The Junk Science Cops Use to Decide You’re Lying

Leaked documents detail law enforcement trainings in lie detection techniques that have been discredited by scientists.

by Jordan Smith, The Intercept

The training session was billed as “cutting edge,” and dozens of law enforcement professionals signed up to learn about “New Tools for Detecting Deception” from a human lie detector who calls herself “Eyes for Lies.” Her real name is Renee Ellory, and she claims that she’s one of just 50 people identified by scientists as having the ability to spot deception “with exceptional accuracy.”

A flyer for the event, hosted by Wisconsin’s High Intensity Drug Trafficking Area — a federal program that supports law enforcement drug interdiction work — was included among a trove of law enforcement documents that were hacked and posted online in June under the title BlueLeaks. The promo copy leans heavily into Ellory’s skill at ferreting out deception in others. She is “exceptional at pinpointing a liar and can tell you why she doesn’t trust someone on the spot,” it reads. Training participants would learn how to “identify anger, contempt, and disgust before words are even spoken.” Course objectives were broad: Learn to differentiate between “real” and “fake emotional displays”; recognize hidden emotions; identify the “ways our subconscious brain leaks information when we lie”; “analyze body language that indicates deception”; gain tips to use when interviewing a psychopath; “identify the key features of expressions that reveal danger for you!”

Participants spanned the law enforcement spectrum and included the chief of a small police department, corrections officers, university cops, state troopers, various members of the Milwaukee Police Department as well as individuals from the U.S. Probation Office and the FBI. In surveys filled out after the training, which took place in November 2015, the common complaint was that there weren’t enough structured breaks; as one participant put it, “the mind can only absorb what the buttocks can tolerate.” But otherwise, a majority of the 82 respondents gave the training high marks. Participants wrote that they would incorporate what they’d learned into their police work. A number of them said the most valuable thing they learned was “the seven universal facial expressions that all people have all over the world as a good indicator” of lying, as one trainee put it.

It might seem reassuring that so many law enforcement officers found a skills training so valuable. But not in this case. That’s because Ellory’s lie detection training is based on what many psychologists say are largely discredited theories, if not simply junk science. “It’s completely bogus,” said Jeff Kukucka, an assistant professor of psychology and law at Towson University who studies forensic confirmation bias, interrogations, and false confessions. “And what’s maybe more alarming about it … is that this isn’t new. We’ve known for quite a while that this stuff doesn’t work, but it’s still being peddled as if it does.”

The BlueLeaks documents contain numerous flyers for trainings offered to police agencies across the country. Many of them promote methods of interviewing and interrogation, lie detection, and detecting “danger,” such as Ellory’s, that rest on unsteady scientific ground and have been linked to false confessions and wrongful convictions. The documents offer a window into how various training methods perpetuate myths — subjective, hunch-based approaches to interpreting human behavior that are unreliable and have been discredited by leading psychologists — that police are then encouraged to use in crime solving.

The search for a foolproof method of lie detection has a “long history,” said Richard...
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Lie Detection Junk Science (cont.)

Leo, a professor of law and psychology at the University of San Francisco School of Law and an expert on interrogation practices. “The search for some way to be able to read body language, demeanor, vocal pitch, gestures and then infer with a high degree of accuracy whether someone is telling the truth.” It just doesn’t exist, he said. He likens many of the claims about human lie detection to claims of psychic ability. “This reminds me of psychics and the lottery. If there was a psychic and they could see what the lottery numbers are, that would just be gold, right? Why wouldn’t they win $400 million when the Powerball is up there?”

As the country has become increasingly focused on police reform in the wake of George Floyd’s killing by Minneapolis cops, experts say the movement should include reforms to the way police are trained to interview and interrogate suspects, witnesses, and victims to ensure they’re grounded in best practices supported by science. “Part of the distrust that you see between law enforcement and minority communities stems from the way that suspects, witnesses, victims, and family members are treated by detectives during the course of an investigation,” said Steven Drizin, co-director of the Center on Wrongful Convictions at Northwestern University’s Pritzker School of Law, who studies false confessions. Law enforcement training that isn’t based in science “just furthers the deterioration of the relationship between case officers and people in the community.”

Dumb Luck

In addition to Wisconsin’s HIDTA, police agencies in California, Georgia, Nevada, and Texas have promoted Ellory’s trainings, according to flyers found within the Blue-Leaks files. One flyer boasts that Ellory has trained law enforcement in the “largest U.S. cities,” including “New York City, Los Angeles, Chicago, Houston, San Antonio, Washington, D.C., Atlanta, Honolulu, Las Vegas, Reno, Key West — just to name a few.” In an email to The Intercept, Ellory said she has been training as Eyes for Lies since 2009 and estimates she’s reached between 2,500 and 3,000 law enforcement officers.

The problem is that what she’s teaching them has been widely discredited — an assertion Ellory vehemently denies. According to Ellory, she was one of 50 individuals identified as an “expert in deception” as part of the so-called Wizards Project, run by researchers associated with Paul Ekman, a professor at the University of California, San Francisco. The researchers studied thousands of people — from CIA and Secret Service agents to regular folks — to see who could best detect behavior associated with deception, a practice that relies heavily on the idea of universal facial expressions and so-called microexpressions that last mere fractions of a second. Ellory’s trainings rely on the validity of both concepts.

While the theory of universal expressions dates back to Charles Darwin, research has been mixed, and Ekman’s work in this area has been repeatedly challenged by scientists in recent years as unreliable, in part because of methodological issues.

Where microexpressions are concerned — also an area of Ekman’s studies — subsequent research has found them “rare and nondiagnostic,” Kukucka said, and that training individuals to see them doesn’t actually work.

Ultimately, Kukucka said, the individuals Ekman identified as exceptional human lie detectors were simply a result of chance. With the Wizards Project, the idea was to test thousands of people to identify those who scored “unusually” high on a lie detection test, Kukucka said. Out of 15,000 people, “they found 50 who were unusually good. And they thought maybe from those people’s knowledge they could reverse engineer — OK, well, what are these people doing that’s working? And then use that to figure out what actually works,” he explained. “The problem with that is, it’s a total artifact of just having a bunch of people and how probability works. If you flip 15,000 coins 10 times, you’re going to get a couple that come up heads all 10 times, but there’s really nothing different about those coins than any of the other coins, just dumb luck.”

Indeed, years of research has demonstrated that behavioral cues — like eye-blinking, arm-crossing, a voice rising or dropping in pitch — are simply not reliable indicators of deception. “A lot of police science is really pseudoscience,” Drizin said. “Police officers do believe that they’re able to detect liars from truth-tellers at much higher rates than you and I are. And that’s just been proven not to be the case.” In fact, research has found that the odds of a person detecting deception in another are really no better than chance, and that while those who’ve been trained to do so feel more confident in their conclusions, they’re no more competent. “When police are
trained in this false and misleading stuff, they become more confident, so they become more prone to error,” said Leo. “It’s just this loop, this dangerous loop.”

In an email exchange, Ellory first wrote that she wouldn’t have time to explain things to me unless I took one of her courses — her “master class” is currently priced at $1,950 per person — but then noted that she’s not “actively doing” classes right now.

In a subsequent email, she defended her trainings as being rooted in science but wrote that as a “rare expert,” she’s used to people not understanding that. “I find at times with my gift, it’s akin to seeing color in a world where other people live in a colorblind world. Seeing color is real but trying to convince a color blind person color exists is nearly impossible,” she wrote. “I tell people in my classes what I teach will be common knowledge in 100 years, she wrote. “I tell people in my classes what I teach will be common knowledge in 100 years, but we are still in the dark ages when it comes to understanding human behavior and deception,” she continued. “At a point, I learned, I can’t change the world alone. But I can educate them through demonstration and example it don’t understand and when I share it with others can’t — so it’s useless.”

“I don’t get that reasoning on any level,” she wrote. “I have insight into human behavior that most people have never considered, don’t understand and when I share it with them through demonstration and example it changes their world for the better. I don’t teach interrogation techniques. I teach people how to see and find the truth.”

Kukucka called Ellory’s response bizarre. “They’re selling snake oil. I mean, let’s be honest,” he said. “They’re raking in money by selling snake oil to, unfortunately, people who have a lot of clout.”

Ellory’s is not the only training program found among the BlueLeaks documents that sells questionable science to law enforcement. There’s a California-based group that has provided training in neurolinguistic programming, which teaches that deception can be detected by tracking eye movements, a theory that has been widely discredited. And there’s a suite of programs from the Subconscious Communication Training Institute and Spotting Lies, outfits headed by Steven Rhoads — a former police chief, current sheriff’s department investigator, and retired Christian rodeo clown.

The leaked documents indicate that Rhoads’s group has provided a number of trainings over the last decade for law enforcement across the country, including individuals from the Department of Homeland Security and Immigration and Customs Enforcement. The trainings feature lessons in how body language — including “facial gestures and human emotions,” “eye movement and gaze behavior,” and “gestures involving the torso” — can be used in interrogations and reveals not only deception but danger for officers. “As a very general rule of thumb the left side of the body is more apt to reveal known deception than is the right side of the body,” reads material for a 2018 training called “Subconscious Communication for Detecting Danger,” found in files connected to the Northern California Regional Intelligence Center.

Leo says the subconscious communication training is disturbing. “I mean, anything can be said to be subconscious,” he said. “So the cops can just make it up. It’s not based on any research.”

And Kukucka finds the documents related to detecting danger particularly troubling. “I would be very concerned that the context of those trainings would just exacerbate the implicit, especially racial, biases that already exist,” he said. “We know from very clever shooting simulation research that people already hold an implicit bias where their reaction time in shooting unarmed
black individuals is faster. So I would wonder from a training like that, the cues that they're teaching people to look for are those same cues perceived as threatening in black individuals and not in white individuals, for example.”

Rhoads says he’s been teaching interrogation techniques for more than four decades. “I’m still a police officer and use it regularly,” he said. “The techniques I’m teaching work extremely well.” That includes focusing on behavioral cues — including eye movements, like the ones used in neurolinguistic programming. Rhoads, who has a doctorate in behavioral science, said he was one of the “original researchers” into eye movements back in the ‘70s, which he's been able to prove are “98 percent accurate in determining deception.”

But he agrees that researchers are correct to say that you can’t just go into an interview and immediately rely on nonverbal cues to determine deception. Rather, he said, you first have to establish a “baseline” for a person before you can infer deception from their behavior or speech. He says he can do this with high accuracy, usually after asking no more than 20 questions.

Rhoads dismissed the idea that things in a person’s life that an interrogator wouldn’t know — like their cultural norms or past interactions with law enforcement — might influence their behavior during an interview or interrogation. He said his approach for establishing a baseline is similar to what a polygrapher does by measuring physiological responses. “It’s the same science that the polygraph is based on except this is strictly based on verbal and nonverbal leakage versus physiological factors.” Of course, polygraph results are generally inadmissible in court precisely because they’re unreliable.

The approaches that seem to work better to determine whether a person is being deceptive, Kukucka said, “are the ones where the interviewer takes the initiative to be an active participant in the interview and questions a person in a way that draws out things that are diagnostic.” Kukucka said he’d love to see the research that demonstrates Rhoads’s claim of over 90 percent accuracy with his techniques, which he says is just “astronomically higher than anything that any study has ever found.”

In the end, he said, resolving the conflicting claims between trainers like Rhoads and Ellory and researchers like himself should be easy. “If you can do this, prove it. That’s really what it boils down to,” he said. “If you can get 98 percent accuracy with whatever technique you’re using, and you can prove to the scientific community that you can actually do this: A, people are going to throw money at you, and B, we will all gladly be the first to say, ‘You know what? We were wrong, you were right.’”

**Resistance is Futile**

Although there are dozens of documents related to deception detection and interrogation trainings by Ellory, Rhoads, and others, the single largest number of documents on the topic that The Intercept identified are for trainings by John E. Reid and Associates, purveyors of the so-called Reid technique. Essentially the granddaddy of interrogation methods, the Reid technique replaced the third degree, and while it does not employ physical torture, it is nonetheless controversial in its approach, which scholars agree has led to false confessions — a persistent problem in the criminal justice system. Roughly 12 percent of the 2,654 exonerations since 1989 involved a false confession, according to the National Registry of Exonerations. Of those who were wrongly convicted of murder and later cleared by DNA, 62 percent had confessed, reports the Innocence Project.
The Reid technique is guilt-presumptive, confrontational, and includes an emphasis on nonverbal behaviors. “It begins with an accusation, a confrontation,” Drizin said. “The police officers have conducted an investigation, and there’s no question in their mind that you were the person who committed the crime.” Interrogators will often lie about evidence linking a person to the crime. “Props are used; big, thick files filled with paper. Claims of DNA or other evidence. Every time the suspect asserts their innocence … they are interrupted and redirected to the idea that they’re guilty.” Reid interrogators also use “themes,” minimizing the crime in a way that makes a confession more likely — offering sympathy, downplaying the severity of the offense, or offering an excuse for it, like you didn’t know what you were doing because you were drunk. It’s “a justification or an excuse that operates as an implied promise of leniency,” said Drizin. “Over time, the message that resistance is futile begins to carry more weight. And then the suspects will agree to confess.”

Joseph Buckley, president of Reid and Associates, takes exception to the criticisms heaped on the technique by academicians and lawyers and insists that it is supported by science. In response to a series of emailed questions, Buckley directed me to the company’s YouTube channel and a paper he wrote that seeks to clarify what the company calls “misrepresentations” about the practice, though many of them read like distinctions without a difference.

Consider the clarification regarding nonverbal cues. Like Rhoads, Buckley says they shouldn’t be used on their own as an indication of deception, only in context. He offers an example. Say a suspect is asked if he’s ever stolen from his employer. Yes, the suspect says, as he crosses his legs, looks down at the floor, and dusts his shirt sleeve, a couple years ago he stole from the hardware store where he worked. But what if a suspect is asked directly, did you steal that missing $2,500? His response — as he crosses his legs, looks at the floor, and dusts his sleeve: “No, I did not.”

“These two subjects displayed identical paralinguistic and nonverbal behaviors during their responses,” Buckley wrote. “However, the interpretation of the behaviors is completely different.” In the first example, the guy is “telling the truth, but he feels embarrassed and possibly even threatened in revealing his prior theft.” But in the second example, the “verbal content … does not explain the accompanying nonverbal behaviors, so the investigator should consider these behaviors as reflecting possible fear or conflict — emotional states that would not be considered appropriate from a truthful subject.”

A 2018 flyer for a four-day Reid training in Austin, Texas, specifically talks about teaching investigators to read behavioral cues — “the verbal and nonverbal behavior symptoms that are displayed by a person who is telling the truth during a non-accusatory interview, as well as those displayed by a person who is withholding or fabricating relevant information,” including “posture changes,” “grooming,” and “eye contact.” On days three and four, the training covers the interrogation process, “beginning with how to initiate the confrontation; develop the interrogational theme; stop denials; overcome objections’ and ask questions to stimulate the admission.”

Building Rapport

Though Reid still dominates the market, there are encouraging signs that may be changing. In 2017, the police-training equivalent of a bomb dropped when Wicklander-Zulawski & Associates, one of the country’s leading law enforcement training organizations, announced that it would no longer teach the Reid technique because of the risk of false confessions. “Confrontation is not an effective way of getting truthful information,” Shane Sturman, the company’s president and CEO, told the Marshall Project. “This was a big move for us, but it’s a decision that’s been coming for quite some time. More and more of our law enforcement clients have asked us to remove it from their training based on all the academic research showing other interrogation styles to be much less risky.”

While science doesn’t support the efficacy of subconscious communication techniques, lie detection, or even the Reid technique, there is ample research to support a different approach: one that is decidedly nonconfrontational, encourages open conversation, and emphasizes rapport-building. Support for this approach in the U.S. comes in part through the work of the High-Value Detainee Interrogation Group, a federally funded interagency effort created by the Obama administration as a means of “advancing the science and practice of interrogation” — and to end Bush-era torture practices against terrorism suspects. The group, known as the HIG, also funded research to develop the science of police interrogation. “Empirical observations have found that police in the U.S. regularly employ poor interview techniques that either reduce the amount of information elicited or entice subjects … to provide incorrect information,” reads a 2016 HIG report. (The HIG was basically abandoned by the Trump administration.)

Increased research in the field, including what has come out of the HIG, “has been paramount,” said Dave Thompson, partner and vice president of operations at Wicklander-Zulawski. Actually, he says, the research has always been there, it just hasn’t always been embraced by practitioners. “We’ve got a lot of these companies that are teaching police practices, regardless of what they are, but they’re teaching it off of being police officers for 30 years. And then you have a lot of academics who are running studies and coming up with great research results but have never been in a practitioner environment. So, I think the really important revolution we’ve had the last few years is the practitioner and the academic working together to make sure that we’re applying research in a practical setting.”

If the practices that research finds are effective aren’t being incorporated “into what law enforcement’s being trained,” said Thompson, “then we’re headed in the wrong direction.”

There is some suggestion within the BlueLeaks files that newer methods of interrogation might be seeping in, albeit slowly. The documents include at least one flyer from the Savage Training Group advertising “a modern way of interviewing suspects, victims and witnesses that is highly effective and in harmony with the latest research.” The training was organized by the San Mateo County, California, Sheriff’s Office in March. “You might have heard those ‘old-school’ interview techniques have been shown to cause false confessions (Yikes!),” it reads. “You’ve probably been frustrated and thought there ought to be a better way. Well, now there is.”

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Dear Compassion Ambassador,

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Please join us. With immense gratitude from the entire team at Compassion Prison Project.

**Prior to your 18th birthday:**

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<td>Did a parent or other adult in the household often or very often... Swear at you, insult you, put you down, or humiliate you? or Act in a way that made you afraid that you might be physically hurt?</td>
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<td>Did you often or very often feel that ... You didn’t have enough to eat, had to wear dirty clothes, and had no one to protect you? or Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?</td>
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<td>Was your mother or stepmother: Often or very often pushed, grabbed, slapped, or had something thrown at her? or Sometimes, often, or very often kicked, bitten, hit with a fist, or hit with something hard? or Ever repeatedly hit over at least a few minutes or threatened with a gun or knife?</td>
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<td>Did you live with anyone who was a problem drinker or alcoholic, or who used street drugs?</td>
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Now add up your “Yes” answers: **This is your ACE SCORE: __________**

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From the Editors

After his days at Princeton, Kent attended the University of California, Berkeley School of Law, where he served as an editor on the California Law Review, grew out his hair, and joined the 1968 protests. He interviewed at a prestigious corporate law firm, but he knew it wasn’t a match when they asked him to cut his hair. Instead, he took a job at the law offices of Melvin Belli, the “King of Torts.” It was there that Kent honed his legal skills tackling criminal defense cases and became a talented trial lawyer himself.

In 1976, Kent opened his own law practice. He won acquittals in numerous criminal cases, including that of Sonny Barger and his then-wife Sharon in the year-long RICO trial, as memorialized in Sonny’s book Hells Angel.

