court erred in its failure to either secure from him a waiver of the insanity defense or to sua sponte require the jury to consider it. The ICA affirmed the judgment, explaining that although HRS § 704-408 provides that if a mental health examiner’s report states the defendant was affected by a mental disease then the court shall submit the defense of mental disease to the jury; the statute had to be interpreted in pari materia (rule of statutory construction that dictates laws on the same subject matter be construed with reference to each other) with HRS §§ 704-402 and 701-115. When read in pari materia, § 704-408 requires the trial court to obtain a waiver or instruct the jury on the insanity defense only when evidence of the mental disease was presented to the jury. Because no evidence supporting a penal-responsibility defense was presented to Glenn’s jury, the circuit court was neither required to obtain a waiver from Glenn nor sua sponte instruct the jury to consider whether Glenn lacked penal responsibility.

The Hawai‘i Supreme Court granted Glenn’s application for writ of certiorari.

The Court explained that a defendant has a fundamental right under the Hawai‘i Constitution to present a complete defense, State v. Matsumoto, 452 P.3d 310 (Haw. 2019), and this right includes the right to assert lack of penal responsibility as a defense. The Court has long recognized the vital importance of ensuring defendants know and understand their rights before waiving them. Tachibana v. State, 900 P.2d 1293 (Haw. 1995). A colloquy between the trial court and the defendant is the best way to ensure that a defendant’s rights are protected. State v. Murray, 169 P.3d 955 (Haw. 2007). For that reason, the Hawai‘i Supreme Court requires trial courts to engage in on-the-record colloquies with criminal defendants to ensure the knowing, intelligent, and voluntary waiver of numerous trial rights. (See opinion for listing of rights and citations in support.) The Court concluded and announced it would require a colloquy with respect to the right to present a penal-responsibility defense.

The colloquy is required if the defendant files notice that the defendant intends to rely on the defense of physical or mental disease, disorder, or defect excluding penal responsibility or if there is reason to believe this will become an issue in the case. HRS § 704-407.5(1). The colloquy is to take place no later than the court’s pretrial advisement that the defendant has a right to testify. Tachibana.

As to the content of the advisement, the Court adopted the approach taken in State v. Gorby, 145 A.3d 146 (N.J. 2016), i.e., the trial court should explain the nature and purpose of the defense, describe the evidence used to support or counter the defense, explain the sentencing exposure upon conviction, and explain the potential dispositions if acquitted by reason of insanity.

At the conclusion of the advisement, the trial court should make a finding on the record whether the defendant’s decision not to rely on the penal responsibility defense was knowing, intelligent, and voluntary. The court must accept the defendant’s decision. Gorthy.

Because the Supreme Court adopted the colloquy requirement by exercising its supervisory powers to adopt new procedural requirements to prevent error in the trial courts, the rule applies only prospectively to cases commencing after the date of the decision, viz., June 30, 2020. Tachibana.

Accordingly, the decision did not apply to Glenn, so the Court affirmed the judgment of the ICA. See: State v. Glenn, 2020 Haw. LEXIS 199 (2020).

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**Colorado Supreme Court Announces Framework for Distinguishing True Threat From Protected Speech Communicated Online**

*by Douglas Ankney*

_The Supreme Court of Colorado announced the framework for distinguishing a true threat from constitutionally protected speech._

A few days after a shooting at Arapahoe High School, students from Littleton High School ("LHS") got into an argument on Twitter with students from Thomas Jefferson High School ("TJHS").

R.D., an LHS student, posted messages to J.W. and A.C., stating he would come to TJHS and kill A.C. and referred to A.C. as a "bitch" who would be "catching a bullet." Along with his statements, R.D. posted a photograph of a handgun lying beside approximately 50 cartridges of ammunition.

Based on these tweets, the People filed a petition in delinquency charging R.D. with harassment under Colorado Revised Statute ("C.R.S.") § 18-9-111(1)(e) (2013). R.D. moved to dismiss the charge on the ground that his statements were protected by the First Amendment of the U.S. Constitution and article II, § 10 of the Colorado Constitution.

The trial court denied R.D.’s motion to dismiss, finding that the tweets were a "type of speech not protected under the First Amendment." At the ensuing bench trial, the juvenile court adjudicated R.D. delinquent in violation of § 18-9-111(1)(e). R.D. appealed, arguing that application of the statute to his speech on Twitter violated the First Amendment. The court of appeals agreed with R.D. and reversed. The Colorado Supreme Court granted the People’s petition for certiorari.

The Court observed that the First Amendment prohibits Congress from passing laws that abridge freedom of speech. However, there are well-defined, narrowly limited categories of unprotected speech that may be regulated and punished without offending the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). One such category is a "true threat." Watts v. United States, 394 U.S. 705 (1969). The U.S. Supreme Court defined “true threat” as “those statements where the speaker means to communicate a serious threat.” Virginia v. Black, 538 U.S. 343 (2003).

States may regulate speech that constitutes a true threat without violating the First Amendment. _Id._ But there was a split among the U.S. Circuit Courts of Appeals as to interpretation of the definition, with some holding that a true threat requires only proof that the person intended to make the statement that a reasonable person would interpret as a threat, but other jurisdictions interpreted it
to mean that the person must have intended to communicate a threat. Compare United States v. Clemens, 738 F.3d 1 (1st Cir. 2013), with United States v. Heineman, 767 F.3d 970 (10th Cir. 2014).

The Colorado Supreme Court sought to strike a balance between the two interpretations. To begin with, First Amendment problems must be examined in light of the circumstances. People v. Weeks, 591 P.2d 91 (Colo. 1979). Because words communicated online do not have the interpretive aid of body language and can travel around the globe where the words can have differing meanings, the Court held that “a true threat is a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence.”

The Court provided the following guidance: When the alleged threat is communicated online, courts should consider (1) the statement’s role in a broader exchange, (2) the medium or platform through which the statement was communicated and any distinctive features thereof, (3) whether the statement was made publicly, privately, anonymously, etc., (4) the relationship between the parties, and (5) the subjective reaction of the recipients. The Court explained that the foregoing factors “are not meant to constitute an exhaustive list.” Additionally, “the fact-finder has discretion to weigh each factor in the balance, and to decide whether a particular factor cuts for or against finding a true threat,” the Court instructed.

Courts should start with the words of the statement, along with any accompanying images or other cues to the words’ meaning as well as any specific, accurate details to heighten the threat’s credibility. Elonis v. United States, 135 S. Ct. 2001 (2015). But courts should also consider anything said or done to undermine the threat’s credibility. Watts v. United States. The Colorado Supreme Court cautioned that, while the recipients’ subjective reactions should be considered, it should not be dispositive because how a particular individual reacts to particular words would not give sufficient “breathing space” for freedom of speech. Chaplinsky.

The Court agreed with the parties that the People must “prove that R.D. had the subjective intent to threaten.” However, it cautioned, “We need not decide today whether the First Amendment requires that showing in every threats prosecution.” Accordingly, since the courts below did not have the benefit of the newly announced framework, the Court reversed the judgment of the court of appeals and remanded with instructions to return the case to juvenile court to “reconsider the adjudication applying this refined test.” See: People ex rel. R.D., 464 P3d 717 (Colo. 2020).

