Alexander Hamilton said in Federalist Paper No. 78 that the judiciary “may truly be said to have neither force nor will but merely judgment.” Because the judiciary lacks the legislative purse and the executive sword, compliance with such judgment is largely voluntary. The Founding Fathers recognized this disability and crafted a judiciary that is grounded in impartiality, integrity, and independence.

A judiciary that is true to these critical principles has the confidence of the people and the respect of the other branches of government. The need for confidence in judicial integrity is, in the words of the U.S. Supreme Court, “genuine and compelling.” Without it, the American system of government under law is placed in serious jeopardy.

The last several decades have seen the judicial principles of impartiality, integrity, and independence eroded from within and attacked from without. Political campaigning for judicial office is rampant across the states, with rivers of cash flowing in from partisan sources. Judges running for election routinely jettison even the facade of impartiality, declaring themselves “tough on crime” and “pro-prosecution.” Ideological and political divides are the new norm for high court justices, both elected and appointed.

The judicial failure to stay true to the principles of impartiality, integrity, and independence—the canons of the judiciary—has had predictable results. Public confidence in the American court system is low. A 2014 poll showed that less than one-third of Americans have confidence in the U.S. Supreme Court, the highest court in the land.

Add to that the ever-increasing number of wrongfully convicted criminal defendants, and the public’s confidence in the judiciary falls off a cliff. Those who have personal experience with the criminal justice system are aware of just how easily an innocent American can end up convicted.

Judge and legal philosopher Learned Hand was wrong: The ghost of the innocent man convicted is not an unreal dream; it is a very real nightmare. The former prisoners whose wrongful convictions have been overturned can attest to that.

Wrongful convictions represent a kind of double whammy to the judiciary. The failures of impartiality, integrity, and independence that sometimes lead to wrongful convictions (but more often work to prevent their disclosure) weaken the public’s confidence in the judiciary. The wrongful convictions themselves, from the Central Park Five to the Norfolk Four, further limit the trust that the public is willing to place in the judicial function.

“Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges,” says the commentary to Canon 1 of the Code of Conduct for United States Judges. The growing role of politics and partisan divides in the judiciary represent an existential threat to the “Third Branch” of government.

Politics: The Federal Judicial System

Federal judges are nominated by the President, confirmed in the Senate, and hold lifetime tenure. The Framers chose this system of judicial appointment to promote “that independent spirit in the judges which must be essential to the faithful performance” of the courts’ role as “bulwarks of a limited Constitution,” unaffected by fleeting “mischiefs.” Federalist Paper No. 78 (A. Hamilton). The Framers believed that federal judges should not “consult popularity,” but instead rely on “nothing...but the Constitution and the laws.”

In addition to (theoretically) shielding the judiciary from political winds, the Framers intended the judiciary to be completely distinct from both the legislature and the executive branches. Even in the absence of the purse and the sword, Alexander Hamilton warned the judiciary to take “all possible care...
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Partial Justice (cont.)

... to defend itself against” intrusions by other branches. Indeed, Hamilton said that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”

In short, the Framers went to great lengths to ensure judicial independence. According to Justice Clarence Thomas of the U.S. Supreme Court, the Framers understood “judicial independence” to mean independence from both external and internal threats.

“Independent judgment required judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources,” wrote Justice Thomas, concurring in Perez v. Mortgage Bankers Association, 135 S. Ct. 1199 (2015). “Internal sources might include personal biases, while external sources might include pressure from the political branches, the public, or other interested parties.”

Alexander Hamilton would surely be aghast at the role that politics plays in the modern federal judiciary. The nomination and confirmation of judges, especially Supreme Court justices, has descended into political blood sport. Consider the Republican-led effort to block former President Obama’s attempt to fill the Supreme Court seat left open by the death of Justice Antonin Scalia. The President nominated Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit, but Senate Republicans refused to hold a confirmation hearing in the hopes of winning the next presidential election. That turned out to be a good political strategy, at least in the short-term, but it surely did nothing to boost the public’s confidence in the independence of the Supreme Court.

The politicization of the nomination and confirmation process is, of course, not a new development. In fact, because the nomination and confirmation processes take place within the political branches, it is not necessarily surprising. But some, including Judge John M. Walker of the U.S. Court of Appeals for the Second Circuit, believe that the nomination and confirmation process for federal judges is “broken.”

“The nomination and confirmation process … politicizes the judiciary, misrepresents the judiciary’s role in our democracy, demeans highly qualified nominees, and unjustifiably delays or jettisons confirmations altogether,” Judge Walker said in an article for The Atlantic.

Notably, Judge Walker’s comments were made in 2012, well before the U.S. Senate abdicated its duty to advise and consent to then-President Obama’s nomination to fill Justice Scalia’s seat. Judge Walker’s concerns about politicizing the judiciary seem almost quaint when one considers the current state of affairs in the Senate.

Senate Majority Leader Mitch McConnell, for example, makes no bones about his desire to pack the federal judiciary with Republican-vetted conservative judges, as quickly as possible.

“We intend to keep confirming as many as we possibly can for as long as we are in a position to do that,” McConnell said. “It will still be my top priority in setting the agenda.”

In fact, under McConnell’s leadership, the Senate has set a record, confirming 29 circuit court judges, 53 district court judges, and two Supreme Court justices—all in the first two years of the Trump administration.

The politicization of the federal nomination and confirmation process “lowers the public esteem on which courts depend,” says Judge Walker. Recall that compliance with a court’s decree is largely voluntary, with public confidence in judicial impartiality, integrity, and independence a necessary condition of such compliance. Judge Walker points to President Nixon’s compliance with a court order to turn over the Watergate tapes as an example of the way the system works when confidence is not undermined by politicization. But, he argues, “as the public grows to perceive judges as political, it becomes easier for presidents and others to disregard judicial decisions as partisan pronouncements.”

If President Trump’s public statements, tweets, and actions are any indication, the time of diminishing public confidence in the federal judiciary is nigh. The President has referred to judges whose decisions he disagrees with as “Obama judges” and even questioned whether Judge Gonzalo Curiel of the federal Southern District of California could be fair in presiding over a lawsuit against him because the judge was “of Mexican heritage,” “Hispanic,” and a member of a Latino Lawyers’ Association.

When presidents question the impartiality, integrity, and independence of the judiciary, the public listens. As the public grows to perceive judges as political, says Judge Walker, “it becomes easier for presidents and others to disregard judicial decisions as partisan pronouncements.” And in all fairness, would anyone who has experienced the first
Partial Justice (cont.)

two years of the Trump administration be surprised if the President defied a court order because he didn't like it?

The question remains, however, whether the decisions of federal judges are actually influenced by political ideology. The answer is an unfortunate but resounding “yes”—especially at the Supreme Court level.

A 2018 study published in the *Journal of Law and Courts*, for example, found that both liberal and conservative Supreme Court justices were more supportive of free-speech claims when the speech matched their underlying ideological and political preferences. Conservative justices tend to uphold the rights of a speaker when the speech conforms to their political values, such as when the speech is “pro-life.”

Interestingly, liberal justices, who as a rule are more likely to support a free speech claim, are more likely to not support such a claim when, as in the “pro-life” example, they disagree with the political or ideological content of the speech.

The political nature of recent Supreme Court decisions goes well beyond free-speech claims. Party politics now seems to be the best predictor of how the Court will rule on almost any issue. The Supreme Court has never in its history ruled along party lines as consistently as it does today.

Judges will deny that they make decisions based on partisan ideology. During his confirmation hearing, Chief Justice John Roberts famously said, “It’s my job to call balls and strikes and not to pitch or bat.”

Decades earlier, Supreme Court Justice Felix Frankfurter said the Court “must observe a fastidious regard for limitations on its own power, and this precludes the Court giving effect to its own notion of what is wise or politic.” Despite these statements, which one presumes the Justices truly meant, the Court undoubtedly rules in a partisan manner. Why?

The authors of the 2018 study posit an answer: the automatic operation of a manifestation of social identity known as “in-group bias.” Ideological in-group bias, the authors suggest—the “us versus them” theory of human behavior—explains how a judge could be truly invested in impartiality, integrity, and independence and yet still rule in a partisan manner. This theory suggests that while Chief Justice Roberts may actually limit himself to calling balls and strikes, he sees the strike zone differently than the “out-group” Justices.

Whatever the underlying cause, there can be no doubt that the federal judiciary, including the Supreme Court, is influenced by politics. “[T]he Supreme Court,” said former Seventh Circuit Court of Appeals Judge Richard Posner, “is not an ordinary court but a political court, or more precisely a politicized court, which is to say a court strongly influenced in making its decisions by the political beliefs of the judges.”

But, as we shall see, the federal judiciary has nothing on the court systems across the states, where the corrupting influence of money and politics has risen to an obscene level.

**Politicians in Robes: Mud, Money, and Ethical Infidelity in the States**

Alexander Hamilton and other Founding Fathers believed strongly in the necessity of an independent judiciary, free from popular influence. Hamilton et al., however, were responsible only for designing the federal government. In fact, they were very careful to leave to the states the right to set up lower-level governments how they wished.

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Many states, motivated by Jacksonian populism, went on to establish governments in which the judiciary is held directly responsible to the voting public. Today, 39 states hold some form of election to choose judges for their high courts. Upwards of 90 percent of all state court judges face election, despite the fact that judicial elections are virtually unheard of anywhere else in the world. Over 90 percent of all felonies are resolved by elected judges.

Choosing a judiciary by way of popular election brings with it certain risks. Hamilton warned that fidelity to the law would be undermined when judges faced electoral pressures. He said that such pressures would be “fatal to their necessary independence.” Judicial integrity can be (and often is) compromised by the lengths one must go to get and stay elected to judicial office.

While establishing a direct connection between the election of a judiciary and wrongful convictions may be impossible, there is little doubt that the two go hand-in-hand. Judges who face reelection are not solely beholden to the law. They are, in fact, answerable to the constituency. As further developed below, there may be no faster way to lose a judicial election than to appear “soft on crime.”

Regardless of what the ethical canons say, and the U.S. Constitution requires, elected judges are very aware that they need votes in order to keep their judicial chambers.

Sue Bell Cobb, former Chief of the Alabama Supreme Court, said this of elected judges: “Judges would have to be saints to ignore the political reality, and judges aren’t saints.”

But, are elected judges politicians? In theory, the answer is no. U.S. Supreme Court Chief Justice John Roberts said that “Judges are not politicians, even when they come to the bench by way of the ballot.”

While politicians are expected to be responsive to the electorate, Chief Justice Roberts said, “A judge must observe the utmost fairness, striving to be perfectly and completely independent.”

The theory that politics does not invade the sacred province of the (elected) judiciary is not borne out in reality, however. Consider the lawless act of Alabama Supreme Court Chief Justice Roy S. Moore, an elected judge who in 2016 ordered all Alabama probate judges to defy federal court orders regarding same-sex marriage. Two other elected state Supreme Court justices suggested that they would not follow U.S. Supreme Court rulings on same-sex marriage. These were not the acts of impartial and principled judges who follow the law; they were instead the rebellious acts of ideological zealots, driven by politics.

Today’s judicial election, reelection, and retention campaigns share many of the trappings of a typical run for office, including an influx of campaign cash, a TV ad blitz, and a “tough on crime” message. These items have a symbiotic relationship: Campaign cash pays for the TV advertising, and those ads deliver the tough on crime message.

Campaign contributions can be a significant problem in any electoral system. Cash is used to buy things. When a campaign contribution is made, it is fair to ask what is being purchased. And, when the campaign in question is one for judicial office, that is a scary question.

Such a question was asked during the 2004 West Virginia Supreme Court of Appeals election. The debate over the answer went all the way to the U.S. Supreme Court.

Coal baron Don Blankenship, CEO of A.T. Massey Coal Co., had a problem. His company had just lost a case in which dam-
Partial Justice (cont.)

ages of $50 million were assessed. But he had a plan: get a “friendly” judge elected to the West Virginia Supreme Court of Appeals, where the case was heading on appeal.

Blankenship spent $3 million supporting the candidacy of Brent Benjamin for a seat on the court. Blankenship’s money represented more than 60 percent of the total amount spent to support Benjamin. After winning the election, Benjamin, now the acting Chief Justice of the court, refused to recuse himself and cast the deciding vote in the court’s 3-2 decision to overturn the verdict against Blankenship’s company.

In Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2752 (2009), the U.S. Supreme Court by a 5-4 vote reversed the West Virginia court. The serious, objective “probability of bias” that arose when Justice Benjamin refused to recuse himself offended due process, said the Court.

“Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome,” Justice Anthony M. Kennedy wrote for the majority. “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties’ consent—a man chooses the judge in his own cause.”

Blankenship was not the first (and won’t be the last) whose judicial campaign contributions raised eyebrows. In what was then the most expensive state judicial campaign in U.S. history, $9.3 million was raised in 2004 to elect Lloyd Karmeyer to the Illinois Supreme Court. About $1.3 million came from State Farm Insurance and affiliated groups. Surprise, surprise – a $450 million verdict against State Farm was pending at the high court, and after winning the election, now-Justice Karmeyer refused to recuse himself from the case and cast the deciding vote to overturn the verdict.

The U.S. Supreme Court didn’t get involved in that case, but then-Justice Sandra Day O’Connor had this to say:

“It cost just over $9 million for that race. As you might have guessed, the winner of the race got his biggest contribution from a company that had an appeal pending before the court. You like that?”

Situations as outrageous as the apparently tainted judicial elections in West Virginia and Illinois are relatively rare. But the amount of money flowing into judicial campaign coffers is on the rise and has been for decades. From 1990 to 1999, about $83 million was spent on judicial high court campaigns. That number more than doubled over the next decade, with $206.9 million spent between 2000 and 2009.

The U.S. Supreme Court’s decision in Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010), virtually guarantees continual increases in the amount of money raised and spent to elect, reelect, and retain judges. In a decision that has dramatically altered the democratic election system in the United States, the Court said that corporations can finance independent campaigns directly from their treasury and can spend an unlimited amount to support the candidate of their choice.

Justice John Paul Stevens voiced his concern with how the decision would impact judicial elections in a dissenting opinion.

“At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races,” Justice Stevens wrote.

Campaign Special Interests

The concerns raised by Justice Stevens are real and are shared by the majority of Americans. A 2001 survey found that 76 percent of Americans believe that campaign cash affects court decisions. The same survey found that almost half of judges agree. The Conference of Chief Justices, which represents 57 chief justices from every state and U.S. territory, warned the U.S. Supreme Court in Caperton that confidence in the judiciary is threatened by the increasing flow of money into judicial elections.

“As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation’s elected judges may be imperiled,” wrote the Chiefs, in a friend of the court brief.

Of course, those who spend money on judicial elections know that they are buying something. As the Justice at Stake Campaign said in a 2010 report on politics in judicial elections, “For big money interests, high court seats are one more investment.” One AFL-CIO official put it this way: “We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.”

Or take it right from the horse’s mouth: “I never felt so much like a hooker down by the bus station . . . as I did in a judicial race,” Ohio Supreme Court Justice Paul Pfeifer told The New York Times in 2006. “Everyone interested in contributing has very specific interests. They mean to be buying a vote.”

Improper influence is not the only problem with million dollar judicial election campaigns. There is another significant issue, and it concerns where all that money is going: TV advertising.

The use of television ads in judicial elections has risen from 22 percent of all state supreme court elections in 2000 to essentially 100 percent today. The amount of money spent on TV ads has also spiked, with over...
$90 million spent on airtime in high court contests between 2000 and 2009.

And what do these television ads discuss? Why, crime, of course. And more specifically, how “tough on crime” the candidate is—especially as compared to his or her opponent, who is inevitably accused of being “soft on crime.” In 2013-14, more than half of all judicial-election ads discussed the candidate’s (or the opponent’s) record in criminal cases.

Judges who are running for election can’t seem to go far enough to establish how tough on crime they are. The reason for this is simple: American voters nearly universally believe that crime rates are higher than they actually are, and a large majority of voters believe that judges are too soft on criminals.

Consider the following “tough on crime” claims, all of which were made during judicial election runs:

- “Some complain that he’s too tough on criminals, AND HE IS …. We need him now more than ever.”
- “I will be a tough judge that supports the death penalty and isn’t afraid to use it.”
- “Sent more criminals—rapists, murderers, felons—to prison than any other judge in Contra Costa County history.”
- “Over 90% convicted criminals sentenced … prison commitment rate is more than twice the state average.”
- “Tough on sexual predators, refusing to allow technicalities to overturn convictions.”
- “The only candidate who has sent hundreds of criminals back to death row.”
- “Has committed his life to locking up criminals to keep families safe, putting child molesters behind bars for over 100 years.”

And these, “soft on crime” attack ads:

- “Louis Butler worked to put criminals on the street, like Reuben Lee Mitchell who raped an 11-year-old girl with learning disabilities. Butler found a loophole; Mitchell went on to molest another child.” [The ad failed to mention that Butler was a lawyer at the time and represented Mitchell].
- “[The opponent] gave easy bail to kidnappers who tortured and nearly beat a 92-year-old grandmother to death.”
- “Vote against Robertson because he’s opposed to the death penalty and he wants to let them all go.”
- “Hathaway granted probation to a man who was arrested in camouflage paint while carrying a loaded AK-47. His web page praised terrorists and declared his own personal jihad. Probation for a terrorist sympathizer? We’re at war with terrorists. Diane Hathaway, out of touch.”
- “[The opponent] gave easy bail to a woman later found guilty of murdering her 4-year-old stepson” and “gave probation instead of prison to a man who sexually assaulted a child.”

It’s easy to see how “tough on crime” and “soft on crime” television ads are effective. Narratives that invoke the elemental fear of hardened murderers, rapists, and serial child molesters motivate voters. Such ads work especially well when the electorate knows very little about the candidates. The majority of Americans don’t know much about the judiciary—a 2018 CSPAN poll found that 54 percent of voters could not name a single U.S. Supreme Court justice.

Voters know that they want rapists in prison, though.

The need to appear tough on crime in order to win a judicial election is a problem for the criminal justice system. A 2015 Brennan Center for Justice review of 10 prominent, widely cited studies found that election, re-election, and retention campaign pressures make judges more punitive toward defendants in criminal cases.

One of the studies looked at 22,000 sentences for aggravated assault, rape, and robbery in 1990s Pennsylvania. That study found that “sentences for these crimes are significantly longer the closer the sentencing judge is to standing for reelection,” and that “all judges, even the most punitive, increase their sentences as reelection nears.” The study authors concluded that from 1990 to 1999, for the crimes analyzed, judges added more than 2,000 years of additional prison time as a result of reelection pressures.

The increased use of attack ads in judicial campaigns drives this (mis)behavior. A 2014 study by the American Constitution Society concluded that state supreme court justices are less likely to rule in favor of criminal defendants when faced with the possibility of future attack ads. As former Mississippi Supreme Court Justice Oliver Diaz said, “Judges who are running for reelection do keep in mind what the next 30-second ad is going to look like.”

A significant issue for many judges who will face reelection is the death penalty. Bryan Stevenson, executive director of the Equal Justice Initiative, said, “If you’re a … judge who has to run for reelection, and you have to worry about your identity in the community—frankly, nothing says ‘tough on crime’ like the death penalty.”

Judges know this, and that’s why appellate judges facing reelection are more likely to affirm death sentences than their appointed brethren. The numbers should give pause to anyone concerned with the use (or misuse, in the case of a wrongful conviction) of the ultimate penalty: States with appointed justices reverse death penalty sentences 26 percent of the time, while those with elected justices reverse death penalty sentences 11 percent of the time.

Could this mean that 15 out of every 100 death penalty defendants will be executed...
because some judges needed to appear tough on crime in order to keep their jobs.

That appeared to be the case in Alabama, where until very recently, trial judges had the authority to overrule juries in capital cases. As of 2013, Alabama judges (elected judges, that is) imposed the death penalty contrary to the jury’s verdict in 97 cases. In a forceful dissent to the Court’s refusal to overturn this highly questionable system, U.S. Supreme Court Justice Sotomayor wondered why Alabama judges were so much more bloodthirsty than juries. The explanation? Judicial elections.

“The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system,” wrote Justice Sotomayor. “Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.”

When Recusal is Necessary

Professor Keith Swisher of the Phoenix School of Law argues that these “tough on crime” judges should recuse themselves from all criminal cases or face disqualification. Electoral pressures, says Swisher, “produce a vicious cycle for judges: gaining office through tough-on-crime promises, issuing tough-on-crime rulings between elections, and then touting those tough-on-crime rulings in gaining reelection.”

Swisher, who is an expert on legal ethics, argues that both due process and ethical canons require the disqualification of all tough-on-crime judges from criminal trials.

Caperton, says Swisher, mandates disqualification “in light of the serious risk[s] of ‘actual bias or prejudgment,’ ‘debt[s] of gratitude’ or ‘possible temptations’ toward one large independent expender.” As such, due process “should mandate disqualification, a fortiori, when a judge faces a ‘serious risk’ of losing her job for appearing soft on crime.”

But even without the “nuclear option” of the Due Process Clause, Swisher says judicial canons of ethics mandate disqualification of tough-on-crime judges. Judges must be impartial, and the canons “quite clearly and quite universally require disqualification even at the appearance of partiality.” There is no doubt that tough-on-crime judges appear partial, and the data show that they are partial.

“Why, then, tough-on-crime judges persist in sitting on criminal cases is baffling,” Swisher writes. “It might be explained in part because the foxes guard the hen houses (that is, the actual or apparently biased judges are the ones who normally decide whether to disqualify themselves) and because the elective system itself renders those foxes even less trustworthy than normal.”

In addition to concluding that elected “tough on crime” judges should be disqualified from all criminal trials, Swisher argues that these judges are both lawless and immoral. All judges have an obligation to uphold the law and to do so in an impartial, fair, and objective manner. The actions of a “tough” or “pro-prosecution” judge fly in the face of impartiality.

“To be ‘tough on crime’ in the absence of careful and open-minded consideration of actual cases . . . is lawless, and a pledge of lawlessness is not something a judge can honor and still remain on the bench,” Swisher writes.

The tough-on-crime judge’s pledge and actions also are immoral.

“[I]t is immoral to pre-doom the future of another human being—particularly one whom the judge has never met—in order to further the judge’s personal (i) perversions (namely, sadism) or (ii) ambitions (namely, election and reelection),” Swisher argues.

The undeniable reality of the elected judiciary is grim. Immorality, illegality, lack of ethics . . . these are existential threats to a functioning judiciary. They also are the harbingers of wrongful conviction. A tough-on-crime judge—the only electable kind—must convict, convict, convict.

Norman Reimer of the National Association of Criminal Defense Lawyers said in 2014 that the constitutional rights of the accused are often the “roadkill in . . . camping wars.”