In 1981, Kent posted an ad at the University of California, Hastings College of the Law for volunteers to help host a networking event. A female student name Pamela Russell answered the ad, and it was love at first sight. The couple married in Mexico, and together they founded their law practice, Russell and Russell.

California Court of Appeal Grants Habeas Relief Over Failure to Instruct Jury on ‘Heat of Passion’

by Dale Chappell

The Court of Appeal of California, Third Appellate District, granted habeas relief on April 3, 2020, in a case where appellate counsel failed to request a jury instruction that could have led to a lesser included conviction, requiring the vacatur of a murder conviction.

Jonathan Hampton filed his appeals and at least two habeas corpus petitions in state court after his 2009 conviction for second-degree murder. He was found guilty by a jury of shooting and killing someone during a drug deal gone bad. While the facts of how the shooting happened were unclear, Hampton testified at his trial that he was trying to escape from a man holding a gun to his head who was robbing him. He said when the gun landed in his lap and the man lunged for him, he shot him “without thinking.” He feared for his life, he said.

Instead of first-degree murder, the jury found him guilty of second-degree murder. The issue in Hampton’s third habeas petition was whether his appellate lawyer was ineffective for failing to challenge that the trial court was required to give the jury a “heat of passion” instruction, which could have allowed a conviction for voluntary manslaughter, not murder.

First, Hampton had to get over some procedural hurdles the State raised. Claims that could have (and should have) been raised on direct appeal cannot be the basis for a habeas petition. Neither can claims that were raised and lost on appeal. But new facts arising after an appeal may allow a new claim in a habeas petition if the petitioner acts with “due diligence” in finding those facts. This, if adequately explained, can provide an exception to the rule against piecemeal habeas litigation.

But where a claim should have been raised on appeal but appellate counsel neglected to do so, ineffective assistance of appellate counsel (“IAAC”) can form the basis to at least avoid that first bar. Hampton, though, also needed a new factual basis to support that
Court credited his assertions to help excuse to hire a lawyer to research it for him. The in the law library and that he had no money lacked the skill needed to find it on his own written opinion in July 2014. He also said he case until a fellow prisoner handed him the ... in the heat of passion."

manslaughter "if the defendant killed someone otherwise be murder is reduced to voluntary manslaughter, not unlike Hampton's case. The court there recognized that "heat of passion" is a "state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of considered reactions to the provocation." In Thomas, the court found the defendant "fired because he was afraid, nervous and not thinking clearly." The court concluded that under CALCRIM No. 570, a killing that would otherwise be murder is reduced to voluntary manslaughter "if the defendant killed someone ... in the heat of passion."

Hampton filed an affidavit swearing that he did not become aware of the Thomas case until a fellow prisoner handed him the written opinion in July 2014. He also said he lacked the skill needed to find it on his own in the law library and that he had no money to hire a lawyer to research it for him. The Court credited his assertions to help excuse his delayed filing.

Finding the Thomas case was not the new fact to allow a late filing, the Court did clarify that Hampton's claim did not rely on Thomas. "The key fact underlying the IAAC claim is that Hampton's appellate counsel unreasonably failed to raise the instructional error claim in his appeal," the Court said. Hampton "remained unaware" that he had a valid IAAC claim until he saw the Thomas case in 2014. That was enough to excuse the procedural barriers for Hampton.

The question then became whether the appellate court would have found the trial court erred in not providing the instruction sua sponte to the jury about the heat of passion rule. If so, Hampton's appellate counsel would have been ineffective. The Court found that there was "substantial evidence" that a "reasonable jury" could have found the instruction persuasive. Even if the jury would not have believed all of Hampton's testimony, other evidence could have supported the instruction, the Court said.

The standard is whether Hampton's firing of the gun was a rational thought or out of "considered reactions to the provocation of being robbed at gunpoint," the Court said. "Heat of passion manslaughter is a lesser included offense of murder, facts permitting, because it negates the element of malice," the Court explained.

The failure of the trial court to issue the heat of passion instruction violated Hampton's federal constitutional rights. "Jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution," the Court said.

"There is at least a reasonable probability the jury believed enough of Hampton's testimony to conclude that while he did not kill [the person] in self-defense ... his judgment was so obscured by intense emotion that he fired the gun without thinking, acting from passion rather than judgment," the Court concluded.

Accordingly, the Court of Appeal granted Hampton's petition for writ of habeas corpus, vacated his conviction, and remanded to the trial court. The Court instructed that the "People may retry [him] for second degree murder, should they so elect, within the time specified in Penal Code section 1382, subdivision (a)(2)." See: In re Hampton, 2020 Cal. App. LEXIS 357 (2020).

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Criminal Legal News 9 October 2020
Attacking the Guilty Plea: The Art of Withdrawing a Guilty Plea

by Dale Chappell

State prisoners will find that their state laws and rules closely track those of the federal rules and cases cited in this column because they typically adopt each other’s rules, with minor differences at times. Such similarities will be noted throughout this column.

Before a Guilty Plea Is Accepted

The easiest phase to withdraw a guilty plea is before it is accepted by the court. Under Rule 11(d)(1), a guilty plea may be withdrawn before a court accepts it “for any reason or no reason.” Courts have consistently ruled that you have a “right” to withdraw a guilty plea at this point and that “the court lacks authority to deny” your withdrawal. United States v. Feliz, 2019 U.S. Dist. LEXIS 207814 (D.N.J. 2019) (collecting cases). And here’s another “research alert”: Caselaw prior to the amendments to Rule 11 in 2002 will say there’s no absolute right to withdraw a guilty plea before it’s accepted. That used to be true under the old rule, but the amendments expressly changed that to fix a split among the Circuits on the issue.

When is a guilty plea actually “accepted” by a court? There aren’t any “talismanic words” a court must use to mark the acceptance of a guilty plea. What matters, courts say, is the context of the language used by the court in accepting the plea. Even where a court provisionally or conditionally accepts a guilty plea, it is usually considered “accepted” under Rule 11. Feliz. Courts will often accept a guilty plea pending review of the presentence report or the plea agreement. As long as the court follows Rule 11 in accepting a guilty plea, it’s “accepted.” United States v. Hyde, 520 U.S. 670 (1997) (once the court has taken these steps [under Rule 11], it may, in its discretion, accept a defendant’s guilty plea”).

A guilty plea, however, does not live or die with the plea agreement, and a plea agreement can be rejected while the guilty plea stands. In Hyde, the Supreme Court recognized that a plea agreement usually isn’t even accepted by a court until sentencing, long after the guilty plea has been accepted. But there are exceptions. Under Rule 11(c)(5), if the court rejects a plea agreement where the defendant has pleaded guilty and the government has agreed to dismiss charges, not to bring further charges, or to a certain sentence or sentencing range, the court must “give the defendant an opportunity to withdraw the plea.” In this scenario, you have an “unrestricted right” to withdraw your plea as if it had never been accepted. United States v. Lopez, 385 F.3d 245 (2d Cir. 2004).

This is important because nearly all plea agreements have some kind of “charge bargaining,” where the government agrees to drop charges or not bring new charges if the defendant pleads guilty. After all, the whole reason the government piles on charges is to coerce a guilty plea, even though it knows it can get the same sentence with just the remaining charges agreed to in the plea agreement. This means a guilty plea after a court rejects a plea agreement will usually fall under Rule 11(c)(5), allowing withdrawal without any reason at all.

Another example of when you have the right to withdraw your guilty plea would be when a magistrate judge conducts the guilty plea hearing and then makes a recommendation to the district judge to accept your plea. Even if the magistrate judge follows Rule 11 top to bottom, your guilty plea isn’t “accepted” until the district judge adopts the magistrate’s recommendation and accepts your guilty plea. Until then, you can withdraw it for any reason. United States v. Davila-Ruiz, 790 F.3d 249 (1st Cir. 2015).

After Acceptance and Prior to Sentencing

If you want to withdraw your guilty plea after it’s accepted but before sentencing, you must show a “fair and just reason,” according to Rule 11(d)(2)(B). What that entails is not defined in the rule, so we turn to the courts to find out what “fair and just reason” means.

In United States v. Carr, 740 F.2d 339 (5th Cir. 1984), the Fifth Circuit established seven factors a court considers in finding whether a fair and just reason exists to allow withdrawal of a guilty plea after it’s been accepted by a court. These include: (1) a claim of innocence, (2) prejudice to the government, (3) a defendant’s delay in moving to withdraw his plea, (4) judicial “inconvenience,” (5) the “close assistance of counsel,” (6) the knowing and voluntary nature of the plea, and (7) the waste of judicial resources. Any one or several of these can be enough to find a fair and just reason for withdrawal. Most courts have adopted their own factors, but Carr covers all the
big ones. All of this, of course, is at the court’s discretion, and none of the factors amounts to an automatic right to withdraw.

That last point is important because it’s the way a withdrawal motion is argued that matters. Notice that constitutional issues, like the knowing and voluntary nature of the plea and the assistance of counsel, only come into play as factors — unless they’re argued as independent grounds for withdrawal. Of course, if a guilty plea is not knowing and voluntary, it’s unconstitutional and invalid and can be withdrawn. And the same goes for a guilty plea infected with IAC, constituting a violation of the Sixth Amendment.

But the “close assistance of counsel” factor is not identical to the familiar IAC standard. While the analysis is the same, “close assistance of counsel under [Rule 11] and constitutionally ineffective assistance of counsel under the Sixth Amendment are distinct issues.” United States v. McKnight, 570 F.3d 641 (5th Cir. 2009) (collecting cases). How do they differ? By their application. Close assistance of counsel guides a court’s discretion in allowing withdrawal of guilty plea before sentencing; while IAC is used to invalidate a conviction or disallowing the withdrawal of a guilty plea, as a § 2255 motion or just dismiss it. Rauner v. United States, 871 F.2d 693 (7th Cir. 1989) (treating letter to withdraw plea as § 2255 motion).

So, when is a sentence imposed for purposes of Rule 11(e)?
When it is orally pronounced in court. It’s not the written judgment that counts but what’s actually said in open court. United States v. Villano, 816 F.2d 1448 (10th Cir. 1987) (en banc); Young v. U.S., 943 F.3d 460 (D.C. Cir. 2019). Although the foregoing examples are federal cases, states generally follow the same reasoning as federal courts on withdrawing a guilty plea. State v. Reid, 894 A.2d 963 (Conn. 2006) (explaining when motion to withdraw a guilty plea no longer available); Cano v. Superior Court, 72 Cal. App. 4th 1310 (Cal. App. 2 Dist. 1999) (court is without jurisdiction to hear motion to withdraw guilty plea after sentence begins); State v. Turner, 919 S.W.2d 346 (Tenn. Ct. App. 1995) (withdrawal of guilty plea after sentencing only for “manifest injustice”).

**Conclusion**
If you are still within the limits of withdrawing your guilty plea under the first two phases — that is, before sentencing — understanding what it takes to do so is a huge first step to putting yourself back before the court as an accused who is “not guilty.” If you’re like the majority of people who found out all too late that they would’ve been better off not pleading or going with another option, then you may want to brush up on the § 2255 remedy and research some of the materials cited in the previous three columns of this series on the standards for attacking a guilty plea under § 2255.

In the next column in this series, we’ll go over how waivers and breaches affect attacking the guilty plea.

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

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

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The U.S. Court of Appeals for the Fourth Circuit ruled that a prisoner immediately released under the First Step Act of 2018 could not “bank” the extra time spent in prison toward a future prison sentence imposed in the event of a supervised release revocation.

While the Court’s decision wasn’t a “win” for the prisoner, it provides a glimpse into the Court’s reasoning of how it treats prisoners immediately released who have served too much time in prison.

Ronald Jackson was not the first prisoner released under a change in the law who had spent more time in prison than he should have, but his case was used by the Fourth Circuit to explain its position on what to do with the extra time such prisoners spent in prison when imposing a “time-served” sentence to allow release. Jackson was sentenced 15 years ago for conspiracy to distribute more than 50 grams of crack. Because he had a prior drug conviction, the Government filed a notice requiring the court to impose at least 20 years in federal prison without parole.

Jackson filed a motion in 2019 under the First Step Act that retroactively applied the Fair Sentencing Act of 2010 (“FSA”) to his case. The FSA raised the amount of crack needed to trigger the stiff penalty Jackson received, lowering his statutory sentencing range now to a minimum of 10 years, not 20. The district court agreed that Jackson was due to be released under the First Step Act and granted his motion. He was ordered to be released immediately.

The Government agreed with Jackson’s release, but it argued that the extra 10 years he spent in prison that he should not have should be ignored and that he should not be able to “bank” that extra time toward any future sentence he might serve. Jackson disagreed. He argued that the extra 57 months above his new mandatory minimum that he spent in prison should be given as credit in the event he violates his supervised release and be sent back to prison.

The district court recognized that Jackson legally could have banked that extra time toward a supervised release revocation sentence, but it eliminated that possibility by sentencing Jackson to “time served” of 177 months, effectively declaring all of the time he erroneously spent in prison as the lawful sentence for his offense. Judge Elizabeth Kay Dillon of the U.S. District Court for the Western District of Virginia reasoned that “the need to protect the public and the need for deterrence dictate[ ] that a defendant not be allowed to ‘bank time,’ which could allow him to commit further crimes without the fear of imprisonment.” She relied on a Fourth Circuit case decided before supervised release ever existed, Miller v. Cox, 442 F.2d 1019 (4th Cir. 1971), which reasoned that “the availability of credits against sentences for future crimes would provide a sense of immunity and an incentive to engage in criminal conduct.”

Jackson appealed. He argued that the district court abused its discretion by considering the possibility of banking time in imposing a sentence almost six years above his new mandatory minimum and more than 10 years above his new Guidelines sentencing range of 51 to 61 months.

The Fourth Circuit recognized that a prisoner may bank time toward a sentence. But it agreed with the district court that doing so in this case would fail to provide a “deterrence” for Jackson not to commit future crimes on supervised release.

Under 18 U.S.C. § 3553(a), a sentencing court must consider several factors when imposing a sentence. Two of those are the need to protect the public and to provide deterrence for future crimes. “Section 3553(a)’s broad language is consistent with the principle that district courts enjoy significant discretion in sentencing, provided, of course, that they devise reasonable sentences,” the Court reiterated.

A district court’s consideration of banking time for a future supervised release revocation sentence includes the § 3553(a) factors, the Court said. It rejected Jackson’s argument that he wasn’t asking for credit toward a new crime but only toward a possible revocation sentence. The Court said that would also defeat the purposes of supervised release. “It is reasonable for a district court to think that the prospect of returning to prison under a revocation sentence would provide a measure of deterrence against future crimes of the defendant and thereby provide a measure of protection to the public,” the Court explained.

In other words, the Court equated revocation of supervised release as a new crime to justify the need to protect the public and provide deterrence by way of supervised release and the threat of more prison time. But the Court did acknowledge that supervised release revocation can be a tool for encouraging compliance with conditions not directly related to criminal conduct, that the fear of going back to prison will cause a releasee to comply with supervised release conditions.

But the question Jackson raised was whether the district court’s consideration of the need to provide deterrence was a valid factor in counting his extra prison time as part of the corrected sentence under the First Step Act. The Court answered it this way: “The threat of consequences for violating the terms of a defendant’s supervision is important to the rehabilitative purposes of supervised release, including assisting the defendant in learning to become a law-abiding member of the community.” Jackson’s new sentence was still within the statutory range and therefore “legal,” so there was no issue with him having served time beyond what the law allowed. The Court did not have to face that thorny question, so it focused on the effects banking the time would have on supervised release (not exactly Jackson’s question).

Accordingly, the Court affirmed the district court’s sentence, finding that it did not abuse its discretion. See: United States v. Jackson, 952 F.3d 492 (4th Cir. 2020).

Writer’s note: Jackson and other prisoners who have served more time than they were supposed to and who have been released still have an avenue for modification of the terms of their supervised release. While the U.S. Supreme Court ruled in United States v. Johnson, 529 U.S. 53 (2000), that over-service of a sentence cannot be used by a court to impose a lower supervised release term, courts still have the authority to entertain a releasee’s request to adjust the terms of supervised release under 18 U.S.C. § 3583(c)(2) or, after completion of one year of supervised release, under § 3583(c)(1) because of extra time served on a sentence. That option may still be available to Jackson. Blackwell v. Quintana, 2019 U.S. App. LEXIS 982 (6th Cir. 2019) (unpublished opinion).
The Supreme Court of New Hampshire held that N.H.R. Crim. P. 14(b)(2)(A) does not allow trial courts to require that defendants identify evidentiary support for a noticed defense.

Michael Munroe was a prisoner at the Rockingham County House of Corrections when he became involved in a fight with another prisoner identified as W.V. Munroe was charged with assault by a prisoner. Prior to trial, he filed a Notice of Self-Defense and Notice of Competing Harms (“Notice”). The Notice stated that pursuant to RSA 627:4, Munroe “may rely on the defense of self defense.” His stated grounds for the notice were basically a recitation of the facts, some of which included that he stood accused of felony-level assault by a prisoner; that the State alleged he had caused serious bodily injury to W.V. by punching him at a time when Munroe was in custody; and that at a prison disciplinary hearing W.V. pleaded guilty to the charge of fighting.

The State objected to the Notice, arguing that Munroe wasn’t “entitled to argue self-defense as a matter of law based upon the offer of proof as contained within the [Notice].” According to the State, the Notice was deficient because Munroe didn’t allege how or why he had to defend himself from any imminent use of force against him.

The trial court ruled that the Notice failed to adequately set forth grounds under Rule 14(b)(2)(A). The court found that the grounds in the Notice were “insufficient to support” Munroe’s self-defense claim because he “ha[d] not alleged any facts suggesting that W.V. ... threatened him with the use of non-deadly force.” The trial court ordered that Munroe supplement his Notice to identify facts that formed the basis for a claim of self-defense within 10 days, or the Notice would be stricken. The Notice was ultimately stricken.

A jury convicted Munroe of the charged offense, and he appealed. One of his assignments of error was that the trial court erred by striking his Notice of self-defense.

The New Hampshire Supreme Court observed that N.H.R. Crim. P. 14(b)(2)(A) (“Rule 14(b)(2)(A)” states in pertinent part that if a defendant “intends to rely upon any defense specified in the Criminal Code” he must “file a notice of such intention setting forth the grounds therefore.”

The Court had not previously ruled on Rule 14(b)(2)(A), but the Court had ruled on a similar provision in former Superior Court Rule 101 (“Rule 101”) that required the defendant to “set forth the grounds” for a noticed defense. The Supreme Court explained in the instant case that “Rule 14(b)(2)(A)’s requirement that the defendant ‘set forth the grounds’ is not tantamount to a requirement that the defendant proffer evidence in support of the defense.... The rule does not allow trial courts to require that defendants identify evidentiary support for a noticed defense.” The Court concluded that the trial court erred in striking the noticed defense.