Tenth Circuit: Confession Involuntary Where FBI Agent Falsely Claimed to Be in Contact With Judge, and Defendant Could Shorten Sentence With Each Truthful Answer

by Douglas Ankney

The U.S. Court of Appeals for the Tenth Circuit held that Shane Thomas Young’s confession was involuntary because, under the totality of the circumstances, his capacity for self-determination was critically impaired.

As a sheriff’s deputy attempted to pull Young over, he drove his vehicle onto a nearby residential property, stopped his car, and fled on foot. The deputy pursued, tased, and arrested him. The deputy then retraced Young’s path and found a small headphone case containing four grams of a mixture containing methamphetamine.

Young was charged and released. Later that same day, officers returned to the area where Young had stopped his vehicle and found a black bag containing 93 grams of a mixture containing methamphetamine. That night, the deputy rearrested Young. He consented to an interview and admitted to the deputy that he had possessed the smaller amount of methamphetamine but denied the larger amount was his. He then cut off questioning and revoked his consent to speak.

Four days later, while he was still in jail, he was interrogated by FBI Special Agent Kent Brown and a state narcotics agent. The interrogation was videotaped. After Young waived his Miranda rights, Brown showed him a federal warrant. Young was visibly shocked. Brown told Young they would proceed from the “bad news” that he was facing federal charges to the “good news” that Brown was on Young’s side.

Brown had made false representations and promises of leniency that were “coercive in nature under the circumstances,” it also found Brown’s confession was not involuntary and denied the motion. Young pleaded guilty and was sentenced to 188 months in prison and five years of supervised release. He appealed.

The Tenth Circuit observed “convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand.” Rogers v. Richmond, 365 U.S. 534 (1961). Voluntariness is determined by the totality of the circumstances with no single factor being determinative. United States v. Lopez, 437 F.3d 1059 (10th Cir. 2006). The inquiry requires consideration of the characteristics of the accused and the details of the interrogation. United States v. Tolles, 297 F.3d 959 (10th Cir. 2002). Promises of leniency may render a confession involuntary. Clanton v. Cooper, 129 F.3d 1147 (10th Cir. 1997). Misrepresentations of the penalties a suspect is facing weighs in favor of concluding a confession is involuntary because courts are less likely to
tolerate misrepresentations of the law. Id. If the defendant’s will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993).

In the instant case, Brown falsely represented that he knew the federal judge who was handling Young’s case, and this misconduct was coercive, according to the Court. Worse, Brown told Young he could reduce the time he spent in prison by truthfully answering questions. The Court observed that is not how the federal system works, and that was an improper promise of leniency offered in exchange for cooperation. Additionally, Brown misrepresented the amount of time in prison Young was facing. While it was true that Young somewhat understood his rights and invoked them during his interview with the deputy, this single factor didn’t outweigh the coercive factors. Besides, Young had invoked his rights when he was only facing state charges and nothing from his conduct or background indicated he was familiar with the federal system.

Thus, the Court concluded that under the totality of the circumstances, “Young’s capacity for self-determination was critically impaired, rendering his confession involuntary.”

Accordingly, the Court reversed the decision of the district court, vacated the judgment, and remanded for proceedings consistent with the Court’s opinion. See: United States v. Young, 2020 U.S. App. LEXIS 24218 (10th Cir. 2020).

Minn. Supreme Court Announces Rule for Analyzing Out-of-State Convictions for Public Safety Registry Requirement Purposes

by Anthony Accurso

The Supreme Court of Minnesota reversed a Court of Appeals decision requiring a defendant to register as a predatory offender because proving the elements of the out-of-state conviction does not necessarily prove a violation of Minnesota law. Additionally, the Court announced rules for analyzing whether out-of-state convictions trigger registration requirements under Minn. Stat. § 243.166, subd. 1b(b).

Edward Martin was convicted of sexual battery under California Penal Code § 243.4(a) in 1992. He was required to register for life under Cal. Penal Code § 290(a)(2)(A). Martin moved to Minnesota in 2000, went to prison, and was released in 2005 after being notified of his requirement to register, which he disputed.

When he was homeless in 2016, he was told he had to check in weekly to the local police department to comply with his registration requirement. He failed to do so, was later arrested, and convicted at a bench trial of failing to register.

Martin was convicted under Minn. Stat. § 243.166, subd. 6(d)(1). On appeal, the State conceded this was in error because 6(d)(1) is a statute that requires two priors to trigger lifetime registration. The State then cited subd. 6(d)(3), which requires lifetime registration for persons convicted under other states’ statutes that are “similar to” any one of several Minnesota criminal sexual conduct statutes. The Court of Appeals affirmed his conviction, stating his California offense was “sufficiently similar to Minnesota’s fourth-degree criminal sexual conduct statute” under § 609.345, subd. 1(c).

On appeal to the Minnesota Supreme Court, the State acknowledged it erred because § 243.166, subd. 6(d)(3) only applies to people whose convictions occurred after August 1, 2000. The State instead relied on subd. 6(e), which requires offenders with out-of-state convictions to register in Minnesota for the length required by their state of conviction. This statute requires a person to register when “the person was convicted ... in another state for an offense that would be a violation of law described in paragraph (a) if committed in this state.”

The Minnesota Supreme Court agreed that the State was finally using the proper statute and stated that the phrase “would be a violation of law” countermands the ruling of the Court of Appeals’ analysis using the “similar to” standard from subd. 6(d)(3).

In determining whether an out-of-state conviction would be a violation of Minnesota law under § 243.166, subd. 1b(b)(1), the Court announced: “We will compare the elements of the out-of-state offense to the elements of the Minnesota offense. An out-of-state conviction would be a violation of a Minnesota offense requiring registration if proving the elements of the out-of-state offense would necessarily prove a violation of that Minnesota law. But if the elements of the out-of-state offense could be proven without proving a violation of Minnesota law, then the out-of-state conviction would not be a violation of a Minnesota offense requiring registration.”

In the present case, subd. 6(e) requires the Court to compare the elements of the offense as they were listed in the California statute in effect in 1992 with the version of the Minnesota statute that was in effect at the same time, the Court explained.

The Court said both statutes criminalize conduct that includes: (1) the “touching of similarly defined intimate parts,” (2) the nonconsensual nature of the touching, and (3) the sexual purpose of the touching. The comparison hinged on whether someone who “unlawfully restrained” a victim in California necessarily must have used the “force or coercion” required under the Minnesota law.

“Force” is defined in Minnesota Stat. § 609.341, subd. (11), to include the threat, attempt, or infliction of bodily harm “or commission or threat of any other crime” against the complainant. “Coercion” is defined in subd. 14 to include words that create fear of bodily harm, “confinement, or superior size or strength” that causes “complainant to submit to sexual ... contact.”

In People v. Arnold, 6 Cal. App. 4th 18 (1992), the defendant was convicted for pulling the victim toward him “by the buttocks,” which was not restraint and did not cause bodily harm. Neither did this require superior size or strength. This conviction did not require even the threat of bodily harm. The Court cited two more similar California cases to illustrate that “unlawful restraint” under California’s statute had been so broadly defined by California courts as to not require the “force or coercion” necessary for conviction in Minnesota.

Thus, the Court held that Martin’s 1992 California conviction for sexual battery was insufficient to trigger registration in Minnesota because it did not match the Minnesota statute element for element.