“Our freedom and our constitutional rights depend on judges who have the courage to be fair and impartial,” Reimer said.

“It’s a real problem if they know every ruling is likely to become fodder in a campaign.”

The Long Arm of the Judge

For the accused, it would be fair to say that the defense of his liberty and constitutional rights also depends on the effective assistance of counsel. The Sixth Amendment to the U.S. Constitution guarantees the assistance of counsel to all criminal defendants, regardless of their ability to pay. In order to act effectively, defense counsel must be independent and free from any outside influence.

In the federal system, indigent defense services are provided by either a Federal Public Defender Organization (“FPDO”) or appointed private counsel (“Panel attorneys”). Panel attorneys and FPDOs provide counsel to over 80 percent of all federal criminal defendants. For the most part, Federal Defenders and Panel attorneys provide competent representation. But there is a significant problem with the federal indigent defense system: It is funded, managed, and supervised by the federal judiciary.

In a 2017 article for the Cornell Law Review, executive director of the Federal Defenders of New York and NYU law professor David E. Patton argued that the judicially controlled federal public defense system is independence-compromised and called for establishing a new, independent federal defense agency.

Consider these aspects of the current federal public defense system, highlighted as worrisome by Patton:

Federal appellate judges select the federal public defenders in the districts they oversee and can choose to renew them (or not) every four years;

• Federal trial judges require Panel attorneys to describe and justify the hours they spend on a case;

• In many districts, trial judges decide whether private appointed counsel may remain on the Panel; and

• At the national level, judges decide how much money to seek from Congress to fund indigent defense.

Patton argues that this arrangement, wherein the entire federal indigent defense apparatus is under the thumb of the judiciary, creates serious constitutional, ethical, and policy concerns. The criminal justice system
“relies on its adversarial nature to function properly,” says Patton, and “it would be inconceivable for judges decide who is hired in a prosecutor’s office, how much they should be paid, or how and whether prosecutors should investigate individual cases.” It should be just as inconceivable for judges to control the defense in this way — but that is exactly what the scenario is, right now, for the federal indigent defense system.

A Step Too Far

From a constitutional perspective, it is reasonable to question whether the judiciary exceeds its Article III authority in managing the indigent defense function in federal courts. Article III limits the authority of federal judges to (mostly) adjudicative functions in certain limited circumstances.

Patton argues that court involvement in regulating and administering the federal defense function is a step too far.

“[W]hen it comes to managing the defense function, [federal] judges determine (1) how much money to seek from Congress for the defense program overall (perhaps at the expense of the federal courts’ budget), (2) how to apportion those public dollars among Panel Attorneys and public defenders, (3) whether individual Panel Attorneys are permitted to use those dollars to investigate particular cases or engage in other out-of-court preparations, (4) how to apportion those dollars among defender offices nationwide, (5) what policies covering employment, information technology, and administration to apply to public defender offices, and (6) who among the bar is permitted to act as a Panel Attorney or the head of a federal public defender office,” Patton writes. “None of those decisions arise in the course of resolving disputes between the parties to cases or controversies, and nothing about the activity is inherently ‘judicial’ in nature.”

Moreover, judicial management of the indigent defense function arguably runs afoul of Gideon v. Wainwright, 372 U.S. 335 (1963), in which the U.S. Supreme Court declared that all indigent defendants have the right to the ‘guiding hand’ of counsel.” Implicit in the concept of a guiding hand,” said the Court, “is the assumption that counsel will be free of state control.” There is no fair trial “unless the accused receives the services of an effective and independent advocate.”

But the constitutional concerns are dwarfed by the ethical problems inherent in a judge-controlled defense function. Lawyers, says Patton, are duty-bound to provide “diligent, zealous, and conflict-free counsel” to their clients. They must maintain strict confidentiality with respect to any information relating to the representation of a client.

Can a Federal Defender or Panel attorney act ethically when the defense function is controlled by the judiciary? Not always. Consider these scenarios, developed by Patton:

• A Panel attorney represents a client in a case involving voluminous amounts of electronic evidence on computers and mobile phones. She needs an expert and a lot of time to review the material and exceeds the $10,000 cap on fees she may receive in any case. In order to obtain the fees, she must fill out forms which may require the disclosure of confidential information forms that are reviewed by
Not wish to risk losing a place on the Panel by angering judges, rarely request the use of outside services, asking for investigators and experts in less than 20 percent of all cases. In some districts, they request such services less than 5 percent of the time.

There is nothing fair about an adversarial system in which the umpire administers and controls one side of the contest but not the other. And there can be little doubt that the collateral consequences of such a system include wrongful conviction.

**How Important is the Question of Innocence to a Judge?**

The National Registry of Exonerations has identified over 2,000 wrongful convictions resulting in exoneration.

Conservative estimates put the number of falsely convicted Americans who are still behind bars at over 20,000. Unfortunately, there are many examples of situations in which the innocence of a criminal defendant didn’t matter much to a judge.

The case of Glenn Ford is a prime example. Ford, a black man, was convicted by an all-white jury for a murder he did not commit. He spent 30 years on death row before being exonerated in 2014. He died from cancer soon after his release.

Ford was innocent of the crime during his entire prison ordeal, of course. But that didn’t matter to the many judges who rejected, over and over, his claim that he was a victim of police and prosecutorial misconduct. And his exoneration didn’t matter to the Louisiana appeals court that rejected his estate’s claim for compensation for his wrongful conviction and 30 years in prison.

It seems that the Louisiana appeals court, despite Ford’s exonerations (which was supported by the state), still didn’t believe he was innocent. So in what Andrew Cohen of The Marshall Project called “one of the most remarkable acts of judicial activism” he had ever seen, the appellate court added a “summary” to its order denying compensation. The summary amounts to a narrative that was never proven, or even asserted, in court—that Ford was “the sinister guardian” of the actual killers. As such, the court said, the estate was due no compensation.

The Texas Court of Criminal Appeals also found a lower court’s ruling as to innocence irrelevant. Benjamin Spencer was convicted and sentenced to life in prison for a fatal carjacking in 1987. He maintained his innocence throughout trial and the decades he has spent in prison.

In 2004, with the help of Centurion Ministries, he filed a petition for a writ of habeas corpus. The petition alleged that Spencer was actually innocent and included new evidence to support the claim.

After an evidentiary hearing, Texas District Court Judge Rick Magnis ruled that Spencer presented sufficient new evidence to require a retrial. Most of the original evidence against Spencer was eyewitness testimony. At the evidentiary hearing, an expert established to Judge Magnis’s satisfaction that the lighting was such that it was “physically impossible” for the eyewitnesses to have identified anyone. Some witnesses recanted their testimony.

William Alan Ledbetter, the foreman of the jury that convicted Spencer, took the day off work to watch the evidentiary hearing before Judge Magnis. He later told The Atlantic that as he observed the proceedings, “it was very clear that we had made a tragic mistake.”

“THERE’S a bit of personal culpability that one takes on,” said Ledbetter. “I had a role in this. Our role as jurors was to sort through the evidence and reach a reasonable conclusion. And it’s clear that we worked with what we had. But we were very wrong.”

The Texas Court of Criminal Appeals disagreed with both Ledbetter and Judge Magnis. In Texas, the lower court that conducts the evidentiary hearing can only recommend a new trial—the Court of Criminal Appeals is the only court that can grant such relief. And despite recantations, expert testimony, and Judge Magnis’s eight months of deliberations, the state high court said no.

The eight judges—all Republican, all elected, and five of them former prosecutors—found that Spencer had not established that “no rational jury would have convicted him in light of this new evidence”—the Texas standard for getting a new trial on the grounds of actual innocence. How difficult is it to meet that standard? According to The Atlantic, Texas judges call it a “Herculean burden.”

Why is that standard so high, and why do judges give such short shrift to claims of innocence? Part of the problem is the conveyor belt of the law enforcement system, wherein, as law professor and criminal justice expertStephanos Bibas said, too much emphasis is placed on speed, cost, volume, and efficiency. The other part of the problem is, of course, political pressure. Ordering the release of a prisoner, regardless of his or her innocence, is something no elected judge is in a hurry to do. 
Judges Behaving Badly

Judicial misconduct refers to acts that are unethical, illegal, or in violation of the judicial obligation of impartiality. As we have seen, there are myriad ways in which judicial misconduct rears its tainted head. More often than not, such misconduct is subtle. Sometimes it is blatant.

Cook County criminal court judge Slatery Boyle has a bad record with the Illinois Appellate Court. In the space of six years, the appellate court overturned Judge Boyle’s decisions 34 times. Three of those reversals resulted in the exoneration of the defendant.

For purposes of comparison, consider the record of five other criminal court judges in the same six-year span: Erica Reddick—3 reversals; Catherine M. Haberkorn—4 reversals; Carol M. Howard—8 reversals; Michael B. McHale—11 reversals; and Matthew E. Coghlan—12 reversals. That’s 38 total reversals for these five judges combined.

One of Judge Boyle’s cases involved disgraced former Chicago police detective Reynaldo Guevara. Armando Serrano was convicted of a murder based largely on the testimony of an eyewitness. Years later, the eyewitness recanted, saying that Guevara had encouraged him to give false testimony. Serrano then challenged his conviction.

Judge Boyle refused to allow much of the testimony related to the witness’ recantation and dismissed the case before the hearing was even complete.

On appeal, the Illinois Appellate Court called Judge Boyle’s actions “truly puzzling.” The court reversed Judge Boyle’s ruling, noting that she “turned a blind eye to much of the evidence and also refused to admit probative, admissible evidence that, when evaluated under the proper standing, is damming.” The case was reassigned to another judge, and prosecutors soon dropped the charges.

In another case, Judge Boyle convicted a man who had fired a gun into the air of murder, under the unusual theory of “accountability for murder by another.” Boyle sentenced the defendant to 43 years in prison and required him to register as a sex offender, though the crime was in no way related to sex.

The appellate court reversed, writing that “the evidence [was] so improbable and unsatisfactory that it creates a reasonable doubt of the defendant’s guilt.” The court also directed Judge Boyle to “conform to the requirements of the Sex Offender Registration Act before requiring defendant to register as a sex offender for a seemingly non-sexual crime.”

And then there is Comal County, Texas, district court Judge Jack Robinson. Judge Robinson improperly jailed Don Bandleman after he berated the judge in the bathroom. Judge Robinson had Bandleman arrested and ordered that he spend 30 days in jail. A court of appeals quickly intervened and ordered Bandleman immediately released.

The State Commission on Judicial Conduct reprimanded Judge Robinson for exceeding the scope—and authority of his office and for failure to comply with the law.

Several years later, Judge Robinson received a message from God during jury deliberations in a human trafficking case. He interrupted the jury’s deliberations to tell them he knew God said he should intervene because the defendant was not guilty of trafficking a teen girl for sex.

“When God tells me I gotta do something, I gotta do it,” Judge Robinson told the surely stunned jurors. Ultimately, the jury disregarded the Holy message and found the defendant guilty.

It’s not clear whether Judge Robinson was

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reprimanded or disciplined in any way. What is clear, however, is that judges are very rarely held accountable for their actions, no matter how bizarre or egregious.

An investigation by The Guardian, in partnership with Contently.org, revealed that about 90 percent of all complaints filed against judges in 12 states over a five-year period were dismissed out of hand. Discipline was meted out less than 5 percent of the time. A total of about 3 per decade for each state. And in most cases, unless a sanction is imposed, complaints against judges are kept confidential.

Discipline on the federal bench is virtually unheard of. The investigation revealed that between 2010 and 2014, 5,228 grievances were filed against federal judges, about half of which alleged bias or a conflict of interest. A grand total of three federal judges were disciplined during those years. None were suspended or removed.

That’s not too surprising, given that federal judges may only be removed by impeachment in the House of Representatives and conviction in the Senate. According to Ballotpedia.org, eight federal judges have been impeached by the Senate, only four since 1936.

There is no evidence that any judge has ever been disciplined or removed from the bench for misconduct leading to a wrongful conviction. In fact, given the statistics, discipline in such a situation would be highly unlikely. Convictions—wrongful or not—are business as usual for judges.

**Appellate Courts Use ‘Harmless’ Error Review and Unpublished Opinions to Kneecap Defendants**

Appellate affirmance of convictions that are later found to be wrongful is also business as usual. By the time a conviction is under review, whether on direct appeal or a collateral attack, the deck is heavily stacked against the defendant. Harmless error review and unpublished opinions render the path to fair review of a conviction very narrow.

Harmless error is defined by Black’s Law Dictionary as “[a] trial-court error that does not affect a party’s substantive rights or the case’s outcome.” The concept of harmless error is reduced to a rule of criminal procedure in Fed. R. Crim. P 52(a), which states that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” Harmless error review is used, and used frequently, across states and the federal system.

The harmless error rule is one of judicial economy. The rule permits appellate judges to overlook lower court errors when in the court’s view, the defendant’s substantial rights were not impacted. The harmless error rule promotes finality and streamlines the criminal justice system. It also ensures that some Americans will be convicted, and even put to death, for crimes that they did not commit.

The U.S. Supreme Court case of *Arizona v. Youngblood*, 488 U.S. 51 (1988), is a good example of how the concept of a “harmless” error in a criminal prosecution can go wrong. Larry Youngblood was convicted of the sexual assault of a child in 1983. He appealed, arguing that the failure of the police to preserve semen samples taken from the victim’s body violated his due process rights.

The Arizona Court of Appeals agreed and reversed. The U.S. Supreme Court took the case up on certiorari and reversed the Arizona Court of Appeals. The Court ruled that simple “negligent” destruction of potentially exculpatory evidence was harmless error. A due process violation would arise only if the destruction was done in “bad faith.”

But it turned out that the error wasn’t harmless at all. Twelve years after the Court’s decision, a rectal swab from the victim was tested, and the results excluded Youngblood as the assailant. He didn’t do it, but a “harmless” error helped keep him in prison for over a decade.

Harmless error also can mean the difference between life and death. Andrew Cohen, a fellow at the Brennan Center for Justice, wrote about a 2013 case in the Sixth Circuit in which “harmless” error may have resulted in a sentence of death instead of life. In *Dixon v. Houk*, 737 F.3d 1003 (6th Cir. 2013), the defendant argued that the trial judge erred when he refused to allow mitigating evidence relating to Dixon’s prior wrongful conviction and poor treatment as a child. The Sixth Circuit found that excluding such “negligibly mitigating” evidence amounted to simple harmless error. It was a 2-1 panel decision, with Judge Gilbert Merritt dissenting.

“We cannot know now how much jurors would have been influenced by the exonerating evidence and how the discussion of the death penalty in the jury room would have changed,” Judge Merritt wrote. “But certainly no one can confidently predict that it would not have been discussed as a serious basis for sparing Dixon’s life. It should not have been swept under the rug at the trial or on appeal…. It is our duty to see that individuals are not executed in the face of uncontested constitutional violations.”

Cohen called this “the story” of capital punishment in 21st century America. He lamented the “Orwellian” nature of harmless error.

“Our nation’s courts do not routinely seek...
out ways to remedy material errors in these cases,” Cohen said. “Instead, they routinely bend over backwards to justify results, convictions and death penalties even they themselves concede are inaccurate or based upon unfair procedures.”

The rise of the unpublished opinion is another significant blow to defendants on appeal. An unpublished opinion resolves the issue before the appellate court but is not binding precedent. Nearly 90 percent of all federal appellate decisions are designated as unpublished opinions, despite the concept not even existing in the American legal system until the early 1970s.

Unpublished opinions are usually brief — sometimes as short as a few words. They are written with less attention to detail than published, precedential opinions and often do not provide defendants the appellate analysis they deserve. And because they are not precedential, some worry that appellate judges use them to avoid creating binding law in their circuit.

Justice Thomas of the U.S. Supreme Court had such a concern in a 2015 case. The Court denied certiorari in Plumley v. Austin, 565 Fed. Appx. 175 (4th Cir. 2014) (unpublished), but Justice Thomas would have heard this opinion except to avoid creating binding law for the Circuit,” Justice Thomas wrote in his dissent.

“[A] rule which authorizes any court to censor the future of its own opinions rests on a false premise,” Justice Stevens wrote in a 1977 law review article. “Such a rule assumes that the author is a reliable judge of the quality and importance of his own work product.”

Such a rule also assumes that judicial misconduct doesn’t happen. It assumes that judges always act with integrity, impartiality, and independence. As we have seen, that is not the case.

Conclusion: The Judiciary is Part of the Problem

Justice Antonin Scalia referred to the principle of nulla poena sine lege — no punishment without law — as “one of the most widely held value judgments in the history of human thought.” This concept goes hand in hand with the vision of liberty embraced by the Framers. The U.S. Constitution was designed to maximize liberty, honor the law, and protect citizens from the power of the State.

In order to foster liberty and freedom, the Framers created a judiciary imbued with impartiality, integrity, and independence. Judges don’t make law, they adjudicate. Judges aren’t politicians, they are neutral umpires.

At least, that’s the idea.

In reality, the judiciary often fails to live up to its promise. When English jurist and law professor William Blackstone said in 1769 that “[i]t is better that ten guilty persons escape than that one innocent suffer,” he meant it — and the Framers believed it. The thousands of Americans who have been chewed apart by the judicial system despite having committed no crime are a testament to the failures of the judiciary.

Judges are complicit in the wrongful conviction and imprisonment of innocent Americans. Until the judiciary is de-politicized and judges are held accountable for their actions, wrongful convictions will continue unabated.


About the Author: Christopher Zoukis, MBA, author of the Directory of Federal Prisons, Federal Prison Handbook, and Prison Education Guide, is the Managing Director of the Zoukis Consulting Group, a boutique federal prison consultancy which assists clients with prison preparation, in-prison matters, and reentry services. He can be found online at PrisonerResource.com

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Who Inflicts the Most Gun Violence in America? The U.S. Government and Its Police Forces
by John W. Whitehead, Commentary, The Rutherford Institute

“It is often the case that police shootings, incidents where law enforcement officers pull the trigger on civilians, are left out of the conversation on gun violence. But a police officer shooting a civilian counts as gun violence. Every time an officer uses a gun against an innocent or an unarmed person contributes to the culture of gun violence in this country.” — Journalist Celisa Calacal

Yes, gun violence is a problem in America, although violent crime generally remains at an all-time low.

Yes, mass shootings are a problem in America, although while they are getting deadlier, they are not getting more frequent.

Yes, mentally ill individuals embarking on mass shooting sprees are a problem in America.

However, tighter gun control laws and so-called “intelligent” background checks fail to protect the public from the most egregious perpetrator of gun violence in America: the U.S. government.

Consider that five years after police shot and killed an unarmed 18-year-old man in Ferguson, Missouri, there has been no relief from the government’s gun violence.

Here’s what we’ve learned about the government’s gun violence since Ferguson, according to The Washington Post: If you’re a black American, you’ve got a greater chance of being shot by police. If you’re an unarmed black man, you’re four times more likely to be killed by police than an unarmed white man. Most people killed by police are young men. Since 2015, police have shot and killed an average of 3 people per day. More than 2,500 police departments have shot and killed at least one person since 2015. And while the vast majority of people shot and killed by police are armed, their weapons ranged from guns to knives to toy guns.

Clearly, the U.S. government is not making America any safer.

Indeed, the government’s gun violence—inflicted on unarmed individuals by battlefield-trained SWAT teams, militarized police, and bureaucratic government agents trained to shoot first and ask questions later—poses a greater threat to the safety and security of the nation than any mass shooter.

According to journalist Matt Agorist, “mass shootings … have claimed the lives of 339 people since 2015 … [D]uring this same time frame, police in America have claimed the lives of 4,355 citizens.”

That’s 1200% more people killed by police than mass shooters since 2015.

For example, in Texas, a police officer sent to do a welfare check on a 30-year-old woman seen lying on the grass near a shopping center, took aim at the woman’s dog as it ran towards him barking, fired multiple times, and killed the woman instead.

In Chicago, a SWAT team—wearing “army fatigues with black cloth covering their faces and wearing goggles,” armed with automatic rifles, and throwing flash-bang grenades—crashed through the doors of a suburban home and proceeded to storm into bedrooms, holding the children of the household at gunpoint. One child, 13-year-old Amir, was “accidentally” shot in the knee by police while sitting on his bed.

In St. Louis, Missouri, a SWAT team on a mission to deliver an administrative warrant carried out a no-knock raid that ended with police kicking in the homeowner’s front door, and shooting and killing her dog—all over an unpaid gas bill. Taxpayers will have to find $750,000 to settle the lawsuit arising over the cops’ overzealous tactics.

In South Carolina, a 62-year-old homeowner was shot four times through his front door by police who were investigating a medical-assist alarm call that originated from a cell phone inside the home. Dick Tench, believing his house was being broken into, was standing in the foyer of his home armed with a handgun when police, peering through the front door, fired several shots through the door, hitting Tench in the pelvis and the aortic artery. Tench survived, but the bullet lodged in his pelvis will stay there for life.

In Kansas, a SWAT team, attempting to carry out a routine search warrant (the suspect had already been arrested), showed up at a residence around dinnertime, dressed in tactical gear with weapons drawn, and hurled a flash-bang grenade into the house past the 68-year-old woman who was in the process of opening the door to them and in the general direction of a 2-year-old child.

These are just a few recent examples among hundreds this year alone.

Curiously enough, in the midst of the finger-pointing over the latest round of mass shootings, Americans have been so focused on debating who or what is responsible for gun violence—the guns, the gun owners, the Second Amendment, the politicians, or our violent culture—that they have overlooked the fact that the systemic violence being perpetrated by agents of the government has done more collective harm to the American people and their liberties than any single act of terror or mass shooting.

Violence has become our government’s calling card, starting at the top and trickling down, from the more than 80,000 SWAT team raids carried out every year on unsuspecting Americans by heavily armed, black-garbed commandos and the increasingly rapid militarization of local police forces across the country to the drone killings used to target insurgents.

The government even exports violence worldwide, with one of this country’s most profitable exports being weapons. Indeed, the United States, the world’s largest exporter of arms, has been selling violence to the world for too long now. Controlling more than 50 percent of the global weaponry market, the U.S. has sold or donated weapons to at least 96 countries in the past five years, including the Middle East. The U.S. also provides countries such as Israel, Egypt, Jordan, Pakistan and Iraq with grants and loans through the Foreign Military Financing program to purchase military weapons.

At the same time that the U.S. is equipping nearly half the world with deadly weapons, profiting to the tune of $36.2 billion, its leaders have also been lecturing American citizens on the dangers of gun violence and working to enact measures that would make it more difficult for Americans to acquire certain weapons.

Talk about an absurd double standard.

If we’re truly going to get serious about gun violence, why not start by scaling back the American police state’s weapons of war?

I’ll tell you why: because the government has no intention of scaling back on its weapons.