Accordingly, the Court reversed Munroe’s conviction and remanded for a new trial. See: State v. Munroe, 2020 N.H. LEXIS 131 (2020).
Sixth Circuit Reverses District Court’s Grant of Summary Judgment to Defendants in § 1983 Suit Against City and Police Officers

by Douglas Ankney

The U.S. Court of Appeals for the Sixth Circuit reversed the judgment of the U.S. District Court for the Northern District of Ohio that granted summary judgment to the City of Euclid (“City”) and to Officers Kyle Flagg and Vashon Williams in an action brought under 42 U.S.C. § 1983.

After observing Lamar Wright pull into the driveway of a suspected drug dealer and then leave, Flagg and Williams followed him in an unmarked car. Wright pulled into another residential driveway. Flagg and Williams approached Wright with guns drawn. Williams shouted to Wright, commanding him to turn off his engine and exit his SUV. Wright placed the SUV in park and raised his hands. The officers holstered their guns.

Flagg jerked the driver’s side door open and grabbed Wright’s left arm, twisting it around behind him. Flagg then attempted to grab Wright’s right arm in order to handcuff him. Unable to secure the right arm, Flagg began pulling Wright from the vehicle. Wright had a colostomy bag stapled to his abdomen as the result of a recent surgery. In order to assist Flagg, Wright placed his right hand on the center console for leverage to enable him to turn his body and exit the vehicle. Williams responded to Wright’s hand movement by pepper spraying him. At the same time, Flagg Tased him in the abdomen. Wright was then forcibly removed from the vehicle. A search of Wright’s person and vehicle revealed he had no weapons or other contraband. Due to blood leaking from the staples in his abdomen, Wright was transported to the hospital.

After a doctor tended to his wounds, the officers demanded he submit to an X-ray to find drugs they believed he had swallowed. Wright refused, believing the radiation from the X-ray would aggravate his wound from his surgery. The officers became enraged and said they were going to charge him because he refused to submit to an X-ray. Wright was booked at 10:45 p.m. on charges that included obstruction of official business and resisting arrest.

The officers designated Wright’s arrest as “stemming from a drug investigation.” Flagg later stated that he did this because he knew it would subject Wright to additional, more thorough searches. Wright posted bond before midnight, but the officers would not permit him to leave.

Because the officers had designated Wright’s arrest as stemming from a drug investigation, he was taken to the Cuyahoga County Jail (“Jail”) for a body scan to search for drugs concealed in his abdomen. The body scan revealed no drugs. Wright was not released from the Jail until 3:55 a.m. The prosecutor later dropped all charges.

At some point, Wright became aware that the use-of-force training that Flagg, Williams, and all Euclid police officers undergo included a video of comedian Chris Rock titled “How not to get your ass kicked by the police!” The video trivializes police beatings of citizens by presenting the beatings of Rodney King and other Black men in a “humorous” light. The training also included a PowerPoint slide that depicted a cartoon of a police officer in riot gear beating an unarmed civilian with a club emblazoned: “protecting and serving the poop out of you.” And the use of force training contained a meme depicting two officers with their guns drawn with a caption: “Bed bug! Bed bug on my shoe!”

Sergeant Murkowski was in charge of use-of-force training. The training that officers received consisted of reading the use-of-force policy to officers — including the video, PowerPoint, and meme described above — and a two-page quiz that was sometimes given.

Murkowski was also in charge of reviewing complaints of excessive force. He determined Flagg and Williams had not used excessive force against Wright. Notably, Murkowski had never found that a Euclid officer had ever used excessive force in any of the complaints he reviewed. Chief Meyer also stated that he had never found merit to any civilian complaint concerning use of force, false arrest, or illegal searches.

Wright filed his § 1983 complaint raising numerous allegations, including: excessive force, false arrest, malicious prosecution, extended detention, the City’s municipal liability, and a state law claim of malicious prosecution. The defendant’s filed a motion for summary judgment. The district court granted the motion based on qualified immunity for the officers and based on want of a constitutional violation as to the City. Wright appealed.

The Sixth Circuit observed “[s]ummary judgment is appropriate when no genuine dispute as to any material fact’ exists and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists if there is evidence to support a jury’s finding in favor of the nonmoving party. Peffer v. Stephens, 880 F.3d 256 (6th Cir. 2018). At the summary judgment stage, the evidence and all reasonable inferences are drawn in favor of the nonmoving party. Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013).

The Sixth Circuit analyzes whether an officer is entitled to qualified immunity using two steps: (1) whether the officer violated a constitutional right; and (2) whether that right was clearly established at the time of the violation. Páezica v. Jordan, 926 F.3d 283 (6th Cir. 2019).

Regarding Wright’s excessive force claims, officers are permitted to use some level of force when effectuating an investigatory stop or arrest, and the amount of force permitted is determined by examining “whether the totality of the circumstances justifies a particular level of force.” Coffey v. Carroll, 933 F.3d 577 (6th Cir. 2019).


Police may approach a suspect with weapons drawn during an investigative stop if the officer reasonably fears for his safety. United States v. Heath, 259 F.3d 522 (6th Cir. 2001). And police may approach with weapons drawn if the suspect is engaged in drug activity as such suspects are often armed. Id. Police also may use Tasers and pepper-spray if a suspect actively resists but not if the suspect passively resists or offers no resistance. Goodwin v. City of Painesville, 781 F.3d 314 (6th Cir. 2015).

In the instant case, Wright had committed no crime when officers approached him with guns drawn. He was not a threat to anyone’s safety, and he did not attempt to evade arrest, the Court observed. All three Graham factors weighed in his favor. Merely because he pulled into the driveway of the home of a suspected drug dealer did not give police probable cause to believe he was engaged in drug activity, the Court stated. Consequently,
Flagg and Williams used excessive force when they drew their weapons. The right not to be subjected to such excessive force was clearly established at the time Flagg and Williams drew their weapons. Binay v. Bettendorf, 601 F.3d 640 (6th Cir. 2010).

Likewise, construing the facts in Wright’s favor, when he placed his hand on the console to enable him to get out of the vehicle, it was, at most, passive resistance, and using pepperspray and Taser on him was excessive force, the Court concluded. This right had also been clearly established. Brown v. Chapman, 814 F.3d 447 (6th 2016).

Addressing the false arrest claim, the officers argued that when Wright placed his hand on the console, he was resisting their efforts to remove him from the vehicle. Based on this, they arrested him for the offense of ‘obstructing official business.’ Ohio Rev. Code § 2921.31. But that offense requires proof that the accused intended to obstruct. City of N. Ridgeville v. Reichbaum, 677 N.E. 2d 1245 (Ohio 1996). If a jury believed Wright’s claim that he was trying to assist Flagg in removing him from the vehicle, then there was no intent to obstruct, and the officers lacked probable cause to arrest Wright. Therefore, the arrest would have been unlawful.

Wright also was arrested for resisting that arrest. But it’s not a crime to resist an unlawful arrest. Hoover v. Garfield Heights Men. Court, 802 F.2d 168 (6th Cir. 1986). And the right to be free from arrest without probable cause is a quintessential example of a clearly established right. Jones v. City of Elyria, 947 F.3d 905 (6th Cir. 2020).


Wright posted bond before midnight on the date he was arrested. Under Ohio law, he was to be released from custody. Ohio Rev. Code § 2713.13. But he wasn’t released until the following morning at 3:55 a.m. This extended detention of approximately four hours was due to Wright being held for a body scan to detect drugs hidden in his abdomen. And the body scan was required because Flagg and Williams had designated Wright’s arrest as drug related. But the officers knew there was no evidence of Wright possessing drugs, knew Wright was facing no drug-related charges, and knew there was no probable cause to believe Wright had hidden drugs in his abdomen. The Court concluded that the extended detention was unreasonable. Because the extended detention claim was a derivative of a false arrest claim, the right was clearly established. Jones.

Addressing Wright’s Fourth Amendment malicious prosecution claim, the Court observed he had to prove: (1) a criminal prosecution was initiated against him, and the defendant made, influenced, or participated in the decision to prosecute, (2) there was a lack of probable cause for the criminal prosecution, (3) as a consequence of a legal proceeding he suffered a deprivation of liberty apart from the initial seizure, and (4) the criminal proceeding was resolved in his favor. Fox v. Desoto, 489 F.3d 227 (6th Cir. 2007).

As to the first factor, there must be some element of blameworthiness or culpability in the participation, i.e., truthful participation is not actionable. Johnson v. Moseley, 790 F.3d 649 (6th Cir. 2015). Filing a narrative report that falsely accuses a defendant may establish sufficient culpability for a federal malicious prosecution claim. Jones.

In the instant case, the officers falsely designated that Wright’s arrest was the result of a drug investigation. And the officers’ statements that they were charging him because he refused to be X-rayed were evidence of malice. The Court concluded that the district court erred in granting statutory immunity on this claim.

Regarding the claims against the City, a § 1983 cause of action may be brought against a person who subjects another person to the deprivation of a federal right. 42 U.S.C. § 1983. A city or municipality may be considered a legal “person” for § 1983 purposes. Monell v. Dep’t of Soc. Servs., 436 U.S. 658 (1978). To prevail, a plaintiff must show a city, through its deliberate conduct, was the moving force behind the alleged injury. Alman v. Reed, 703 F.3d 887 (6th Cir. 2013). He may do this by showing that the city had a “policy or custom” that caused the violation of rights. Monell.

The Court explained that there are four methods of proving a Monell claim: the plaintiff may prove “(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom or tolerance or acquiescence of federal rights violations.” Jackson v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019). The first theory of liability requires proof that there were formal rules or understandings that were intended to, and did, establish fixed plans of action to be followed under similar circumstances consistently and over time. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). An official policy includes unwritten practices that are so permanent and well settled as to constitute a custom or usage with the force of law. Monell.

The Court concluded that the Chris Rock video, the cartoon, and the meme were sufficient evidence produced by Wright to support a jury’s finding that the City had a custom of allowing excessive force, this custom was so settled it had the force of law, and it was the moving force behind the violations of Wright’s constitutional rights.

Likewise, the City’s policy of simply reading the excessive-force training manual to officers, and then sometimes giving a two-page quiz, was evidence to support a finding that the City’s practices of inadequate training gave rise to a culture that encouraged, permitted, or acquiesced to the use of excessive force and was the moving force behind the use of such force on Wright, the Court ruled.

Finally, the Court stated that a jury could find that Murkowski and Meyer’s seeming failure to ever investigate even one complaint of excessive force rose to the level of ratification of unconstitutional conduct by a decision maker.

Having concluded that the district court erred in finding that the officers were entitled to qualified immunity and statutory immunity and erred in dismissing the claim against the City for want of a constitutional violation, the Court further concluded that the grant of summary judgment was in error.

Accordingly, the Court reversed the decision of the district court as to these claims and remanded for further proceedings. See: Wright v. City of Euclid, 962 F.3d 852 (6th Cir. 2020).
The U.S. Court of Appeals for the Ninth Circuit has clarified when Federal Rule of Civil Procedure 60(b) may be used to reopen a federal habeas corpus case due to a change in the law that was settled whether a fully unexhausted petition could be stayed. Prior to this, it was an open question, though most district courts did not stay unexhausted petitions. “Unsettled legal questions are sometimes difficult to detect,” the Ninth Circuit said in Bynoe’s case. The Court noted that unpublished cases usually don’t settle open questions of law.

**Timeliness and Diligence**

The “reasonable time” to file a Rule 60(b) motion is not an open invitation to wait, the Court reminded. While there’s not a hard time limit for Rule 60(b)(6), courts “presume” a one-year limit applies. Bynoe’s Rule 60(b) motion was on time, the Court said, because it filed within months of the Mena decision. For a change in law claim, the Rule 60(b) clock runs from the change in law, not from the judgment of the civil case, as it does for other grounds.

The district court’s ruling that Bynoe was too late was wrong, the Court said. The Court also concluded that Bynoe was diligent, given his lack of resources and legal training, and that he exhausted his appeals when he should have long ago. “Petitioners are not required to file repeated, meritless habeas petitions or motions to demonstrate diligence,” the Court said.

**Finality and Comity**

The Court made a brief note about finality and comity, concerns always at issue in Rule 60(b) motions. As far as finality, the Court concluded that because Bynoe was never given a chance to have his claims heard, there were no finality concerns in the federal judgment by the state. Finality had nothing to do with his state conviction. Comity — the federal court’s respect for state court decisions — would have been “minimal,” the Court said, because Bynoe was merely reopening a “procedural” decision that precluded the merits of the claims.

**Conclusion**

“In its resolve to put an end to Bynoe’s habeas claims, the district court failed to recognize that Bynoe timely filed his motion and presented extraordinary circumstances warranting reopening of the final judgment,” the Court stated in reversing and remanding Bynoe’s Rule 60(b) denial. See: Bynoe v. Baca, 966 F.3d 972 (9th Cir. 2020).

*Writer’s note:* When asked if it’s a good
idea to file a Rule 60(b) motion to reopen a federal habeas case, I respond to such inquiries by warning that district courts have very broad discretion in whether the motion should be granted. Too often, it seems district courts have near “immunity” when it comes to Rule 60(b) motions, and Courts of Appeals rarely disturb their denials. They cite “finality” being the overwhelming concern, but the “whole purpose of Rule 60(b) is to make an exception to finality.” Buck v. Davis, 137 S. Ct. 759 (2017).

However, a district court’s decision is out the window if it applies the right law in the wrong way. In that situation, the Court of Appeals reviews the case de novo — that is, it applies the law correctly to the case to determine if the motion should have been granted. Should you be inclined to file a Rule 60(b) motion, brush up on the extensive law surrounding these motions. Bynoe is an excellent starting point.

Nebraska Supreme Court Announces Remand for New Sentencing Hearing Appropriate Remedy for Enhanced Vehicular Homicide Sentence Without Evidence of Prior Convictions

by Douglas Ankney

The Supreme Court of Nebraska announced that the appropriate remedy after vacatur of an enhanced sentence for vehicular homicide that was imposed in the absence of evidence of any qualifying prior convictions is to remand to the district court for another enhancement and sentencing hearing.

After leaving a party where he had consumed a substantial amount of alcohol, José A. Valdez struck another vehicle with his automobile. The driver of the other vehicle died from her injuries, and Valdez was charged with motor vehicle homicide. A blood test revealed that Valdez had .223 grams of alcohol per 100 milliliters of blood. The State alleged that Valdez had prior convictions for driving under the influence (“DUI”) and operating a motor vehicle during a revocation period—either of which would enhance the motor vehicle homicide offense to a Class II felony.

Valdez pleaded guilty to the offense, and the State agreed to recommend a sentence not to exceed 25 years and not to pursue additional charges or restitution.

The district court accepted his plea, and the parties agreed to address the issue of enhancement at a later sentencing hearing. At that hearing, the court considered the offense to be enhanced to a Class II felony and sentenced Valdez to a period of 24 to 25 years’ imprisonment. Although the court made reference to Valdez’s two prior DUI convictions, the court did not take any evidence regarding those convictions.

Valdez appealed, arguing, inter alia, that the district court erred in finding him guilty of motor vehicle homicide enhanced to a Class II felony without proof of prior convictions for enhancement.

The Nebraska Supreme Court observed “[a] person commits motor vehicle homicide when he or she causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the State of Nebraska or in violation of any city or village ordinance.” Neb. Rev. Stat. § 28-306 (l). If the proximate cause of the death is the operation of a motor vehicle in violation of Neb. Rev. Stat. § 60-6, 196 (DUI) or § 60-6, 197.06 (operating motor vehicle during revocation period), it constitutes motor vehicle homicide, which is a Class IIA felony. Neb. Rev. Stat. § 28-306 (3)(b).

But, if the defendant has a prior conviction for either DUI or operating a motor vehicle during a revocation period, the Class IIA felony is enhanced to a Class II felony. Neb. Rev. Stat. § 28-306 (3)(c). A Class II felony is punishable by 0 to 20 years’ imprisonment, while a Class II felony is punishable by 1 to 50 years’ imprisonment. Neb. Rev. Stat. § 28-105 (l).

A sentence is illegal when it is greater than the permissible statutory penalty for the crime. State v. Kantaras, 885 N.W.2d 558 (Neb. 2016).

The Court ruled, “It is undisputed that the trial court did not receive evidence necessary to subject Valdez to the enhanced penalties under § 28-306 (3)(c) and that Valdez’s sentence to a period of 24-25 years imprisonment exceeds the statutory limits for a Class IIA felony. Therefore, Valdez’s sentence is illegal and must be vacated.”

But the Court also recognized it had not previously addressed this issue of an appropriate remedy for the State’s failure to adduce evidence of a prior conviction in the context of enhancement of motor vehicle homicide offense.

In State v. Oceguera, 798 N.W.2d 392 (Neb. 2011), the State failed to present sufficient evidence of three prior DUI convictions to support a conviction for a fourth offense, so the court remanded for a new enhancement hearing. This does not violate principles related to double jeopardy because a stiffened penalty for the latest crime is due to the crime being aggravated by repetition. Gryger v. Burke, 334 U.S. 728 (1948). And in Monge v. California, 524 U.S. 721 (1998), the U.S. Supreme Court ruled that insufficient evidence is not a bar to retrial of a defendant’s enhanced status.

In the instant case, the Court concluded that double jeopardy does not bar the State from presenting evidence of Valdez’s prior convictions at a new enhancement and sentencing hearing.

Accordingly, the Court vacated Valdez’s sentence and remanded with direction for another enhancement and sentencing hearing. See: State v. Valdez, 940 N.W.2d 840 (Neb. 2020).
Study Exposes Public Defender Plea Negotiation Practices and Suggests New Negotiation Theory

by David M. Reutter

“Plea bargaining happens in almost every criminal case, yet there is little empirical study about what actually happens when prosecutors and defense lawyers negotiate,” begins a new study in the Cardozo Law Review. That study, “The Shadow Bargainers,” used the responses of 579 attorneys to look into the “bargaining part of plea bargaining.”

A major tenet of negotiation theory is the claim that attorneys bargain in the “shadow of the trial,” which focuses on the possible outcomes of a trial and sentencing. The study’s authors found that many attorneys operate in what the authors call the “shadow of the client” theory. Attorneys who operate in that shadow focus on the wants and needs of the client.

Over 90% of criminal cases are resolved through a plea bargain. The study under review here is the first look into the “nuts and bolts of plea bargaining.” It provides great insight into how attorneys prepare to bargain, and the priorities and backgrounds that lead attorneys to operate in one of the so-called shadows. It also tested the attorneys’ self-declared negotiation goals against their actual practices.

The authors — Ronald F. Wright, Jenny Roberts, and Betina Wilkenson — began by going into the field to interview public defenders in four states. From there, they created a survey that was sent to 2,265 public defenders in 31 offices across 13 states. Responses came from 579 attorneys. Of the respondents, 21% devoted more than half their time to working on misdemeanor cases, about 40% worked general felony cases, and 8% specialized in particular types of felonies.

The authors noted that the survey focused on “defense attorneys to the exclusion of prosecution, and public defenders rather than private defense attorneys.” They said comparison of responses amongst these groups merit future research, but it is outside the scope of this study.