Accordingly, the Court reversed his conviction. See: State v. Martin, 941 N.W.2d 119 (Minn. 2020).
Kentucky Supreme Court: Trial Court’s Ex Parte Discussion With Juror About Offered Bribe Was Structural Error

by Douglas Ankney

The Supreme Court of Kentucky held that a trial court’s ex parte discussion with a juror who was offered a bribe was a structural error because it denied Steven Dale Eversole his right to an impartial jury.

Eversole was tried by jury on charges of first-degree fleeing or evading, first-degree wanton endangerment, reckless driving, and being a first-degree persistent felony offender. During a lunch break, Juror #262 (“Juror”) reported an incident of attempted bribery to the bailiff. The bailiff informed the judge, who in turn called the Juror to the bench. Eversole wasn’t yet present in the courtroom. Even though defense counsel and the Commonwealth were present, neither party was called to the bench or made aware of the conversation.

At the bench, the Juror told the judge that an elderly man with a beard “offered me $50 to change my jury selection.” During the colloquy, the judge learned that the man offering the bribe did not refer to any particular case or request a vote of “guilty” or “not guilty.” The judge praised the Juror for reporting the incident, which the Juror remained on the jury, which found Eversole guilty on all counts.

Eversole appealed to the Kentucky Supreme Court. Among his appellate issues, Eversole argued that he was deprived of counsel at a critical stage of the trial. The Supreme Court recognized that the error was unpreserved but observed “it is clear from the record that the Commonwealth, defense counsel, and Eversole were never made aware of the information provided by the [Juror]. Without that information, we would not expect to find a timely objection to the attempted bribery. Counsel was not afforded an opportunity to examine the Juror to determine if the Juror believed Eversole was responsible for the attempted bribery or to determine if the Juror felt harassed or had been prejudiced by the incident in some other manner. The trial court did not admonish the Juror to disregard the incident or to give it no consideration during deliberations. Nor did the trial court instruct the Juror not to discuss the incident with other jurors. The record did not reveal the impact the attempted bribery may have had on the Juror or other jurors.

Because the trial court neither informed defense counsel of the attempted bribery nor of the ex parte discussion that followed, the Court held that Eversole was denied representation at a critical stage of the trial. The error was structural because it denied Eversole his right to an impartial jury.

Accordingly, the Court reversed Eversole’s conviction, vacated his sentence, and remanded to the trial court for further proceedings consistent with the opinion. See: Eversole v. Commonwealth, 600 S.W.3d 209 (Ky. 2020).

Seventh Circuit Holds First Step Act Applies to All Crack Offenses ‘As a Whole,’ Regardless of Crack Amounts

by Dale Chappell

The U.S. Court of Appeals for the Seventh Circuit held on April 28, 2020, that eligibility under the First Step Act’s retroactive application of the Fair Sentencing Act (“FSA”) applies to all crack-cocaine offenses “as a whole,” regardless of the amount of crack involved in the offense.

The decision came after four different First Step Act motions in the U.S. District Court for the Central District of Illinois were all denied because the court there found that the amount of crack involved in each case rendered the movant ineligible for relief. Consolidating the cases for appeal, the Seventh Circuit concluded that each movant qualifies for relief since the FSA changed the statutory penalties for crack offenses, without regard to the facts of the case.

Under the FSA, Congress significantly increased the amount of crack needed to trigger the statutory penalties under 21 U.S.C. § 841(b)(1). Prior to the FSA, a first offense involving more than 5 grams of crack required a minimum five-year prison sentence, and more than 50 grams required at least 10 years. The FSA bumped up those crack amounts to 28 grams and 280 grams, respectively.

But the FSA applies only to persons sentenced after August 3, 2010, leaving those sentenced before that ineligible for relief.
eight years later, however, Congress corrected this unfair result by applying the FSAs statutory changes to every "covered offense" under the FSA committed before August 3, by enacting the First Step Act. So, what is a "covered offense?" That's the question the Seventh Circuit set out to answer.

The First Step Act defines "covered offense" as "a violation of a federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." (Section 2 changed the crack amounts, and section 3 eliminated the mandatory minimum for simple possession of crack.) The dispute was whether the mandatory minimum for simple possession of crack was required by the act.

The Seventh Circuit later rejected that argument for a fact-specific inquiry turned into a "complicated" matter.

The Court noted that it has another important question coming before it in upcoming cases:

Accordingly, the Seventh Circuit reversed all four district court orders denying First Step Act relief and remanded. See: United States v. Shaw, 957 F.3d 734 (7th Cir. 2020).

**Writer's note:** In the event you want to file your appeal in light of this decision or the ones coming up that the Seventh Circuit mentioned in this case, be aware that a § 3582 motion is a criminal motion, and the deadline for a notice of appeal in a criminal case is only 14 days—not 60 days as with civil cases, such as 28 U.S.C. § 2255 motions. See FRAP 4(b).

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**Ban the Box not Applicable to COVID-19 Stimulus Aid**

*by Ed Lyon*

It is no secret that the inability to gain employment by prisoners who have either finished their sentences or been released from prison to parole is a major factor in recidivism. Returning to crime in order just to survive is a fact of life for many, as Johnny Cash once quipped to a convict audience at California’s Folsom Prison “a man’s gotta get somethin’ to eat some way!” Although this was meant as a joke, it is nonetheless a sad truth.

This built-in impediment to employment for former prisoners has been eased somewhat over the past few years by a movement called Ban the Box. The "box" is the one on employment applications asking about an applicant’s criminal history. However, revelations from a 2011 study found that many prospective employers skirt the banned box by simply barring former prisoners from applying for a job. A full third of able-bodied, unemployed men in the prime of their lives have a criminal record; that’s a lot of people potentially frozen out of the job market.

That number of unemployed former prisoners would likely be a lot higher were it not for the inner drive and entrepreneurial spirit of many of them who create employment for themselves and others by starting small businesses.

The Texas prison system actually hosts an in-house intensive study program called the Prison Entrepreneurship Program at its Kyle unit. It teaches "out of the box" thinking and mentors help released prisoners as they begin their own small businesses.

Recently, COVID-19 and the U.S. Small Business Administration ("SBA") have managed to do what the banned-box sidesteppers have not been able to do to these intrepid entrepreneurial former prisoners. They are putting them out of business.

When Congress passed the $2 trillion CARES economic stimulus act, it made no provisions to deny eligibility for Paycheck Protection Plan ("PPP") small business loans to businesses owned by former prisoners. Nevertheless, the SBA took it upon itself to add a limiting provision that effectively excludes these types of businesses from eligibility for PPP loans.

KB Brown began a promotional advertising business after leaving prison. He worked hard, hired other hard workers, and his business steadily expanded. His business has fallen due to COVID-19. He was prevented from obtaining a PPP loan by the SBA and furloughed his employees. "There’s a chance that Wolfpack Promotions will never reopen," he lamented.

Courtney Stewart is a former prisoner who runs his own nonprofit organization. His mission is to counsel, mentor, and help newly released prisoners reentering society. Since the COVID-19 pandemic began, Stewart has had to lay off two of his employees and reduce hours for the others. In a bitter paradox, Stewart’s National Reentry Network for Returning Citizens is now needed more than ever as more and more jurisdictions are releasing more and more prisoners because of the same COVID-19 pandemic.