In fact, all the while gun critics continue to clamor for bans on military-style assault weapons, the U.S. government has no intention of scaling back on its so-called “intelligent” background checks fail to protect the public from the most egregious perpetrator of gun violence in America: the U.S. government.

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Weapons, high-capacity magazines and armor-piercing bullets, the U.S. military is passing them out to domestic police forces.

Under the auspices of a military “recycling” program, which allows local police agencies to acquire military-grade weaponry and equipment, more than $4.2 billion worth of equipment has been transferred from the Defense Department to domestic police agencies since 1990. Included among these “gifts” are tank-like, 20-ton Mine Resistant Ambush Protected (MRAP) vehicles, tactical gear, and assault rifles.

There are now reportedly more bureaucratic (non-military) government agents armed with high-tech, deadly weapons than U.S. Marines.

While Americans have to jump through an increasing number of hoops in order to own a gun, the government is arming its own civilian employees to the hilt with guns, ammunition and military-style equipment, authorizing them to make arrests, and training them in military tactics.

Among the agencies being supplied with night-vision equipment, body armor, hollow-point bullets, shotguns, drones, assault rifles and LP gas cannons are the Smithsonian, U.S. Mint, Health and Human Services, IRS, FDA, Small Business Administration, Social Security Administration, National Oceanic and Atmospheric Administration, Education Department, Energy Department, Bureau of Engraving and Printing and an assortment of public universities.

Seriously, why do IRS agents need AR-15 rifles?

For that matter, why do police need armored personnel carriers with gun ports, compact submachine guns with 30-round magazines, precision battlefield sniper rifles, and military-grade assault-style rifles and carbines?

Short answer: they don’t.

In the hands of government agents, whether they are members of the military, law enforcement or some other government agency, these weapons have become routine parts of America’s day-to-day life, a byproduct of the rapid militarization of law enforcement over the past several decades.

Over the course of 30 years, police officers in jack boots holding assault rifles have become fairly common in small town communities across the country. As investigative journalists Andrew Becker and G.W. Schulz reveal, “Many police, including beat cops, now routinely carry assault rifles. Combined with body armor and other apparel, many officers look more and more like combat troops serving in Iraq and Afghanistan.”

Does this sound like a country under martial law?

You want to talk about gun violence? While it still technically remains legal for the average citizen to own a firearm in America, possessing one can now get you pulled over, searched, arrested, subjected to all manner of surveillance, treated as a suspect without ever having committed a crime, shot at and killed by police.

You don’t even have to have a gun or a look-alike gun, such as a BB gun, in your possession to be singled out and killed by police.

There are countless incidents that happen every day in which Americans are shot, stripped, searched, choked, beaten and tasered by police for little more than daring to frown, smile, question, or challenge an order.

Growing numbers of unarmed people are being shot and killed for just standing a certain way, or moving a certain way, or holding something—anything—that police could misinterpret to be a gun, or igniting some trigger-centric fear in a police officer’s mind that has nothing to do with an actual threat to their safety.

With alarming regularity, unarmed men, women, children and even pets are being gunned down by twitchy, hyper-sensitive, easily-spooked police officers who shoot first and ask questions later, and all the government does is shrug, and promise to do better, all the while the cops are granted qualified immunity.

Killed for standing in a “shooting stance.” In California, police opened fire on and killed a mentally challenged—unarmed—black man within minutes of arriving on the scene, allegedly because he removed a vape smoking device from his pocket and took a “shooting stance.”

Killed for holding a cell phone. Police in Arizona shot a man who was running away from U.S. Marshals after he refused to drop an object that turned out to be a cellphone. Similarly, police in Sacramento fired 20 shots at an unarmed, 22-year-old black man who was standing in his grandparents’ backyard after mistaking his cellphone for a gun.

Killed for carrying a baseball bat. Responding to a domestic disturbance call, Chicago police shot and killed 19-year-old college student Quintonio LeGrier who had reportedly been experiencing mental health problems and was carrying a baseball bat around the apartment where he and his...
Killed for opening the front door. Bettie Jones, who lived on the floor below LeGrier, was also fatally shot—this time, accidentally—when she attempted to open the front door for police.

Killed for running towards police with a metal spoon. In Alabama, police shot and killed a 50-year-old man who reportedly charged a police officer while holding “a large metal spoon in a threatening manner.”

Killed for running while holding a tree branch. Georgia police shot and killed a 47-year-old man wearing only shorts and tennis shoes who, when first encountered, was sitting in the woods against a tree, only to start running towards police holding a stick in an “aggressive manner.”

Killed for crawling around naked. Atlanta police shot and killed an unarmed man who was reported to have been “acting deranged, knocking on doors, crawling around on the ground naked.” Police fired two shots at the man after he reportedly started running towards them.

Killed for wearing dark pants and a basketball jersey. Donnell Thompson, a mentally disabled 27-year-old described as gentle and shy, was shot and killed after police—searching for a carjacking suspect reportedly wearing similar clothing—encountered him lying motionless in a neighborhood yard. Police “only” opened fire with an M4 rifle after Thompson first failed to respond to their flash bang grenades and then started running after being hit by foam bullets.

Killed for driving while deaf. In North Carolina, a state trooper shot and killed 29-year-old Daniel K. Harris—who was deaf—after Harris initially failed to pull over during a traffic stop.

Killed for being homeless. Los Angeles police shot an unarmed homeless man after he failed to stop riding his bicycle and then proceeded to run from police.

Killed for brandishing a shoehorn. John Wrana, a 95-year-old World War II veteran, lived in an assisted living center, used a walker to get around, and was shot and killed by police who mistook the shoehorn in his hand for a 2-foot-long machete and fired multiple beanbag rounds from a shotgun at close range.

Killed for having your car break down on the road. Terence Crutcher, unarmed and black, was shot and killed by Oklahoma police after his car broke down on the side of the road. Crutcher was shot in the back while walking towards his car with his hands up.

Killed for holding a garden hose. California police were ordered to pay $6.5 million after they opened fire on a man holding a garden hose, believing it to be a gun. Douglas Zerby was shot 12 times and pronounced dead on the scene.

Killed for calling 911. Justine Damond, a 40-year-old yoga instructor, was shot and killed by Minneapolis police, allegedly because they were startled by a loud noise in the vicinity just as she approached their patrol car. Damond, clad in pajamas, had called 911 to report a possible assault in her neighborhood.

Killed for looking for a parking spot. Richard Ferretti, a 52-year-old chef, was shot and killed by Philadelphia police who had been alerted to investigate a purple Dodge Caravan that was driving “suspiciously” through the neighborhood.

Shot seven times for peeing outdoors. Eighteen-year-old Keivon Young was shot seven times by police from behind while urinating outdoors. Young was just zipping up his pants when he heard a commotion behind him and then found himself struck by a hail of bullets from two undercover cops. Allegedly officers mistook Young—5’4”, 135 lbs., and guilty of nothing more than taking a leak outdoors—for a 6’ tall, 200 lb. murder suspect whom they later apprehended. Young was charged with felony resisting arrest and two counts of assaulting a peace officer.

This is what passes for policing in America today, folks, and it’s only getting worse. In every one of these scenarios, police could have resorted to less lethal tactics. They could have acted with reason and calculation instead of reacting with a killer instinct.

They could have attempted to de-escalate and defuse whatever perceived “threat” caused them to fear for their lives enough to react with lethal force.

That police instead chose to fatally resolve these encounters by using their guns on fellow citizens speaks volumes about what is wrong with policing in America today, where police officers are being dressed in the trappings of war, drilled in the deadly art of combat, and trained to look upon “every individual they interact with as an armed threat and every situation as a deadly force encounter in the making.”

Remember, to a hammer, all the world looks like a nail.

Yet as I point out in my book Battlefield America: The War on the American People, “we the people” are not just getting hammered. We’re getting killed, execution-style.

Violence begets violence: until we start addressing the U.S. government’s part in creating, cultivating and abetting a culture of violence, we will continue to be a nation plagued by violence in our homes, in our schools, on our streets and in our affairs of state, both foreign and domestic.

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Constitutional attorney and author John W. Whitehead is founder and president of The Rutherford Institute.
Tracking Phones: Google as a Dragnet for the Police
by Bill Barton

The Google Sensorvault database has been used by law enforcement agencies on multiple occasions to obtain what are being called “geofence” warrants, which specify an area and period of time and require Google to provide information regarding the devices that were there.

According to nytimes.com, the warrant “labels [the devices] with anonymous ID numbers, and detectives look at locations and movement patterns to see if any appear relevant to the crime. Once they narrow the field to a few devices they think belong to suspects or witnesses, Google reveals the users’ names and other information.”

Catherine Turner, a Minnesota defense attorney who is handling a case involving the technique, said, “There are privacy concerns that we all have with our phones being tracked—and when those kinds of issues are relevant in a criminal case, that should give everybody serious pause.”

Gary Ernsdorff, a senior prosecutor in Washington state who has been involved with several cases utilizing geofence warrants, said, “It doesn’t pop out the answer like a ticker tape, saying this guy’s guilty. We’re not going to charge anybody just because Google said they were there.”

Nytimes.com said, “Technology companies have for years responded to court orders for specific users’ information. The new warrants go further, suggesting possible suspects and witnesses in the absence of other clues. Often, Google employees said, the company responds to a single warrant with location information on dozens or hundreds of devices. It is unclear how often these search requests have led to arrests or convictions because many of the investigations are still open, and judges frequently seal the warrants.

“The practice was first used by federal agents in 2016, according to Google employees, and first publicly reported last year in North Carolina. It has since spread to local departments across the country, including in California, Florida, Minnesota, and Washington.

“This year, one Google employee said, the company received as many as 180 requests in one week. Google declined to confirm precise numbers.”

A good example of just how many privacy and probable cause issues are raised by Sensorvault and the use of geofence warrants is the December 2018 arrest of warehouse worker Jorge Molina in a Phoenix suburb.

“Investigators also had other circumstantial evidence, including security video of someone firing a gun from a white Honda Civic, the same model that Mr. Molina owned, though they could not see the license plate or attacker. But after he spent nearly a week in jail, the case against Mr. Molina fell apart as investigators learned new information and released him. Last month [March 2019], the police arrested another man: his mother’s ex-boyfriend, who had sometimes used Mr. Molina’s car,” according to nytimes.com.

“Mr. Molina, 24, said he was shocked when the police told him they suspected him of murder, and he was surprised at their ability to arrest him based largely on data. ‘I just kept thinking, You’re innocent, so you’re going to get out,’ he said, but he added that he worried that it could take months or years to be exonerated. ‘I was scared,’ he said.”

Google often does not provide information right away to law enforcement.

“The Google unit handling the requests has struggled to keep up, so it can take weeks or months for a response. In the Arizona investigation, police received data six months after sending the warrant,” nytimes.com said.

Jorge Molina, even though he was exonerated after spending about a week in jail, had his life disrupted in a major way by the consequences of his arrest. Arrested at his workplace, he subsequently lost his job. His car was impounded for investigation and then repossessed.

In a statement, Richard Salgado, Google’s director of law enforcement and information security, said that “the company tried to vigorously protect the privacy of our users while supporting the important work of law enforcement.” He added that it handed over identifying information only “where legally required.”

“Investigators who spoke with The New York Times said they had not sent geofence warrants to companies other than Google, and Apple said it did not have the ability to perform these searches. Google would not provide details on Sensorvault, but Aaron Edens, an intelligence analyst with the sheriff’s office in San Mateo, California, who has examined data from hundreds of phones, said most Android devices and some iPhones he had seen had this data available from Google.”

Current and former employees of Google have stated that the Sensorvault database was not designed for the needs of law enforcement, raising questions about its accuracy in some situations.

The use of geofence warrants raises novel legal issues, according to Orin Kerr, a law professor at the University of Southern California and an expert on criminal law in the digital age. These issues include:

(1) The privacy of innocent people scooped up in these searches. “Several law enforcement officials said the information remained sealed in their jurisdiction but not in every state,” nytimes.com reports. For instance, in Minnesota, the name of an innocent man was released to a local journalist “after it became part of the police record.”

(2) There are serious Fourth Amendment issues that have not been ruled upon by the U.S. Supreme Court, which ruled in 2018 that a warrant is required for historical data about a person’s cellphone location over the course of several weeks. But the Court has not ruled on anything like geofence, which harvests data from many people at once. Questions regarding the contours of probable cause with this type of warrant remain open.

In several cases reviewed by The Times, a judge approved the entire procedure in a single warrant, relying on investigators’ assurances that they would seek data for only the most relevant devices. Google responds to those orders, but Kerr said it was unclear whether multistep warrants should pass legal muster.

“Some jurisdictions require investigators to return to a judge and obtain a second warrant before getting identifying information. With another warrant, investigators can obtain more extensive data, including months of location patterns and even emails,” according to nytimes.com.

“Normally we think of the judiciary as being the overseer, but as the technology has gotten more complex, courts have had a harder and harder time playing that role,” Jennifer Granick, surveillance and cybersecurity counsel at the American Civil Liberties Union, told The Times. “We’re depending on companies to be the intermediary between people and the government.”

Source: nytimes.com
SCOTUS Declares Portion of Federal Supervised Release Statute Unconstitutional

by Dale Chappell

A sharply divided Supreme Court of the United States narrowly held on June 26, 2019, that the revocation provision of the federal sex offender supervised release statute is unconstitutional because it violates the right to trial by jury under the Fifth and Sixth Amendments — so a sentence imposed under that provision must be vacated. However, a majority of the Court could not agree on whether federal supervised release as a whole should be revamped to require a higher standard of proof to send violators back to prison.

The case came before the Court when the Government petitioned for review of a decision of the U.S. Court of Appeals for the Tenth Circuit, which held that the revocation provision of 18 U.S.C. § 3583(k) is unconstitutional and vacated Andre Haymond’s revocation sentence imposed under that provision.

Haymond was on supervised release after completing a 38-month sentence for possession of child pornography in 2010 when he was found with what appeared to be downloaded child pornography on his smartphone. While the judge at the revocation sentencing said he would have imposed “two years or less” for the violation, he was required under § 3583(k) to impose at least five years in prison. The judge called this “repugnant” but complied with the law.

On appeal, the Tenth Circuit agreed with Haymond that the revocation provision of § 3583(k) is unconstitutional, “because it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range” under the supervised release statute, § 3583(e), and “because it imposes heightened punishment on sex offenders based not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt.” United States v. Haymond, 869 F.3d 1153 (10th Cir. 2017).

The Government petitioned the Supreme Court for review, and five justices agreed with the Tenth Circuit. In a concurring opinion by Justice Breyer, adding the fifth and decisive vote against the Government, he agreed that “this specific provision” of § 3583(k) is unconstitutional. That narrow concurrence upheld the Tenth Circuit’s ruling. But that was the only issue that a majority of the Court could agree on.

Under 18 U.S.C. § 3583(e)(3), a court may revoke a term of supervised release and impose a prison sentence if the court finds by a preponderance of the evidence that the defendant violated the conditions of his supervised release. The maximum sentence allowed for the violation under § 3583(e) depends on the “class” of the original offense, but it cannot go above five years in prison, even for the highest “class A” offense. 18 U.S.C. §§ 3559(a) (listing classes) and 3583(b) (maximum terms of supervised release).

However, in its efforts to substantially increase punishments for sex offenders, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (“PROTECT Act”) in 2003, adding subsection (k) to § 3583 to ensure that any sex offender who “commits” a new sex offense while on supervised release would face at least five years and up to life in prison. (§ 3583(k) is actually three sentences long. The first requires a minimum of five years and up to life terms of supervised release for sex offenders; the last two deal with revocation of supervised release.)

The problem with § 3583(k), the Supreme Court said, is that a conviction isn’t even required for a court to impose a mandatory prison sentence. Instead, a court is only required to find by a “preponderance of the evidence” that the defendant committed the new offense in order to impose the sentence. In Haymond’s case, the district court found by a preponderance of the evidence that he possessed the child pornography while on supervised release before it imposed the sentence.

Justice Breyer agreed with the plurality on this point. He said that § 3583(k) was “less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach.” In fact, the Court recognized that had the Government filed new charges against Haymond for the child pornography on his phone, he would have faced up to 20 years in prison for the new crime, if he were found guilty by a jury beyond a reasonable doubt, instead of up to life under § 3583(k) by a mere preponderance of the evidence found by a judge.

But the plurality dug deeper into federal supervised release as a whole, distinguishing it from traditional parole, where a prisoner could be released to serve the remainder of his sentence on parole. When parole was abolished under the Sentencing Reform Act of 1984, supervised release replaced it. But they are not the same, the Court explained. Supervised release wasn’t introduced to replace a prison term like parole, the Court noted, but only to encourage rehabilitation after a prison term. Indeed, a prisoner must serve nearly all of his sentence before being released on supervised release, the Court pointed out.

Under parole, a court could impose a sentence for a parole violation only up to the maximum authorized by the original prison sentence. A revocation was not a new punishment under parole.

This makes supervised release different from parole, the Court said. And that difference means that additional constitutional protections are necessary when a court revokes supervised release and imposes a “new punishment.”

Analyzing two decades worth of decisions requiring that only a jury may find facts to impose a mandatory minimum sentence or to extend the statutory maximum for an offense, the plurality said those decisions should also apply to supervised release revocation sentencing. But this is where Breyer drew the line and where the Court divided. For now, Justices Gorsuch, Ginsburg, Sotomayor, and Kagan would require more for supervised release revocation sentencing, while five of the other justices would not. The plurality’s opinion, though, laid the groundwork for a possible future case on the issue.

The limited holding by the five justices only held that, unless a mandatory minimum sentence for a supervised release revocation is established by facts found by a jury beyond a reasonable doubt, a judge’s findings under a preponderance of the evidence are not enough to meet constitutional muster. Supervised release, as a whole, has survived for now, but its foundation has been questioned.

Accordingly, the Court remanded Haymond’s case to the lower courts to address what remedy should apply. See: United States v. Haymond.
Oregon Supreme Court Announces State Constitution Prohibits Cops From Digging Through Residents’ Trash Without a Warrant

by Mark Wilson

Departing from 50 years of precedent, the Supreme Court of Oregon held that Oregonians retain a constitutionally protected privacy interest in garbage that they leave at the curb for pickup under the state’s constitution. The Court also held that police improperly invade that privacy interest when they search a resident’s garbage without a warrant.

Lebanon, Oregon, Police Detective McCubbins received information about possible drug activity in the home of Tracy Lien and Travis Wilverding. McCubbins decided to secure and search their trash without a warrant.

Republic Services is a private sanitation company under contract with the City of Lebanon to provide garbage collection services to city residents. Neither Lien nor Wilverding had a separate written garbage service agreement with Republic.

McCubbins asked Republic to collect the Lien/Wilverding garbage bin separately from other residences and allow police to search it. Republic’s manager agreed. On the normal garbage pickup day, Republic’s manager drove to the Lien/Wilverding residence in a pickup truck before the larger mechanical sanitation truck arrived to collect their garbage. The manager placed their full trash bin in the back of the pickup and replaced it with an empty plastic trash receptacle. The manager then delivered the Lien/Wilverding trash bin to police who searched it, finding evidence of illegal drug activity.

Lien and Wilverding were then charged with various drug offenses. Both filed pretrial motions to suppress the evidence, arguing that the warrantless garbage bin search violated Article I, section 9, of the Oregon Constitution. The trial court denied the motions, and the Court reversed, concluding that “based on social and legal norms, only police may search a resident’s garbage when the police direct a private actor to facilitate government’s search subject to such examination,” the Court observed.

An individual does not “lose” their privacy interests in their garbage when the police direct a private actor to facilitate the government’s search by picking up garbage bins left at curb side for regular trash “pick-up day,” the Court declared. Acknowledging that it was departing from 50 years of precedent, the Court expressly overruled State v. Purvis, 438 P.2d 1002 (Ore. 1968), and State v. Howard, 129 P.3d 792 (Ore. 2006).

“The state lacked a warrant when its agent, having taken defendants’ garbage bin, turned it over to the police, who then searched its contents,” the Court explained. Given the prosecution’s failure to meet its burden of proving the validity of the warrantless search, the Court concluded that the State violated defendants’ Article I, section 9, rights, and “the trial court erred in denying their motions to suppress the evidence obtained as a result of the unlawful search of their garbage.” State v. Lien, 441 P.3d 185 (Ore. 2019).

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9th Circuit Finds IAC for Failure to Investigate Mitigating Factors During Penalty Phase of Capital Case

by Anthony Accurso

The U.S. Court of Appeals for the Ninth Circuit vacated and remanded the defendant’s death sentence for first-degree murder because defense counsel failed to investigate mitigating evidence of cognitive defects that would have resulted in a “reasonable probability that the outcome of sentencing would have been different” had such evidence been presented.

In 1986, Theodore Washington was involved in a brutal home invasion that resulted in the death of Sterleen Hill. He was found guilty, along with two co-defendants, on six counts relating to the robbery and murder.

Washington began appealing his conviction and sentence in 1990, and his case was reviewed by the Ninth Circuit in 2019. While he presented several issues on appeal, all other issues besides counsel’s deficient and prejudicial performance at sentencing were denied.

In preparation for Washington’s sentencing hearing, trial counsel Robert Clarke interviewed Washington and his friends and family. During these interviews, Washington admitted to having a “cocaine problem,” but this alone was insufficient to indicate that Washington was addicted to cocaine or was under the influence at the time of the crime. Also absent from these interviews were any indications that Washington had “diffuse brain damage,” which contributed to his poor impulse control and below-average intelligence. However, these conditions would have been readily apparent if Clarke obtained Washington’s school or prison records. Evidence that Washington was drinking alcohol recreationally by age eight and was a functional alcoholic by age 14, as well as his experiences in his “significantly dysfunctional family,” was easily discernable from such records.

Because this case originated prior to the passage of the AEDPA, the Court reviewed trial counsel’s performance under Strickland v. Washington, 466 U.S. 668 (1984). Under that standard, Washington needed to prove that his counsel’s performance was deficient and that the deficient performance resulted in prejudice. The Court relied on Robinson v. Schriro, 595 F.3d 1086 (9th Cir. 2010), which recognizes, “at the very least, counsel should obtain readily available documentary evidence such as school, employment, and medical records” when investigating mitigating factors for the sentencing phase of a capital crime. Failing to obtain such records established the deficient performance prong for Washington.

Washington’s sentencing judge eventually heard this mitigating evidence during the post-conviction review but dismissed it as lacking a nexus to the crime.

The Ninth Circuit, however, admonished that such a “nexus test” is an erroneous standard that has been rejected by the U.S. Supreme Court in Smith v. Texas, 543 U.S. 37 (2004), which rejected the nexus requirement for mitigating evidence in a capital case. The Ninth Circuit found this nexus test was the sole reason the mitigating evidence was not weighed properly and that this was enough to establish prejudice under Strickland’s second prong.