The responses led the authors to “believe that case characteristics, attorney background, courthouse environment, and attorney beliefs about negotiation objectives influence the way that attorneys prepare for negotiation.”

They noted, however, that because the attorneys self-reported, their responses should be interpreted with care. “[G]iven the voluntary nature of the survey, we probably received responses from the most active and conscientious defense attorneys in each office.” Nonetheless, the results offer insights to a process that takes “place behind closed doors with no other parties present.”

The survey asked 24 questions in its “Negotiation Practices” section. The top five factors were: the client’s criminal history, knowledge of the relevant facts, the client’s wants and needs, the category or type of case, and the attorney’s knowledge of relevant legal issues.

Client Goals and Discovery Critical

Seven questions were contained in the “Preparation for Bargaining” section. Having a clear sense of client goals and timely receipt of discovery were deemed the most important factors, while developing a theory of defense and being able to predict the outcome of a trial and sentencing were deemed the least important.

Nonetheless, “relative importance” was given to all factors in this section, which also included investigating the facts and researching the legal issues.

While a trial casts a shadow over all bargaining, “a lot of bargaining appears to happen in an entirely different shadow, one cast by the defendant’s life situation,” the authors wrote. “These factors, even if they wouldn’t prove relevant at trial or sentencing, are important considerations for a prosecutor who wants to do justice.”

Misdemeanor attorneys rated collateral consequences of a plea to be of relative importance when plea bargaining. Yet there are felony attorneys who emphasize collateral consequences in bargaining. The study found that it is the attorney’s focus on collateral consequences that matters, rather than if they have a misdemeanor caseload, that determines if they operate in the shadow of the client.

The study also found that attorneys who place weight on a client’s custody during negotiations were more likely to score higher on shadow-of-client indicators such as importance of the client’s goals.” Custodial status remained important for those defendants even after controlling for the attorney’s caseload, courthouse environment, and personal backgrounds.

The survey found that attorneys with eight or more years of experience were more likely to operate in the shadow of the trial. Likewise, attorneys who emphasize the importance of “suppression” issues more often treat the probable outcome of a trial as an important factor in bargaining preparation.

“Male defense attorneys were less likely than female attorneys to treat trial prediction as a focal point for bargaining preparation,” the study found. “Overall, the shadow of the trial’ theory of negotiation matters more for the most experienced attorneys, particularly those who stress the importance of motions to suppress.”

Likewise, attorneys who emphasized the importance of a trial cast a shadow over all bargaining. While attorneys who placed the most importance on criminal history were more likely to stress trial and sentence predictions, they also were more likely to emphasize knowledge of alternatives to incarceration.

The most surprising result to the authors was that the survey respondents reported that their caseloads at the time of negotiation were relatively unimportant to the outcome of the negotiation. “The response highlights the uncertainties involved in self-reported survey data,” the authors wrote.

That result surprised them because they said “the common wisdom [is] that high volume is a primary driver of our bargain based system of criminal justice.” That, however, is only part of the wisdom.

Those experienced with the system, however, believe there are other drivers of plea bargaining. In a previous report, CLN found that prosecutorial power has a lot to do with pushing defendants into plea bargains. It is common for prosecutors to charge more severe or additional crimes to coerce the defendant with a greater sentence. This often compels a plea to a lesser crime or the additional charges being dismissed. Then, there is what is known as the trial tax, which is where a sentence greater than a pre-trial plea offer is imposed after trial. In some jurisdictions, courts have discretion to impose maximum penalties without regard to guideline sentences that plea offers routinely rely upon. See CLN, May 2019, p. 1.
Caseload ‘Relatively Unimportant’

Of the 24 factors for importance of negotiation outcomes, caseload was rated “dead last” by defenders. Misdemeanor attorneys rated that factor as “relatively unimportant” while felony attorneys placed even less importance on this factor.

“Defenders beliefs about the unimportance of their own caseloads stand in contrast to other evidence about the pressures of caseloads,” the authors wrote. They pointed to the “many studies and news reports highlighting public defense systems that operate unethically, and sometimes unconstitutionally, high workloads.”

The authors concluded the defenders are either “simply fooling themselves about the ability to get good negotiation outcomes despite the number of cases they handle,” or the low rating “might align with a narrative that treats plea bargaining as something distinct from trial preparation and prediction.”

Nonetheless, the authors said it is “self-delusional” for defendants to rate caseload so low. “Defenders who downplay the effects of caseload fail to see that preparation for negotiation in the shadow of the client involves the investigation of a broader range of factors, and therefore can take more time than preparation for bargaining in the shadow of trial predictions,” they wrote.

A contrast between personal interviews and survey responses was found when it came to the importance of an attorney’s personal style and reputation. Other studies have found a negotiator’s personality and the interpersonal dynamic between two negotiators impacts an agreement.

Defenders who were interviewed pre-survey confirmed this theory. “It is a strongly-held view among criminal law practitioners that reputation as a skilled trial attorney — and one who is not afraid to go to trial — is a valuable chip in any plea bargaining session,” the authors wrote. Yet, in survey responses, “defenders rated both parties’ reputation as negotiators and as trial attorneys near the bottom” of the 24 factors.

A prosecutor’s reputation as a negotiator and trial attorney were rated the lowest. The defenders rated case and defendant characteristics as more important.

At the same time, shadow of trial attorneys perceive the relationship between an attorney and prosecutor as having importance in plea bargaining. Those attorneys also believed that trial and sentence predictions should be central to plea bargain preparation.

The study also revealed a gap in what defenders report as important during negotiations and what they claim to do in their own cases. This was revealed by the responses to 24 questions in the “Negotiation Practices” section of the survey.

Witnesses and Facts

Attorneys rated knowledge of the facts as “relatively” and “extremely important.” While they nearly “always” review the file in preparation for bargaining, “several other preparatory activities related to fact investigation happen less frequently.” Defense witness interviewing occurs midway between “sometimes” and “usually,” while prosecution witnesses are “sometimes” interviewed. As defense attorneys gain more experience or handle more serious cases, they become more likely to investigate facts more thoroughly, the study found.

The culture of quickly resolving misdemeanor cases could be a factor in this result, “particularly in high-volume jurisdictions.” Less experienced attorneys are also more likely to handle cases where the only defense witness is the defendant. It may also be that as attorneys gain experience, they learn how important it is to interview witnesses.

Discovery is a key component to fact investigation. The defenders rated “timely receipt of discovery” close to “extremely important.” They also reported “usually” receiving discovery prior to negotiations. Yet “defense attorneys do not engage very often in strategic information exchange during the bargaining process,” the study found.

The authors said it was a “missed opportunity” for defenders to not request “information from the prosecution during plea bargaining that reaches more broadly than discovery laws indicate.” Such information, they said, could lead to “better negotiation outcomes in some classes of cases.” Attorneys handling misdemeanor cases had the lowest score for learning new information apart from discovery.

All defenders reported sharing information with the prosecution during bargaining. Spur-of-the-moment bargaining could explain why defenders share more information than they obtain. This sharing of information is consistent with a shadow of the client negotiation theory.

While defenders rated their knowledge of the relevant legal issues as “relatively important,” they reported that they only “sometimes” and “usually” do legal research in preparation for

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bargaining. “This gap between aspirations and self-declared practice is especially troubling for adherents of the shadow-of-trial theory,” the authors wrote. “[W]ithout adequate legal research, the defenses [sic] attorney will never see all of the opportunities” to develop “legal arguments that will shape the trial.”

The authors believe legal research is most important for misdemeanor attorneys because their cases can “involve significant legal issues, such as constitutionality of a public order offense statute or whether the prosecution properly alleged every element of the offense.”

Finally, the authors looked at the bargaining interactions. Again, they found a gap between what defenders say matters and what they actually report doing during negotiations. While they emphasize focusing on the client’s goals and needs, they report they “usually” wait for the prosecution to make the “first concrete offer,” which is known as anchoring.

The theory behind anchoring is that an opening offer highly favorable to one’s side makes subsequent offers appear reasonable. Misdemeanor defenders are more likely to await that first offer. This could be due to the fact “a large percentage of guilty pleas happen at arraignment or first appearance” in those cases.

Waiting for the prosecution to make an offer was found to be detrimental to the client’s interests. The defenders reported that first offers were “somewhat unfavorable” for their clients. They also said they “sometimes” receive “take it or leave it offers” and offers with time limits.

With a “grim starting point,” the defendants said they “usually counter-offer.” That, however, is not always good for the client. Almost half of the defendants reported their counter-offer was “somewhat unfavorable” or “very unfavorable” to their clients. Only 15% of the defendants reported making offers that were extremely favorable to their clients.

“The default of waiting for prosecutor offers is also worrisome in cases where an aggressive first offer from the defense is likely to have little downside risk,” wrote the authors.

‘Split of Opinion’

Almost 25% of defenders, and one-third of misdemeanor defenders, said their clients “infrequently” or “never” paid a trial tax. That group of attorneys also reported they made first offers that were “reasonable” for the defendant rather than “somewhat favorable” or “extremely favorable.”


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Colorado Supreme Court Announces New Rules for Awarding Presentencing Credit

by Anthony Accurso

The Supreme Court of the State of Colorado reversed its earlier precedent and announced a new set of rules for determining when a defendant should be granted presentence confinement credit (“PSCC”).

Derick Wayne Russell was in community confinement following unrelated convictions in Jefferson County and Douglas County, Colorado, in December 2015 and January 2016, respectively. He was terminated from the program for a violation and taken into custody on May 26. On June 1, Jefferson County sentenced him to three years’ imprisonment, to run concurrently with his Douglas County sentence. Douglas County sentenced him on October 13 to six years’ imprisonment, also to run concurrently with his Jefferson County sentence.

At sentencing in Douglas County, the district court calculated his PSCC time, awarding him PSCC for time spent confined prior to his sentence to community corrections, the time he served in residential community corrections, and the days he spent in custody prior to his resentencing in Jefferson County. The court denied him PSCC for the period between June 1 and October 13 because, under the but-for causation test articulated in People v. Torrez, 403 P3d 189 (Colo. 2017), he could not be awarded this time since he would not have been released from custody had he not been serving his Douglas County sentence (because his Jefferson County sentence was not complete).

Russell appealed, and the Court of Appeals upheld the district court’s decision. But it did so while noting that it was bound by the Colorado Supreme Court’s decision in Torrez, though this determination seemed to conflict with the statute regarding PSCC and the Supreme Court’s previous decision in Massey v. People, 736 P.2d 19 (Colo. 1987).

Given this apparent conflict, Russell appealed again, and the Colorado Supreme Court granted certiorari, in part to clarify for courts the procedures for calculating PSCC.

The Court observed that § 18-1.3-405 of the Colorado Revised Statutes states, “A person who is confined for an offense prior to the imposition of Sentence for said offense is entitled to credit against the term of his or her sentence for the entire period of such confinement.”

The Supreme Court in Massey articulated rules for when and how this credit should be applied. However, under Massey, this was, in part, determined by geography. If a defendant was held in one county, the district court in another county could deny him PSCC at sentencing since his confinement in another county undermined the “substantial nexus” to the second county’s sentence.

The Supreme Court fixed the geography issue in Torrez but then confused the issue of PSCC by also imposing the but-for causation test. Under this test, a defendant can be denied PSCC for either of two convictions because he would not be released “but-for” either of them and would thus fail the test for both.

The Court noted that these “prior decisions applying the PSCC statute are not easy to reconcile with each other and are inconsistent with the statutory language.” In an effort to eliminate the current confusion and provide clarity going forward, the Court announced the following three principles: “First, a defendant is entitled to PSCC for each day served where there is a substantial nexus between the charge or conduct for which he is confined and the sentence that is ultimately imposed. A substantial nexus exists when the defendant would have remained confined on the charge or conduct for which credit is sought in the absence of any other charge. Second, regarding whether a substantial nexus exists, causation, not geography, is the defining question. And third, a defendant is not entitled to duplicative PSCC.”

Applying these principles, the Court concluded that Russell should be granted “additional PSCC against his Douglas County sentence for the period that he was confined after he was resentenced in Jefferson County until he was resentenced in Douglas County.”
Accordingly, the Court reversed the judgment of the Court of Appeals and remanded with instructions for the district court to grant Russell PSCC in accordance with this opinion. See: Russell v. People, 462 P.3d 1092 (Colo. 2020).}

Government Agencies Expand Use of Private Companies to Bypass Constitution

by Casey Bastian

Most Americans are not aware that Vigilant Solutions has a product called “Law Enforcement Archival Reporting.”

U.S. Customs and Border Protection (“CBP”) knows about it and reportedly uses its database to conduct warrantless surveillance. CBP admitted that it uses the database in CBP’s updated Privacy Impact Assessment (“PIA”). The PIA states the database “provide[s] CBP law enforcement personnel with a broader ability to search license plates nationwide.”

LEARN (the Law Enforcement Archival Reporting Network) is a license plate reader innovation that allows for the collection of plate information of passing vehicles. With this information, CBP tracks historical locations of specific cars. Often other vehicles are equipped with license plate reader cameras and collect data on passing cars.

Vigilant’s sister company, DRN, claims to have over nine billion scans in its database. DRN shares all of its information with Vigilant customers.

It is virtually impossible to avoid such a dragnet. In April, a man was convicted of dealing heroin in Massachusetts. The state used historical location evidence caught by a reader near a bridge. The Massachusetts Supreme Judicial Court affirmed the conviction.

Justice Frank M. Gaziano did warn, “Where the [automated license plate readers] are placed matters… ALPRs near constitutionally sensitive locations – the home, a place of worship, etc. – reveal more of an individual’s life associations than does an ALPR trained on an interstate highway.” The PIA claims to give notice and assessment of the unique privacy risks when using such information.

Sen. Ron Wyden wrote, “[CBP] owes the public an explanation… it’s now clear that several government agencies are purchasing data as an end-run around the Fourth Amendment… CBP’s use of the purchased data is the latest in a trend being embraced by many government agencies.

In February, the Department of Homeland Security was chastised for tracking citizens through commercially available cellphone records from data broker Venntel. DHS was trying to circumvent stricter subpoena requirements set forth in the 2017 U.S. Supreme Court case Carpenter v. United States regarding use of historical cellphone location records.

Criticizing the FBI’s use of such information then, Chief Justice John Roberts warned, “Only the few without cell phones could escape this tireless and absolute surveillance.” Cellphone data, license plate data — what commercial data will Big Brother use next?

Source: slate.com

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California Supreme Court Announces New Time Limit for Habeas ‘Appeal’ Stages, Clarifying Tolling for Federal Habeas Petitioners

by Dale Chappell

The Supreme Court of California, on July 20, 2020, established a new time limit for filing subsequent habeas corpus petitions in state courts that clarifies when a state petition is "pending" to toll the harsh one-year clock for filing a habeas petition in federal court.

Almost nine years ago, Julius Robinson filed a habeas corpus petition in a California superior court, challenging his indeterminate 205-years-to-life sentence for premeditated murder and gun charges. When the court denied his petition, Robinson filed a new petition in the California Court of Appeal, raising the same issues 66 days later. That court denied his petition, and he filed a new petition in the California Supreme Court, which was denied. When he filed a federal habeas petition in federal court under 28 U.S.C. § 2254, it was denied as untimely because he waited too long between the superior court denial and filing in the Court of Appeal – 66 days.

On appeal to the U.S. Court of Appeals for the Ninth Circuit, Robinson argued that the 66-day period was not too long, and this brought up an issue that has perplexed federal courts handling habeas petitions by California prisoners: At what point in time is [a] state prisoner's petition, filed in a California court of review to challenge a lower state court's disposition of the prisoner's claims, untimely under California law? That's the question the Ninth Circuit asked the California Supreme Court to answer over five years ago in Robinson v. Lewis, 795 F.3d 926 (Cal. 2015).

AEDPA and California Habeas Procedure

This case examines the interplay between the federal Antiterrorism and Effective Death Penalty Act (“AEDPA”) and California’s habeas corpus procedure. Under the AEDPA, a state prisoner has just one year to file a habeas corpus petition in federal court after his conviction becomes final. But first, he must exhaust his state postconviction remedies, and the one-year AEDPA clock is "tollled" while those proceedings are "pending" in the state courts. 28 U.S.C. § 2244(d)(2).

Most states have a postconviction review process that allows for appeals of denials. But California does not. Instead, California prisoners must file a new habeas petition in the Court of Appeal after a denial in the superior court and then typically a new petition (again) in the California Supreme Court thereafter. It's been considered a sort-of appeal process for California habeas petitioners, even though there's no statutory right to appeal a habeas denial in the California courts. Evans v. Chavis, 546 U.S. 189 (2006) (explaining California's "special" habeas process).

And this causes a problem in the federal courts in determining when the AEDPA clock is tolled while a California habeas petition is pending. This is because the time intervals between the petitions in subsequent higher courts are included in the tolling period, like an appeal in other states. But that's only if the next petition is filed within a "reasonable" time. The U.S. Supreme Court has ruled that California's serial habeas process to "appeal" a denial is "the equivalent of a notice of appeal" in other state systems and that the 30 to 60 day notice of appeal time limit could be presumed to apply in California as well. Chavis.

These "gap delays," as the California Supreme Court has called these intervals between habeas petitions, are not counted by state courts as separate time periods for filing challenges to habeas denials, but they are part of the overall delay in bringing the claims.

California's New Habeas 'Safe Harbor'

About 18 years ago, the U.S. Supreme Court said the California Supreme Court could help clarify tolling under § 2244(d)(2) by setting some time limits for habeas petitions in its courts. Carey v. Saffold, 536 U.S. 214 (2002). The California court finally obliged.

Answering the Ninth Circuit’s question, the Court held that a "new petition filed in a higher court within 120 days of the lower court's denial will never be considered untimely due to gap delay." This "safe harbor," as the Court called it, is not an absolute deadline but is subject to extension for good cause. "Providing a safe harbor simply means that delay beyond the specified time would be subject to the normal Robbins analysis," the Court explained. The California Supreme Court set the "reasonableness" time standard for habeas petitions in In re Robbins, 959 P.2d 311 (Cal. 1998).

The Court rejected the State's argument that gap delay should be limited to the same statute of limitations for a notice of appeal. The Court explained that a habeas petition is unlike a notice of appeal and cannot be so easily compared. 'A notice of appeal is merely a notice that the party intends to appeal. Record preparation and briefing comes later, and the matter is not submitted in the Court of Appeal until after the case has been fully briefed and argued,' the Court said. 'A habeas corpus petition, by contrast, effectively constitutes the first round of briefing and in many cases the only briefing.'

The Court also took a moment to correct the Ninth Circuit's misunderstanding of the California habeas process and gap delay. It's the overall delay in bringing a claim that matters, the Court explained, and not any period of gap delay. 'The time between levels is just part of that question,' the Court said. 'Gap delay ... is relevant to this overall question and might be a significant factor in our timeliness analysis under Robbins, but it is not the question itself.' Once a claim is filed, the State is already "on notice" and gap delay is less of a concern in subsequent petitions, the Court said.