Source: theintercept.com
Six Eyewitnesses Misidentified a Murderer – Here’s What Went Wrong In The Lineup

by Laura Smalarz, Assistant Professor of Psychology, Arizona State University, The Conversation, July 4, 2020

On the strength of six eyewitnesses’ lineup identifications, Lydell Grant was sentenced to life in prison in 2012 for the murder of a young Texas man, Aaron Scheerhoorn, who was stabbed to death outside a Houston nightclub in 2010.

All six of those eyewitnesses were wrong.

New DNA testing on biological material collected from underneath the victim’s fingernails cleared Grant and implicated another man, Jermarico Carter, who police said confessed to the killing. Carter has now been indicted for the murder by a grand jury, and Lydell Grant was released from prison. But his name has not been cleared.

Faith in eyewitnesses runs so deep that despite the overwhelming proof of Grant’s innocence, the Texas Court of Criminal Appeals refused his exoneration request. Instead, the court wants the six eyewitnesses who originally testified against Grant to respond to his claims of innocence.

It’s a fact that eyewitnesses make mistakes. There have been hundreds of cases in which mistaken eyewitness identification testimony led to the conviction of innocent people.

The puzzling question in this case, though, is why did six eyewitnesses independently identify Lydell Grant as the killer and then confidently testify in court?

One might assume that Grant was the murderer’s unlucky doppelganger. But a comparison of the pair’s mugshots reveals that they bear little physical resemblance to one another beyond both being Black men.

As an experimental psychologist who conducts research on eyewitness identification, I’ve seen hundreds of examples of highly confident yet mistaken eyewitnesses — both in the laboratory and in actual court cases. My review of the transcripts from Grant’s trial suggests a simple explanation for these high-confidence mistakes: The police did not use scientific best practices for collecting the eyewitness identification evidence.

**Conducting a lineup with the suspect in mind**

**Scientific best practices for conducting eyewitness lineups** require that the person administering the lineup not know who the police suspect. Just as double-blind clinical trials in medical studies are intended to prevent patients’ and doctors’ expectations from affecting outcomes of the clinical trial, double-blind lineups aim to prevent witnesses’ and administrators’ expectations from influencing the outcomes of the identification procedure.

The transcript from Lydell Grant’s trial revealed that the homicide detective in charge of investigating the case administered the lineup to the eyewitnesses. Of course, he knew that Lydell Grant was the one under suspicion.

Psychological experiments have shown that lineup administrators who know who the suspect is end up cuing witnesses toward that person. Compared to administrators conducting double-blind lineups, these informed administrators are more likely to ask witnesses about the suspect and smile when witnesses are looking at the suspect rather than at another person in the lineup.

Such behaviors are often inadvertent; neither lineup administrators nor eyewitnesses may be consciously aware that they’re happening. Nevertheless, these subtle behavioral cues affect eyewitnesses’ decisions by making them more likely to choose the suspect.

But if the six eyewitnesses chose Lydell Grant from the lineup only because they were cued to do so by the case detective, why were they so confident in their identifications? According to the trial transcript, most of the eyewitnesses testified to having been positive when they picked Grant out of the lineup. One reported that he had identified Grant without doubt or hesitation. Another stated that the killer’s face was “burned into [her] memory immediately.”

**Reinforcing what eyewitnesses remember**

The witnesses’ trial testimony reveals a simple explanation for these high-confidence errors: All of the eyewitnesses received confirmatory feedback following their identification of Grant.

Three of the eyewitnesses reported that the detective told them that they had picked the same person other people had, though the detective himself denied having made such statements. Two other eyewitnesses, a couple, remembered discussing their selection with one another and confirming each other’s decisions. One eyewitness couldn’t recall whether the detective had told him anything after he identified Grant, but the detective acknowledged telling that particular eyewitness “good job” following the identification. The detective also admitted making a similar comment to at least one other witness.

Research has repeatedly demonstrated that simple confirming comments such as these have dramatic effects on eyewitnesses’ testimony. Not only do such statements inflate eyewitnesses’ confidence in the accuracy of their identification, but they lead them to falsely remember having been that confident all along.

As a result, witnesses who have received confirmatory feedback provide testimony that is highly persuasive to jurors.

In one study, people playing the role of jurors were able to reliably distinguish between accurate and mistaken eyewitnesses when the witnesses had not received any confirmatory feedback.

But when the witnesses had received a simple reinforcing comment following their identification (“Good job, you got the guy”), the mock jurors could no longer tell the difference between accurate and mistaken eyewitnesses. In other words, the confirmatory remark made the mistaken eyewitnesses just as persuasive as the accurate ones.

Witnesses aren’t able to tell whether their testimony was influenced in this way. Moreover, confirmatory feedback can alter witnesses’ memories of the original crime, making them less able to recognize the actual perpetrator when they see him again. So, there is little to be gained from speaking to the original eyewitnesses from Lydell Grant’s case.

**How to run less biased lineups**

The processes at play in Lydell Grant’s case are predictable and unfortunately common. The way to avoid these problems with eyewitness testimony is for police to adopt best practices based on the psychological research.

In addition to implementing double-blind lineup procedures, it’s essential that
The Lunacy of Qualified Immunity

by Ed Lyon

The entire premise underlying punishment is that the person being punished knew what they did was wrong before they acted but did the action anyway. If the person lacked the requisite knowledge of right and wrong, then they may not legitimately be punished for having committed the act.

The legal doctrine of qualified immunity is a legalized adoption of this tenet as applied to public servants who commit a wrongful act during their official duties.

They are shielded from civil liability unless the plaintiff can prove the official had no notice that the act they were performing violated one or more constitutional rights that had been clearly established as a violation by a court, statute, law or policy adopted by their employing agency.

Basic moral societal behavior should be taught to all people beginning at a young age, starting with parents and reinforced by schoolteachers. These are things such as not stealing property from others and not lying. These are societal norms that should not have to be deemed wrong in specific circumstances by courts, legislatures or employing agencies, yet they are anyway.

A good example of qualified immunity lunacy involved two Fresno, California, police officers executing a search warrant in 2013.

During the search, they allegedly stole over $225,000 worth of items from the property they were searching. The owners were legally estopped from suing them in a unanimous 9th Circuit U.S. Circuit Appeal Court panel that ruled “the officers did not have clear notice that it [the theft] violated the [Constitution’s] Fourth Amendment.”

Another example is Georgia sheriff’s deputy Matthew Vickers. He was pursuing a fleeing suspect in 2014 when he stopped to shoot a pit bull named Bruce, who was not threatening anyone. Vickers missed the dog but hit a 10-year-old boy who still requires care from a surgeon. The child’s parents were legally estopped from suing Vickers under the qualified immunity doctrine. While acknowledging the innocent child Vickers shot has “suffered severe pain and mental trauma” the court shielded Vickers.

The boy’s mother Amy “Corbitt failed to present us with any materially similar case from the United States Supreme Court, this Court or the Supreme Court of Georgia that would have given Vickers fair warning that his particular conduct violated the [Constitution’s] Fourth Amendment,” opined the panel.

It appears that a qualified immunity defense trumps common sense every time a cop pulls some dangerous stunt, like shooting an innocent child, for instance.

Source: reason.com

Tear Gas: Soldiers Prohibited From Using It in Warfare but Cops Using It Against Peaceful Protesters

by Douglas Ankney

Tear gas is a chemical weapon banned by numerous international treaties from use in warfare. But as the images on the nightly news show us, police have used it indiscriminately on crowds of peaceful protesters.