Accordingly, the Court reversed the district court’s denial of habeas relief with respect to the penalty phase and remanded “with instructions to grant the writ of habeas corpus unless the state court undertakes resentencing proceedings within a reasonable time to be determined by the district court.” See: Washington v. Ryan, 922 F.3d 419 (9th Cir. 2019).

Minnesota Supreme Court: Even With a Warrant, Forced Anoscopy Is Unreasonable Search

by Douglas Ankney

The Supreme Court of Minnesota ruled that forcing a suspect to undergo an anoscopy to retrieve a baggie from his rectum was an unreasonable search even though police had obtained a warrant permitting the procedure.

Guntallwon Karloyea Brown was arrested after an informant made a controlled purchase of crack cocaine from Brown. A police officer observed Brown “shoving his hands down his pants and grinding his buttocks against the seat [of a chair],” possibly concealing something.

Brown was strip searched, and police observed a baggie protruding from his anus. Believing the baggie contained crack cocaine, a warrant was obtained directing hospital staff to “use any medical/physical means necessary to have Brown vomit or defecate [sic] the contents of his stomach or physically by any means necessary remove the narcotics from the anal cavity so Officers can retrieve the narcotics.”

Brown was then taken to Hennepin County Medical Center where, after being shown the warrant, Brown refused to remove the baggie.

Brown was then taken to Hennepin County Medical Center where, after being shown the warrant, Brown refused to remove the baggie.

The police then presented the warrant to Dr. Paul Nystrom. Nystrom informed Brown of four possible options: (1) Brown removes the baggie himself, (2) Brown submits to an enema to cause him to defecate, (3) Nystrom performs an anoscopy with Brown sedated, or (4) Nystrom sedates Brown, intubates him and pours a laxative through the tube into his stomach to clear his bowels.

Brown refused to answer. Nystrom left the room to give Brown time to think it over. When Nystrom returned, Brown still refused to answer.

Nystrom had hospital staff strap Brown down and sedate him to make the anoscopy “less painful, less uncomfortable.” Nystrom placed a speculum into Brown’s rectum, examined his anal cavity, and removed the baggie with forceps described as “pinchers of some sort that has ... a five-to six-inch arm on it that opens and closes.” Though rare, the risks associated with anoscopy include bleeding, tearing, and abrasions. None were observed in this case. However, two police officers remained in the room and observed the procedure. Nystrom later testified the baggie could have been retrieved through natural elimination, i.e., a bowel movement.

Test results later showed the baggie contained 2.9 grams of cocaine. Brown moved to suppress the evidence, and the district court denied his motion. He was convicted and appealed. The court of appeals affirmed, and
the Supreme Court of Minnesota granted his petition for review.

The Supreme Court observed that the Fourth Amendment protects people from unreasonable searches and seizures. “The ultimate touchstone of the Fourth Amendment is reasonableness.” Riley v. California, 573 U.S. 373 (2014). Searches “which are not justified in the circumstances, or which are made in an improper manner,” are not reasonable. Winston v. Lee, 470 U.S. 753 (1985).

If a search is unreasonable, the evidence obtained from the search is not admissible. State v. Rohde, 852 N.W.2d 260 (Minn. 2014). Searches that invade the body are generally “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive,” and signify “degradation and submission.” Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985). The reasonableness of surgical intrusions beneath the skin is determined by balancing three factors: (1) the extent to which the procedure may threaten the safety or health of the individual, (2) the extent of the intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity, and (3) the community’s interest in fairly and accurately determining guilt or innocence. Winston.

The Court determined that factor (1) leaned slightly in favor of unreasonableness. Though the risks to Brown’s health were minimal, there was yet some risk. Factor (2) leaned heavily in favor of unreasonableness. The State compelled a search of Brown’s anal cavity, a body-part recognized by society as undoubtedly private. The search involved strapping Brown to a table; inserting an IV; sedating him without his consent; poking and prodding his anal cavity; inserting medical instruments into his anal canal risking injury; and all being done against his will and in the presence of two non-medical personnel. Factor (3) leaned in favor of reasonableness. Police had reason to believe the baggie contained crack cocaine, and it was evidence supporting the community’s interest in fairly and accurately determining Brown’s guilt.

The Court, in weighing the factors, concluded it came down to the fact that factor (2) greatly outweighed factor (3). While the State had an interest in retrieving the evidence, the extent of the intrusion to obtain the baggie was not reasonably justified, especially in light of the fact that the baggie could have been retrieved through the normal process of defecation. There were no exigent circumstances justifying the speedy removal through anoscopy.

The Court concluded that the search was unreasonable, and thus, the evidence was inadmissible. Accordingly, the Supreme Court reversed and remanded to the district court to vacate the judgment of conviction and ordered a new trial. See: State v. Brown, 2019 Minn. LEXIS 438 (2019).

Whether State or Federal, Most Convictions Are Overwhelmingly Based on Guilty Pleas

by Ed Lyon

Readers of Criminal Legal News and Prison Legal News are familiar with the fact that criminal convictions occur mostly as a result of guilty or no-contest pleas.

A recently released report by the Pew Research Center confirms a steady erosion of citizens asserting their right to a jury trial over the past 20 years. “Only 2% of federal criminal defendants go to trial, and most who do are found guilty” is the headline.

In 1998, 4,710 cases went to jury trial. In 2018, this number dropped more than half to 1,879.

In raw percentages, the 1998 number represented 7 percent of the cases actually tried, dropping to 2 percent of the criminal cases actually tried in 2018.

A look at the federal statistics specific to 2018 reveals that a full 90 percent of all criminal convictions occurred through guilty pleas. Of the remaining 10 percent, 80 percent of those cases were ultimately dismissed prior to trial. Of the 20 percent of the remaining cases that were actually tried, a whopping 83 percent resulted in convictions with 17 percent resulting in acquittal.

For the 38 percent of those who chose to forego a jury in favor of having their case heard by a judge, a verdict of acquittal was returned. Jury trials returned acquittals in just 14 percent of the cases tried before them.

Defendants in state criminal proceedings fared even worse, on average, than did their peers in the federal arena. Because of procedural differences and other vagaries, aggregate data from state courts are not available for comparison purposes.

However, data from individual states are available. From 2017, the latest year that a complete set of data are available, criminal defendants in Texas fared the worst with only 0.86 percent of cases going to trial. Next was Pennsylvania with 1.11 percent, California with 1.25 percent, Ohio with 1.27 percent, Florida with 1.53 percent, North Carolina with 1.66 percent, Michigan with 2.12 percent, and New York with 2.91 percent.

With the number of federal cases in 2017 that went to trial at 3 percent, the conclusion drawn here is that even more state criminal defendants are ceding their right to jury trials than their peers in the federal system.

Possible reasons for this trend cited by the study are shrinking pools of panelists for jurors and the so-called “trial penalty.” The trial penalty is the phenomenon where higher percentages of convictions with harsher punishments are the usual result for cases tried versus cases pled.

Sources: pewresearch.org, uscourts.gov

Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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

Please contact Kathy Moses at kmoses@humanrightsdefensecenter.org, or call (561) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth, FL 33460.
Third Circuit Rules Lower Courts Abused Discretion When They Failed to Conduct Evidentiary Hearing on Brady Claim and on Conflict of Interest Claim

by Douglas Ankney

The U.S. Court of Appeals for the Third Circuit ruled that the Superior Court abused its discretion when it failed to conduct an evidentiary hearing on a habeas petitioner’s Brady claim and ruled the Appellate Division abused its discretion when it failed to conduct an evidentiary hearing on a claim that counsel was ineffective due to a conflict of interest.

In September 1993, three men broke into the home of Elroy Connor. When Connor and Daniel Ezekiel interrupted the burglary, Ezekiel was shot and killed. The three men fled. Later James Roach was tried for first-degree murder in connection with Ezekiel’s death. When asked during trial about a co-conspirator named Carl Simon, Roach denied knowing Simon. Roach testified he was at his girlfriend’s house on the night in question and wasn’t involved in the crime. Roach was convicted and appealed, but he later withdrew his appeal in March 1995.

After his conviction, Roach provided a statement to the Government that was completely opposite of his testimony at his trial. Roach now stated that Simon orchestrated the burglary and shot Ezekiel. Simon was arrested shortly after Roach’s conviction. Roach was the Government’s key witness at Simon’s murder trial. Roach claimed he testified differently at his own trial because he was scared that Simon would kill him. When asked by the prosecutor if any promise of a sentence reduction had been made to him by the Government in exchange for his testimony against Simon, Roach answered that he had only been promised protection from Simon.

Augustin Ayala, Simon’s court appointed attorney, asked Roach if the third burglar was named Daryl Ward. Roach testified that Ward fit the description, but Roach didn’t think Ward was the third burglar because Ward was allegedly in jail when the crime occurred. Roach did say, however, that after the three men fled Connor’s home, the third man partied ways where Daryl Ward lives. Additionally, Roach indicated the third man was named Crucian, and Roach testified he had heard people refer to Ward as “Crucian.” Although other people testified at Simon’s trial, Roach was the only one to place Simon in Connor’s house and identify Simon as the one who shot Ezekiel. Simon was convicted.

Years later, Ayala testified in an unrelated proceeding that he believed Ward was the third man in the Connor house. Ayala testified that even though Bureau of Corrections’ records indicated Ward was incarcerated at the time of the crime, Ayala knew Ward was out because Ward was a client of Ayala. Ayala further testified that he didn’t force Ward to testify because “[t]he records would indicate that he would be in jail.”

After Simon’s appeals were exhausted, he filed a habeas petition in federal district court alleging, inter alia, that the Government violated its Brady disclosure obligations. Simon stated that at Roach’s re-sentencing Roach’s attorney testified that “after we had filed our appeal with regards to [Roach’s conviction], we were approached by the Government and we agreed with regards to that matter to testify in Territorial Court. Upon our testimony ... we stipulated to vacate the conviction for first degree murder.” Simon also presented the fact that after Roach’s testimony helped secure Simon’s conviction, Roach withdrew his ongoing appeal.

The U.S. Attorney’s Office then requested Roach’s conviction for first-degree murder be vacated and reduced to second-degree murder based on Roach’s extensive cooperation. The district court obliged and reduced Roach’s sentence to 20 years. Simon’s habeas petition was denied on the grounds that he had failed to prove any “agreement” existed “prior” to Roach’s testimony. Simon appealed to the Appellate Division. Due to a series of procedural errors and missteps, Simon was permitted to add a claim to his habeas in the Appellate Division. In one claim, he alleged that Ayala was ineffective due to a conflict of interest. He argued that Ayala protected Ward by not having Ward present to testify that he was the third man and that either Ward or Simon had to testify. The Appellate Division denied the petition, and Simon appealed to the Third Circuit. The Third Circuit observed that when the Government fails to disclose evidence that could help impeach an opposing witness, it is a violation of due process. Brady v. Maryland, 373 U.S. 83 (1963). To establish a Brady violation, a defendant must show: (1) the government withheld evidence, (2) the evidence was favorable ... because ... of impeachment value, and (3) the withheld evidence was material. United States v. Walker, 567 F.3d 160 (3d Cir. 2011). For evidence to be material, it requires only that there is a reasonable probability the outcome of the proceedings would have been different if the evidence had been disclosed. United States v. Bagley, 473 U.S. 667 (1985). Because only the prosecution alone can know what was undisclosed, a petitioner need only make a prima facie showing of a Brady violation in order to obtain an evidentiary hearing. A lower court abuses its discretion when it denies an evidentiary hearing after the prima facie showing has been made, and the claim is not otherwise procedurally barred or if the factual allegations are not contravened by the existing record. Palmer v. Hendricks, 592 F.3d 386 (3d Cir. 2010). Evidence that the Government agreed to reduce Roach’s sentence in exchange for his testimony would have impeached Roach. The evidence was material because Roach was the only witness to place Simon at the scene of the crime and the only one who identified Simon as the killer, so impeaching him could have altered the jury’s verdict. The Court concluded Simon had made a prima facie showing, and the Superior Court erred when it failed to convene an evidentiary hearing.

A petitioner claiming a conflict of interest must prove (1) multiple representation that (2) created an actual conflict of interest that (3) adversely affected the lawyer’s performance. Sullivan v. Cuyler, 723 F.2d 1077 (3d Cir. 1983). A petitioner may prove the claim by showing that the attorney failed to pursue an alternative strategy that (a) could benefit the instant defendant and (b) would violate the attorney’s duties to the other client. United States v. Morelli, 169 F.3d 798 (3d Cir. 1999). Simon’s allegations, again, made a prima facie showing that his attorney had a conflict of interest by not subpoenaing Ward to testify. The evidence revealed that either Ward was the third man, or he was in jail when the crime occurred.

The Court concluded the Appellate
Fourth Circuit Holds Appeal Waiver Does Not Preclude Retroactive ACCA Claim

by Anthony Accurso

The U.S. Court of Appeals for the Fourth Circuit held that retroactive ACCA claims are not barred by a defendant’s appeal waiver, and defendant’s 1976 Georgia burglary conviction is no longer a valid ACCA predicate.

Randall Cornette was convicted of being a felon in possession of a firearm, which normally carries a statutory maximum sentence of 10 years under 18 U.S.C. § 924 (a)(2). However, Cornette had four priors and was sentenced to 220 months under the Armed Career Criminal Act (“ACCA”).

After Cornette’s first § 2255 motion failed, he was granted leave by the Fourth Circuit to file a second or successive motion under Johnson v. United States, 135 S. Ct. 2551 (2015). The district court denied his motion, finding his 1976 Georgia burglary met the definition of generic burglary under the ACCA. On appeal, the Fourth Circuit disagreed.

The Government argued that review was improper because the district court at sentencing did not specify whether it was classifying any of Cornette’s priors as ACCA predicates under the elements clause, or the now void “residual clause” of 18 U.S.C. § 924(e)(2)(B). The Court held this ambiguity worked in Cornette’s favor under United States v. Winston, 850 F.3d 677 (4th Cir. 2017) by quoting “we will not penalize a movant for a court’s discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony.”

The Government’s next gambit was to argue that Cornette’s plea deal included an appeal waiver precluding challenges to his sentence. The Court found that under Welch v. United States, 136 S. Ct. 1257 (2016), “the residual clause of the ACCA can no longer mandate or authorize any sentence, and that the substantive clause of the ACCA can no longer mandate or authorize any sentence, and that the substantive clause of the ACCA can no longer mandate or authorize any sentence.”

Thus, the Court ruled Cornette’s ACCA claim under Johnson, and made retroactive in his plea agreement. In his case, “the district court is now deemed to have had no statutory authority to impose Cornette’s sentence under the residual clause of the ACCA,” so the Court may review his sentencing challenge notwithstanding the appeal waiver.

Next, the Court considered whether Cornette’s 1976 Georgia burglary fit the burglary element under the ACCA. Under United States v. Hemingway, 743 F.3d 323 (4th Cir. 2013), the Court must first determine divisibility of the statute of conviction before choosing its approach as to whether the conviction qualifies as an ACCA predicate. According to Womack v. United States, 136 S. Ct. 2243 (2016), the Court must look to “the text of the statute and controlling state law” for the divisibility analysis.

The Georgia burglary statute contains a disjunctive list of locations that may be burgled, and Georgia state court precedent and jury instructions confirm that the list of locations delineate alternative means, not elements, of the statute. Thus the statute is indivisible.

The Court then determined the statute and controlling law at the time allowed for prosecution of criminal entry into “any ... vehicle,” regardless of whether it was used as a dwelling. While the Supreme Court of Georgia modified the understanding of the statute to only include vehicles used as dwellings, this didn’t happen until a year after Cornette was convicted. Because the generic definition of burglary under the ACCA requires the location to be a dwelling, the Court ruled that the statute was overbroad at the time Cornette was convicted.

As a result, Cornette’s 1976 Georgia burglary conviction was no longer a valid ACCA predicate. However, that was only one of Cornette’s four priors, leaving him with the three required for an ACCA sentence.

Fortunately for Cornette, though, the Court applied its decision in United States v. Newbold, 791 F.3d 455 (4th Cir. 2015) (conviction didn’t qualify as serious drug offense because defendant couldn’t have been sentenced to 10 years in prison without finding aggravating factors), and held that one of his other priors (a 1986 North Carolina charge for drug possession with intent to manufacture/sell/deliver) also was not a predicate.

Accordingly, the Court held that Cornette’s sentence under the ACCA was no longer valid because only two priors survived following the post-Johnson analysis; the Court remanded the case to the district court for resentencing. See: United States v. Cornette, 932 F.3d 204 (4th Cir. 2019).

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.

In almost all cases we cannot help find an attorney, intervene in criminal or civil cases, contact prison officials regarding grievances or disciplinary issues, etc. We cannot assist with wrongful convictions, and recommend contacting organizations that specialize in such cases, such as the Innocence Project (though we can help obtain compensation after a wrongful conviction has been reversed based on innocence claims).

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.

Also, if you contact us, please ensure letters are legible and to the point – we regularly receive 10- to 15-page letters, and do not have the staff time or resources to review lengthy correspondence. If we need more information, we will write back.

While we wish we could respond to everyone who contacts us, we are unable to do so; please do not be disappointed if you do not receive a reply.
Thrash said that Weeks couldn’t prove his felonies could qualify him for the ACCA qualifying drug priors, either of the violent his prior convictions were under the residual clause. The Circuit upheld the denial of Weeks’ motion. Back to Weeks’ § 2255 motion, the question before the Eleventh Circuit on rehearing was whether Beeman requires a court to ignore developments in case law while a sentence is on direct appeal. In other words, whether new

In his motion for a rehearing, Weeks pointed out that the case law regarding his prior violent felony convictions had changed while his sentence was on direct appeal, leaving both convictions under the residual clause. He argued that his case is different from Beeman because his sentence went to appeal, while the sentence in Beeman did not. The non-argument panel granted rehearing and sent Weeks’ appeal to an argument panel.

Under the ACCA, a prior conviction qualifies as a “violent felony” if it is punishable by more than a year and has “as an element” the use of force or one of the enumerated offenses listed in the ACCA statute, 18 U.S.C. § 924(e). These two clauses are known as the “elements clause” and the “enumerated offenses clause.” At the time of Weeks’ sentencing, though, there was a third provision called the “residual clause,” which allowed a court to include an offense under the ACCA if it presented a “serious potential risk of physical injury to another.” Johnson 2015, of course, killed this third provision. The ACCA also counts nearly all drug trafficking offenses toward the three total priors needed for the penalty.

During Weeks’ sentencing, the court relied on case law from the First Circuit to find that his prior assault and battery conviction fell under the elements clause. Applying the ACCA penalty required the court to impose at least 15 years in prison. He received just five months shy of 20. Without the penalty, he would have faced at most 10 years. Weeks filed a direct appeal of his sentence.

While Weeks’ sentence was on direct appeal, the First Circuit, relying on the Supreme Court’s ruling in Johnson v. United States, 559 U.S. 133 (2010) (“Johnson 2010”), overturned the case law Weeks’ sentencing judge had relied on. Weeks promptly updated the Court of Appeals of the change. But the Court said it didn’t matter because his resisting arrest qualified under the residual clause, and that was enough with his prior drug convictions. The court affirmed his ACCA sentence.

Back to Weeks’ § 2255 motion, the question before the Eleventh Circuit on rehearing was whether Beeman requires a court to ignore developments in case law while a sentence is on direct appeal. In other words, whether new

Recognizing that a sentence does not become “final” until the appeal “comes to an end,” the Court said that Weeks’ sentence was “not yet fixed at the time of sentencing.” Any new case law that came down while Weeks’ sentence was on appeal automatically applied to his case, the Court explained.

So, the new decision in Johnson 2010 not only overturned the case law regarding his assault and battery, but it also applies to his resisting arrest prior. Though the sentencing court said it was relying on the residual clause to count the resisting arrest prior, Weeks still had to prove the residual clause was the “sole” clause the court relied on. That’s what Beeman required, the Court said.

But Johnson 2010 settled this. Though Massachusetts resisting arrest was divisible, one part qualifying under the elements clause and the other under the residual clause, Johnson 2010 requires the sentencing court to presume Weeks’ conviction “rested upon the least of the acts criminalized in the statute” because the government had no authorized documents to show which part his conviction was under. The residual clause was the least of the acts criminalized in the statute.

In light of Johnson 2010, which was decided just six days after Weeks’ sentencing and while his sentence was on appeal, neither Weeks’ assault and battery nor his resisting arrest priors fit under the ACCA, the Court said.

The Court explained that Beeman applies to cases in which sentences do not go to appeal. It utilized the “unique factual and legal situation” in Weeks’ case to announce the new rule for sentences that go to appeal: “a claimant who has challenged his enhanced sentence on direct appeal may point to the appellate opinion, concessions made by the parties, or legal precedent through the time of the direct appeal making it more likely than not that only the residual clause could have formed the basis for his ACCA enhancement.”

Accordingly, the Court reversed the district court’s dismissal of Weeks’ motion and remanded for resentencing without the ACCA penalty. See: Weeks v. United States, 930 F.3d 1263 (11th Cir. 2019).
In the push for criminal justice reform, several ideas have emerged to help fix our broken system.

Many experts have promoted risk assessments as effective tools that could be employed at every level of criminal justice to provide more objective standards. Widespread use of these tools is already making an impact, yet few know exactly what risk assessments are or how they are applied.

Risk assessments are mathematical models that measure the likelihood of a future event based on certain variables. When applied to parole, for example, such a program would weigh the prisoner’s age, prior convictions, and other factors to determine how likely the individual is to re-offend.

The primary target for risk assessments currently is the cash bail system, which incarcerates people who have not been convicted of a crime until their trial if they are unable to pay a bond. Bond was intended by the framers of our Constitution to be an inducement for someone charged with a crime to appear in court, at which time the bond would be refunded. However, contemporary judges routinely set bonds so high that only the very wealthy can pay them. Most people must turn to the services of bail bondsmen, who charge a 10 percent to 15 percent nonrefundable fee for covering the full price of the bond. Still, many Americans cannot afford such services and are left to languish in jail until their case is adjudicated. Using risk assessments would relieve judges of the sole responsibility of making bail decisions and create a more transparent system that provides less biased outcomes.

That is the theory, at least. In practice, risk assessments have produced mixed results. The problem is not that algorithms are biased but that human fallibility is involved in programming and determining how they are used—or, as is sometimes the case, misused.

One of the most popular algorithms, the Arnold Foundation’s Public Safety Assessment, relies on demographics and court records to generate its results. Other tools add a questionnaire conducted by a court official. Either way, the algorithms assign a specific weight to factors like employment, education level and prior arrests. How each variable is weighted affects the outcome, yet risk-assessment companies typically keep this part of their formula under wraps.