Nevertheless, the Court established a safe harbor of 120 days between petitions where habeas petitioners would "never" be considered too late. Anything beyond that, the Court instructed, "will simply be a relevant factor" in overall timeliness. See: Robinson v. Lewis, 2020 Cal. LEXIS 4360 (2020).

Writer’s Note: For the first time ever, the California Supreme Court finally gave some guidance on what has always been uncertain territory. Federal courts in California have routinely cited notice of appeal deadlines of 30 and 60 days to say that gap delays have gone too long, dismissing countless federal § 2254 petitions. Maybe with such a dramatic and clear statement of the law by the California Supreme Court, those petitioners might be able to reopen their habeas cases under Federal Rule of Civil Procedure 60(b). Gonzalez v. Crosby, 545 U.S. 524 (2005).

I think this case also highlights the problems with AEDPA, a baseless act by Congress that has been picked apart by the courts the
Defense Officials: Law Enforcement in Military Garb not Appropriate

by Casey Bastian

Protests against excessive force by police continue across the country. Demonstrations escalated after George Floyd was killed on a Minneapolis street in May. Portland, Oregon, received significant attention when violent acts began overshadowing the mostly peaceful protests. In response to attempts by protesters to vandalize a federal courthouse, the federal government sent in agents to protect federal property in Portland. Inexplicably, those agents were wearing military uniforms.

U.S. Customs and Border Protection’s Border Patrol Tactical Unit (“BPTU”), its immediate response force, arrived in Portland to quell the destructive protests. Concerns were raised when video showed the BPTU agents were recorded wearing what appeared to be U.S. Army uniforms.

Secretary of Defense Mark Esper promptly raised his concerns about uniform misappropriation to the Trump administration. “The secretary has expressed a concern of this within the administration, that we want a system where people can tell the difference,” said Defense Department spokesman Jonathan Hoffman.

Hoffman addressed concerns as early as June about certain uniforms making agents of law enforcement appear to be military personnel.

Lawmakers began demanding answers after video footage and photographs of law enforcement appearing to wear Army camouflage while confronting protesters. Many officials refused to identify not only themselves individually but wouldn’t even identify the agency they represent. The BPTU, like many law enforcement agencies, often wear uniforms with custom patches that appear very similar to those of the military. This caused many Americans to believe the military was on our streets. Adding more confusion to the situation, there were various activists also wearing similar military-style outfits to the protests.

“You want a clear definition between that which is military and that which is the police,” said U.S. Army General Mark Milley, chairman of the Joint Chiefs of Staff.

Milley had previously expressed reservations about military uniforms on law enforcement when quelling protestors, believing there should be a blatant “visual distinction” between military personnel and those of law enforcement. That seems like a reasonable idea to most Americans.

Source: businessinsider.com
South Carolina Supreme Court: Failure to Give Logan Instruction Not Harmless Error Where Evidence Almost Entirely Circumstantial

by Douglas Ankney

The Supreme Court of South Carolina held that a trial court’s failure to charge the jury with the circumstantial evidence instruction from State v. Logan, 747 S.E.2d 444 (S.C. 2013), was not harmless error where the State’s evidence was almost entirely circumstantial.

Robin Herndon was a law enforcement officer whose live-in boyfriend, Christopher Rowley, was diagnosed with bipolar disorder and placed on medication because of his mood swings, aggression, and uncontrolled anger. Witnesses testified that they saw Herndon and Rowley arguing in front of their home. The two then retreated into the residence.

According to Herndon, Rowley then punched her. She drew her service weapon and warned him to leave. Rowley charged at her, swatting the gun. She shot and killed him.

The pathologist testified that the bullet trajectory was consistent with two scenarios: (1) Herndon shot Rowley as he walked up the steps to the house or (2) Rowley was charging Herndon when he was shot. The State elected to try Herndon on a murder charge based on the first scenario.

At trial, Herndon specifically requested the charge set forth in Logan. The trial court refused, opting instead to “go with the charge that’s in the desk book.” Herndon was convicted of manslaughter and sentenced to 19 years in prison. The court of appeals affirmed, but the trial court’s refusal to give the Logan charge was harmless error. The South Carolina Supreme Court granted Herndon’s petition for writ of certiorari.

The Court recited the charge from Logan which, in pertinent part, states: “Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact…. [T]o the extent the State relies on circumstantial evidence … the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant’s behavior as suspicious, the proof has failed.”

When a trial court refuses to give a requested instruction, the judgment will be reversed only where the refusal was both erroneous and prejudicial. State v. Brandt, 713 S.E.2d 591 (S.C. 2011). There’s no error if the charge given covers the substance of the request. State v. Mattison, 697 S.E.2d 578 (S.C. 2010). The evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded – a process not required when evaluating direct evidence. Logan. Consequently, when the State relies in whole or in part on circumstantial evidence, trial courts should give the Logan charge when requested.

The Court concluded that the trial court’s failure to give the Logan charge in this case was not harmless error because the State relied on (1) eyewitness testimony prior to the shooting to suggest Herndon was angry and (2) testimony from the pathologist explaining the pathway of the bullet could have been the result of Herndon shooting Rowley as he walked up the stairs – but the pathologist also testified that the shooting could have happened as Herndon said. The competing inferences from the circumstantial evidence required the Logan charge.


Justice Sotomayor Raises Due Process Concerns Over Eleventh Circuit’s Use of Published Successive Habeas Denial Orders

by Dale Chappell

The U.S. Court of Appeals for the Eleventh Circuit publishes more orders denying “second or successive” habeas corpus petitions (“SOS applications”) than any other Circuit, and it then uses those published cases against every litigant who comes before the court, even those on direct appeal. The practice has been criticized for years, and now U.S. Supreme Court Justice Sonia Sotomayor has offered her opinion on the matter.

In a statement regarding the denial of certiorari where published orders denying SOS applications were used to foreclose an argument on direct appeal, Sotomayor called the practice “troubling” and stated she’s concerned that it may violate due process. The case came before the Court as a direct appeal from the Eleventh Circuit, where Michael St. Hubert had challenged his 32-year sentence for brandishing a firearm during several robberies. He argued that Hobbs Act robbery, under 18 U.S.C. § 1951, isn’t a qualifying offense to allow the mandatory, harsh consecutive sentence under 18 U.S.C. § 924(c), use of a firearm during a crime of violence. The Eleventh Circuit rejected his appeal using two published orders denying SOS applications, which ruled — without any response from the government or briefing — that Hobbs Act robbery qualifies under § 924(c).

When St. Hubert argued that these published orders shouldn’t carry the same weight as published cases with full adversarial testing, such as a direct appeal or first habeas petition, the Eleventh Circuit cited its “prior-panel-precedent” rule, which makes any published case in the Circuit binding on every court in the Circuit, no matter what the proceeding was in that published case.

To understand why publishing orders denying SOS applications and then using them to foreclose relief for all litigants is so concerning to Sotomayor, it’s necessary to understand how differently an SOS application is handled compared to a direct appeal or even a first habeas petition on appeal. Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), the criteria to grant an SOS application are extremely narrow, and the denial of the application is not appealable or subject to rehearing, unless the court itself (sua sponte) decides to rehear it. And the denial cannot be the subject of a writ of certiorari. In other words, the denial by the Court of Appeals is final and not appealable, making it unreviewable.

In addition to these restrictions, the Eleventh Circuit also adheres to a strict 30-day deadline and limits the application to about 100 words of argument, often done by a pro se prisoner. The Eleventh Circuit also doesn’t
ask the government to respond, and it never grants oral argument on an SOS application. It’s basically a unilateral decision by the court on an often complex problem. Sotomayor called this the “worst of three worlds” in the Eleventh Circuit.

Several judges in the Eleventh Circuit over the past half-decade have also criticized this practice of publishing orders denying SOS applications and then using them against all sorts of litigants. It’s what happened in St. Hubert’s appeal, and four of the 11 judges voting to rehear his appeal en banc dissented, while seven of them concurred, in denying a rehearing. The concurring judges called the dissenters’ opinions an “attack” on the “integrity of the court” and defended the rule as “sound.” They said because the court itself could decide to rehear a SOS denial en banc, it was “reviewable” enough to be acceptable. But the dissenters pointed out that out of more than 10,000 applications, the Eleventh Circuit had decided on its own only one time to rehear a SOS application en banc after it was denied.

Sotomayor seemed to agree with the dissenters and further recognized that the Eleventh Circuit publishes “far more” orders denying SOS applications than any other Circuit. Judge Adalberto Jordan admitted in a separate opinion that the Eleventh Circuit “led the country” in the practice and even took responsibility for some of those published decisions. But he nonetheless concurred in denying rehearing en banc because he said the problem must be fixed by changing the court’s rules.

“Making matters worse,” Sotomayor said, is the Eleventh Circuit determining the merits of an applicant’s claims in deciding whether to grant authorization. Under 28 U.S.C. § 2244(b)(3)(C), an applicant is only required to make a “prima facie showing” that his claims arguably have merit, not that he would be successful.

In the competing opinions in St. Hubert’s en banc denial, Judge Bill Pryor said that deciding the merits of the claims in an application was “common sense practice” and that if the Court of Appeals didn’t do that it would create unnecessary work for the district court. In other words, an applicant could only be granted authorization to file a SOS habeas petition in the district court if his claims would be successful, in contradiction to the statute itself.

Sotomayor called the Eleventh Circuit “out of step” with other Circuits, and its practice of using published orders that had no adversarial testing created “grave problems” and even due process concerns. “This Court has been wary of affording full precedential weight to its own decisions based on so little argument” in summary decisions by the Court, she said. “Everyone should have his own day in court,” she said, and that happens “only when certain minimum requirements, consistent with due process, have been met.”

St. Hubert’s case wasn’t the proper case to decide whether the Eleventh Circuit’s practices violate due process (because it was never argued in the courts below). However, Sotomayor observed that the “Eleventh Circuit has not yet appeared to address a procedural due process claim head on, so I will leave it to that court to consider the issue in the first instance in an appropriate case.” She pointedly added: “In the meantime, nothing prevents the Eleventh Circuit from reconsidering its practices to make them fairer, more transparent, and more deliberative.”

One of those, she suggested, is to limit publishing decisions “only to those orders resulting from a robust process” that would ensure “basic fairness.” See: St. Hubert v. United States, 140 S. Ct. 1727 (2020) (Sotomayor, J., concurring in denial of certiorari).
The U.S. Court of Appeals for the Seventh Circuit held that the U.S. District Court for the Western District of Wisconsin abused its discretion when it denied Vincent Corner’s motion seeking relief under § 404 of the First Step Act (“the Act”) without first determining whether the Act applied to him and making the recalculations required under the Act.

Corner was originally convicted of violating 21 U.S.C. § 841 and later violated the conditions of his supervised release. For the violation, he was sentenced to 18 months’ imprisonment followed by 42 months of supervised release. Shortly after Corner was sentenced, Congress passed the Act that retroactively applied the provisions of the Fair Sentencing Act of 2010. (The Fair Sentencing Act reduced the statutory minimum penalties and increased the minimum amounts of crack cocaine necessary to trigger those penalties.) Corner filed a motion under 18 U.S.C. § 3582(c) seeking a reduction of his 18 months’ revocation term and his 42 months of supervised release.

At issue in this case was whether § 404’s retroactive application of the Fair Sentencing Act would result in Corner’s statutory range being reduced from five years to four years to three years. The maximum prison term for revocation followed by 42 months of supervised release shortened from four years to three years.

The court noted that even under the new statutory penalties, it had no baseline from which to exercise its discretion. Without first determining whether the Act applied to him and making the recalculations required under the Act, the district court failed to determine which lower statutory penalties applied, and without that information, it had no baseline from which to exercise its discretion.

The Seventh Circuit determined that “the question here is less about determining eligibility than determining the consequences of eligibility — the new statutory penalties — and whether a district court can reasonably exercise its discretion without doing so. The text of the First Step Act, however, suggests that it cannot.” There must be a complete review of the motion on the merits. United States v. Boulding, 960 F.3d 774 (6th Cir. 2010).

The Court explained that “[a] complete review suggests a baseline process that includes an accurate comparison of the statutory penalties — and any resulting change to the sentencing parameters — as they existed during the original sentencing and as they presently exist.” A resentencing predicated on erroneous or expired Guidelines calculation or a decision to decline resentencing without consideration of the Guidelines at all would seemingly run afoul of Congressional expectations. Boulding. A district court is procedurally required to correctly compute the applicable sentencing Guidelines range before deciding, in its discretion, what sentence to impose. Gall v. United States, 552 U.S. 38 (2007). A court may impose a sentence outside the calculated range, but the Guidelines “must be considered seriously and applied carefully.” United States v. Lopez, 634 F.3d 948 (7th Cir. 2011). A failure to properly calculate and consider the Guidelines amounts to reversible procedural error. United States v. Griffith, 913 F.3d 683 (7th Cir. 2019).

The Court concluded that by failing to consider what reduced penalties would now apply to Corner’s offense, the district court fell short of the review envisioned by the Act.

Accordingly, the Court vacated the district court’s judgment and remanded for further proceedings. See: United States v. Corner, 967 F.3d 662 (7th Cir. 2020).

Colorado Supreme Court: Prosecution Prohibited From Arguing Defendant’s Failure to Retreat Showed Lack of Fear, Undermining Claim of Self-Defense

The Supreme Court of Colorado held that a trial court erred when it permitted the prosecutor to argue that the defendant’s failure to retreat showed she was not afraid, and this lack of fear of the imminent use of unlawful force against her undermined her claim of self-defense.

Sheila Renee Monroe got into an argument with a man on a city bus. Monroe showed the man she had a pocket knife. The man said he was going to call police. The man claimed that after he removed his phone and was dialing, Monroe stabbed him in the neck. A witness testified that the man had his phone in his hand and “was opening his jacker” when Monroe stabbed him. Monroe was charged with first-degree assault and attempted first-degree murder.

At trial, Monroe claimed that she acted in self-defense when the victim reached into his pocket.

During closing argument, the prosecutor said Monroe “didn’t have any duty to retreat, but she does have a clear line of retreat, if she’s actually scared for her safety.” Defense counsel objected, arguing that this imposed a duty to retreat. The trial court overruled the objection.

Calling the jury’s attention to the self-defense instruction that specified Monroe didn’t have a duty to retreat, the court directed the jury to only consider Monroe’s failure to retreat as relevant to “whether or not she reasonably believed there was an imminent use of force.” The prosecutor continued, saying, “she did not have any duty to retreat but could have backed away, if she wanted to, if she was actually afraid.” Then three additional times during rebuttal closing, the prosecutor argued that Monroe’s failure to remove herself from the situation contradicted her claim that she was in fear of being hurt; that the video showed she had a clear escape route up the bus aisle that she did not take; and that she said during a police interview that if she was scared...
she would have run away but she didn’t run away because she wasn’t acting in self-defense.

Each time, defense counsel objected. And each time, the trial court overruled the objection, directing the jury’s attention to the instruction on self-defense. But apparently, the latter two times, the trial court did not instruct the jury to only consider the argument for the purpose of whether Monroe believed there was an imminent threat of physical violence. The jury convicted Monroe, and she appealed.

The Court of Appeals reversed, holding that the prosecutor’s last two arguments imposed upon Monroe a duty to retreat, which the trial court failed to correct. The Court of Appeals declined to decide if the trial court erred in permitting the prosecutor to make its arguments. The Colorado Supreme Court granted the People’s petition for certiorari review.

The Court observed “[i]t is improper for counsel to misstate the law or ‘misinterpret for the jury how the law should be applied to the facts’ during closing argument. People v. Sepeda, 581 P.2d 723 (Colo. 1978). In Colorado, a person may use physical force against another “in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.” Colorado Revised Statutes § 18-1-704(1) (2019).

And in Colorado, only the initial aggressor is required to retreat before using force in self-defense. Cassels v. People, 92 P.3d 951 (Colo. 2004). A non-aggressor may assert self-defense without (1) considering whether a reasonable person would retreat to safety instead of resorting to physical force or (2) actually retracting from an attack even if she could safely do so. People v. Toler, 9 P3d 341 (Colo. 2000). Therefore, a prosecutor may not argue that a defendant is barred from claiming self-defense unless she first retreats from an encounter. Brown v. United States, 256 U.S. 335 (1921).

The Court rejected the People’s contention that there is a recognized distinction between arguments that improperly imposed a duty to retreat and arguments regarding a defendant’s failure to retreat that under mined the reasonableness of a defendant’s use of force. The Court opined that allowing the prosecution to argue about a defendant’s failure to retreat “would cripple the no-duty-to-retreat rule.” It would condition the use of defensive force on flight, so only defendants who had no ability to retreat could claim self-defense. Commonwealth v. Hasch, 421 S.W.3d 349 (Ky. 2013).

Further, that line of argument is based on a faulty premise. Not all persons facing a threat will flee even when an opportunity exists. Some will freeze, and some will fight. Karin Roelofs, Freeze for Action: Neurological Mechanisms in Animal and Human Freezing, 372 Phil. Transactions Royal Soc’y B 1, 1 (2017).

Finally, such arguments may confuse a jury. In the instant case, the prosecutor and the trial court struggled to distinguish between arguments that imposed an outright duty to retreat and those that don’t. This confusion and possibility of misleading the jury weighed against its admission. Colorado Rules of Evidence, Rule 403.

The Court concluded that it was error for the trial court to permit the People to make the five arguments to the jury regarding Monroe’s failure to retreat.

Accordingly, the Court affirmed the judgment of the Court of Appeals on different grounds and remanded the case for a new trial. See: People v. Monroe, 2020 Colo. LEXIS 608 (2020).
Arizona Supreme Court Announces Cumulative Error Framework for Reviewing Multiple Instances of Prosecutorial Misconduct

By Douglas Ankney

The Supreme Court of Arizona announced a cumulative error framework for when an appellant claims he was denied a fair trial due to the cumulative effect of multiple instances of prosecutorial misconduct.

A jury found Luis Armando Vargas guilty of several offenses, including first-degree murder. On appeal, Vargas argued that the prosecutor engaged in a “pervasive pattern of misconduct” that cumulatively deprived him of his right to a fair trial. Because trial counsel failed to object to the alleged misconduct, appellate counsel argued that the Court of Appeals should review the entire case for fundamental error. Counsel supported this claim with 11 instances of alleged misconduct.

For all but three of the alleged instances of misconduct, the Court of Appeals concluded the argument waived because Vargas failed to set forth that each of those instances, by itself, was fundamental error. For each of these conclusions, the Court of Appeals relied on State v. Moreno-Medrano, 185 P.3d 135 (App. 2008). It concluded Vargas failed to establish cumulative error based on misconduct and affirmed. The Arizona Supreme Court accepted review.