A main chemical in tear gas is 2-chlorobenzylidene malonitrile, or “CS.” CS is a powder that is aerosolized when the canister or grenade containing it is discharged.

A 2016 scientific review revealed that the effects of CS can be redness, itching, rashes, and oozing blisters. When inhaled, CS causes coughing fits, choking, and chest tightness. In the eyes, CS can cause bleeding, tearing of the corneas, and possible traumatic nerve damage. The Centers for Disease Control and Prevention report that tear gas may cause “immediate death” from severe burns to the throat and lungs.

Security specialist Dan Kaszeta, who has written about tear gas in Nature and elsewhere, said in an email, “Tear gas is often used without proper care for consequences of employment. Many of the uses seen in previous days are problematic. Tear gas is originally meant to disperse crowds but many crowds have legal rights of assembly.”

Even though police training manuals warn against using it in confined spaces, a Washington, D.C. man reported that police shot tear gas into his home after he invited protesters inside who were being pepper-sprayed by police. And the tear gas canisters cause severe injuries.

Balin Brake, a 21-year-old part-time video editor, lost one eye during a demonstration in Indiana where police fired a canister. (Police claim it was unintentional.)

Members of the media in Minneapolis told of police firing tear gas at close range. Compounding the severity of the issue is the current COVID-19 pandemic. An infected person exposed to tear gas is naturally, perhaps reflexively, going to remove any protective mask while coughing or choking. This will spread droplets of bodily fluid containing the disease. And while not yet confirmed by research, it is suspected that mouths, throats, and lungs inflamed from exposure to tear gas are more susceptible to contracting COVID-19.

The widespread use of tear gas by police across the country against peaceful protesters is but one more example of the systemic police brutality being protested.
I Cover Cops as an Investigative Reporter. Here Are Five Ways You Can Start Holding Your Department Accountable.

Police culture can be insular and tough to penetrate, but the public can hold law enforcement accountable. Here are important methods and context you need to know.

by Andrew Ford, Asbury Park Press

The death of George Floyd at the hands of police in Minneapolis has drawn historic levels of interest in police misconduct and drawn condemnation from law enforcement leaders nationwide.

As a reporter covering law enforcement for the Asbury Park Press in New Jersey, and now in partnership with ProPublica's Local Reporting Network, I use investigative reporting techniques to strengthen police accountability. Other journalists do the same. But, in truth, any citizen can apply the same methods to ensure the law enforcement system they're funding is serving them well.

Police culture can be insular and tough to penetrate. But I've been surprised by how often it's possible, though time consuming, to expose important issues by requesting and examining records and data from police departments and other government agencies and engaging citizens and key leaders. So here are five techniques concerned citizens, journalists and policymakers can use to examine police conduct in their communities.

1. Understand the policies and laws that govern police conduct.

If you're alarmed by what you saw in Minneapolis, or other recent incidents of apparent police misconduct, the first step is to find out if the agency in question has a written policy on the use of force. Does the policy dictate when officers should or shouldn't use force? What tactics are they allowed to use? Is there any rule against choking a suspect?

It's important to know if the officers involved were following the policies and procedures that are supposed to guide their behavior. Police actions that strike an onlooker as inappropriate may actually be within a department's rules. It's possible the rules themselves are inconsistent with best practices elsewhere.

Ask the department for its policies on the practices that concern you, like restraining suspects or the use of pepper spray or Tasers. You may also need to request rules set by a county or state authority. Ask for written copies. You may be required to file a formal public records request, which I will describe below. And if there is no existing written policy, that might be something worth questioning itself.

If you're having trouble understanding a policy, try running it by an attorney, academic, elected official or a journalist in your community.

How I did it: I did a deep dive into policies about drug testing after a police captain was killed in a car crash in 2016, and I exposed that he was drunk and on drugs at the time. I spoke to his chief and learned their department didn't have a policy for random drug testing. I wondered why that was the case and looked to the state attorney general's office, which sets many police rules. The rules allowed departments to choose whether they wanted to do random testing, and my reporting identified more than 100 that did not. After our story, the state attorney general mandated random drug testing for cops across the state.

2. You are entitled to public records that can show whether rules are being followed. Get them.

Your tax dollars pay for just about everything a police department does, which includes generating tons of reports, dispatch logs, video recordings and data about what officers do every day. Any citizen is entitled to see those public records to understand how the government works.

The agency may say the public records law does not allow you to have access to some documents — information about confidential informants and medical records, for example. The laws that dictate what's considered public vary by state, so check out the national guide by the Reporters Committee for Freedom of the Press. Information the agency considers off limits may also be redacted, and it may take time to get a response.

Even with the hassles and limitations, public records laws are empowering and I've been surprised by how much I can obtain. My policy is always to ask and make a records clerk explain why I can't have taxpayer-funded records. Follow up to ensure important requests aren't lost or ignored. Assume you should be able to see everything. Your state's public records law may even include a presumption that records are open and exemptions are an exception. You may run into roadblocks that you can't overcome on your own. In some cases, journalism organizations have had to sue to obtain public records. Your budget may not allow for an attorney, but some states have mediators that you can go to if you think your request is being wrongly denied.

It's striking how much information the government collects but then does not review. So you might be the first person to ask for a particular body of records and put them together to identify an important trend which you can share with leaders who weren't paying attention to the issue. Your local journalists may also be very interested in the information you have gathered.

Sometimes it's hard to even know which records exist. That's where documents commonly known as records retention schedules come in handy. Government agencies use these to track which records they keep and how long they hold onto them. Use the schedules to help you see what you might be able to obtain. These are available all over the country. Just for fun, I looked up the city of Los Angeles — they call them records disposition schedules and found them for agencies ranging from the Police Department to the zoo. The agency of interest to you might use a different name for the document, so call them and ask if they have a written guide that shows which records they maintain and for how long.

How I did it: I started investigating police car chases after I saw the government keeps summaries of those incidents, including how many people are arrested or injured. I saw I could add up those figures and see if the benefits of the chases outweighed the risks and harm. I discovered that chases in recent years usually didn't end with an arrest, and that lots of people get hurt, including cops...
and bystanders.

If you’re interested in scrutinizing the type of misconduct we saw in Minneapolis, you could request use of force reports. New Jersey made those public a few years ago, and Newark Star-Ledger journalists used them to great effect. ProPublica has that data available here for a fee.

If I were investigating a case of violence by the police I’d ask for:
- The use of force reports filed by the officers involved.
- Related incident reports.
- Computer-assisted dispatch reports.
- 911 phone call recordings.
- Body-worn and vehicle-mounted camera recordings.

I might also request policies that dictate how an agency handles complaints against officers. Some states consider substantiated complaints against individual officers to be public records, so you could request them, depending on where you live. WNYC has a helpful breakdown of where that information is public. If you’re looking for video from police body cameras, the Reporters Committee has a guide that shows the places where those are considered public. If you want to obtain recordings of 911 calls, they have a guide for those, too.

You could also be more general and ask the relevant department for substantiated internal affairs complaints alleging excessive force in the past year or so, if those are public in your state. Departments might keep summary data on internal affairs complaints, so ask for the most recent copy of that, too.