The values the algorithm determines for a particular individual are then measured against a known data set to make a prediction.

It is hard to argue with the cold logic of math, but an algorithm’s results will only be as accurate as its inputs. The variables selected and the quality of their information mirror the beliefs of the individuals that choose them, thus allowing human bias to seep into the equation.

Problems also arise because of a gap between what a risk assessment is designed to predict and what the available information actually reflects. Arrest and conviction records seem like obvious choices for criminal justice tools, but such data may reveal more about the behavior of police and judges than the people upon which the model is intended to focus.

How a variable is defined also affects an assessment’s predictive value. Most models consider recidivism to mean one is arrested again within two years of release. A tool developed to measure the likelihood of an individual committing another crime, however, would be poorly served by such a definition. Arrests are commonly made in the absence of a crime, just as many crimes occur without any arrests. Because arrests happen more often in areas where police concentrate their activities, arrest rates tend to be skewed against people in minority and lower-income neighborhoods. This bias is compounded by the fact that once an individual is “in the system” their chances of being re-arrested skyrocket.

Another misapplication problem occurs when assessment tools are used for tasks for which they were not intended. One popular model, COMPAS, was formulated for case management in correctional institutions, but administrators have employed it for sentencing and other purposes. While some may assume one algorithm is as good as another, this is not unlike using a wrench to hammer a nail.

Those who favor risk assessments argue that models can be improved through observation and study to reduce bias. A recent computer simulation involving five years of New York City arrests demonstrated that eliminating human judgment from bail decisions could significantly lessen pretrial incarceration without impacting crime rates and do so in a non-discriminatory fashion.

Another study found that risk assessments could cast more accurate predictions than judges when it came to which defendants would fail to show up in court. Other research revealed that untrained personnel can estimate risks of recidivism almost as well as COMPAS software, but the methodology of this particular study has proven controversial.

Although computer models may do a better job of making criminal justice decisions, there has been no rush to remove human judgment from the process. A 2016 case questioned if it would even be constitutional to do so.

The Wisconsin Supreme Court found in State v. Loomis that the defendant’s right to due process was not violated by the use of COMPAS to generate risk scores that influenced his sentencing; however, the court did recommend standards for future application of assessment tools. First, when models are employed that keep secret their chosen inputs and/or how they are weighted, judges must be warned if an assessment has not been validated by independent research or regularly updated for accuracy. Last, judges must be informed about the possibility of racial bias in the algorithms and the dangers of misapplying models to the situations for which they were not intended.

Every indication points to increased usage of risk assessments in the coming years. Ideally, this will lead to more people getting a fair shake in their dealings with the criminal justice system, though such an outcome is far from certain.

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The Power of Sheriffs: An Explainer

by Jessica Brand, The Appeal

This Explainer was produced by The Appeal, a nonprofit criminal justice news site.

In our Explainer series, Justice Collaborative lawyers and other legal experts help unpack some of the most complicated issues in the criminal justice system. We break down the problems behind the headlines—like bail, asset forfeiture, or the Brady doctrine—so that everyone can understand them. Wherever possible, we try to utilize the stories of those affected by the criminal justice system to show how these laws and principles should work, and how they often fail. We will update our Explainers quarterly to keep them current.

In September 2018, President Trump stood in front of 44 sheriffs as he began another diatribe against The New York Times and other media outlets that had published stories criticizing his administration. The sheriffs applauded.

The meeting was originally scheduled to be between the sheriffs and officials from ICE and U.S. Customs and Border Protection. Getting a photo opportunity with Trump was an unexpected boon. Sheriff Thomas Hodgson of Bristol County, Massachusetts, a man whose jails have had the highest suicide rate per capita in the state and who publicly offered to let Trump use his detainees as labor to build the Mexican “border wall,” presented Trump an honorary plaque that read, “There’s a new sheriff in town.” (David Nakamura / Washington Post and Sophia Eppolito / Boston Globe)

The Trump years will be known for many things, but one of them most likely will be the growing visibility of sheriffs as they rise from the local crime pages to the national stage.

What’s a sheriff?

If the sheriff sounds like something from the American frontier, that’s because it is. The role of sheriff goes back to England where sheriffs were usually appointed by the Crown and other officials to oversee the laws of the shire, or county. Duties included tax collection and running a local militia, also called the posse comitatus—citizens who would moonlight as law enforcement.

In America, sheriffs played a particularly pivotal role in Southern states where they served as chief law enforcement officers. (Northeast states relied on constables, who are more like the police chiefs of today.) Sheriffs got to take cuts from fees, one of the perks of the job, in addition to collecting salaries. As America expanded westward, those states adopted the Southern sheriff model. As states drafted their constitutions, they often included an elected sheriff position. Right now, at least 40 states have elected sheriffs. [James Toberlin / Virginia Law Review]

In many regions, especially in the South, sheriffs still have wide jurisdiction and primary law enforcement responsibilities. Unlike police chiefs, who usually report to mayors or other elected officials, sheriffs have fewer checks on their power. Many sheriffs serve long stints in office, and some are in place for decades.

While the precise role of elected sheriffs varies from state to state, they have some duties in common, including overseeing local jails, transporting prisoners and pretrial detainees, and investigating crimes. Some even act as coroners, ruling over a person’s cause of death.

The only states that do not have local sheriffs are Alaska, Hawaii, and Connecticut, which rely on statewide law enforcement agencies. [National Sheriffs’ Association]

Potential for abuse

While many sheriffs serve important functions in the community, the position itself is easy to abuse. Long tenures with limited oversight allow some to run their counties as small fiefdoms, subject to their own rules.

Despite their broad duties, sheriffs and their deputies aren’t always trained in law enforcement. Elected sheriffs may have backgrounds in business or real estate instead. Patronage can run strong in sheriffs’ departments, with some deputies hired as political favors. [James Toberlin / Virginia Law Review, Robert Faturechi and Ben Poston / Los Angeles Times]

While sheriffs are accountable to voters, that has led some to prioritize the will of the majority over their responsibility to ensure equal rights. For example, during the Civil Rights movement of the 1960s, many white Southern sheriffs sought to consolidate power for whites by cracking down on black protesters who tried to exercise their right to vote. [Louis Menand / The New Yorker]

Similarly, sheriffs today sometimes use their power to excess, violating civil liberties. In Worth County, Georgia, in 2017, the sheriff subjected up 850 high school students at Worth County High School, nearly the entire student body, to invasive drug searches, including checking inside their underwear, according to court documents. He was suspended and replaced after a Southern Center for Human Rights lawsuit. [Christine Hauser / The New York Times]

Running jails

Running a jail can be a lucrative business, and sheriffs have been known to enrich themselves in the process.

In Alabama, for example, sheriffs legally had the discretion to use state money to feed prisoners in any way they chose. Some opted to feed people cheaply and pocket the remainder, or use it for questionable purchases like cars and homes. In Etowah County, Sheriff Todd Entrekin used more than $750,000 from his office’s fund to buy a beach house and pay for other personal expenses. In Morgan County, Greg Bartlett was nicknamed “Sheriff Corndog” for feeding prisoners corn dogs for two meals a day. [Eli Rosenberg / Washington Post]

Sheriffs also are responsible for maintaining jail conditions, which includes wide-ranging authority to do as they see fit. In Maricopa County, Arizona, former Sheriff Joe Arpaio forced detainees to wear pink underwear, reinstated the chain gang, and created a “tent city” with no air conditioning. [Jacey Fortin / New York Times]

Sheriff Thomas Hodgson in Bristol County, Massachusetts, charged detainees $5 per day in what amounted to rent payments between 2002 and 2004. Last summer, the Massachusetts attorney general requested an investigation of the suicides at his jails, where multiple lawsuits are pending. His jails contained about 13 percent of jailed people in the state between 2006 and 2016, but were home to over a quarter of jail suicides, according to an investigation by the New England Center for Investigative Reporting. [Sophia Eppolito / Boston Globe]

Sheriff as coroner

In 41 California counties, elected sheriffs also serve as coroners. Coroners are in charge of officially determining a cause of death—for example, whether a death is a homicide or accident.

In many counties, there will also be forensic examiners who do autopsies, but they don’t
always control the final assessment of cause of death. Yet there is generally no requirement for sheriffs who are coroners to have previous medical expertise.

In San Joaquin County, departing Sheriff Steve Moore (who lost his primary in 2018) was accused by Dr. Bennet Omalu—the forensic examiner who is most famous for diagnosing severe head trauma in NFL players—of changing the cause of death in some instances from “homicide” to “accidental.” Moore was accused of altering the cause of death for a person who died from suffocation and of withholding information regarding another person who was Tased to death by police. He denied any wrongdoing. [Julie Small / KQED]

Excessive force
In some places, the sheriff department’s role as primary law enforcement leads to disparities in treatment and instances of excessive force, especially against people of color.

In Louisiana’s Iberia Parish, longtime Sheriff Louis Ackal had been sued so many times for his deputies’ excessive force that a group of state sheriffs no longer wanted to insure him against lawsuits. The group paid around $3 million to settle claims, including one connected to the death of a handcuffed man in a police car and another regarding an incident in which deputies threw a pregnant woman to the ground and pepper sprayed her. [John Simerman / The Advocate]

As the result of an FBI investigation, in 2016, Ackal went on trial for conspiracy to violate the civil rights of five pre-trial detainees, based on an alleged 2011 incident where the detainees were beaten by jail deputies. Nine former sheriff department employees pleading guilty to civil rights violations; Ackal was acquitted. [Nathaniel Rich / New York Times Magazine]

Some counties, including a few in Colorado, still maintain groups of lay volunteers who are permitted to conduct armed patrols and help in times of emergency. Civilians conducting law enforcement have led to lapses of ethics and other dangerous situations. [James Toberlin / Virginia Law Review]

Sheriffs and forfeiture
Ex-Attorney General Jeff Sessions rescinded an Obama-era rule that prevented state and local law enforcement from using federal asset forfeiture laws to evade local reform efforts. As a result, sheriffs are now free to use asset forfeiture by citing federal law even if local rules prevent the practice. Forfeiture funds, like many other fees and fines, are often at the complete disposal of sheriffs and other officials, which can lead to abuses and corruption. [U.S. Department of Justice Police Directive 17-1 and DOJ press release]

In April 2018, Sheriff Butch Conway of Gwinnett County, Georgia, used $70,000 from asset forfeiture funds to buy a 707-horsepower muscle car. The Department of Justice wrote a letter demanding that the sheriff reimburse the federal government for the forfeiture funds he used. (The government had previously approved the purchase, taking at face value the sheriff’s argument that the car was for undercover operations and teaching kids about the dangers of distracted driving.) The Justice Department requested the money back in July 2018 and is conducting a federal review of expenditures. [Tim Cushing / TechDirt and Tyler Estep / Atlanta Journal-Constitution]

Sheriffs and ICE
Because sheriffs have the power to detain people, they often play a role in immigration enforcement.

Ex-Sheriff Arpaio was found in contempt of court in 2017 after refusing to follow a federal judge’s order to stop profiling and detaining Latino people during traffic stops and immigration raids. His push to deport undocumented immigrants was a constant throughout his tenure, though he finally lost his seat in November 2016. [Jacey Fortin / New York Times]

ICE can issue detainers, which are requests for law enforcement to hold an individual for 48 hours even if the person has posted bond or completed a jail sentence. [ACLU] But courts have found that sheriffs who do detain people without probable cause or a new arrest are violating the Fourth Amendment. [Yvette Cabrera / ThinkProgress]

In Florida, ICE has implemented a pilot program using basic ordering agreements (BOAs), which pay sheriffs $50 per person to detain people solely for the purpose of immigration proceedings for up to 48 hours after they are supposed to be released. There are currently 18 Florida counties in the program. The Southern Poverty Law Center and ACLU brought a lawsuit in December 2018 challenging the legality of BOAs. [Southern Poverty Law Center]

ICE’s 287(g) program is based on agreements between state and local law enforcement and the agency to enable sheriffs and other officials to check the immigration status of jail detainees and assist with initiating deportation proceedings. [ICE Fact Sheet]

In 2006, then-Sheriff Jim Pendergraph enrolled Mecklenburg County, North Carolina, in the 287(g) program and, consequently, the number of people placed in deportation proceedings from the county increased significantly. Pendergraph left his elected position in 2007 to become the executive director of ICE’s Office of State and Local Coordination, and he made this comment at a 2008 law enforcement conference: “If you don’t have enough evidence to charge someone criminally but you think he’s illegal, we can make him disappear.” [Jacqueline Stevens / The Nation, Jim Morrill / Charlotte Observer, and Josie Duffy Rice / The Appeal]

Since 2017, the number of 287(g) agreements nationwide has roughly doubled; now more than 70 jurisdictions have such agreements. [Immigrant Legal Resource Center]

In December 2018, Sheriff Scott Jones disclosed information required by state law on the number of people detained and interviewed at Sacramento, California, jails; over 80 percent were Hispanic. He also reiterated that even though California prohibits sheriffs from assisting ICE in any operation because of sanctuary city laws, “ICE has access to our facility, they’re in our facility regularly and they have access to our databases.” [Alexandra Yoon-Hendricks / Sacramento Bee]

Constitutional sheriffs
Historically, some sheriffs have not only enforced the laws; they have also decided which laws not to enforce. They view this as protecting the people from the intrusions of the federal government.

The “constitutional sheriff” movement is comprised of current and former members of law enforcement who believe that sheriffs are the ultimate authority in their jurisdiction—even above federal law enforcement. Constitutional sheriffs have links to white supremacy. Famous members include Joe Arpaio and David Clarke, the ex-sheriff of Milwaukee County who is an unabashed Trump supporter. [Robert Tsai / Politico]

While it may seem like a fringe movement, it is prevalent enough to be taken seriously. In 2013, 500 sheriffs agreed not to enforce any gun laws created by the federal government. In Utah, almost all elected sheriffs signed an agreement to protect the Bill of Rights—and fight any federal officials who
Power of Sheriffs (cont.)

tried to limit them. [Robert Tsai / Politico]

Who sheriffs the sheriff?

Because sheriffs’ duties are enshrined in state constitutions—meaning the role cannot be eliminated—there are few restrictions on their power. In many cases, only a specific official can arrest a sheriff even if he or she has broken the law. In some places, only the governor can arrest the sheriff. In some states, there is a limited amount local government can do to change a sheriff’s budget or determine the allocation of funds. [James Toberlin / Virginia Law Review]

Even voters’ power over sheriffs is finite. In Los Angeles County, for example, voters tried to limit sheriffs’ terms in office, but then-Sheriff Lee Baca sued and won after a court found that sheriffs’ term limits cannot be altered by voters. [Editorial Board / Los Angeles Times]

Still, in some November 2018 elections, voters did successfully elect new sheriffs based on important issues in their communities.

In Mecklenburg County, North Carolina, for example, voters picked Garry McFadden after he promised to end the county’s 287(g) program, which had sent 15,000 people into deportation proceedings since 2006. He followed through on this promise on his first day in office. [Jane Wester / Charlotte Observer]

Shortly thereafter, two other sheriffs in North Carolina—Sheriff Clarence Birkhead of Durham County and Sheriff Gerald Baker in Wake County—both decided to pull out of their agreements with ICE. [Virginia Bridges / Herald Sun and WBTV]

In Los Angeles County, where the sheriff’s department has long struggled with accusations of excessive force and corruption, voters chose Democrat Alex Villanueva over the incumbent. Advocates are unsure whether Villanueva will continue the reforms instituted under the prior sheriff after a federal investigation found a culture of violence against detainees. [Maya Lau / Los Angeles Times]

There are also ways in which the legislative branch can help bring clarity to rules impacting sheriffs. In Alabama, for example, Governor Kay Ivey responded to news reports that Alabama sheriffs were pocketing money intended to feed prisoners by rescinding a policy that gave such money to the sheriffs “personally,” instead requiring that the amounts be placed in a specific fund. She also encouraged the legislature to pass specific laws regulating the personal use of such funds. It remains to be seen how well sheriffs adhere to this ruling. [Associated Press]

Jessica Pishko is a visiting fellow at the Sheriff Accountability Project at the Rule of Law Collaborative at University of South Carolina Law School.

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Tenth Circuit: No Absolute Immunity for Prosecutor Who Fabricated Evidence

by Douglas Ankney

The U.S. Court of Appeals for the Tenth Circuit affirmed a district court’s decision that a prosecutor does not enjoy absolute immunity from suit for fabricating evidence during a preliminary investigation.

In November 1999, 14-year-old C.A. was reported missing by Floyd Bledsoe. C.A. was the younger sister of Floyd’s wife and had been living with the couple.

Two days later Tom Bledsoe, Floyd’s older brother, confessed to raping and murdering C.A. Tom had a limited social life and had some intellectual limitations. He was 25 years old, lived with his parents, and remained an active participant in his church’s Sunday School program for children. Tom first confessed to his Sunday School teacher, leaving messages on the teacher’s answering machine stating, “I know where [C.A.] is,” “I’m going to turn myself in to the police,” and “I will pay for the rest of my life.” Tom also called his parents, confessed to killing C.A., and told them he was turning himself in to the police. Tom and his attorney met that same day with the Jefferson County Sheriff’s Department where they informed officers that Tom had shot C.A. in the back of the head and buried her in a trash dump on his parents’ property. Tom led police to C.A.’s body. She had been shot several times in the torso and in the back of the head. Semen was found in her vagina. Near her body, investigators recovered three bullet casings, a pornographic video, and a t-shirt with the printed name of Tom’s church. Tom’s attorney also surrendered a handgun that was the confessed murder weapon. Tom was charged with first-degree murder.

But, in spite of this evidence, Jim Vanderbilt — the prosecuting attorney at the time — along with Tom’s attorney and several other unspecified individuals, hatched a plan to frame Floyd for the crime. First, they talked Tom into recanting his confession. Second, they persuaded Tom to claim Floyd confessed the crime to him the day after C.A.’s disappearance. Third, they convinced Tom to say that Floyd bullied him into falsely confessing by threatening to expose that Tom watched pornographic videos, masturbated, and tried to have sexual intercourse with a dog. Tom and Floyd both took polygraph examinations. Floyd disavowed any involvement in the crime. Tom provided the false recantation and implicated Floyd as the perpetrator. However, Tom failed the question, “Did you kill [C.A.]?” That evening, Vanderbilt released Tom, dropped the charges against him, and arrested Floyd. Vanderbilt offered Floyd a plea deal of five years in prison. Floyd rejected the offer, went to trial, was convicted, and was sentenced to life plus 16 years in prison.

Fifteen years later, new forensic testing excluded Floyd as the contributor of semen found in C.A.’s vagina but indicated Tom was the most likely source. Tom committed suicide shortly thereafter. He left a note stating: “I sent an innocent man to prison. The Jefferson County police and ... Jim Vanderbilt made me do it. I was told by Vanderbilt to keep my mouth shut. Now I am going to set the record straight. I killed [C.A.] on November 5, 1999. I had sex with her and I killed her.... I raped and murdered a 14 year girl. I tried telling the truth but no one would listen. I was told to keep my mouth shut.... Floyd S Bledsoe is innocent man. Tom E Bledsoe is the guilty one.” In addition to the note, Tom left a diagram showing the location where he shot C.A. before carrying her to the dump sight. Investigators recovered a fourth bullet casing at the location.

Floyd’s conviction was vacated, and the Jefferson County Attorney dismissed all charges against him.

Floyd then brought a 42 U.S.C. § 1983 suit against Vanderbilt for depriving him of a fair trial by fabricating Tom’s testimonial inculpation of Floyd that resulted in Floyd’s
unjust conviction and for conspiring with others to frame him by fabricating evidence. Vanderbilt argued to the district court that prosecutorial immunity shielded him from suit. The district court disagreed, and Vanderbilt appealed.

The Tenth Circuit observed “[p]rosecutors generally enjoy absolute immunity from suit for activities that are intimately associated with the judicial phase of the criminal process.” Imbler v. Pachtman, 424 U.S. 409 (1976). But absolute immunity doesn’t apply when a prosecutor is engaged in administrative or investigative tasks. Van de Kamp v. Goldstein, 555 U.S. 335 (2009).

Absolute immunity does not protect the act of fabricating evidence during the preliminary investigation of a crime. Buckley v. Fitzsimmons, 509 U.S. 259 (1993). This is because the prosecutor cannot properly claim to be acting as advocates in the judicial phase when performing such acts but is more akin to detectives in searching for clues or corroboration to give probable cause to have a suspect arrested. Id. Since a detective would be entitled to only qualified immunity when fabricating evidence, a prosecutor who does the same is only protected by qualified immunity. Id.

The Tenth Circuit determined that the principles of Buckley compelled them to conclude Vanderbilt was not entitled to absolute immunity from suit. Accordingly, the Court affirmed the decision of the district court denying absolute immunity. See: Bledsoe v. Vanderbilt, 2019 U.S. App. LEXIS 24493 (10th Cir. 2019).

Michigan Supreme Court: Reaching Out Door of Home to Retrieve ID Inadequate to Surrender Fourth Amendment Rights

by David Reutter

The Supreme Court of Michigan held that a defendant did not expose herself to public arrest when she reached out of her doorway to retrieve her identification from a police officer — and there could be no “hot pursuit” when she pulled her arm back into the home.

Jennifer Hammerlund was involved in a single-vehicle accident in the wee hours of September 30, 2015. She called her insurance company and took a rideshare service home. She did not call police. Officer Erich Staman of the Wyoming Police Department reported to the scene, identified the car as Hammerlund’s, had the vehicle towed, and had Kentwood police officers report to Hammerlund’s home to conduct a welfare check.

When they arrived, Hammerlund was in bed, and her roommate answered the door. Hammerlund initially refused to leave her room, but with the officers’ threat to take her into custody and arrest her roommate for harboring a fugitive, Hammerlund came to the door.

Staman arrived to make contact, and it was “pretty clear that she wasn’t coming out of the home.” When he asked for Hammerlund’s ID, she had her roommate pass it to him. He refused to return it that way, and when Hammerlund reached out the door to retrieve her property, Staman grabbed her arm to make an arrest.

Hammerlund pulled her arm back, and Staman said the “momentum” pulled him into the house where he completed the arrest.

Hammerlund waived her Miranda rights and made statements about the crash, including that she had drunk alcohol. She subsequently was given breathalyzer tests and charged with her third offense for operating while intoxicated (“OWI”) and failing to report an accident resulting in damage to fixtures, a misdemeanor.

The trial court denied motions to dismiss the case and to suppress evidence as a result of an illegal, warrantless search. Hammerlund was convicted at trial and sentenced to five years’ probation and four months in jail on the OWI charge and a concurrent 60-day sentence on the failure to report charge. She appealed, and the court of appeals affirmed.