The Court observed that Arizona Rule of Criminal Procedure 31.10(a)(7) sets out the procedure for properly raising and developing a claim of error on appeal in the opening brief: “(A) appellant’s contentions with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which appellant relies; (B) for each issue ... the applicable standard of appellate review with citation to supporting legal authority.”

The Court also considered the framework of State v. Escalante, 425 P.3d 1078 (Ariz. 2018): “[T]he first step in fundamental error review is determining whether [] error exists. If it does, an appellate court must decide whether the error is fundamental.... A defendant establishes fundamental error by showing that ... (3) the error was so egregious that he could not possibly have received a fair trial.... If the defendant establishes the third prong, he has shown both fundamental error and prejudice, and a new trial must be granted. The defendant bears the burden of persuasion at each step.”

The Court then formulated a framework, based on Rule 31.10(a)(7) and Escalante, for when a defendant raises a claim that the cumulative effect of multiple instances of prosecutorial misconduct, for which he failed to object, deprived him of a fair trial. The Court announced the defendant must: (1) assert cumulative error exists, (2) cite to the record where the alleged instances of misconduct occurred, (3) cite to legal authority establishing that the alleged instances constitute prosecutorial misconduct, and (4) set forth the reasons why the cumulative misconduct denied the defendant a fair trial with citation to applicable legal authority. The defendant is not required to argue that each instance of alleged misconduct individually deprived him of a fair trial, the Court instructed. Nor does a defendant need to argue that the trial court committed fundamental error by failing to sua sponte grant a new trial in each instance.

Applying this framework to Vargas’ claim, the Court concluded he complied with the procedural requirements of properly presenting the claim, i.e., he asserted cumulative error; he cited specific instances of misconduct from the record with legal authority establishing that the incidents constituted misconduct; and he alleged the overall cumulative effect denied him a fair trial. But whether he carried his burden of persuasion that misconduct did occur for each allegation and that they cumulatively denied him a fair trial was for the Court of Appeals to determine on remand.

Finally, the Court disproved of Moreno-Medrano to the extent that it could be read to mean that appellants must explicitly argue that each instance of prosecutorial misconduct was “fundamental error.” A claim of cumulative error resulting from multiple instances of misconduct is one claim (not multiple claims) of fundamental error caused by the combined effect of the multiple instances of misconduct, the Court explained.

Accordingly, the Court vacated the judgment of the Court of Appeals and remanded for a redetermination consistent with the Court’s opinion. See: State v. Vargas, 2020 Ariz. LEXIS 226 (2020).

California Supreme Court Vacates LWOP Sentence After Its Recent Cases Clarifying ‘Special Circumstance’ Murder

By Dale Chappell

The Supreme Court of California vacated a life without parole (“LWOP”) sentence imposed in a first-degree murder conviction, applying its recent decisions clarifying a “special circumstance” to allow such a sentence and instructing that those decisions apply retroactively for habeas corpus relief.

A decade ago, a jury convicted Willie Scoggins of first-degree murder and robbery and further found that a “special circumstance” applied to allow the Sacramento County Superior Court to impose a LWOP sentence. That special circumstance was that he was a major participant in the crime and that he should have known an accomplice had a propensity for violence and would have used a gun, even though Scoggins didn’t plan for the robbery to be armed. He exhausted all of his appeals and filed numerous habeas corpus petitions, all without any success.

But in 2016, Scoggins filed a habeas petition again challenging the special circumstance finding, after the California Supreme Court decided People v. Clark, 372 P.3d 811 (Cal. 2016). In Clark, the Supreme Court ruled that “the mere fact of a defendant’s awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life,” which is a requirement for the special circumstance finding. Scoggins argued that the Clark decision applies to him because, while he planned the robbery and even the beating of the victim, he had no idea an accomplice would use a gun to kill him.

The crime happened after Scoggins was duped into buying what he thought were boxes of televisions but were really boxes of garbage. Thinking he was swindled, Scoggins planned
for his friends to buy some televisions from this con man and then beat and rob him to get Scoggins’ money back. Scoggins stayed away from the scene as it played out, in case the man recognized him and balked.

The beating and robbery went off as planned, but one of Scoggins’ friends pulled a gun and shot the man dead. Scoggins was charged with the murder, and the prosecution argued that he was equally responsible for the shooting. The special circumstance was that the murder was committed during the robbery because a principal in the crime was armed.

The Supreme Court issued an order to show cause returnable to the court of appeal on whether its decisions in \textit{Clark} and \textit{People v. Banks}, 351 P.3d 330 (Cal. 2015), apply to Scoggins to allow another challenge, and if so, whether the special circumstance could still apply. A divided court of appeal found the cases apply retroactively to allow Scoggins’ petition to move forward but found the cases apply retroactively to allow Scoggins to allow another challenge, \textit{v. Banks}, and \textit{Clark} narrowed the special circumstance statute. In \textit{Banks}, the Supreme Court held that the U.S. Supreme Court’s decision in \textit{Tison v. Arizona}, 481 U.S. 137 (1987), shaped the statute. In \textit{Tison}, the high court held that the death penalty is justified for “major participation in the felony committed, combined with reckless indifference to human life.” Those are the two elements of the special circumstance statute under California law.

The Court in Scoggins’ case took a look at another U.S. Supreme Court case on the “other end of the spectrum.” In \textit{Enmund v. Florida}, 458 U.S. 782 (1982), the high court ruled that it is unconstitutional to impose the death penalty on a getaway driver during an armed robbery where death resulted. The Court said Enmund was a minor participant and didn’t intend to kill nor did he have the requisite culpable mental state — that is, Enmund didn’t act with reckless indifference to human life.

And neither did Scoggins, the Court concluded. “Reckless indifference” requires a “willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions,” the Court explained. Mere awareness of a risk of death is not enough to meet this requirement, the Court said.

First, Scoggins didn’t use a gun. He didn’t even know a gun would be used, the Court noted. In fact, “Scoggins planned for the assault and robbery of [the victim] to be unarm[ed],” the Court pointed out. He also wasn’t at the scene to stop the shooting. The prosecutor had argued Scoggins should have stopped the shooting and therefore deserved the special circumstance.

Applying \textit{Banks} and \textit{Clark}, the California Supreme Court concluded that based on the facts in the present case, Scoggins does not qualify for the special circumstance finding to impose LWOP.

Accordingly, the Court reversed the court of appeal’s judgment denying his habeas corpus petition and remanded for further proceedings. See: \textit{In re Willie Scoggins}, 2020 Cal. LEXIS 3976 (2020).

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Indian Supreme Court: Must Be Immediate Causal Connection Between Confrontation and Other Crime by Defendant to Negate Self-Defense

by Douglas Ankney

The Supreme Court of Indiana reaffirmed the standard set forth in Mayes v. State, 744 N.E.2d 390 (Ind. 2001), that held a statute barring a claim of self-defense if the defendant had committed a crime requires a showing that “there must be an immediate and causal connection between the crime and the confrontation.”

Anthony Gammons, Jr. and his 10-year-old son stopped by the house of Gammons’ cousin. Gammons was immediately accosted by Derek Gilbert. Gammons knew that Gilbert liked to get drunk, fight, rob, and shoot at people. He also knew that Gilbert had previously been charged with murder. Even though Gammons was openly carrying a handgun, Gilbert squared up as if to punch Gammons, pulling at his waistband and asking if Gammons was “casket ready.”

Gammons later testified that he shot at Gilbert eight times because he feared for his life and the life of his son. But as soon as Gilbert retreated and ran away, Gammons stopped firing. Gilbert survived, and Gammons was charged with attempted murder.

At trial, Gammons conceded he was carrying the handgun without a license. Gammons requested that the court instruct the jury that he was “justified in using deadly force” if he believed it was “necessary to prevent serious bodily injury to himself.” The court inserted additional language stating “a person may not use force if ... he is committing a crime that is directly and immediately related to the confrontation.” And in closing, the prosecutor emphasized that a person “can’t be doing anything illegal at the time” he claims he was acting in self-defense.

Gammons was found guilty, and the Court of Appeals affirmed, holding that if error occurred in the instruction, it was harmless. Gammons appealed to the Indiana Supreme Court.

The Court observed that when an appellant challenges an instruction as an incorrect statement of law, the Court conducts a de novo review and “reversal is required ... if the jury’s decision may have been based upon an erroneous instruction.” Hawkins v. State, 100 N.E.3d 313 (Ind. Ct. App. 2018).

Self-defense is legal justification for an otherwise criminal act. Coleman v. State, 946 N.E.2d 1160 (Ind. 2011). But by statute, a person cannot use force defending himself if he, inter alia, “is committing ... a crime.” Ind. Code § 35-41-3-2. But the Indiana Supreme Court has held the statute isn’t to be strictly applied because the “legislature is presumed to have intended the language in the statute to be applied logically and not to bring about an unjust or absurd result.” Mayes. “[T]here must be an immediate causal connection between the crime and the confrontation.” Id. A literal interpretation of the statute would foreclose a claim of self-defense where the defendant’s crime was tenuously connected to the confrontation, the Court explained. For example, self-defense would be barred where the defendant was illegally gambling and a fight erupted because the victim accused the defendant of cheating, leading to the victim’s death. State v. Leaks, 103 S.E. 549 (S.C. 1920).

In the instant case, the trial court’s instruction allowed the jury to reject Gammons’ claimed self-defense and convict him if his crime of carrying an unlicensed handgun was “directly and immediately related” to the confrontation. The instruction failed to explain the level of causation demanded by Mayes, and the Court could not “conclusively determine that the verdict would have been the same absent this instructional error.”

Accordingly, the Court reversed and remanded for a new trial. See: Gammons v. State, 148 N.E.3d 301 (Ind. 2020).

Seventh Circuit: Sentences for ‘Non-Covered’ Offenses Can Also Be Reduced Under First Step Act

by Dale Chappell

The U.S. Court of Appeals for the Seventh Circuit ruled on July 22, 2020, that when a “covered offense” under the First Step Act is reduced, a non-covered offense may also be reduced to achieve the purposes of sentencing, reiterating that any covered offense allows a court to apply the First Step Act to an entire case.

When three separate cases filed under the First Step Act came before federal district courts in Illinois, those courts refused to lower the overall sentences, either because a non-covered offense under the First Step Act had the same lengthy sentence or because the corrected sentence would have remained within the original Guidelines sentencing range (“GSR”). On appeal, all three were vacated and remanded when the Seventh Circuit ruled that the district courts had the authority to reduce those sentences for all the counts.

The Sentencing Package

Two of the cases involved crack cocaine (a covered offense under the First Step Act), one of them also involved a powder cocaine conviction (a non-covered offense), and the third involved a firearm conviction (also a non-covered offense). The sentences imposed for all of the offenses were the same length and concurrent with the crack offenses. The Government had argued that the district courts had authority to reduce only the crack sentences but not the non-covered offenses. The district courts agreed and left the overall sentences intact, only reducing the crack sentences, even though the non-covered offense sentences were the same length as the crack sentences as a package.
On appeal, the Seventh Circuit agreed that because the sentences were imposed as a package, the First Step Act undid that package to allow the district courts to also reduce the sentences on the non-covered offenses to correspond with the purposes of sentencing. First, the Court explained that a district court must impose a single, aggregate sentence under 18 U.S.C. § 3584(c) and that the Guidelines require grouping of similar offenses, with the highest base offense level controlling for all the counts. This is why it’s not uncommon that a district court imposes the same sentence for every count, even when that count by itself may have received a lower sentence. “Sentences for covered offenses are not imposed in a vacuum, hermetically sealed off from sentences imposed for non-covered sentences,” the Court said and added, “Sometimes ... a reduced statutory maximum for one count grouped with other offenses directly reduces penalties for other counts.”

The Court also noted that nothing in the First Step Act prevents a court from reducing sentences on non-covered offenses when a covered offense is reduced. “If Congress intended the Act not to apply when a covered offense is grouped with a non-covered offense, it could have included that language. It did not. And we decline to expand the limitations [already in the First Step Act] crafted by Congress,” the Court said.

First Step Act Relief Not Limited by the Guidelines or Other Factors

One case involved all covered offenses, but the district court refused to reduce those sentences because the corrected sentence under the First Step Act would have still been within the original GSR. “Nothing in the text of the First Step Act requires the Guidelines range to have changed for a court to consider whether to reduce an aggregate term of imprisonment,” the Court instructed. The Court reiterated its prior holding that relief under the First Step Act is not like that under a retroactive Guidelines amendment by way of 18 U.S.C. § 3582(c)(2). United States v. Shaw, 957 F.3d 734 (7th Cir. 2020).

And the Court explained that the district courts, on remand, could consider post-sentencing conduct in imposing an even lower sentence, if they choose. Such conduct, the Court said, “is pertinent to the need for the sentence imposed; and it can inform a court in carrying out its duty to impose a sentence sufficient, but not greater than necessary to comply with the sentencing purposes set forth in [18 U.S.C. § 3553(a)].”

One final point was that the Government conceded that because one defendant’s mandatory life sentence was commuted by the President to a term of years in 2017, it did not prevent the district court from further reducing his sentence. [Writer’s note: The Government’s position in similar cases to the current one is completely opposite of the position articulated by Seventh Circuit. Dennis v. Terris, 927 F.3d 955 (6th Cir. 2019) (explaining the effect of a commutation on a court’s ability to reduce a sentence and noting other court decisions on the matter).]

Conclusion

Accordingly, the Court vacated and remanded all three cases to their respective district courts to allow them to impose a reduced sentence for both covered and non-covered offenses, considering post-sentencing conduct and other factors under today’s laws and Guidelines. See: United States v. Hudson, 2020 U.S. App. LEXIS 22887 (7th Cir. 2020).
T
de U.S. Court of Appeals for the Ninth Circuit ruled that law enforcement officers violated the Fourth Amendment in executing an administrative warrant at a private residence where their “primary purpose” was to gather evidence in support of a criminal investigation.

In October 2017, the City of Lancaster, California (“City”), began investigating Franz Grey for possible violations of the City’s Municipal Code after receiving complaints from Grey’s neighbors. The neighbors complained that Grey had erected an electrified fence around his home, covered the fence with tarps, erected a 30-foot pole with an attached video camera, and installed bright lighting that illuminated their backyards. They also claimed he was operating an illegal auto repair business at his residence.

Grey’s case was referred to Russell Bailey. He was a managing member of a consulting firm that contracted with the City to provide general municipal code enforcement services. In March 2018, Bailey went to Grey’s residence and informed him that the fence violated the City’s code and needed to be corrected. Grey indicated he would not do so.

In April 2018, one of Grey’s neighbors reported him to the Los Angeles County Sheriff’s Department (“LASD”). The neighbor told Deputy Andrew Chappell that on the previous Fourth of July Grey had shown him several firearms at Grey’s residence, including a Glock handgun and an AK-47 along with ammunition. He stated Grey fired both weapons into the air. The neighbor also said Grey had shown him a large amount of methamphetamine. When Chappell asked the neighbor why he had waited so long in reporting Grey, the neighbor stated that Grey had recently made a false allegation of child abuse to the authorities against the neighbor.

Chappell spoke with Bailey and City Attorney Jocelyn Corbett and learned they were investigating Grey for municipal code violations.

On April 5, 2018, Chappell filed a report stating he believed that Grey was a felon in possession of firearms that he had illegally discharged and that Grey was in possession of a controlled substance. But the following day, Chappell’s supervisor, Sergeant D. Wolanski, told him they did not have probable cause to arrest Grey or search his home.

On May 1, 2018, Bailey applied for an administrative warrant, stating in his affidavit that in order for the City to determine the extent of Grey’s violations and the corrective actions needed, it was “necessary for the City to conduct a comprehensive inspection of the premises and residence ... to ... bring the property into substantial compliance with the Lancaster Municipal Code.” Bailey also requested exemption from the 24-hour advance notice requirement because Grey might act violently upon learning of the warrant. Bailey also requested assistance from the LASD for security. The superior court issued the warrant and granted all of Bailey’s requests.

Chappell was placed in charge of assisting the City with the inspection because he was in charge of the criminal investigation. Instead of the usual single deputy assigned to assist, Chappell assembled a team of nine deputies. Prior to executing the warrant, Wolanski told the deputies that Grey was to be arrested for negligent discharge of a firearm and felony in possession of a firearm.

While Grey sat handcuffed in the back of a patrol car, the nine deputies “entered the house ... to determine whether there were other individuals or any dangerous conditions inside the house that could harm” the City’s inspectors. But the deputies spent at least 20 minutes conducting this search, in which they opened cabinet doors and desk drawers. The deputies claimed they saw multiple firearms, drug paraphernalia, and large amounts of a white crystalline powder in plain view in several locations throughout the residence.

After the place was secured, Bailey entered to conduct the code enforcement inspection. But based on what the nine deputies had witnessed earlier, the LASD secured a search warrant that same day and recovered the firearms, methamphetamine, and a large amount of currency. Grey was charged with multiple firearm violations, and he filed a motion to suppress the evidence, arguing the initial search violated his Fourth Amendment rights because the LASD’s assistance with the inspection warrant was a pretext to conduct a criminal search and arrest. Since the subsequent criminal search warrant was obtained as a result of the initial unlawful search, all evidence seized had to be suppressed. The district court granted the suppression motion, and the Government appealed.

The Ninth Circuit observed “[t]he Fourth Amendment protects ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’” Ordinarily, a search of a residence requires a warrant based upon probable cause. Maryland v. Buie, 494 U.S. 325 (1990).

But the search warrant and probable cause requirements do not apply when government regulators conduct searches to inspect residences to ensure compliance with a housing code. Ashcroft v. al-Kidd, 556 U.S. 731 (2011). In such a case, an administrative warrant is sufficient. Id. But even where a criminal search warrant is not required, a search is not beyond the Fourth Amendment’s requirements that the search be reasonable in its scope and its manner of execution. Maryland v. King, 569 U.S. 435 (2013).

Ordinarily, the reasonableness inquiry is purely objective. al-Kidd. But administrative searches and “special needs” searches are exceptions to this rule, requiring courts to examine “actual motivations” for these searches. Id.

For example, a suspicionless vehicle checkpoint search for the purpose of interdicting unlawful drugs was held to run afoul of the Fourth Amendment because the “primary purpose” of the checkpoints was ultimately indistinguishable from the general interest in crime control as opposed to checkpoints to catch drunk drivers for purposes of highway safety. City of Indianapolis v. Edmond, 531 U.S. 32 (2000). And in Michigan v. Clifford, 464 U.S. 287 (1984), the U.S. Supreme Court held that an administrative warrant is sufficient when fire inspectors enter a private residence to determine the cause of a recent fire, but if the “primary object” of the search is to “gather evidence of criminal activity,” then a criminal warrant based on probable cause is required. 464 U.S. 287 (1984). And in Alexander v. City & County of San Francisco, 29 F.3d 1355 (9th Cir. 1994), the Ninth Circuit held that law enforcement officers called upon to assist
in the execution of an administrative warrant to inspect a residence violates the Fourth Amendment if their “primary purpose” in executing the warrant is to make a criminal arrest rather than assist inspectors.