3. Identify the power players and engage them.

Engaging law enforcement leaders is essential to understanding policing, and their involvement is key to fixing problems. My access and experience as a white man who works for a news organization may be different than someone else’s experience. It also depends on who you talk to and their openness to criticism. But I think we stand the best chance of a good outcome if we deal with each other respectfully.

Many policing issues are handled at the local, county or state level. Part of your work will involve figuring out who is responsible for the issue you’re concerned about.

“All policing is local,” former Milwaukee police Chief Edward A. Flynn told me. Like many cities, Milwaukee is also experiencing unrest and criticism of the police. Flynn, a well-known law enforcement leader, encouraged conversations between citizens and cops, possibly aided by a neutral third party like a local faith leader.

“The key to changing policing is on the ground level,” he said. He added that it helps for citizens to praise the good work they see from their officers. He encouraged the public to consider crime statistics when scrutinizing police tactics.

I have found that the police themselves are often open to talking to me about the problems in their profession. Many I have talked to feel bad when things go wrong.

How I did it: I’ve been amazed at who is willing to talk to me when I simply take the time to ask. As part of my investigation into police car chases, I talked to a former cop who lost her police officer husband when his vehicle was struck during a high-speed pursuit. I was touched by the way she took hours from her busy life to tell me some of her most painful memories and share her insights as a former cop.

I took my findings to the attorney general, the state’s largest police union and to lawmakers who vouched action. “It appears to me there’s a lot more harm done than good right now,” one of them said about the high-speed incidents.

“If the community has an issue either positive or negative with their law enforcement, then they should definitely have a conversation with the mayor, council and police chief,” said New Jersey Assemblyman Gordon Johnson, a former cop who has participated in community discussion about police issues.

Contact information for law enforcement leaders is often available online. They may regularly attend meetings that are open to the public.

4. Presenting findings in a fair and persuasive manner is a powerful way to spur reform.

Show police leaders the problem that concerns you, using specific examples and quantifying the damage broadly. Show them the harm. Be careful to be fair. Frame the violations by showing how they go against policies or laws or best practices. Back up what you’re saying with the evidence you’ve acquired.

How I did it: To highlight the dangers of police car chases, I introduced readers to Eric Larson, a young father killed when his car was hit by a motorcyclist fleeing police. Then I quantified the harm based on the records I had obtained: “New Jersey police pursuits killed at least 55 people in the past decade and injured more than 2,500.”

Remember that there’s always a different view to your perspective. Integrate it into your presentation if it is legitimate. Acknowledging the counterpoints helps you focus and ask tougher questions. In the car chase story, I made sure to also note incidents in which police chased a suspected killer and men wanted in connection to a shooting. Sometimes police chase violent criminals, but is it worthwhile for cops to chase someone for a traffic violation?

Policing is tough work, and there are times when cops use justified force. Differentiate how the issue you identified deviates from what’s appropriate.

5. Follow up relentlessly until change is made.

Change is incremental and can take years. You will likely have to repeat yourself and persist in your efforts. But if you’ve found an issue of serious public importance — like the use of force incidents we’ve seen lately from the police — there may be ongoing examples you can point to as you make your case to decision-makers.

It may be worthwhile to reach out to local journalists with what you’ve found. News outlets often have a tip line you can call. Or, find a reporter who covers similar issues and call or email them with what you’ve found. I take calls like this frequently and look forward to them. Academics who study criminal justice may also be interested. You can look them up at your local college or university. When reaching out to reporters or academics, keep it brief and focus on the facts.

The wave of protests is hitting home for many people, including in my newsroom in New Jersey. On Monday, police arrested my Asbury Park Press colleague Gustavo Martínez Contreras after he filmed officers tackling two minors to the ground in Asbury Park.

I’m continuing to investigate police accountability problems in New Jersey this year in partnership with ProPublica’s Local Reporting Network. If you have a tip for me, please share it. If you have questions about applying the suggestions in this column, please email me at aford3@gannettnj.com. And if you find anything interesting as you start to investigate law enforcement practices, please let me know.

This article by Andrew Ford, Ashbury Park Press, was published June 4, 2020, by ProPublica (propublica.org); reprinted with permission. Copyright, 2020 Pro Publica Inc.
**Problems With Predictive Policing**

by Jayson Hawkins

Phillip K. Dick made the concept of “pre-crime” famous in his novel *Minority Report*, which described a future where people with “pre-cognitive” abilities could predict a crime and those predictions were used to arrest and convict “offenders.”

Without the luxury of pre-cognitive abilities, modern police agencies have come to rely on a suite of surveillance and data-crunching techniques called “predictive policing.” Predictive policing is a process whereby algorithms attempt to predict instances of crime, as well as victims and offenders, based on previous data.

While in theory this process could possibly enhance public safety, in practice it creates or worsens far more problems than it solves. Critics of predictive policing assert that problems with bad data, institutional biases in law enforcement, and a lack of transparency and public input undermine any effectiveness this new technique might bring to the table.

This criticism is not based on an instinctive distrust of law enforcement. AI Now Institute at NYU has studied predictive policing in 13 U.S. police jurisdictions that had recently been cited for illegal, corrupt, or biased practices. The study found that in nine of these jurisdictions, the predictive policing system produced outcomes that reflected the problems previously cited in that jurisdiction.

The most remarkable example was the Chicago Police Department (“CPD”), which has a long and well-documented history of corruption and bias that disproportionately affects people of color. These practices generated what AI Now called “dirty data,” that is, biased information fed into the system that in turn generated biased outcomes. In other words, instead of providing tools for more balanced and effective policing, the CPD system merely amplified existing prejudices and disguised them as neutral, data-driven intelligence.

Bad data and institutionalized biases were only two of the problems identified by AI Now. The third problem is the secrecy that customarily surrounds law enforcement practices and the development of proprietary, algorithm-based software. These twin barriers prevent public scrutiny of data or how it is used. The public is only aware of outcomes, and these only become public at the discretion of police agencies, if at all. Without oversight or public input, the incentive for critical assessment and reform is non-existent.

Though institutional scrutiny of predictive policing in the U.S. is conspicuously absent from public discourse, the European Parliament held hearings on the issue. Andrea Nill Sánchez, executive director of AI Now, delivered unambiguously critical testimony about current practices in the U.S. He warned that “left unchecked, the proliferation of predictive policing risks relocating and amplifying patterns of corrupt, illegal, and unethical conduct linked to the legacies of discrimination that plague law enforcement agencies around the globe.”

Sánchez recommended minimal assessments to help balance implementation of predictive policing. First, agencies must self-assess the system’s potential impact on fairness, justice, and bias. Second, there must be a meaningful external review process. Third, public notice and comment should be part of the ongoing process. Finally, enhanced due-process protections should be put in place to allow effective challenges to unfair, biased, or other harmful effects, especially regarding racial inequality.

The spectacular failure and corruption of the Pre-Crime Unit in *Minority Report* led to it being dismantled, and even though it is unlikely law enforcement will abandon predictive policing, public pressure to ensure it is fair and transparent can help mitigate the damage.