The Michigan Supreme Court noted that the Fourth Amendment permits an arrest without a warrant in a public place if the officer possesses sufficient probable cause. Here, Officer Staman had cause to make an arrest for failing to report an accident that caused damage to fixtures.

While he had cause to make a warrantless public arrest, “the same is not true when it comes to arresting a suspect in her home,” stated the Court. It explained that Payton v. New York, 445 U.S. 573 (1980), requires law enforcement to obtain a warrant or identify exigent circumstances that excuse the warrant requirement before entering a home to make an arrest. Payton instructs that even when there is probable cause for a search or seizure, doing so without a warrant inside a suspect’s home is presumptively unreasonable.

The trial court found that Hammerlund was subject to public arrest because she “reached out of her door” with a portion of her arm. The high court said it would not focus on an arbitrary determination of how far she reached out because “our focus remains on determining whether a person sought to preserve her constitutionally protected reasonable expectation of privacy.”

Based on her actions, the Court concluded that Hammerlund’s behavior “made clear that she was carefully preserving her expectation of privacy.” The Court explained that her “expectation of privacy within her home was reasonable, and her action of reaching out over the threshold and retrieving her identification did not relinquish that reasonable expectation.”

The Court then turned to the issue of whether exigent circumstance were present to constitute “hot pursuit,” which would justify the warrantless intrusion into and arrest inside of Hammerlund’s home. “What makes the pursuit ‘hot’ is ‘the emergency nature of the situation,’ requiring police action,” the Court explained, citing Smith v. Stoneburner, 716 F.3d 926 (6th Cir. 2013).

Hammerlund was “suspected of a 90-day misdemeanor and there was no evidence of that crime that she could destroy. Indeed, all the elements of the crime were already known to the police,” reasoned the Court. In fact, the Court stated that it could find no supporting precedent to arrest a misdemeanant suspect on a theory of hot pursuit.

At no point did Hammerlund expose herself to public arrest, and since the seizure occurred beyond the “firm line at the entrance to the house,” the arrest was unreasonable because it was accomplished without a warrant, without consent, and without any exigent circumstances, the Court concluded.

Accordingly, the Court reversed the judgment of the Court of Appeals and remanded the case to the trial court with instructions to determine if the exclusionary rule applies to suppress the evidence. See: People v. Hammerlund, 2019 Mich. LEXIS 1286 (2019).
DNA testing, once an expensive technology, is now so inexpensive that approximately 26 million people have taken advantage of it,” according to Slate.com.” With sites like Ancestry.com and 23andMe, you can easily submit samples of your DNA and receive information about your family history and personal health.

“Both sites allow individuals to obtain raw DNA data files, which they can then upload to an open-source database like GEDmatch in order to connect them to distant family members. While the files are supposedly anonymous, one study found that an outside individual could identify an ‘anonymous’ set of data using GEDmatch in just one day.”

It is now a tool for law enforcement. For instance, police can create a “user profile” for a crime suspect, upload that suspect’s DNA, and find a match, without requiring a court order of any sort.

A suspect in a scenario such as this one has no idea that his or her DNA has been uploaded to a public website. Joseph DeAngelo, the Golden State Killer suspect in over a dozen murders and 50 rapes in the 1970s and 1980s, was apprehended in part due to this technique. It might appear, in his case, the concern for public safety outweighs the right to privacy, but not every suspect in every case in the U.S. is an alleged serial killer.

According to The Gazette in Iowa, “A paper published last year in the Public Library of Science’s Biology journal presented survey data about the use of DNA by law enforcement. More than 90 percent of respondents said agencies should be allowed to search genealogical databases for evidence about violent crimes and missing people. A minority, 46 percent, said the tools should be used for nonviolent crimes.”

In fact, 80 percent of cases in state criminal dockets are misdemeanors. As many Americans have criminal records as have college degrees. Additionally, human error, or the potential for human error, plays a significant role in the ambiguity associated with many criminal cases. For instance, if law enforcement collects DNA at a crime scene, it may or may not be the DNA of a suspect. If later on it is proven to be the DNA of someone else, an innocent person, and the data has been uploaded to a public opensource database, the damage has already been done even if law enforcement subsequently deletes the mistaken file. The data potentially remains in the public domain.

The effects of uploading a suspect’s DNA data to an open-source database may very well outlive that person’s experience in the criminal justice system. When released from prison, the person’s data would remain accessible to employers and insurance companies, among others, making it more and more of a challenge to successfully re-enter society. Family members, perhaps even generations to come, would be negatively affected as well.

A window of opportunity now exists to come up with intelligent regulations and policies that ensure genetic privacy for all citizens.

But we need to act before that window closes.

Sources: Future Tense, a partnership of Slate, New America, and Arizona State University; thegazette.com

U.S. District Court Holds Residual Clause of Federal Three-Strikes Law Unconstitutional

by Dale Chappell

The U.S. District Court for the Southern District of California granted postconviction relief on June 12, 2019, to a federal prisoner serving a mandatory life sentence, holding that the so-called “residual clause” of the federal three-strikes law is unconstitutional.

The case came before the Court in a motion for relief under 28 U.S.C. § 2255 filed by Thomas Morrison.

He’s been fighting his mandatory life sentence under the three-strikes law for the last 23 years. This time it worked.

Morrison was sentenced in 1996 after he pleaded guilty to federal bank robbery. The Government then invoked the mandatory life sentence penalty under 18 U.S.C. § 3559(c) (1)(A)(i) because the bank robbery was a violent felony, plus Morrison had two prior California robbery convictions. The court found that Morrison’s prior convictions qualified, and it had no option except to impose the sentence. Morrison appealed, challenging the use of his priors, but lost.

Eighteen years later, Morrison filed his first § 2255 motion arguing that the Supreme Court had extended Johnson to the residual clause of another statute in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), and remanded the case to the § 2255 court “to reconsider its ruling in light of that decision.”

The Ninth Circuit also noted that the Supreme Court had granted certiorari in what would become United States v. Davis, 139 S. Ct. 2319 (2019), declaring the residual clause of 18 U.S.C. § 924(c) unconstitutional (and decided just days after Morrison’s § 2255 was granted).

On remand, the district court found that the reasoning in Johnson, when applied to the residual clause of § 3559(c), rendered it unconstitutional and granted Morrison’s motion.

At the time of Morrison’s sentencing, a prior conviction qualifying as a “violent felony” under § 3559(c) had to fall under one of three clauses: (1) the “elements clause” requiring the conviction had “as an element the use, attempted use, or threatened use of physical force against the person of another,” (2) the “residual clause,” requiring that the conviction involved “substantial risk that physical force against the person of another may be used,” or (3) the “enumerated offenses clause,” requiring the conviction matched one of the listed offenses. § 3559(c)(2)(F).

Johnson declared unconstitutional language nearly identical to the residual clause contained in § 3559(c), finding that it violated due process because it required a judge to take
New Hampshire Supreme Court: State’s Armed Career Criminal Statute Applies Only When Qualifying Convictions Arise From at Least 3 Separate Criminal Episodes

by Douglas Ankney

The Supreme Court of New Hampshire held that the state’s armed career criminal statute (codified at RSA 159:3-a) applies only to persons whose qualifying convictions arise from three or more separate criminal episodes.

Jonathan Folds allegedly sold 50 grams of heroin to a “cooperating individual” (CI). Based on the CI’s controlled purchases, the police obtained a warrant to search Folds’ residence. During the course of the search, police found a firearm. Folds was charged, inter alia, with violating RSA 159:3-a based on a burglary conviction from 2015 and three drug-offense convictions resulting from a search of his home in 2012. Folds moved to dismiss the charge, arguing that his prior felonies were insufficient as a matter of law to satisfy the statute’s requirements. The trial court granted Folds’ motion, and the State appealed.

The Supreme Court observed that it is “more likely than not” that the sentencing court relied on the residual clause. But the Court rejected the Government’s position. “Indeed, imposing such a burden would lead to inconsistent results, as any judge who sentenced a defendant prior to Johnson was doubtlessly unaware that the sentencing transcripts would later be combed for the words ‘elements clause’ or residual clause.”

Without any binding case law at the time of Morrison’s sentencing, and because the judge didn’t say which clause she was relying on because it didn’t matter at the time. And case law at the time didn’t say which clause of California robbery it could have fallen under.

The Government urged the Court to apply the strict rule adopted by the Eleventh Circuit, requiring a movant to prove it was “any combination” that the sentencing court relied on the residual clause.

But the Court rejected the Government’s position. “Indeed, imposing such a burden would lead to inconsistent results, as any judge who sentenced a defendant prior to Johnson was doubtlessly unaware that the sentencing transcripts would later be combed for the words ‘elements clause’ or residual clause.”

Accordingly, the Court granted Morrison’s motion, vacated his mandatory life sentence under the three-strikes law, and ordered a new presentence report detailing his conduct while in prison over the last 20-plus years. See: Morrison v. United States, 2019 U.S. Dist. LEXIS 99568 (S.D. Cal. 2019).
The U.S. Court of Appeals for the Seventh Circuit announced that something more than psychological coercion is required before a sentencing court can apply the two-level enhancement of U.S.S.G. § 2B3.1(b)(4)(B).

Jacob Kirk invited Joshua Herman to Kirk’s house in Hammond, Indiana. Samantha Daniels, Kirk’s mother, was in the house when the men arrived. Herman saw a Jimenez Arms handgun in Daniels’ purse and asked Daniels if he could hold it. After taking it into his hand, Herman pulled out a revolver and said, “Look ... stay seated. I don’t want to blow you guys back, but I will if I have to.” He told Kirk and Daniels not to move and then ran outside. Kirk and Daniels ignored Herman’s order and chased him outside. Herman spun around with a pistol in each hand, yelled, “I told you not to ...” and fired a shot that flew past Daniels’ head.

After pleading guilty, Herman appealed. For reasons not relevant to the instant appeal, the Seventh Circuit remanded. On remand, the district court calculated Herman’s final Guidelines range of 100 to 120 months. Herman argued that more is needed to constitute physical restraint. The Seventh Circuit announced it is aligning with the latter four circuits that require more than pointing a gun at someone or ordering that person not to move in order to trigger the application of U.S.S.G. § 2B3.1(b)(4)(B). The Court recommended that district courts instead consider 18 U.S.C. § 3553(a)(1) as part of “the nature and circumstances of the offense” whenever a defendant uses a gun to coercede a victim. Accordingly, the Court vacated Herman’s sentence and remanded for resentencing consistent with its opinion.

The Court acknowledged that United States v. Doubet, 969 F.2d 341 (7th Cir. 1992); United States v. Taylor, 620 F.3d 812 (7th Cir. 2010); United States v. Carter, 410 F.3d 942 (2005), there is language implying that psychological coercion based solely on pointing a gun at a victim suffices.

However, the Court expressly disapproved those holdings pursuant to Circuit Rule 40(e). Because the instant holding was in tension with prior holdings, the Seventh Circuit ordered the opinion circulated to all circuit judges in regular active service. Additionally, in light of the split among the circuits, a copy of the opinion was sent to the U.S. Sentencing Commission. See: United States v. Herman, 930 F.3d 872 (7th Cir. 2019).

Fifth Circuit Announces That Categorical Approach Applied to SORNA Doesn’t Permit Circumstance-Specific Inquiry Into Offender/Victim Age Differential

by Douglas Ankney

In a case of first impression, the U.S. Court of Appeals for the Fifth Circuit held that the text of the Sexual Offense Registration and Notification Act (“SORNA”) does not permit a court, when applying the categorical approach to determine sex offender tier levels, to conduct a circumstance-specific inquiry into an offender-victim age differential when the differential is an element of a corresponding cross-referenced offense. However, the circumstance-specific inquiry is permitted for the limited purpose of determining the victim’s age.

Johnny Escalante, 35, was convicted in Utah of sexual activity with a 14-year-old girl that did not include rape or aggravated sexual assault. Utah Code Ann. § 76-5-401.

After being released from prison, Escalante moved to Texas where he was arrested for failing to register as a sex offender under 18 U.S.C. § 20913(c). After Escalante pleaded guilty, a presentence report (“PSR”) was prepared that concluded his Utah conviction was comparable to abusive sexual contact of a minor as described in 18 U.S.C. § 2244. And § 2244 in turn cross-references 18 U.S.C. § 2243(a), which criminalizes sexual acts with someone who is (1) 12 to 15 years old and (2) is at least four years younger than the offender. Based on this, the PSR recommended Escalante be categorized as a Tier II offender with a Guidelines imprisonment range of 27 to 33 months. But the PSR also urged the court to consider an upward departure based on Escalante’s history of domestic violence, parole violations, and high risk of recidivism.

Escalante objected, arguing, inter alia, that 18 U.S.C. § 2243(a) requires the Government to prove a four-year age differential whereas the Utah statute does not. Thus, the Utah statute “sweeps more broadly than the federal statute” and could not serve as a predicate for the Tier II classification. This means Escalante’s sentencing Guidelines call for less severe punishment as a Tier I offender. The district court rejected Escalante’s objections, adopted the PSR as its factual findings, and upwardly varied from the Guidelines to sentence him to 48 months in prison. Escalante appealed.

The Fifth Circuit observed that the
category approach is employed when classifying the SORNA tier of a defendant’s state law sex offenses. United States v. Young, 872 F.3d 742 (5th Cir. 2017). However, Young left open the question of whether a circumstance-specific inquiry is required to determine the victim’s age. Id.

“Under the categorical approach, the analysis is grounded in the elements of the statute of conviction rather than the defendant’s specific conduct.” United States v. Rodriguez, 711 F.3d 541 (5th Cir. 2013).

If the statute of conviction ‘sweeps more broadly’ than the referenced federal offense, the state offense cannot serve as a proper predicate. Descamps v. United States, 570 U.S. 254 (2013).

However, circumstance-specific inquiries may be required to determine whether conditional or modifying requirements of a qualifying state predicate offense are met. Ni-Jhawan v. Holder, 557 U.S. 29 (2009). While courts are to apply a categorical approach to sex-offender tier classifications designated by reference to a specific federal criminal statute, the courts are to employ a circumstance-specific comparison for the limited purpose of determining the victim’s age. United States v. White, 782 F.3d 1118 (10th Cir. 2015).

A state sex offense is a Tier II offense for SORNA sentencing purposes when, among other things, it “is comparable to or more severe than [abusive sexual contact as described in § 2244] when committed against a minor.” 34 U.S.C. § 20911(3). Abusive sexual contact under 18 U.S.C. § 2244 includes, inter alia, sexual abuse of a minor under 18 U.S.C. § 2243(a) which requires the victim to be 12 to 15 years old and that the offender be older by four years or more.

The Fifth Circuit, in agreement with the Fourth, Ninth, and Tenth Circuits, concluded that the district court properly made a circumstance-specific inquiry when determining the age of Escalante’s victim was 14. But the district court erred when it used the circumstance-specific inquiry to determine Escalante was more than four years older than the victim.

The categorical approach limits the court’s inquiry to the elements of the relevant statute. Since the Utah statute under which Escalante was convicted did not require the offender to be at least four years older than the victim, it prohibited conduct that 18 U.S.C. 2253(a) does not prohibit. For example, under the Utah statute, an 18-year-old offender could be convicted of sexual conduct with a 15-year-old victim, but this conduct could not be punished under the federal statute. Since the statute “sweeps more broadly” than the corresponding federal statute, a conviction under the state statute cannot qualify as a predicate offense. Thus, the district court improperly classified Escalante as Tier II sex offender.

Accordingly, the Court vacated and remanded to the district court for resentencing. See: United States v. Escalante, 2019 U.S. App. LEXIS 23234 (5th Cir. 2019).

**Note**: This decision also explains why the Court considered but rejected Escalante’s argument that the federal statute permits an affirmative defense that the state statute does not permit.

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**First Circuit Rules Appeal Waiver Does Not Relieve Counsel of Duty to Consult About an Appeal**

*by Dale Chappell*

In a case applying a newly minted U.S. Supreme Court decision, the U.S. Court of Appeals for the First Circuit held that an appeal waiver in a plea agreement did not relieve counsel of his duty to consult with his client about filing an appeal.

When the district judge sentenced Toribio Rojas-Medina to more time in prison than he expected under his plea agreement, and further ordered the sentence to run consecutive to any state sentence that might be imposed, he asked his lawyer “why they had given me so much time” during a two-minute conversation after sentencing. Counsel then filed a “motion to reconsider sentence,” and Rojas-Medina was transferred to his designated prison by way of several county jails and detention centers.

Months later, a docket sheet obtained by Rojas-Medina showed that counsel had not filed an appeal, and he promptly filed a motion under 28 U.S.C. § 2255 claiming ineffective assistance of counsel for failing to file an appeal. At an evidentiary hearing, Rojas-Medina testified that he “wanted to appeal because the sentence was too high.” However, counsel testified that the sentence “could not be appealed” because of the appeal waiver in the plea agreement.

The magistrate judge recommended granting Rojas-Medina’s motion, finding that he had demonstrated an intent to appeal and because counsel still had the duty to file a requested appeal despite the waiver. The Government objected.

The district judge agreed with the Government that the appeal waiver absolved counsel of his duty to file the appeal and denied the motion. But the court granted a certificate of appealability on the issue.

In Roe v. Flores-Ortega, 528 U.S. 470 (2000), the Supreme Court held that counsel has a “duty to consult” with his client about an appeal and to file an appeal “if he was interested in appealing.” The Court clarified that “consult” meant “advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes.”

A defendant, the Court made clear, is not required to prove his appeal would succeed, but he is required to make his desire to appeal known to counsel. Courts have held that there’s no “magic words” to do this, but inquiries “about having time run together” or why the court “gave so much time” are signs to counsel to file an appeal.

Rojas-Medina’s comments to counsel about his sentence being “too high” were enough to prompt counsel to file an appeal, the First Circuit concluded. The big question was whether the appeal waiver relieved counsel of this obligation. At the time of Rojas-Medina’s motion before the district court, the circuits were split on this question. The First Circuit was not clearly on one side or the other.

But then the Supreme Court decided Garza v. Idaho, 139 S. Ct. 738 (2019), in which the Court held that an appeal waiver does not relieve counsel of his or her duty to file a requested appeal. “While signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain,” the Court explained.

Finding that Flores-Ortega required Rojas-Medina’s counsel to file an appeal and that Garza answered the question about the waiver’s effect on that requirement, the First Circuit ruled that the “presumption of prejudice” when counsel fails to file a requested appeal applies here.

Accordingly, the Court remanded to the district court “with instructions to vacate the judgment in the underlying criminal case and reenter it so that petitioner may enjoy a fair opportunity to file a timely notice of appeal.” See: Rojas-Medina v. United States, 924 F.3d 9 (1st Cir. 2019).
**Delaware Supreme Court: Where Defendant Competent to Plead ‘Guilty but Mentally Ill,’ He May Revoke Plea Before It Is Accepted**

by Anthony Accurso

The Supreme Court of the State of Delaware held that when a defendant has been declared competent to plead guilty he retains the right to revoke his plea of “guilty but mentally ill” before the court accepts it.

Martin Taylor was found with knife wounds on his body after he was named a person of interest in the killing of Whitney White. Taylor was charged with her murder and possession of a deadly weapon. A psychological evaluation revealed that Taylor had a low IQ and suffered from schizoaffective disorder (bipolar type), PTSD with dissociative symptoms of depersonalization, borderline personality disorder, and antisocial personality disorder.

Because Taylor failed to consistently take his medications, he was likely under the influence of his mental illnesses when the crime occurred.

Taylor’s counsel sought a “guilty but mentally ill” plea under 11 Del. Code Ann. tit. 11, § 408(a). Taylor’s counsel said Taylor was competent to knowingly and willingly plead, and the court provisionally accepted his plea pending a hearing on his mental illnesses. Taylor then sought, through letters to counsel and the court, to withdraw his plea and voiced a willingness to seek a self-defense claim at trial. His lawyer refused Taylor’s repeated requests to withdraw his plea, and since he was represented by counsel, the court refused to consider Taylor’s pro se requests to withdraw his plea prior to the second hearing.

At his second hearing, the court accepted Taylor’s plea over his objections and ultimately sentenced him to 45 years in prison.

Taylor appealed claiming, among other things, that he should have been allowed to revoke his plea. The Delaware Supreme Court began its analysis with a written opinion in Nichols v. State, 977 A.2d 803 (Del. 2009), in which the Court explained: “The attorney controls the day-to-day conduct of the defense, meaning they decide if and when to object, which witness, if any, to call, and what defenses to develop. But, certain decisions, regarding the exercise or waiver of basic trial and appellate rights are so personal to the defendant that they cannot be made for the defendant by a surrogate.”

The decision to withdraw a guilty but mentally ill plea is among the personal rights that only Taylor can make because doing so implicates his “autonomy interest in his plea decision,” according to the Court.

The reason stated by Taylor’s counsel and the lower court for proceeding with the plea over Taylor’s objection was that counsel believed Taylor’s fixation on the self-defense claim arose out of his mental illnesses. Under Dusky v. United States, 362 U.S. 402 (1960), in order to be found competent to stand trial, “the court must be satisfied that the defendant (1) has a rational as well as factual understanding of the proceedings against him and (2) has sufficient present ability to consult with his lawyer with a reasonable degree of understanding.”

The Court found that if Taylor’s counsel did not believe Taylor met this standard, counsel should seek a competency hearing on remand. However, since Taylor’s competency was not found to be insufficient before, the lower court should have allowed him to withdraw his plea before it was accepted by the court.

Accordingly, the Court held that Taylor’s guilty but mentally ill plea was not knowingly and willingly entered. It vacated the judgment of the lower court with instructions to allow Taylor to withdraw his plea. See: Taylor v. State, 2019 Del. LEXIS 332 (2019).

**Maryland Court of Appeals: Sentence Imposed on Remand That Is of Equal Maximum Length as Former Sentence but With Longer Term Before Parole Eligibility Is ‘More Severe’**

by Douglas Ankney

The Court of Appeals of Maryland held that where a circuit court imposed on remand a sentence of equal maximum length as the former sentence, but required a longer period of incarceration before parole eligibility than the former sentence, the new sentence was “more severe” for purposes of Maryland Code, Courts & Judicial Proceedings Article (“CJ”), § 12-702(b).

Philip Daniel Thomas was convicted of several crimes in the Circuit Court of Wicomico County. His aggregate sentence of 18 years included 15 years for kidnapping and three years consecutive for second-degree assault.

The Court of Special Appeals vacated the sentence, ruling that the kidnapping and assault convictions should have merged for sentencing purposes. On remand, the circuit court sentenced Thomas to 18 years on the kidnapping alone. Thomas appealed, arguing that his new sentence was more severe than his former sentence because the new sentence required him to serve more time in prison before becoming eligible for parole. The Court of Special Appeals agreed that the new sentence was illegal, vacated it, and remanded for resentencing. The Maryland Court of Appeals granted the State’s petition for a writ of certiorari.