The Court agreed with the district court’s finding that the primary purpose of the LASD in executing the administrative warrant was to arrest Grey and gather evidence in a criminal investigation. This conclusion was supported by the facts that: Wolanski instructed prior to the search that Grey was to be arrested; LASD deputies took 20 minutes or longer to perform a walk-through search to determine if other persons were present in the house; and during this alleged walk-through, they opened cabinets and desk drawers where one could not reasonably expect to find a person hiding but where one could expect to find evidence of firearms and methamphetamine.

The Court rejected the Government’s argument that the district court should have found the search lawful based on United States v. Orozco, 858 F.3d 1204 (9th Cir. 2017). In Orozco, the Court held that dual motives — including a permissible one and an impermissible one — did not render an administrative stop of a commercial vehicle pretextual. Instead, a defendant had to show that the stop would not have occurred but for the impermissible motive. Id. And when an officer does not have discretion regarding the search — such as an inventory search — the search is not more intrusive due to the presence of an impermissible motive. Id.

But the distinction between Alexander and Orozco is that Alexander applies to administrative searches of private residences, and the principle in Orozco applies to searches of commercial vehicles, borders, and commercial premises. When assessing the reasonableness of a search, courts must weigh the degree of the government’s need to search against the degree to which the search intrudes upon an individual’s privacy. Samson v. California, 547 U.S. 843 (2006). And citizens have an exceptionally strong interest in the privacy of their homes. Clifford. Further, Alexander derived its “primary purpose test” from the U.S. Supreme Court’s holding in Clifford. And in the instant case, the search by the LASD deputies was more intrusive (opening drawers and cabinets) than needed to inspect for violations of the municipal code.

Accordingly, the Court affirmed the district court’s decision granting the motion to suppress. See: United States v. Grey, 959 F.3d 1166 (9th Cir. 2020).

Interactions Between Diabetics and Law Enforcement Can Become Life-Threatening

by Casey Bastian

Once again, a video of an interaction between a police officer and a citizen has gone viral. Thankfully, the citizen survived this encounter. Alexis Wilkins, a 20-year-old diabetic, was returning from a George Floyd protest in Cincinnati when the car she was in was stopped. Wilkins was force out and on to the curb. For 30 minutes, Wilkins sat terrified that her Type-1 diabetes might cause a serious medical emergency. The video shows Wilkins begging the officer for her diabetic supplies.

The health of diabetics depends on uninterrupted access to insulin, snacks, pumps, glucose testing strips, or syringes on a near constant basis. If a diabetic experiences unbalanced blood sugar levels, he or she may struggle to process commands, possibly becoming erratic or aggressive.

“A decent chunk of ‘use of force’ cases involve people who...were in some kind of physical or mental health crisis,” said Matthew Segal, legal director of ACLU Massachusetts. He added, “It’s very common for the police to deal very harshly with people who simply need help.” This issue is neither new nor infrequent.

In 1984, Dethorne Graham, a diabetic who is Black, entered a store to get juice to raise his blood sugar. Graham left when he saw the long line. An officer, assuming Graham had committed a crime, detained him. Graham was assaulted by the officer and sued.

That suit became a landmark U.S. Supreme Court ruling regarding use of force in policing. Graham v. Connor set forth the “objective reasonableness test”: Would a reasonable police officer in the officer’s position have done the same thing? The test disregards the actual subjective intent or motivation of the officer in question.

“If you see everything from the perspective of the police officer, then suddenly the horrible beating of a man just trying to get orange juice is just a reasonable mistake,” says Segal. The American Diabetes Association found that diabetic care is often denied to those in short-term custody.

Diabetic healthcare deteriorates rapidly behind bars, with a dozen deaths in Georgia jails and prisons from ketoacidosis in 2019 alone. Research suggests that diabetics being injured or killed by police is all too common. Making these encounters even more dangerous is the fact that Blacks are 60 percent more statistically likely to be diabetics.

Bob Carder, a Black Type-1 diabetic, was arrested in 2009 for unpaid speeding ticket. Carder summed up what he believes the guards were thinking, “I don’t think the majority of them that I’ve dealt with wake up and go, ‘How am I going to ruin somebody’s life today?’ But at the same time, they’re also not thinking, ‘How do I make sure I don’t ruin somebody’s life today?’”

Source: thenation.com

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

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

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

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

KMOSES@HUMANRIGHTSDEFENSECENTER.ORG

Prison Legal News
Attn: Kathy Moses
PO Box 1151
Lake Worth, Florida 33460
SCOTUS ‘Shadow Docket’ Secretly Pushes Agendas, Issues Major Rulings Without Argument or Public Knowledge

by Dale Chappell

For the first time since 1862, the U.S. Supreme Court has decided a record low number of regular-docket cases – just 52. But that doesn’t mean the highest court in the land wasn’t busy. In fact, it was busier than ever, handing down decisions under the cover of night (sometimes literally) and without any public knowledge or input.

It’s what University of Chicago law professor Will Baud calls the Court’s “shadow docket,” and these aren’t cases left over from an earlier term or from the Court’s normal docket. Instead, these are cases where the Court barely gets any briefing from the parties (and usually the government is a party) and never hears oral argument. Often the decisions are only a sentence long, but their impact is great.

It’s true that the Court decides thousands of cases outside it’s normal “merits docket,” i.e., the docket that the public knows about, and they’re often unimportant decisions. But some cases are groundbreaking. Consider this fact. During the weeks between the beginning of July and the first week of August, Slate.com reports that the Court handed down the following big decisions without any fanfare:

• It paved the way for the first federal executions in 17 years after lower courts had repeatedly stopped them;
• It permitted President Trump to use military funds to complete his controversial border wall, “even though every lower court to consider the issue has ruled that such repurposing of funds is unlawful”;
• It pushed back the resolution of a dispute between the House of Representatives and the Department of Justice over the Mueller report in a way that ensures the DOJ will win;
• It refused to stop a Florida law that requires felons to pay all outstanding fines and fees before they can vote, effectively endorsing a “pay to vote” law in Florida which a lower court had called flagrantly unconstitutional; and
• It stopped a district court order that required an Orange County, California, jail to take measures its own policies already mandated to protect prisoners from Covid-19.

Even more disturbing is that most of the orders were “split decisions,” the justices voting 5 to 4. Usually, the merits docket produces the most split decisions, but for the first time ever, the Court’s shadow docket will create more split decisions.

One factor that has crowded the Court’s shadow docket is that Trump, in his first three and a half years as president, has requested 34 stays of lower court orders adverse to him, and the Court has granted 22 of those. Compare that to only four stays over the 16 years of presidents Bush and Obama, combined.

While the Supreme Court says it’s a “court of review, not of first view,” its shadow docket says otherwise. This puts the justices in a position to decide critical legal questions without any argument and in secret. If the Court itself won’t start bringing these shadow docket cases into the open, Congress should exercise its authority and change how the Court handles its caseload. [1]

Source: slate.com

Fourth Circuit Grants ‘SOS’ § 2254 Petition Attacking Three-Decade-Old Murder Conviction Based on New Evidence

by Dale Chappell

The U.S. Court of Appeals for the Fourth Circuit granted permission for a state prisoner to file a second or successive ("SOS") habeas corpus petition in the federal court to attack a three-decade-old murder conviction based on newly discovered evidence.

On August 23, 1985, a mother of two went missing in Lancaster County, Virginia. Four days later, police found her body tied to a cinderblock in the Rappahannock River. She had been strangled. Emerson Stevens, a local crabber, was implicated in her murder. He was tried and convicted for first-degree murder. After his appeals went nowhere, he filed postconviction challenges in state and federal courts, all without any success.

Over 30 years later, Stevens filed an application in 2019 seeking permission from the Fourth Circuit to file a SOS § 2254 petition in federal district court attacking his conviction based on a “box of materials” finally turned over to him by the Virginia State Police. He said he had been requesting this box for decades.

Stevens then pursued federal postconviction relief, again, even though by this time he had been paroled two years earlier by the State. He raised three claims in his application to the Fourth Circuit: the prosecution (1) presented false testimony and suppressed evidence that would have showed that testimony was false, (2) suppressed evidence showing a witness’ testimony about Stevens’ whereabouts on the day of the murder was false, and (3) withheld evidence that proved his innocence. He alleged that previously undisclosed FBI and police reports in the box supported his claims.

Represented by Jennifer Leigh Givens and Deirdre M. Enright of the Innocence Project at the University of Virginia School of Law, the Fourth Circuit found after oral argument that the box turned over all these years later indeed contained evidence enough to make a “prima facie” showing of Stevens’ innocence to allow another habeas petition.

To make this prima facie showing, Stevens had to show that his application, “on its face,” meets the following criteria: (1) “the factual predicate of the claim could not have been discovered previously through the exercise of due diligence,” and (2) “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B).

While the Court found that Stevens met the low threshold to make this showing, it left any analysis of the claims in the first instance to the district court. However, Judge Thacker filed a concurring opinion “to explain in more detail” why Stevens met the strict standard to allow a SOS § 2254 petition, and why, in the judge’s opinion, “no reasonable jury would have convicted Stevens.”
WASHINGTON FEDERAL COURT: LOOKING AT LOCK PHONE SCREEN REQUIRES WARRANT
by Anthony Accurso

The U.S. District Court for the Western District of Washington in Seattle ruled that the FBI conducted an illegal search of a defendant’s phone by powering it on to inspect the lock screen, resulting in suppression of information obtained from the search. Joseph Sam was arrested pursuant to an indictment on conspiracy to commit robbery, robbery, and assault resulting in serious bodily injury. When Sam was arrested, Tulalip Police seized his phone. He was booked into police custody, and his phone was inventoried, including determining whether the phone was locked and attempting to place the phone in airplane mode to prevent remote wiping.

On February 13, 2020, the FBI temporarily obtained Sam’s phone from police inventory, powered it on, and took a photo of the lock screen, which displayed the user’s name as “<<Streezy.” Sam’s lawyer filed a motion to suppress this evidence as the result of an illegal search.

The Court briefly discussed the governing law, starting with the Fourth Amendment’s prohibition against unreasonable searches and seizures. The Court explained that the “default rule is that a search is unreasonable unless conducted pursuant to a warrant.”

The Supreme Court has defined “search” in one of two ways: (1) if it physically intrudes on a constitutionally protected area to obtain information ([Florida v. Jardines, 569 U.S. 1 (2013)], or (2) if it intrudes on a person’s reasonable expectation of privacy ([Carpenter v. United States, 138 S. Ct. 2206 (2018)]).

The Court explained that the FBI physically intruded onto Sam’s personal property by powering on the phone to examine the lock screen, and by doing so, the FBI violated the Fourth Amendment’s prohibition against unreasonable searches. The Government claimed this did not constitute a search because Sam had no reasonable expectation of privacy in preventing the examination of his lock screen — indeed, that is what is meant to be seen by anyone who isn’t you when trying to access your phone.

The Court flatly rejected this argument by pointing out the Supreme Court has consistently instructed that “a person’s Fourth Amendment rights do not rise or fall with the Katz [Katz v. United States, 389 U.S. 437 (1967).] formulation…” Rather, “the Katz reasonable-expectations test” is in addition to, not instead of, the traditional property-based test under the Fourth Amendment. Jardines. The Court explained that when the government physically intrudes on constitutionally protected areas, as it did in this case, it’s unnecessary to perform a reasonable expectation of privacy analysis.

Accordingly, the Court ordered suppression of the contents of the lock screen obtained by the FBI. However, the Court also ordered the parties to brief it on the circumstances under which the Tulalip Police Department may have inspected Sam’s phone pursuant to search exceptions established as constitutionally valid without a warrant if conducted incident to an arrest or proper procedures for inventorying a defendant’s property. See: United States v. Sam, 2020 U.S. Dist. LEXIS 87143 (W.D. Wash. 2020).
The Supreme Court of Michigan ruled that a probation officer who found heroin during a compliance check after the probation had ended and then began unlawfully extended conducted an unauthorized warrantless search.

John D. Vandenpool was sentenced to two years of probation on June 24, 2013. On September 23, 2015, his probation officer petitioned the court to extend his probation until June 25, 2016, because he had been on “warrant status” during part of the probation and had not paid all of his fines and fees. The extension was granted.

On November 12, 2015, the probation officer applied for a warrant for Vanderpool because he had failed a drug screening. On December 3, 2015, he applied for another warrant because Vanderpool failed to show up for his weekly appointment at the probation office. The next day, the probation officer conducted a “compliance check” of Vanderpool’s home and found a small amount of heroin, which Vanderpool admitted was his. This led to Vanderpool’s prosecution for possession of under 25 grams of heroin.

Vanderpool filed a motion to suppress the heroin, which was denied. Vanderpool pleaded no contest and was sentenced to 18 months to serve suspended sentence of 19 to 32 months for the current offense violates the misdemeanor assault statute. Vanderpool’s probation was not controlled by probation had ended and then been unlawfully extended conducted an unauthorized warrantless search.

The Supreme Court of North Carolina held that Melvin Lamar Fields could not be convicted of both habitual misdemeanor or assault and felony assault for the same act.

In November 2015, Fields and A.R. — a transgender woman — engaged in consensual sex. Afterward, while they were bathing, Fields seized A.R. by the hair, roughly grabbed and squeezed her genitals, and slammed her to the floor. As a result, A.R. needed 15 stitches to close the wound to her scrotum.

A jury convicted Fields of both misdemeanor and felony assault for his attack on A.R. Because Fields had stipulated to two prior misdemeanor assault convictions within the past 15 years, the superior court imposed a sentence of nine to 20 months for habitual misdemeanor assault and a consecutive sentence of 19 to 32 months for the felony assault. Fields appealed, arguing, inter alia, that he could not be convicted of both habitual misdemeanor assault and felony assault for the same act. The Court of Appeals agreed with Fields and vacated his habitual misdemeanor assault conviction. The North Carolina Supreme Court granted the State’s petition for discretionary review.

The Court concluded that the time limits of the statute do not control whether Vanderpool’s probation was not controlled by probation officer to report a probation’s pending termination “and the probationer’s conduct during the probation period to the court.” It states that, upon receiving the report, a court may discharge the probation and enter a judgment of suspended sentence or extend the probation period so long as it does not exceed five years. Further, MCL 771.6 requires a record of discharge.

The question was whether Vanderpool remained on parole because he failed to pay his fines and fees by the end of the two-year probation period, his probation officer failed to make a report by that time, the court did not discharge Vanderpool from probation, and no record of discharge was entered. The Court concluded that his period of probation terminated at the end of the initial two-year period.

A further question was whether MCL 771.2(5), which authorizes a court to amend an order of probation “in form or in substance” including the terms of probation “at any time,” means that a court can extend a term of probation after it has terminated. The Supreme Court ruled that it does not and clarified that a court can neither “extend” nor “amend” an order that had expired.

The Court concluded that termination of Vanderpool’s probation was not controlled by the failure of the probation officer and circuit court to carry out their obligations under statute. To hold otherwise would effectively convert all probationary terms to the statutory maximum of five years.

The Court held that, because he was not on probation, officers had no authority to enter Vanderpool’s home and conduct a warrantless search under the probation exception to the Fourth Amendment.

Accordingly, the Court reversed the judgment of the Court of Appeals and remanded the case to the circuit court for further proceedings. See: People v. Vanderpool, 2020 Mich. LEXIS 1207 (2020).

The State argued that because the prefatory language of the misdemeanor assault statute, (i.e., “Unless the conduct is covered under some other provision of law providing greater punishment”) does not appear in the habitual misdemeanor assault statute, the prefatory language is inapplicable to Fields because he was sentenced only on habitual misdemeanor assault and the finding of guilt on the charge of misdemeanor assault was for the purposes of proving an element of the habitual misdemeanor assault statute.

The Court defined the issue as one of statutory construction that is controlled by the intent of the legislature. State v. Joyner, 494 S.E.2d 653 (N.C. 1991). The Court is to give effect to the plain meaning of the words when the language of a statute is unambiguous. State v. Byrd, 675 S.E.2d 323 (N.C. 2009). When more than one statute is implicated, the Court is to construe the statutes in pari materia [construed together] and give effect, when possible, to all applicable provisions. Meza v. Div. of Soc. Servs., 692 S.E.2d 96 (N.C. 2010).

In State v. Davis, 698 S.E.2d 65 (N.C. 2010), the North Carolina Supreme Court interpreted identical prefatory language in the statute governing the crime of felony serious injury by vehicle, which provided: “unless the conduct is covered by some other provision of law providing greater punishment ... felony serious injury by vehicle is a Class F felony.” N.C.G.S. § 20-141.4(b) (2009). The defendant in Davis was convicted of both felony serious injury by vehicle and of assault with a deadly weapon inflicting serious injury (a Class E felony) for the same conduct. The Davis Court explained: “This [prefatory] language indicates the General Assembly was aware when it enacted the ... [vehicular injury statute] that other, higher class offenses might apply to the same conduct.... [T]he General Assembly intended an alternative: that punishment is either imposed for the more heavily punishable offense or for the [vehicular injury offense], but not both.” Since assault with a deadly weapon inflicting serious injury is a Class E felony providing greater punishment, the Court in Davis held the conviction for felony serious injury by vehicle could not stand.

Because identical prefatory language appears in the misdemeanor assault statute — a Class A1 misdemeanor, Fields’ conviction of felony assault — a Class F felony — invalidated his misdemeanor assault conviction, the Court concluded. And that meant he could not be punished for habitual misdemeanor assault as that offense was predicated on the misdemeanor assault conviction.

However, in State v. Pakulski, 390 S.E.2d 129 (N.C. 1990), the North Carolina Supreme Court held that when a judgment is arrested on predicate felonies underlying a felony murder conviction to avoid double jeopardy problems, the guilty verdicts on the underlying felonies remain on the docket, and judgment can be imposed if the murder conviction is later reversed on appeal. For this reason, the Court in the current case agreed with the State that the Court of Appeals should have arrested, rather than vacated, the trial court’s judgment for habitual misdemeanor assault.

Accordingly, the Court modified and affirmed the decision of the Court of Appeals and remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with the Court’s opinion. See: State v. Fields, 843 S.E.2d 186 (N.C. 2020).

Medical Experts Publish Guidelines on SUDC

by Douglas Ankney

Sudden unexplained death in childhood (“SUDC”) ranks fifth in the categories of death in children ages one to four, and every year, it affects approximately 400 children ages one to 18.

Unlike Sudden Infant Death Syndrome (“SIDS”), SUDC is the listed cause of death when a child age 12 months or older dies and the death cannot be explained after investigation and autopsy. And, unlike SIDS, SUDC is not usually part of the educational instruction received by pediatricians nor is it something medical examiners evaluate often enough to reach a comprehensive understanding.

The SUDC Foundation (“Foundation”) is the single organization dedicated to promoting research into SUDC. A grant from the Foundation paid for the development and publication of the first national consensus guidelines for SUDC.