Source: techdirt.com

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**News in Brief**

**Arizona:** Mariah Valenzuela has filed legal notices against the city of Phoenix and Maricopa County over Phoenix police officer Michael McGillis’ use of force during a January 16, 2020 traffic stop, abc15.com reports. The officer, driving a white van, stopped Valenzuela for allegedly veering across the center line, then repeatedly demanded her ID but didn’t tell her why she’d been stopped. He allegedly forced her to the ground to handcuff her, then slammed her against her car, injuring her face and head, abc15.com and azcentral.com report. “Why don’t you act like a lady?” the officer asked. Said James Palestini, Valenzuela’s criminal defense attorney: “I was shocked. It was incredibly troubling to see a police officer that is supposed to protect the public to act the way he did — in such an aggressive manner.” Valenzuela was cleared of suspicion of DUI and the county attorney’s office told *The Guardian* that it was “dismissing the felony resisting charge,” citing review of bodycam video. Police said McGillis did not violate its use of force policy and that Valenzuela refused to cooperate.

**California:** Protesters marched in July 2020 to ask for justice in the death of Mely Corado, who was killed in a police shootout at Trader Joe’s in Silver Lake where she worked. Protesters asked that the LAPD be held accountable for her death. Corado was struck by a bullet while police were in pursuit of an armed suspect, a motorist, Gene Atkins. They fired inside and one of their bullets struck her. “Atkins is now facing charges for Mely’s murder, under the theory that he set off the chain of events that led to her death,” kcrw.com reports. Along the way, marchers stopped in the middle of main thoroughfares in Atwater Village and Silver Lake, many of them holding sunflowers, Corado’s favorite flower,” npr.org reports. The Corado family said it wants the two LAPD officers involved in the shooting to be charged.

**California:** A 49-year-old Visalia police officer has been arrested and charged with three misdemeanors: two counts of sexual battery and one count of battery, abc30.com reports July 23, 2020. “Scott Nelson, a veteran police officer, was placed on paid administrative leave [July 22] after being arrested on allegations he groped a woman multiple times at the Visalia Elks Lodge in 2019,” visaliatimesdelta.com reports. “Nelson was cited with a promise to appear in court later this fall. He won’t be booked behind bars. However, he won’t be patrolling the streets and could lose his job if convicted. He could also be forced to give up his guns for up to 10 years, if convicted.” The alleged groping took place at the lodge, but it took a year before charges were filed. Sexual assault advocate Bree “Mervin described the touching as ‘repeated’ and ‘unwanted.’” And “The woman told police she thought Nelson inappropriately touched her at least five times over a two hour period—at one point grabbing her breasts,” abc30.com reports. After the victim filed a complaint, she said Nelson began...
“harassing” the woman and referred to her as a “whore” to other lodge members, prompting her not to return.

California: San Diego deputy sheriff Aaron Russell, 23, was arrested and charged with second-degree murder under a “new law that sets tough standards around the use of deadly force by police,” washingtonpost.com reports in July 2020. And “[i]t’s the first time a San Diego officer has been charged with murder over an on-duty shooting, KNSD reported.” The 36-year-old victim, Nicholas Bils, suffered mental illness and had a lifelong fear of police. He had no weapon when he escaped from a park ranger vehicle in May 2020 and ran along a street, nytimes.com reports. The fatal shooting took place after an incident at a park. While putting golf balls, Bils was told by officers that his dog could not be off leash, plus the park itself was closed because of the pandemic. Bils allegedly swung a golf club at park rangers and ran. Once in the rangers’ car, he unlocked the door and fled. He was shot five times as he ran with his water bottle and lunch. “When a life is taken, we must make decisions based in facts and law, and not ones that are influenced by the status of the accused as a peace officer nor the status of the victim,” San Diego County District Attorney Summer Stephan said in a statement. The officer pleaded not guilty and was released on bail.

Delaware: A University of Delaware student has filed suit against a police officer who says she “humiliated her while arresting her in class” in September 2019, Delawareonline.com reports. The lawsuit says the student, then 19, “was purposefully plucked from her class, berated, humiliated and slammed against a wall to cause embarrassment — all over a potential underage drinking charge that was later dropped.” Named in the suit, which seeks money for damages and injuries and alleges “intentional infliction of emotional distress” are Newark, Delaware, police officer Morgan Fountain, the University of Delaware and Newark city government as defendants. The suit alleges the officer came up behind the plaintiff and her friend who were walking one night. She tried to stop the plaintiff and the friend who was on crutches. Although the teen ran, the officer “threatened to have her [friend] kicked out of school” if she didn’t divulge her friend’s identity, according to the lawsuit.

Florida: A Key West couple — Jose Antonio Freire Interian, 24, and Yokana Anahi Gonzalez, 26 — who had tested positive for COVID-19, were arrested at their apartment after defying an isolation order issued by the Florida Department of Health-Monroe County requiring them to stay at home for two weeks and to wear a mask around others, local10.com reports. The apartment property manager handed over camera footage from the common area showing them coming and going. According to The Washington Post, “the couple was taken to the Stock Island Detention Center on two second-degree misdemeanor charges: breaking quarantine during a public health emergency and violating emergency management.”

Florida: James Kaminski, a K-9 officer and longtime veteran of the North Palm Beach Police Department, is on paid administrative leave. He posted $50,000 bond after he was booked in June 2020 on lewd and lascivious molestation charges, cbs12.com reports. He has been accused of sexually molesting an acquaintance “between the ages of 12 and 15,” the Palm Beach Post reports in June 2020. According to a sheriff’s office report, “the person, who now is 24, told police in upstate New York, where the individual is in college, that Kaminski” had molested her starting in summer 2011. Kaminski’s attorney told the newspaper that his client “was involved in an on-going consensual sexual relationship with my client as an adult. Mr. Kaminski is looking forward to the opportunity to clear his name.” Police also say an internal affairs investigation is underway regarding possible violations of department policy.

Georgia: Former Atlanta police officer Garrett Rolfe, who was charged in the June 12, 2020, shooting death of Rayshard Brooks in a Wendy’s parking lot, was granted a $500,000 bond June 30, cbsnews.com reports. He faces 11 charges, including murder and aggravated assault with a deadly weapon. He was fired less than 24 hours after the fatal shooting. According to CBS: “Rolfe was attempting to arrest 27-year-old Brooks, who had fallen asleep in his car and failed a sobriety test, when Brooks grabbed another officer’s Taser and fled. Rolfe opened fire, fatally shooting Brooks in the back. Video appeared to show Brooks turning and pointing the Taser just before the shooting. The second officer involved, Devin Brosnan, has been placed on administrative leave and charged with aggravated assault and oath violations.”

Illinois: Collinsville trooper Nolan Morgan was arrested on drug charges after mushrooms — specifically around 259 grams of psilocybin mushrooms — were found at his home July 3, 2020, newswEEK.com reports. “Morgan was charged with possession of a controlled substance with the intent to deliver and manufacture of a controlled substance. These are both Class X felony charges in the state of Illinois, which is the most serious felony short of murder. The penalties for a Class X felony include a minimum sentence of six years in prison and a maximum sentence of 30 years, in addition to a maximum fine of $25,000.”