The Court of Appeals observed that when a trial court resentence a defendant on remand after his successful appeal, the court “may not impose a sentence more severe than the sentence previously imposed” unless “(1) The reasons for the increased sentence affirmatively appear; (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and (3) The factual data upon which the increased sentence is based appears as part of the record.” CJ § 12-702(b).

Ordinarily, a defendant is eligible for parole after serving one-fourth of his aggregate sentence. Maryland Code, Correctional Services Article (“CS”), § 7-301(b)(1). But a defendant convicted of a violent crime is not eligible for parole until he has served the greater of either (1) one-half of his aggregate sentence for violent crimes or (2) one-fourth of his total aggregate sentence. CS § 7-301(c).

Black Drivers in Missouri 91 Percent More Likely to Be Stopped Than White Drivers

by Bill Barton

A report by Missouri Attorney General Eric Schmitt reveals that black motorists in that state are 91 percent more likely to be pulled over than whites. The 2018 report illuminating this statistic was released in May.

Scott Decker, an Arizona State University professor of criminology and criminal justice, one of the people who prepared the report, informed CNN that “The disparity is the highest in the 19 years the vehicle stops report has been conducted.”

African Americans comprise 10.9 percent of Missouri’s driving-age population but 19.2 percent of all traffic stops in 2018. The report examined 1,539,477 vehicle stops from 596 law enforcement agencies in the state. “People of other races — including whites, Hispanics, Asians and Native Americans — were stopped at rates well below their portion of the driving-age population,” the report said.

“Unfortunately, the numbers have been trending this way consistently year in and year out,” St. Louis NAACP President Adolphus Pruitt said. “The state is not taking it seriously enough to try to fix this issue. Using stops as a policing tool for crime prevention needs to cease. The fact that somebody is driving in a particular area, and a police officer feels that person or individuals are out of place—that, in itself, should not justify them impeding or intruding on their lives by stopping them and searching their vehicle.”

The 2018 report was the first one that examined whether drivers lived in the area where they were pulled over. “For years, law enforcement organizations said drivers of color who were pulled over in a predominately white area could have exaggerated the racial disparities in vehicle stop data. But this report shows the artificial inflation is not as high as thought — black drivers are still being pulled over at disproportionate rates in their own communities,” CNN reports. Missouri’s 2018 report findings align with national trends. A Stanford University March 2019 study of 93 million traffic stops from around the country reported that black drivers are 20 percent more likely to get pulled over than white drivers.

Sources: cnn.com, ago.mo.gov

New North Dakota Law Arrests Cops’ Ability to Seize Property

by Douglas Ankney

Republican Governor Doug Burgum of North Dakota recently signed House Bill 1286, “which seriously curtails law enforcement agencies’ ability to arrest somebody, take his or her property, and attempt to keep what they seized for themselves even when they cannot prove an underlying crime,” according to reason.com.

Prior to the law, North Dakota was notorious for permitting police to seize and keep citizens’ property without ever convicting anyone of a crime. The rules were so bad that North Dakota was one of the only two states to receive an “F” grade in the “Policing-for-Profit” analysis conducted by the Institute for Justice. (Massachusetts also received an “F”)

Civil asset forfeiture permits police to seize any cash or property, which they have “probable cause” to believe was used in the furtherance of crime. Police keep the seized property for themselves if they can prove by a “preponderance of evidence” it is related to criminal activity. And of course, in a civil proceeding, there is no right to an attorney, so the property owner must hire an attorney to be represented at the asset forfeiture hearing.

The new law requires police to obtain a criminal conviction before attempting to seize assets.

There are exceptions, such as abandoned property, or if the defendant is dead, deported, or missing. Also, in light of a recent U.S. Supreme Court decision holding that the Excessive Fines Clause in the constitution’s Eighth Amendment is applicable to the states (See: CLN, April 2019, Pages 22-23), the new law requires courts to evaluate the value of property seized in comparison to the level of offense committed.

Source: reason.com
First Circuit: Prosecutor Not Entitled to Absolute Immunity When Performing Purely Administrative Duty

by Anthony Accurso

The U.S. Court of Appeals for the First Circuit held that when a prosecutor performs a purely administrative function in relation to a criminal prosecution, she does not enjoy absolute prosecutorial immunity from suits brought under 42 U.S.C. § 1983.

Rolando Penate was charged with drug-related offenses in November 2011. Key to his prosecution were samples analyzed at the Amherst Drug lab that tested positive for controlled substances. Penate filed to dismiss his charges after learning that Sonja Farak, the chemist who analyzed his samples, was prosecuted for drug use while at work in the lab. His motion was denied because of a lack of evidence as to her drug use on the dates when Penate’s samples were analyzed.

In connection with the prosecution of Farak, Assistant Attorney General Anne Kaczmarek was aware of drug treatment worksheets and a diary created by Farak, which revealed her drug abuse at the lab. She was entitled to immunity. Quoting Guzman-Rivera v. Rivera-Cruz, the Court said, “the mere ‘custodian of evidence’ whose function is to respond to records requests, similar to the ‘function of police officers ... and other clerical state employees.’” The Court explained that this function, whether performed by a government lawyer or clerical personnel, “is an administrative one, not analogous to the advocacy of a prosecutor...”

Accordingly, the U.S. Court of Appeals for the First Circuit upheld the district court’s denial of absolute immunity for Kaczmarek, finding that her purely administrative role does not grant her immunity in Penate’s suit against her, regardless of her title as prosecutor in another case. See: Penate v. Kaczmarek, 928 F.3d 128 (1st Cir. 2019).

Ninth Circuit Announces that District Court Cannot Sua Sponte Raise Waiver as Ground to Dismiss Motion for Sentence Reduction

by Douglas Ankney

In a case of first impression, the U.S. Court of Appeals for the Ninth Circuit announced that a district court cannot sua sponte raise a defendant’s waiver of the right to seek relief under 18 U.S.C. § 3582(c)(2) and deny the defendant’s motion for resentencing on that ground.

In 2012, David James Sainz entered into an agreement that contained an express waiver of his right to seek relief under 18 U.S.C. § 3582(c)(2) in exchange for the reduction of his prison sentence based upon his extensive cooperation with the government. Sainz’s sentence was reduced from 188 months to 120 months.

After Sainz was sentenced, Congress enacted Amendment 782, which lowered Sainz’s Guidelines range. In 2015, Sainz moved for a sentence reduction under 18 U.S.C. § 3582(c)(2) (2), which allows resentencing for a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered.

The district court denied Sainz’s motion based on the fact that “Sainz expressly waived the right to seek relief under 18 U.S.C. § 3582” even though neither party raised the issue of waiver. Sainz appealed.

The Ninth Circuit observed that no circuit had directly addressed whether a district court can sua sponte invoke a defendant’s waiver in an agreement with the government of the right to file a § 3582(c)(2) motion. The Court had previously concluded that courts should not raise waivers sua sponte on appeal. United States v. Chaney, 581 F.3d 1123 (9th Cir. 2009). And in Norwood v. Vance, 591 F.3d 1062 (9th Cir. 2010), the Court stated it “will not address waiver if not raised by the opposing party” because “the more prudent course is to resolve the case on the basis of the issues actually briefed and argued by the parties.”

The Ninth Circuit, in rejecting the Government’s argument, distinguished the instant case from Day v. McDonough, 547 U.S. 198 (2006), and Wood v. Milyard, 566 U.S. 463 (2012). In Day, the Supreme Court upheld a district court’s dismissal of a habeas petition when it sua sponte raised the issue of timeliness.

The Supreme Court reasoned that the issue of being time-barred is like issues of procedural default, failure to exhaust state remedies, and nonretroactivity that implicate procedural values beyond the concerns of the parties. Further, in Day, the Government had inadvertently waived the timeliness issue. None of those concerns were present in Sainz’s case. And in Wood, the Supreme Court ruled that the district court abused its discretion when it sua sponte dismissed a habeas petition as untimely after the state had expressly waived the issue. The Ninth Circuit opined that while
the Government had not expressly waived Sainz's waiver, nothing in the record indicated it had inadvertently failed to raise it. In fact, the Ninth Circuit had previously held that the Government waives a waiver by failing to assert it. Norwood.

The Court was persuaded by Burgess v. United States, 874 F.3d 1292 (11th Cir. 2017), where the defendant waived his right to bring a 28 U.S.C. § 2255 motion. After he filed a motion, the district court, sua sponte and without notice to the parties, denied one of the claims in the § 2255 motion based on the waiver. The Eleventh Circuit reversed, holding that the civil rules required parties to assert affirmative defenses. The Eleventh Circuit reasoned that counsel almost always know more about their cases than the courts do, so there may have been strategic reasons for not raising a waiver. Also, allowing courts to sua sponte invoke waivers damage our system of justice because it gives the appearance that the court is taking the side of one party rather than acting as a neutral arbiter.

The Ninth Circuit recognized that the civil rules do not apply to Sainz's motion raised under the criminal code. Nevertheless, the principles and reasoning of Burgess are the same. Therefore, the Court concluded that the Government waived Sainz's waiver of his right to file a § 3582(c)(2) motion by failing to raise it in district court, and the district court abused its discretion by raising the waiver sua sponte.

Accordingly, the Court reversed and remanded to the district court for further proceedings consistent with its opinion. See: United States v. Sainz, 2019 U.S. App. LEXIS 23919 (9th Cir. 2019).)

MIX13 Reveals Potential Errors in DNA Testing

by Jayson Hawkins

A federal study from 2013 showed that manually sorting DNA mixtures is not as foolproof as previously believed. MIX13, which sent the same hypothetical cases to 108 crime labs around the U.S., tested the accuracy of traditional DNA analysis. Each of the five cases grew more complicated until the last, which involved a mixture of four individuals’ DNA collected from a ski mask at a robbery. The labs were presented with the identities of two of the likely suspects, along with a fifth person who was not involved.

Just seven labs managed to fully solve the problem; worse, more than 70 percent implicated the fifth “innocent” suspect in their findings.

John Butler of the National Institute of Standards and Technology said the purpose of MIX13 was to show the limitations of using combined probability of inclusion (“CPI”), not to expose the probability of mistakes. “This was a teaching moment to realize you can falsely include somebody with CPI.”

The few labs that correctly answered MIX13 employed rigorous techniques or advanced technology like TrueAllele, a genotyping software.

Critics charge that errors associated with CPI are more than possibilities—they have already happened. The Virginia Department of Forensic Sciences used TrueAllele to take a second look at 144 cases and found five where suspects should have been excluded. Another case in Georgia has been granted a retrial due to a TrueAllele analysis of DNA mixtures from evidence. The defendant, Johnny Lee Gates, has spent over 40 years in prison for a crime he may not have committed.

A paper in Forensic Science International: Genetics criticized the six-year delay in releasing MIX13’s results and demanded that labs begin using the updated technology.

“The adoption of probabilistic genotyping by many laboratories will certainly prevent some of these errors from occurring in the future, but the same laboratories that produced past errors can also now review old cases with their new software—without additional bench work,” emphasized Greg Hampikian, the paper’s author.

More agencies have employed genotyping software in recent years, but the majority still rely on manual methods.

Source: forensicmag.com

Michigan Will Pay $1.5 Million to Longest Serving Exonerated Prisoner

by Bill Barton

Richard Phillips, a Michigan man who was wrongfully incarcerated for 46 years before being exonerated in spring 2018, will receive a settlement of $1.5 million from the state, more than a year after he was released without even as much as a bus ticket. Phillips is the longest serving exoneree in U.S. history.

Phillips, 73, had long maintained that he was innocent of a fatal shooting in the Detroit area in 1971.

“The Innocence Clinic at University of Michigan Law School learned that a co-defendant in 2010 told the parole board that Phillips had absolutely no role,” according to USA Today.

Attorney General Dana Nessel said in a statement targeting other exonerees as well that, “We have an obligation to provide compassionate compensation to these men for the harm they suffered.”

The payment still needs approval by state legislators.

“Someone who is exonerated based on new evidence can qualify for $50,000 for every year spent in prison. Phillips would appear to qualify for more than $2 million…. But he’s being paid only for 30 years because he was serving a separate armed robbery conviction at the same time. Phillips and his legal team said he was wrongfully convicted for that crime too, but Oakland County prosecutors haven’t cleared him,” USA Today reports.

Phillips became quite an accomplished painter while in prison, and his paintings now sell for thousands of dollars. “It was something to do, occupy my mind,” he said. “I could get off into one of my paintings and just be in there for hours.

He sold his prison paintings to help raise money for his own defense while waiting to find out if he would be eligible under a Michigan law that compensates the wrongfully convicted.

“The attorney general’s office made a decision to pay him every penny he’s currently owed. I am very happy with how things have turned out,” said Phillips’ attorney, Gabi Silver.

As Phillips said in a CBS News story regarding his case, “I'm gonna be alright regardless, whether they compensate me or not.”

Sources: usatoday.com, cbsnews.com
An Arkansas state trooper violated a motorist’s First and Fourth Amendment rights when he arrested him for yelling “F—k you,” the U.S. Court of Appeals for the Eighth Circuit held in June 2019, affirming the district court’s denial of qualified immunity for the official.

In 2015, trooper Lagarian Cross was conducting a traffic stop on the side of a five-lane highway in Fort Smith, Arkansas. On the other side of the road, Eric Ross Thurairajah was driving past and yelled “F—k You” in the trooper’s direction. Cross abandoned his quarry — the proverbial “bird in the hand” — to chase Thurairajah and arrested him for disorderly conduct.

After several hours in jail, Thurairajah was released, and all charges were dropped.

Thurairajah sued Cross (and associated entities) for deprivation of civil rights under 42 U.S.C. § 1983, and Cross moved for summary judgment on the basis of qualified immunity. The district court, concluding Cross’ arrest of Thurairajah violated the latter’s First Amendment right to be free from retaliation for the exercise of his right to protected speech and his Fourth Amendment right to be free from unreasonable seizure [of his person] both of which were clearly established at the time, denied immunity. Cross appealed.

Qualified immunity shields a state actor from liability except where a two-part test is met: (1) the state actor violated a constitutional right and (2) the right was “clearly establsihed” such that a reasonable officer would know of the right at the time of the violation. Pearson v. Callahan, 555 U.S. 223 (2009).

As the Eighth Circuit explains, the First Amendment to the U.S. Constitution guarantees that “protected speech” be “free from retaliatory government actions.”

Applying the relevant four-prong test for the demonstration of a constitutional violation in this context, the Court determined that, first, “Thurairajah’s profane shout was protected activity,” relying on Cohen v. California, 403 U.S. 15 (1971) (state powerless to punish for “underlying content” of similar public message). Second, “being arrested for exercising the right to free speech would chill a person of ordinary firmness from exercising that right in the future.” Third, even Cross’ own affidavit suggests that “the arrest was motivated, at least in part, by the content of the shout” Finally, the Court said, “Cross had neither probable cause nor arguable probable cause to arrest Thurairajah.”

“Arguable probable cause,” the Court went on to explain, exists when an arrest is based on an objectively reasonable — even if mistaken — belief that it is supported by probable cause. That is, the arrest is based on information “sufficient to lead a reasonable person to believe that the [suspect] has committed or is committing an offense.” The Court noted that “the verbal content of Thurairajah’s yell is irrelevant” to the disorderly conduct statute’s prohibition of “only unreasonable or excessive noise.” A reasonable officer could not have reasonably believed, based on the objective facts available to Cross, that Thurairajah violated the law “by shouting the two-word insult from a moving vehicle with an unamplified human voice.”

As to Thurairajah’s Fourth Amendment claim, the Court noted that a “warrantless arrest, unsupported by probable cause, violates the Fourth Amendment.” Citing several decisions affirming probable cause in cases involving “extended loud shouting and disruptive behavior or amplified sound,” the Court pointed out that Arkansas courts have never found that “a two-word yell” could trigger the statute. Indeed, even “20 seconds of public shouting involving foul language” was insufficient, in a previous case, to establish disorderly conduct.

Having thus concluded that Cross’ arrest of Thurairajah violated both his First and Fourth Amendment rights, the Court, by citations to prior decisions, easily showed that those rights were clearly established at the time of the incident.

Accordingly, the Court affirmed the denial of qualified immunity with respect to both constitutional claims. See: Thurairajah v. City of Fort Smith, 925 F.3d 979 (8th Cir. 2019).

Tenth Circuit Vacates Special Condition of Supervised Release That Gave Probation Officers Discretion to Ban Computer and Internet Usage

The U.S. Court of Appeals for the Tenth Circuit vacated a special condition of supervised release that gave discretion to probation officers to completely ban the defendant’s use of a computer and of the Internet.

Michael Lyle Blair was convicted of possession of child pornography after police discovered a hard drive containing more than 700,000 images of child pornography. Blair pleaded guilty to one count of possession of child pornography, and he was sentenced to 10 years’ imprisonment followed by seven years of supervised release.

One of the many special conditions of release stated: “The defendant’s use of computers and Internet access devices must be limited to those the defendant requests to use, and which the probation officer authorizes.” Blair appealed, arguing, inter alia, that the special condition was more restrictive than is reasonably necessary, in violation of 18 U.S.C. § 3583(d)(2).

The Tenth Circuit observed “district courts have broad discretion to prescribe conditions on supervised release.” United States v. Hanrahan, 508 F.3d 962 (10th Cir. 2007). But that discretion is limited by 18 U.S.C. §§ 3583(d) and 3553(a), the relevant provisions of which, when read in conjunction with one another, permit the trial court to impose special conditions as long as: (1) the conditions are reasonably related to “the nature and circumstances of the offense and the history and characteristics of the defendant,” the need “to afford adequate deterrence to criminal conduct,” the need “to protect the public from further crimes of the defendant,” and the need “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” and (2) the conditions involve “no greater deprivation of liberty than is reasonably necessary for” deterring criminal activity, protecting the public, and promoting...
Relying on United States v. White, 244 F.3d 1199 (10th Cir. 2001); United States v. Walser, 275 F.3d 981 (10th Cir. 2001); and United States v. Ullmann, 788 F.3d 1260 (10th Cir. 2015), the Court determined the special condition imposed on Blair was overbroad and unreasonable. In White, a special condition prohibited the defendant from “possess[ing] a computer with Internet access ....”

In White, the court found the condition too broad because it prohibited White from using the Internet for benign tasks, such as checking the weather or reading the news. In Walser, the court reviewed for plain error a special condition barring the defendant's use of the Internet without prior permission of the probation officer. The court held that Walser did not meet the high hurdle of plain error but cautioned that had the issue been preserved for review then the court may have reversed because "the special condition left open the possibility that the probation office might unreasonably prevent Mr. Walser from accessing one of the central means of information-gathering and communication in our culture today.”

In Ullmann, the Tenth Circuit reviewed a challenged condition that permitted the defendant to use computers and the Internet as long as he abide[d] the policies of the United States Probation Officer's Computer and Internet Monitoring Program which include[d] restrictions and/or prohibitions related to: computer and Internet usage.” The court opined that the phrase "restrictions and/or prohibitions," standing alone would be impermissible because it suggested the Probation Office may completely ban a means of communication that had become a necessary component of modern life. However, the court upheld the condition because the district court had orally modified it to specifically permit Ullmann to access the Internet with the awareness that he was being monitored for any activity that violated the terms of the probation office's standard sex offender supervision condition.

In the instant case, the Court determined that the district court made no such oral modifications. Blair was banned from computers and access to the Internet unless and until the probation officer granted his request. Noting in the district court's order limited the discretion of the probation officer or obliged the officer to grant a request. The condition would prevent Blair from using a computer for benign activities, such as writing a novel or checking the weather without first obtaining permission from his probation officer, and his request could be denied. As a result, the condition imposed a "greater deprivation of liberty than is reasonably necessary" in contravention of 18 U.S.C. § 3583(d)(2).

Accordingly, the Court vacated the challenged special condition of supervised release and remanded to the district court to reformulate it to accord with the Court's opinion. See: United States v. Blair, 2019 U.S. App. LEXIS 24030 (10th Cir. 2019).
Kentucky Supreme Court Rules Parole Board’s Revocation Procedures Are Unconstitutional

by Douglas Ankney

The Supreme Court of Kentucky held that the Parole Board’s ("Board") current conditional-freedom final revocation hearing procedures for post-incarceration supervisees violate an offender’s due process rights.

David Wayne Bailey was released from prison and placed on a five-year period of post-incarceration supervision. A condition of that supervision was successful completion of a sex offender treatment program ("SOTP"). Bailey enrolled in the SOTP, but he was terminated because he was allegedly not making efforts to accept responsibility for his sexual convictions and because he was allegedly disrupting his therapy group. Bailey received notice that due to his failure to complete the SOTP, a preliminary revocation hearing would be held on July 16, 2013. An administrative law judge ("ALJ") conducted the hearing at which Bailey was represented by counsel and presented witnesses and evidence, including mitigating testimony. He vigorously disputed the reasons given for his SOTP termination, asserting he was actually terminated because of his anti-abortion views that conflicted with those of his therapist.

The ALJ found probable cause to believe Bailey violated the terms of his supervision by being terminated from the SOTP. Bailey was subsequently served with a violation warrant and remained in custody pending a final revocation hearing before the Board. Bailey was not provided notice as to time and place of the final revocation hearing, did not have counsel to represent him at the hearing, and was not permitted to present witnesses or further testimony at the hearing. The Board revoked Bailey’s post-incarceration supervision, providing him with only a summary of its decision. Bailey then filed, pro se, a petition for a writ of mandamus challenging the Board’s procedures on due process grounds. The circuit court dismissed the petition for failure to state a claim.

The court of appeals ruled that Bailey was not denied due process at the final revocation hearing. Thus, the court of appeals reversed the circuit court’s judgment and remanded for further proceedings. The Supreme Court granted discretionary review.

The Court first addressed the issue of mootness as Bailey’s sentence had expired prior to the Court hearing his appeal, and the Court’s decision wouldn’t grant him any relief. The Court determined it wasn’t moot because: (1) the question presented was of public importance, (2) there was a need for an authoritative determination for the future guidance of public officers, and (3) there was a likelihood of future recurrence of the question. Morgan v. Getter, 441 S.W.3d 94 (Ky. 2014).

The Court observed that post-incarceration supervision is akin to parole. Jones v. Commonwealth, 319 S.W.3d 295 (Ky. 2010). Because revocation of post-incarceration supervision results in loss of liberty, the Board’s revocation procedure requires both a preliminary hearing and a final hearing. Morrissey v. Brewer, 408 U.S. 471 (1972). These procedures are required for revocation of probation as well. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it. Mathews v. Eldridge, 424 U.S. 319 (1976). The preliminary hearing is to be a minimal inquiry to determine if probable cause exists to believe the offender violated the terms of his conditional release. Morrissey.

The final revocation hearing “must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The [offender] must have [a timely] opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest the violation does not warrant revocation.” Id.

The final revocation hearing procedures must include: (1) written notice of the claimed violations, (2) disclosure of the evidence against the offender, (3) opportunity to be heard in person and to present witnesses, (4) right to confront and cross-examine adverse witnesses, (5) a “neutral and detached” hearing body, and (6) a written statement by the factfinders describing the evidence relied on and reasons for revocation. Id.

The final hearing is more comprehensive than the preliminary one because it “involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole.” Gagnon. The decision as to whether counsel is needed at the hearing is to be made on a case-by-case basis and presumptively arises when a petitioner claims he has not committed the alleged violations or there are substantial mitigating reasons that make revocation inappropriate and those reasons are complex or difficult to present. Id. The standard for revocation of probation is proof, by a preponderance of the evidence that a violation has occurred. Hunt v. Commonwealth, 326 S.W.3d 437 (Ky. 2010).

The final revocation hearing procedures in Kentucky permit the Board to revoke post-incarceration supervision based on the evidence in the administrative record made before the ALJ at the preliminary hearing. 501 Ky. Admin. Reg. 1:070 § 3(2). Any additional evidence must be presented in writing. Id. Only when the Board exercises its discretion to hold a special hearing are witnesses permitted to testify. Id. The Court concluded that Bailey was deprived of due process because: (1) an evidentiary final hearing is a minimal due process right not satisfied by the Board’s reliance upon the record of the preliminary hearing; (2) the Board’s revocation relied on evidence sufficient for a probable cause determination, which is significantly less than proof by a preponderance of the evidence; (3) the Board neither informed Bailey of his right to request counsel at the final hearing nor did it determine whether counsel was needed, even though Bailey challenged the therapist’s alleged reasons for terminating him from the SOTP; (4) Bailey was not provided notice of the time and place of the hearing nor was he given notice of the evidence to be used against him, and (5) the summary decision provided by the Board failed to satisfy the requirement for a statement of reasons for revocation and the evidence relied upon. For reasons not pertinent to Bailey’s due process claims, the Court also concluded that the court of appeals erred when it determined KRS § 31.110 created a statutory right to counsel.

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Accordingly, the Supreme Court affirmed the appellate court’s decision reversing the circuit court’s order of dismissal but reversed the appellate court’s decision regarding Bailey’s due process rights and regarding KRS § 31.110. However, since Bailey’s sentence had expired by the time the appeal was decided, it was not necessary to remand. See: Jones v. Bailey, 576 S.W.3d 128 (Ky. 2019).

### Chicago PD Creating Files, Background Checks on Citizens Who Speak at Police Disciplinary Meetings

**by Dale Chappell**

A public records request by the Chicago Tribune found that the Chicago Police Department has been doing background checks and creating files on citizens who speak at weekly meetings of the city’s police disciplinary board. A police spokesman admitted it goes back at least 2018.

Documents obtained by the Tribune showed that the background checks looked for any open warrants, investigative alerts, and whether the person speaking was a registered sex offender. Police also went online and searched for any posts the person may have made on social media sites.

Mayor Lori Lightfoot said she was “furious and incredulous,” and that she would “make sure that we get to the bottom of this and understand who is responsible.” She said people have a right to express themselves. “That’s what the First Amendment is all about,” she said.

And Karen Sheley, director of the American Civil Liberties Union of Illinois Police Practices Project, agreed. “They’re starting to collect a picture of information about a person by investigating them online and also in criminal databases and keeping a file on it,” she explained. “That’s dossier collecting on people because they’ve engaged in free speech,” she said, noting that “it raises First Amendment concerns.”

Chicago police superintendent Eddie Johnson didn’t deny that his department was collecting information on people speaking at the meeting but said that “nobody did anything with it.”

Those who wanted to speak were previously required to sign up at least a day before the meeting, but in light of the findings by the Tribune’s records request, speakers have to sign up just 15 minutes before the meetings.

Source: theroot.com

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### Study: Brazen Cops Posting Racist, Vitriolic Comments on the Internet

**by Ed Lyon**

There is a time-worn, yet usually quite-accurate saying that states: “Where there’s smoke, there’s fire.” Thanks in great part to Philadelphia attorney Emily Baker-White’s efforts as leader of The Plain View Project (“PVP”), a national study of cops’ social media posts, that old adage has taken on new significance regarding today’s defenders of law and order. Telling the public how they really feel is more than enough to cause an average citizen to pause, then think thrice before dialing 911 for help.

For example, Philadelphia cop Robert Oakes has, to put it mildly, an extremely disturbing presence on the internet. How does he feel about domestic abuse? His post dated February 24, 2015, reads: “Oh baby, oh baby, PLEaSE DONT!!!!stop!!!! resisting!!!!!” Is he a misogynist? His post dated December 21, 2015, shows a husband, wife, son and two daughters. The husband holds a sign saying, “Peace on earth.” Oakes altered the photo, so it appears the wife and daughters have no mouths. How does he feel about basic arrest procedures and the required rights warnings for suspects?

His post dated in September 2015: “here’s your Maranda [sic] rights ...... 1. You have the right to shut the fuck up ...... anything you say will cause me to fucking throat punch you ...... 2. You have the right to an attorney ...... If you can’t afford one that’s your fucking fault ...... you should have done better in life ......”

Just as smoke is an indicator of fire, web posts like these are an indicator of a disturbed individual. Philadelphia has settled two lawsuits totaling $42,000 that involved Oakes. In one, Oakes and another officer stopped and allegedly assaulted an innocent pedestrian as he merely walked down a street. The second settlement involved cops who allegedly assaulted an innocent bystander who was trying to record a “police incident.” Oakes was a member of the mob of cops.

Oakes is not exactly the Lone Stranger in this category of cops. The PVP isolated the most egregious 328 of the 1,073 Facebook-posting Philadelphia cops. Of those 328 posters, 139 had been defendants in one or more civil rights lawsuits.

Rank-and-file cops doing this are bad enough, but in some major cities even supervising cops get into the act. Dallas, Texas, police Sergeant Booker Smith, Jr. posted: “Just another savage that needs to be exterminated” regarding a Dollar General Store murder. “Execute all involved” was his post regarding some teenagers accused of killing a child.

Lake County, Florida sheriff’s Corporal Robert Bedgood displayed a photo of a decal reading “l-800-CHOKE-DAT-HOE” accompanied by his comments “my new motto” and “A choke, is the new; i love you.”

Sociologist Peter Moskos, an associate professor at John Jay College’s Department of Law, Police Science and Criminal Justice Administration, characterizes some of the postings as likely just big talk, according to his comments “my new motto” and “a way of signaling to colleagues that an officer is not a coward and will have their partner’s back when a dangerous situation erupts.” It is no surprise that Moskos is a former Baltimore, Maryland, police officer.

The PVP’s statistical data proves otherwise and again proves true the old adage of “where there’s smoke, there’s fire.”

Source: injusticewatch.org
Killer’s Bold DNA-Based Defense to Get New Mexico Supreme Court Hearing

by Bill Barton

Anthony Blas Yepez, in October 2012, beat to death the 75-year-old boyfriend of his girlfriend’s mother in a drunken dispute. Charged with first-degree murder, Yepez said he could not remember much of the incident and didn’t know why his reaction was so violent. Public defender Ian Loyd, who was assigned to represent him, said, “He seemed bewildered at what he had done.”

While preparing for trial, Loyd learned about the existence of a variant of MAO-A, a genetic mutation that affects the regulation of aggressive behavior in men, from forensic psychiatrist William Bernet, who spoke at a conference in Washington that Loyd attended.

The mutation was first documented in 1993 in a Dutch family, and some researchers dubbed it ‘the warrior gene,’ according to the NBC News story about Yepez. “Maybe he’s got this gene, too,” Loyd recalled thinking.

Loyd went online and found a commercial genetic testing company, FamilyTreeDNA, that charged $99 to check for the MAO-A deficiency. After an associate visited Yepez in Santa Fe County jail and swabbed his cheek, the DNA sample was sent in. A few weeks later, the results came back positive. “This is the defense I want to pursue,” Loyd told Yepez.

When the consumer DNA test wouldn’t hold up in court, Bernet was consulted and advised Loyd to get a geneticist to perform a ‘more comprehensive test.’

David Lightfoot, the geneticist, concluded that there was ‘no doubt’ that Yepez had the MAO-A mutation, according to court filings. And, according to Loyd, “A psychologist also administered a series of tests on Yepez, who said he’d been mistreated as a child, including beatings with a belt buckle.”

This type of childhood abuse was mentioned as key to the worsening of the mutation that linked to an increased risk of criminal behavior.

The judge refused to allow the MAO-A testimony, and four months later, a jury convicted Yepez of second-degree murder. He was sentenced to 22 years in prison. He appealed. The appellate court ruled that the judge should have allowed the genetic evidence but did not overturn the verdict. Yepez subsequently appealed to the New Mexico Supreme Court. His case remains pending as of the publication of this article.

Helen Bennett, the attorney representing Yepez before the state Supreme Court, said, “These genetic markers and the way we’re learning how they operate in the brain makes the determination of intent much more nuanced.”

Nita Farahany, a professor at Duke University, wrote in the January 2019 Annual Review of Criminology, that “Year after year, more and more criminal defendants are using neuroscience to bolster their claims of decreased responsibility for their criminal conduct and moral culpability relevant to their sentencing.”

Owen Jones, a Vanderbilt University law professor who directs the Research Network on Law and Neuroscience, said, “The law at the moment exists in this gray zone where everyone acknowledges that both genetic and environmental factors could affect culpability. But how do you know when, and how much?”

Henry Greely, director of the Center for Law and the Biosciences at Stanford Law School, said that if he were a judge in Yepez’s case, he probably would not allow the MAO-A evidence. “It’s not going as far as junk science, but it’s close,” he said.

Bennett, however, said, “We have a duty as citizens to listen to that science and make informed decisions before we take away another person’s freedom.”

Source: nbcnews.com

News in Brief

Arizona: On the heels of a record 44 cop shootings in 2018, a new policy now requires Phoenix police who draw and point their guns to ‘self report,’ azcentral.com reports. And after they document their actions, “a supervisor will review each incident,” theroot.com reports. “When a gun is pointed at someone, that’s a traumatic event,” Police Chief Jeri Williams told a news conference. “I think this is a first step in being [...] that accountable, transparent organization that is willing to share what we do and how we do it.” The National Police Foundation supports self-reporting “after officer-involved shootings more than doubled in 2018,” the organization said early in the year. The policy comes two months after a tense community meeting where residents vented about a well-publicized incident, in which video showed an officer pull a gun on a family during a shoplifting investigation outside a Phoenix dollar store in May.

CNN reports. In addition to self-reporting, over 1,700 cops have received body cameras and “all patrol officers will undergo an eight-hour training program to teach them how to better assist individuals in the midst of a mental health crisis.”

California: A report by a rookie Los Angeles Sheriff’s deputy that he was shot in the shoulder in the department’s Lancaster station parking lot triggered a massive manhunt and the lockdown of the area in August 2019. The problem: The story was fabricated, thefreethoughtproject.com reports. Angel Reinosa claimed the shots came from a sniper in a nearby apartment building that houses people being treated for mental illness, the new site reports. “This likely led to the rights of innocent individuals being violated as the department blamed the facility’s proximity to the station.” Likewise, Lancaster Mayor R. Rex Parris rushed to judgment. “It’s insanity to allow such a facility to exist in that particular location,” he said. “Reinosa confessed when investigators confronted him with the evidence that indicated the shooting was bogus,” latimes.com reports. “He admitted to cutting the holes in his shirt,” Sheriff Alex Villanueva told the news site. “We know the what and the how. We don’t know the why.”

Louisiana: DEA special agent Chad Scott convinced a Houston drug dealer (a confidential informant) to buy a $43,000 truck — a Ford F-150, no less — so he could seize it through asset forfeiture and then use it for work, reason.com reports in August 2019. An indictment against him also said “that from at least 2009 to 2016, Scott and two other members of a New Orleans drug task force conspired to steal money from suspects and from the DEAs evidence locker, and to falsify records to cover their tracks.” A New Orleans jury agreed and found the now-former agent

Source: nbcnews.com
“guilty of seven counts of perjury, obstruction of justice, and falsifying government records.” Among other things, federal prosecutors said Scott adjusted the records “to make it appear that he had taken the truck in Louisiana,” reason.com reports. They also accused Scott of convincing two drug traffickers to lie on the stand about a third defendant’s involvement in a drug case, in exchange for more lenient sentences. The third defendant’s conviction was later overturned.” Scott’s conviction, said FBI Assistant Special Agent in Charge Anthony T. Riedlinger in a news release, “reinforces the message that no one is above the law. Scott’s actions were selfish and placed an unnecessary stain on an otherwise stellar agency.”

Georgia: Sheriff’s Deputy Brison Strickland of Cartersville was suspended and then fired from the Bartow County Sheriff’s Office as well as arrested alongside fiancée Kristen Smith, yahoo.com reports. The two were captured on video and audio cursing out apartment neighbor Haley Truncer, who posted the tirade to Facebook, yahoo.com reports. This was preceded by Truncer asking the two to turn down their music after midnight. “There was music and stomping and a microphone, like there was some karaoke going on,” she told Fox 5. “Her footage shows Smith and then Strickland — who were joined by an unidentified child — telling her to ‘F*** off’ and demand to know where she lives,” yahoo.com reports. “When Truncer threatens to call the police, they respond, ‘We are the F***** police, b***** and appear to lunge at her.’ Strickland was arrested on charges of simple assault and disorderly conduct, both misdemeanors. Charged with simple assault and disorderly conduct, both misdemeanors. Charged with simple assault and disorderly conduct, both misdemeanors.

Illinois: Tens of thousands of pot convictions will be automatically expunged in Cook County, Illinois, according to the Chicago Tribune. “Possession of up to 30 grams of marijuana will be legal in Illinois beginning in 2020. Code for America will scan conviction data for records eligible for expungement and complete paperwork for prosecutors to present to judges,” abajournal.com reports. “Expunged records will not appear on routine background checks, potentially making it easier for affected people to find jobs and housing,” the Tribune reports. “The expunged marijuana convictions also will not appear in law enforcement databases.”

Iowa: Robert Smith resigned from the Durant Police Department following outcry over dashcam video showing him pulling over a motorcyclist, raising his firearm and knocking the man and cycle to the ground even as the biker was surrendering. The biker was charged with eluding a law enforcement vehicle. At the time of this September 2017 incident, Smith was actually an Iowa state trooper. According to a July 2019 report at desmoinesregister.com: “Allegations of excessive force and false testimony against Smith came to the public’s attention after Cedar County Sheriff Warren Wethington banned him and other Durant officers from bringing suspects to his jail in May. The problems date to Smith’s 30-year career as a trooper with the Iowa State Patrol, which allowed him to resign after an internal investigation last year before his hiring in Durant.” Wethington plans to push for Smith to be charged criminally for his actions in the incident, plus decertified as an officer in Iowa, desmoinesregister.com reports.

Massachusetts: Twitter erupted with criticism over Boston police who destroyed several wheelchairs in an August 2019 “sweep” of South End homeless people and drug users, according to boston.com. In addition, “city officials faced heated criticism for their actions during a South End community meeting … regarding drug use and homelessness in the neighborhood. ‘You are targeting the disabled who cannot survive on the streets!’ one person shouted.” The raid, in fact, was “targeting Boston’s transient community living along a stretch” dubbed “Methadone Mile” or “the Mile,” named for its “concentration” of health services serving people who use opioids, according to theepochtimes.com. At least 34 people were arrested as part of the sweep on Aug. 1 and Aug. 2, many of whom were taken into custody over old warrants. During the operation, homeless people were pushed from Atkinson Street and then told to return to the same street for no discernible reason. As a result, those displaced are unable to find a place to sleep, which has caused justified frustration and confusion about where the city expects them to go.

Michigan: Royal Oak cop Michael Pilcher, who detained a black man for almost 20 minutes after a white woman complained to police that he stared at her across the street and possibly took photos, has resigned, dailymotion.com reports. “The woman,” freep.com reports, “called 911 and reported feeling uncomfortable after 20-year-old Devin Myers circled her vehicle on Aug. 13. Myers says he had parked his car and was walking to a restaurant when he was stopped by police. He believes he was racially profiled.” The probationary officer who stopped and questioned the black man drew the ire of The Detroit Coalition Against Police Brutality, which sought his firing. “The situation in which Mr. Myers found himself — an African American man accused of ‘suspicious behavior’ by a Caucasian woman as he merely attempted to have a meal at a local restaurant — is all too familiar,” coalition spokesman Kenneth Reed stated. Prior to his resignation, the police department said the employee was to receive remedial training. A police supervisor who responded to the Inn Season Café was disciplined, the Detroit Free Press reports. A video of the incident went viral on social media.

Oklahoma: Debra Hamil, 65, ended up tased and arrested during a traffic stop after she refused to sign an $80 ticket for a broken tail light on her truck, nbcboston.com reports. In a bodycam video, she tells the Cassion officer: “You are full of s**t because you’re not placing me under arrest.” Hamil drove off with the officer in pursuit. Hamil pulled over. The officer drew his gun and ordered Hamil to exit her truck, but she refused. The officer opened the truck door, then “pulled her to the ground by her arm,” nbcboston.com reports. She kicked him. He shot her with his stun gun and repeatedly yelled, “Put your hands behind your back.”
News In Brief (cont.)

Hamil refused and said she would stand up. “No, you will not.... You’re gonna get it again,” said the officer. Hamil was charged with one felony assault on a police officer and one misdemeanor for resisting arrest,” NBC affiliate WGBA-TV reports. Her attorney Edward Blau called the officer’s actions “egregious and unnecessary.”

Pennsylvania: A Pittsburgh district attorney is refusing testimony from undercover detectives involved in a bar brawl with several members of the Pagans motorcycle club, according to lawandcrime.com. “The four detectives were allegedly working undercover at Kopy’s Bar on the South Side of Pittsburgh when they started a brawl without getting the okay from their superiors. This news comes after the DA’s office learned that detectives David Honick, David Lincoln, Brian Martin, and Brian Burgunder had been reinstated to the Pittsburgh police department. They’ve reportedly been moved from the narcotics division to the violent crime unit.” According to lawandcrime.com, ‘police Sgt. Matthew Turko arrived and pepper-sprayed more or less indiscriminately into the melee. Stephen Kopy, the owner of the bar, claimed that the bikers didn’t instigate the fight and that he was ‘offered no care or assistance’ after being hit by residual pepper spray.”

South Carolina: Richland County Sheriff’s Deputy Derek Vandeham is accused of “communicating to have sex with a 15-year-old” — while participating in an undercover child sex investigation, lawandcrime.com reports. The 34-year-old lawman was arrested by fellow officers. Sheriff Leon Lott said the now-fired officer was ‘working on-duty’ in his vehicle when taken into custody in August 2019. The sting that included Vandeham, was called Operation Relentless Guardian, by fellow officers. Sheriff Leon Lott said the now-fired officer was “working on-duty” in his vehicle when taken into custody in August 2019. The sting that included Vandeham, was called Operation Relentless Guardian, according to lawandcrime.com. “The four detectives were allegedly working undercover at Kopy’s Bar on the South Side of Pittsburgh when they started a brawl without getting the okay from their superiors. This news comes after the DA’s office learned that detectives David Honick, David Lincoln, Brian Martin, and Brian Burgunder had been reinstated to the Pittsburgh police department. They’ve reportedly been moved from the narcotics division to the violent crime unit.” According to lawandcrime.com, ‘police Sgt. Matthew Turko arrived and pepper-sprayed more or less indiscriminately into the melee. Stephen Kopy, the owner of the bar, claimed that the bikers didn’t instigate the fight and that he was ‘offered no care or assistance’ after being hit by residual pepper spray.”

Texas: A deputy sheriff who began playing the online video game Minecraft with a 15-year-old girl starting when she was age 12 now faces charges of sexual exploitation of a minor, nypost.com reports in August 2019. Police said Matagorda County sheriff’s deputy Pasquale Salas, 25, solicited the Massachusetts girl for hundreds of sexually explicit images and video of herself through social media platforms. He also is accused of sending sexually explicit photos of himself to the girl. In 2016, he allegedly started threatening the girl “by telling her he would release any illicit images if she did not continue to send them,” nypost.com reports. Salas, according to usatoday.com, “referred to himself as ‘daddy’ to the girl, according to an affidavit filed Wednesday, and outlined a list of rules for her to follow, including not being allowed to talk to boys without his permission. The girl, who met with law enforcement June 3, provided a typed list of “rules” that Salas made. The list said: “THINGS TO REMEMBER: (a) You belong to me; (b) You’re my property so I can treat you however I want, whenever I want; (c) I’m Proud of You.... Punishment included gagging, choking” and other sexually explicit actions.” Eventually, Salas “threatened to physically harm and rape her and her sister if she didn’t obey his orders, prosecutors allege.” When she repeatedly tried to end contact, he also threatened her, the affidavit reads.

Washington, D.C.: A child and youth program assistant employed by the Department of Defense at Ramstein Air Base in Germany was sentenced in August 2019 by a federal judge in Washington to two years of prison, followed by five years of supervised release, airforcetimes.com reports. Joseph Robertson, 38, pleaded guilty June 6, 2019, to one count of abusive sexual contact with a child who was 13 to 14 years old. This occurred in the summer of 2016 on “multiple occasions, including touching the minor’s genitals over the minor’s clothing,” the news site reports, while Robertson accompanied children from the Ramstein youth center to a swimming pool in a neighboring community. The investigation of Robertson, of Sanford, North Carolina, was conducted by U.S. Air Force Office of Special Investigations and the FBI, overseen by the Seattle Division’s Tacoma Resident Agency Child Exploitation Task Force. The case was brought as part of Project Safe Childhood, an initiative of the Department of Justice.

Washington: Renton police officer Tanuj Soni faces charges after he allegedly asked a confidential informant in a park to take off her clothes, and then “slapped and groped” her, seattletimes.com reports in August 2019. He was charged with fourth-degree assault with sexual motivation and abuse of office in King County Superior Court. Soni used his position to entice the woman to a park in the “middle of the night under the guise of discussing a case with her,” Senior Deputy Prosecuting Attorney Charles Sergis wrote. “When Des Moines Police officers arrived, they noted that Soni appeared heavily intoxicated and was wearing shorts, an inside-out T-shirt and no shoes. Officers said Soni told them the woman was his confidential informant and they were hanging out when she started ‘freaking out’ and ran, according to charges. Soni told police he ran after her to calm her down.” His bail was set at $50,000.
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