Maryland: Baltimore Police homicide unit Sergeant James Lloyd was held on July 31, 2020, “after allegedly extorting, kidnapping and threatening to arrest a home contractor whose work he was unhappy with and whom he drove to a bank to withdraw money for a refund,” the Baltimore Sun reports. “You are going to give me my money back, and I’m going to give you freedom,” Lloyd told the contractor, according to charging documents and the Sun. “Baltimore Police Commissioner Michael Harrison said Lloyd would be suspended without pay and an internal affairs investigation has been launched.” The officer was allegedly unhappy about a patio the contractor had constructed and insisted on a refund. He told the contractor he had details about his driver’s license being suspended and could arrest him. “Then, authorities said, he made the victim get into Lloyd’s car. The victim told police that he feared being arrested and complied with Lloyd’s demands of going to the bank and getting a certified check for the refund, officials said.” Lloyd’s attorney said there was “no criminality” by his client.

Minnesota: Former Minneapolis police officer Derek Chauvin, who awaits trial on second-degree murder and manslaughter charges in the death of George Floyd, is now facing felony tax charges. “Chauvin and his estranged wife were each charged with nine counts of aiding and abetting false or fraudulent tax returns and failing to file returns,” slate.com reports. According to the complaint, the Chauvins did not report $460,000 in income dating back to 2014, including income the former cop derived from off-duty security work. His wife, who filed for divorce on June 1, a week after George Floyd was killed, worked as a photographer and Realtor at the time.”

Minnesota: Governor Tim Walz recently signed state Legislature-approved police reforms into law, including a ban on neck restraints, pbs.org reports. The bill “bans chokeholds and fear-based or ‘warrior-style’ training, which critics say promotes excessive force. It imposes a duty to intercede on officers who see a colleague using excessive force and changes rules on the use of force to stress the sanctity of life,” according to pbs.org.

Missouri: Velda City police officers
Matthew Schanz and Christopher Gage face charges of first-degree assault and armed criminal action from a traffic stop that began when the officers spotted a vehicle with expired temporary tags Feb. 25, 2020, near West Florissant, KSDK.com reports. The man pulled over, according to police, drove toward the officers. Both Schanz and Gage fired shots at the man, striking him more than once.

New Jersey: Six bills to strengthen criminal justice reform have come before the state legislature, including a “repeal of mandatory minimum sentences for certain non-violent crimes, including drug offenses, that have disproportionately affected communities of color, both Black and Hispanic,” according to nj.com on July 26, 2020. In addition, more commission recommendations sought “would allow sentencing judges to consider a defendant’s youth at the time of the offense as a mitigating factor; create a new ‘compassionate release’ program that builds on the current medical release program; provide the possibility of release for offenders who were sentenced to 30 years or more of imprisonment while juveniles, and [improve] the data collection capacity of the Department of Corrections.” The recommendations come from the state’s Criminal Sentencing and Disposition Commission, which is composed of “judges, prosecutors, defense attorneys, community stakeholders, corrections officials, faith organizations and victim’s rights advocates.”

New Mexico: Former Las Cruces police Officer Christopher Smelser faces a second-degree murder charge in the death of Antonio Valenzuela, a Mexican American. The charge had been increased from involuntary manslaughter. Smelser, who is White, is accused of killing the suspect after placing him in a chokehold following a foot chase that began when Valenzuela fled a traffic stop. After the chase, Smelser can be heard on police video when Valenzuela fled a traffic stop. According to WPRL.com. “Police allege Najeli Rodriguez, 18, hit a sergeant with her bullhorn during the protest, leading police to charge her with disorderly conduct, resisting arrest and simple assault. Her lawyer Shannah Kurland with disorderly conduct, resisting arrest, simple assault, obstructing an officer and a weapons charge.” At least one council member was upset by what happened. “Teenagers should not be held without bail,” City Councilor Kat Kerwin wrote on Twitter. The officer, who is White, responded to report of a man that said he needed oxygen. The man seemed disoriented as he paced in circles around a street, body-cam video showed. Officers and EMT responders at the scene attempted to get the man into an ambulance. According to WTOP.com: “As the officer is attempting to learn whether the man needs medical attention, Timberlake walks into the frame, appearing to have just arrived, and deploys his stun gun on the man multiple times. Timberlake is also seen in the footage holding the man down with his knees as he tries to put handcuffs on the man.” The indictment alleges Timberlake fired a Taser dart into the man, struck his head with a “fist and/or the butt of a Taser device” and then hit the man with another dart while on the ground. The Fairfax Fraternal Order of Police 77 called for the resignation of Chief Ed Roesler for his comments exonerating the officer after the incident. They accused the chief of not being “fair and impartial,” instead crossing “the line from Chief of Police to that of a politician playing dress up.”

Oregon: Nick McGuffin, who served nine years in prison for the murder of his high school sweetheart, Leah Freeman of Coquille, saw his 2011 manslaughter conviction overturned in 2019 “due to findings of unknown male DNA evidence not disclosed during the trial,” nbc16.com reports. Now he’s filed a federal civil rights lawsuit against police in the Coquille, Coos Bay, and Oregon State Police Departments and the Coos County Sheriff’s Office,” nbc16.com reports. McGuffin’s attorney Janis Purucal “claims officers fabricated evidence, coerced witnesses, spread rumors, and withheld evidence that would have cleared her client of the crime.” The lawyer expects the case to go to a jury trial.

Rhode Island: Were two arrests made by police at a protest July 23, 2020, appropriate? That is what the civilian board with police oversight powers in Providence will consider, according to WPPL.com. “Police allege Najeli Rodriguez, 18, hit a sergeant with her bullhorn during the protest, leading police to charge her with disorderly conduct, resisting arrest and simple assault. Her lawyer Shannah Kurland denies the charges, saying Rodriguez was targeted by police because she was protesting against them. The other arrest was 28-year-old Jonas Pierre, who police say shoved an officer while trying to interfere with Rodriguez’ arrest. Police say he had multiple knives on him, and he was charged with disorderly conduct, resisting arrest, simple assault, obstructing an officer and a weapons charge.” At least one council member was upset by what happened. “Teenagers should not to be held without bail,” City Councilor Kat Kerwin wrote on Twitter. The Friday of Rodriguez’s release. “Peaceful protesters should not be held without bail. No one should be held without bail.”

Texas: Dallas police Senior Corporal Daniel Collins was arrested in July 2020 on a charge of transportation of child pornography. The officer assigned to the department’s auto theft unit was arrested by Homeland Security Investigations, Dallas police report, and was reported at the Tarrant County Jail. Collins has been with the department since 2007. He is on administrative leave pending the results of an internal affairs administrative investigation, the department said.

Virginia: A grand jury in July 2020 indicted Fairfax County police officer Tyler Timberlake on three counts of assault and battery for assaulting a noncombative Black man, WTOP.com reports. The officer, who is White, responded to report of a man that said he needed oxygen. The man seemed disoriented as he paced in circles around a street, body-cam video showed. Officers and EMT responders at the scene attempted to get the man into an ambulance. According to WTOP.com: “As the officer is attempting to learn whether the man needs medical attention, Timberlake walks into the frame, appearing to have just arrived, and deploys his stun gun on the man multiple times. Timberlake is also seen in the footage holding the man down with his knees as he tries to put handcuffs on the man.” The indictment alleges Timberlake fired a Taser dart into the man, struck his head with a “fist and/or the butt of a Taser device” and then hit the man with another dart while on the ground. The Fairfax Fraternal Order of Police 77 called for the resignation of Chief Ed Roesler for his comments exonerating the officer after the incident. They accused the chief of not being “fair and impartial,” instead crossing “the line from Chief of Police to that of a politician playing dress up.”
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By Alissa Hull
Edited by Richard Resch

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