“Unexplained Pediatric Deaths: Investigation, Certification, and Family Needs” was published in January 2020 by a panel of experts from over 30 contributors. The experts are from multiple disciplines, including medical examiners, pediatricians, and federal agency experts in fields such as death investigation, autopsy performance, neurology, child abuse, and many others.

A Canadian neuropathologist described the book as “amazing” and said, “Finally, practicing forensic pathologists have practice recommendations to follow, and achieve when they have an apparently unexplained infant/child death to investigate.”

The book also has useful flow charts for the responsibilities of law enforcement, medical examiners/coroners, and death investigators. Plus, there is a section on the grief responses and the needs of families after the death of older children.

Source: forensicmag.com

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.
Successful Alternatives to Armed Police Response

by Ed Lyon

Since the May 25, 2020, killing of George Floyd by police, a movement to defund police departments across the U.S. has been gaining momentum. Defunding is not always the answer to law enforcement agencies that have traditionally been tasked in jack-of-all-trades roles of mediator, mental health crisis responder, and traffic accident responder, among dozens of other roles they are either ill-equipped or not equipped at all to handle. Some cities have discovered that augmentation is a safer, more successful and cost-effective method to handle many situations rather than depending solely on response by armed police — and they have been successfully utilizing it for decades.

Barry Friedman runs New York University’s Policing Project. He points out that police officers are molded from a “one-size-fits-all” model. Police just aren’t trained to do a lot of the things they end up doing. They are trained for force and law. So you get force-and-law results.” The old saying “when you’re a hammer everything looks like a nail” is particularly apt for force and law.

Successful Alternatives to Armed Police Response

The government has a justification for spending money on police, but it’s not always the best use of tax dollars. The U.S. Department of Justice estimates that police departments spend around $200 billion annually on salaries. This is a significant portion of the government’s budget and it is often criticized for being wasteful and inefficient.

However, there are other cost-effective methods to handle many situations. Some cities have discovered that augmentation is safer, more successful and cost-effective. Instead of relying solely on armed police, they have successfully utilized a combination of trained professionals to handle various types of calls.

In Eugene, Oregon, a group of activists there have been clashing with cops, sometimes violently. In Seattle, Washington, cops are required to divert minor drug offenders and sex workers to addiction counselors and social workers. Six-month recidivism rates are down by 60 percent for those diverted from arrest and jail with annual costs to taxpayers per client averaging only $9,507 versus average annual incarceration costs of $42,000.

Miami-Dade County, Florida, has successfully ideated a way to reduce homelessness and address domestic violence. In 1993, the area imposed an additional one-percent tax on restaurant bills for food and beverages. All revenue would be used toward housing solutions for the county’s homeless population. At present, that population is down by 85 percent from the program’s beginning. Fifteen percent of the tax revenue is allocated to Miami-Dade County for domestic violence centers, which aid victims.

Cooperating with cops instead of confronting them has gone a long way toward reducing negative encounters in these cities; no defunding required or needless animosity generated.

Tenth Circuit: District Court Plainly Erred in Giving Erroneous Constructive Possession of Firearm Instruction, Conviction Reversed

by Douglas Ankney

The U.S. Court of Appeals for the Tenth Circuit reversed Fernando Miguel Samora’s conviction for being a felon in possession of a firearm because the U.S. District Court for the District of Utah gave the jury an erroneous instruction on constructive possession.

In May 2017, Samora borrowed Maria Hernandez’s car and drove it alone to a restaurant. When Samora exited the restaurant and approached the vehicle, officers converged to arrest him on an outstanding warrant. After Samora was arrested, they searched the vehicle and found a loaded firearm inside the center console.


At the ensuing trial, the Government’s DNA expert testified that (1) Samora contributed most of the DNA on the firearm, (2) Samora’s DNA was the major profile on the firearm, and (3) because of Samora’s DNA being the major profile, it was likely he had handled the gun at some point.

Hernandez testified that the firearm belonged to her, and she had placed it in the center console a couple of days before Samora borrowed the car. She testified she kept the firearm for home security, but she could not identify the make or model of it.

The district court judge instructed the jury on both “actual” and “constructive” possession. As compared to over two hours by city cops. This leaves armed police free to handle more serious problems.

In Seattle, Washington, cops are required to divert minor drug offenders and sex workers to addiction counselors and social workers. Six-month recidivism rates are down by 60 percent for those diverted from arrest and jail with annual costs to taxpayers per client averaging only $9,507 versus average annual incarceration costs of $42,000.

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Source: vice.com
The U.S. Court of Appeals for the Second Circuit held that a district court’s failure to offer an explanation for its sentence was plain error in violation of 18 U.S.C. § 3553(c).

Gilberto Rosa pleaded guilty to conspiracy to commit wire fraud (Count One) and aggravated identity theft (Count 2) for his role in fraudulently obtaining auto loans. Under the plea agreement, Rosa was to pay $798,542.43 in restitution to his victims. After pleading guilty, Rosa continued defrauding people, and the Probation Office determined that altogether he fraudulently obtained $850,104.23. Based on Rosa’s post-plea conduct, the Probation Office’s Presentence Report (“PSR”) assigned him a three-level enhancement pursuant to § 3C1.3 of the Guidelines for a total offense level of 26.

But at the sentencing hearing, the parties and the district court agreed that § 3C1.3 does not apply. The district court adjusted Rosa’s offense level to 23, and his Sentencing Guidelines range for Count One became 51 to 63 months. The district court sentenced Rosa to the maximum 63 months’ imprisonment on Count One and an additional mandatory consecutive 24 months on Count Two for an aggregate sentence of 87 months’ imprisonment. The court also ordered $715,857.25 in restitution instead of the $798,542.43 listed in the plea agreement. The district court neither adopted the PSR in open court nor explained its reasoning for the sentence imposed. The court merely stated it reached its decision “[a]fter hearing arguments by the counsel and reading the submissions and 3553(a) factors.” Rosa did not object.

Two months later, the district court entered its written judgment which included an even lower restitution amount of $690,774.08. The court also issued its written statement of reasons (“SOR”) that incorrectly stated: (1) the court had adopted the PSR without changes, (2) Rosa’s offense level was 26, (3) Rosa’s Guidelines range was 70 to 87 months, and (4) the restitution amount was $690,774.08. Rosa timely appealed, arguing, inter alia, that his sentence was procedurally unreasonable because the district court failed to state in open court its reasons for the sentence imposed.

Because Rosa did not object to the sentence, the Second Circuit reviewed for plain error, which required Rosa to show (1) an error occurred, (2) that was obvious, (3) which affected his substantial rights, and (4) seriously affected the fairness, integrity, or public reputation of judicial proceedings. United States v. Balde, 943 F.3d 73 (2d Cir. 2019).

The Court observed “[s]ection 3553(c) of Title 18 of the United States Code obligates a district court to state in open court the reasons for its imposition of the particular sentence.” This serves the important goals of (1) informing the defendant of the reasons for his sentence, (2) permitting meaningful appellate review, (3) enabling the public to learn why the defendant received a particular sentence, and (4) guiding prison and probation officials in developing a program to meet the defendant’s needs. United States v. Molina, 356 F.3d 269 (2d Cir. 2004). Adopting the PSR in open court satisfies section 3553(c)’s requirements. Id.

The statement may be brief and concise, based on the context, record, and circumstances of the case. Rita v. United States, 551 U.S. 338 (2007). While a sentence must be sufficient but not greater than necessary to meet the aims of § 3553, a district court’s explanation that it had “taken into consider-

Second Circuit: District Court’s Failure to Offer Explanation for Its Sentence Constitutes Plain Error

by Douglas Ankney

The Court likened Simpson to the current case and ruled that Samora satisfied the third prong. Because the error may have allowed the jury to convict without requiring the Government to prove all of the elements of the offense, Samora satisfied the fourth prong, the Court ruled.

Accordingly, the Court reversed and remanded for a new trial based on the plainly erroneous jury instruction. See: United States v. Samora, 954 F.3d 1286 (10th Cir. 2020)."
SCOTUS Goes Live on Camera
by Jayson Hawkins

The COVID-19 pandemic has changed the way we live and conduct our business, yet some of those changes were long past due. Many relate to safety, others to convenience, and a few — namely with the U.S. Supreme Court — have brought transparency.

For the first time in its history, the Supreme Court heard oral arguments over a conference call in May 2020. Ten arguments involving 13 cases were scheduled over six days. The measure was deemed necessary for the Supreme Court to continue to function amid the pandemic, as the majority of the justices are considered especially vulnerable to the coronavirus because of age and/or underlying medical issues.

Perhaps more significant than the justices working from home was that the proceedings were broadcast live to the general public, which had never been done before. On 27 prior occasions, the Supreme Court had allowed audio recordings of arguments to be released on the day they occurred, but the only way to follow the proceedings in real time was to attend in person. The Supreme Court has always been a public institution, but the necessity of having to be in Washington, D.C., early enough to get in line for limited seating on selected weekdays means that few Americans have had the opportunity to observe the nation’s highest court. Allowing cameras inside is a matter of increasing transparency and availability to a much wider audience.

In an era where the public is clamoring for access to the institutions of power, many courts have already taken the step of placing them online. The Supreme Court has continued to resist that trend though, and the reluctance comes from liberal and conservative justices alike. Nor are their reasons without merit.

The primary concern has been that the presence of cameras would encourage attorneys to play to the public by making sound-bite-ready arguments tailored to cable news — the so-called “C-SPAN effect.” While this would increase attorneys’ exposure to the public eye — and thus raise their fees — it would take away from the technical arguments they should be making to the court.

Justices also are concerned that their questions to the advocates could be taken out of context and used to damage their reputations.

Such concerns are legitimate, but they do not outweigh the positive outcomes of exposing the Supreme Court’s operations to the light. The majority of people lack the specialized training necessary to decode legal jargon, but that does not mean they are unable to discern the core issues — and which justices side for or against them. And while the justices themselves encompass some diversity, the group of reporters who cover them have almost uniformly been White males. Media coverage of the Supreme Court thus has often been slanted against the many demographics that have not been represented in the very place their rights are at stake.

The prohibition of cameras in the Supreme Court can be boiled down to one word — politics. The justices are appointed to their positions, and their rulings tend to reflect the partisan platforms of their respective appointer’s administration. An increased awareness of their legal opinions on crucial cases could have consequences at the voting booth, but as long as the Supreme Court continues to operate outside the public eye, there is little chance their party will be held to account.

Source: thenation.com

Maryland Court of Appeals Announces Reasonableness Standard in Providing Advice of Rights to Non-English Speaking Drivers
by David M. Reutter

The Maryland Court of Appeals ruled that in giving advice of rights police officers must use methods that reasonably convey the warnings and rights contained in Maryland’s implied consent statute. The Court’s ruling discusses whether reading a form in English to a driver with limited English proficiency provides sufficient advice of rights.

Before the Court was a petition for writ of certiorari filed by Walter Elenils Portillo Funes (Portillo), who was found guilty by a jury of driving under the influence of alcohol, driving while impaired by alcohol, and driving while under the influence of alcohol per se.

The charges stemmed from an October 14, 2018, incident in which Montgomery County Police Officer Devon Sharkey saw a pickup truck stopped in the right-most lane of a road. Portillo was in the running truck “slumped over the wheel, apparently not awake.”

An open can of beer was in the console, and Portillo gave off “a consistent strong odor of alcohol beverage” and had “bloodshot watery eyes.” It soon became apparent English was not Portillo’s primary language. An interpreter was not available. Portillo failed a field sobriety test.

At the police station before conducting a chemical breath test, Sharkey read in English the “Advice of Rights” form that had a Spanish translation printed on the back but was never assured that Portillo read the Spanish version. The form, known as a DR-15, contained “a lot to read” and it was “very long, tedious information.” The Court found Portillo exhibited confusion as he took several minutes to decide whether to take the breath test. Ultimately, he signed the form, and the test was administered, registering a blood alcohol concentration of 0.15 — nearly twice the legal limit of 0.08.

Prior to trial, Portillo moved to suppress the field sobriety and breath tests from evidence at trial, arguing he did not understand the instructions given him or the advisement of rights. The trial court denied the motion, finding it was a factual issue for the jury to determine. After Portillo was found guilty at trial, he sought review in the appellate court of the denial of his motion to suppress.

Following the Wisconsin, Iowa, North Dakota, and New Hampshire Supreme Courts, the Maryland Court of Appeals (the state’s highest court) announced its adoption of a reasonableness standard in conveying the advisement of rights in regards to consenting to a breath test. That standard focuses on whether law enforcement officers used reasonable methods that would reasonably convey the warnings and rights contained in Maryland’s implied consent statute.

The Court explained: “Sufficient advice of rights in a drunk driving case is a low
The U.S. Court of Appeals for the Seventh Circuit held that a defendant was entitled to withdraw his guilty plea because he had a plausible defense in light of Rehaif v. United States, 139 S. Ct. 2191 (2019).

Robert Triggs was indicted in May 2016 under 18 U.S.C. § 922(g)(9), which prohibits firearm possession by persons convicted of a misdemeanor crime of domestic violence, by a federal grand jury. That conviction stemmed from a 2008 misdemeanor battery conviction that arose from a dispute with his girlfriend.

The weapons charge resulted from a home weapons check by Tomah, Wisconsin, that police conducted after Triggs’ son and other students made violent social media threats against a teacher. Police found three hunting rifles in the living room of Triggs’ home. He moved to dismiss the indictment, raising an as-applied Second Amendment challenge to the prosecution. He principally argued the predicate conviction was more than 10 years old, but he also asserted mitigating circumstances such as his personal characteristics.

The judge denied the motion. Triggs entered a guilty plea, reserving the right to appeal the Second Amendment issue. He was sentenced to 18 months probation. On appeal, he raised the Second Amendment issue, as well as the Rehaif issue, which the Seventh Circuit found dispositive.

In Rehaif, the U.S. Supreme Court defined the elements of a § 922(g) violation. It held that the government must prove that the defendant "knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."

As the Rehaif issue was new on appeal, the Seventh Circuit applied the plain error standard. The Government conceded the error was clear. The Court, therefore, focused on the question of prejudice, which required Triggs to show that, but for the error, the result below would have been different. In other words, Triggs had to show he would not have pleaded guilty if he had known about the effect of Rehaif.

The Court reiterated that it "understood Rehaif to hold that § 922(g) requires the government to prove that the defendant knew he had the relevant status, not that he knew he was legally barred from possessing firearms." The burden of persuasion rests on the defendant when "seeking to withdraw his plea based on a Rehaif error." United States v. Williams, 946 F.3d 968 (7th Cir. 2020).

The Court explained that a defendant who served more than a year in prison faces "an uphill battle that a Rehaif error in a guilty plea affected his substantial rights" because he can’t plausibly argue that he was unaware his conviction had a maximum sentence longer than a year. However, the same cannot be said in Triggs’ case. The Court observed the definition of the term ‘misdemeanor crime of domestic violence’ in § 922(g)(9) is quite complex...." As a result, Triggs had "at least a plausible argument that he was unaware that his 2008 battery conviction is a crime" that subjects him to the prohibition in § 922(g) (9), according to the Court.

The Seventh Circuit examined the 2008 criminal complaint, which labeled the charge as "misdemeanor battery, domestic battery." It found no such crime exists in Wisconsin and that the complaint charged simple battery. While battery in a domestic situation imposes certain duties on police and prosecutors, there are no separate elements for simple battery. The plea questionnaire did not list the offense, and the trial court made no mention of a firearm prohibition.

The Seventh Circuit made it clear that it wasn’t suggesting the underlying battery conviction was invalid, but its record was important evidence of whether Triggs knew he had been convicted of a misdemeanor crime of domestic violence as that term is used § 922(g) (9). On the other hand, there was evidence that Triggs was turned down when he tried to buy a gun after the 2008 conviction. Nonetheless, the Court held that Triggs “carried his burden to establish a reasonable probability that he would not have pleaded guilty had he known of the government’s Rehaif burden.”

Accordingly, the Court vacated and remanded for further proceedings. See: United States v. Triggs, 963 F.3d 710 (7th Cir. 2020).
New Jersey Supreme Court: Juror Excused After Partial Verdict Requires Mistrial on Remaining Counts
by Dale Chappell

The Supreme Court of New Jersey reaffirmed its rule that when a juror is excused after the jury has reached a verdict on some of the counts, but not others, the proper course of action is to enter a verdict on those counts and to declare a mistrial on the open counts.

The case came before the Court when Antwan Horton took his charges for murder, attempted murder, and weapons offenses to trial, and one of the jurors was excused to go on a preplanned vacation. That juror had been part of the deliberations when the jury reached a verdict on some of the counts.

Instead of accepting the partial verdict, the trial judge merely excused the juror and then reconstituted a new jury to take over and reach a full verdict. The judge instructed the jury to discard the partial verdict and begin deliberations anew. Horton moved for a mistrial, but the trial court denied that motion. Three days later, he was found guilty by a unanimous jury of all the counts.

On appeal, the Appellate Division affirmed, speculating that the substituted juror was a “full participant in the mutual exchange of ideas.” The court cited that the jury had requested transcripts, asked for testimony to be repeated, and asked additional questions before returning its verdict.

The Supreme Court didn’t agree. “We cannot know or speculate whether the replacement juror was a full participant in the mutual exchange of ideas.” The “safest and fairest course,” the Court reiterated, is to take a partial verdict and declare a mistrial on the open counts.

Accordingly, the Court reversed the judgment of the Appellate Division remanded to the trial court for a new trial. See: State v. Horton, 2020 N.J. LEXIS 674 (2020).

Chicago’s Police Torture Reparations
by Jayson Hawkins

In 2015, the decades-long battle waged by social justice activists in Chicago culminated in the passage of a reparations bill for victims of torture at the hands of the Chicago police. Five years after this historic victory, both victims and advocates are taking stock of what has been accomplished and what remains to be done.

The story of police torture in Chicago begins with Jon Burge. In 1972, Burge returned to his job as a detective on the South Side of Chicago after serving a tour as an interrogator in Vietnam.

The brutal techniques he had learned in Southeast Asia—electric shock, suffocation, beating the genitals with a rubber hose—were applied to hundreds of victims, almost all of whom were people of color. Burge obtained countless confessions that sent these victims to prison and even death row. For 20 years, authorities in the police, judiciary, and mayor’s office looked the other way as Burge’s hand-picked crew of officers terrorized the South Side, and Burge himself was rewarded with promotions and commendations.

This reign of terror began to come under fire in 1989 when one of the victims of Burge’s crew brought their behavior to light during a civil rights trial. Andrew Wilson sued Burge and several other Chicago police officials after he was arrested and tortured by having electric shocks applied to his genitals and being strapped to a hot steam radiator. During the trial, Wilson’s attorneys were contacted by an anonymous source close to Burge’s crew, and this source provided detailed information about the scope of the torture. This information was the basis of the effort to bring Burge to justice and undo the damage to his victims.

Several anti-torture and social justice groups began to campaign for a series of demands in the wake of the torture revelations. Their immediate goals were the firing of Jon Burge; new trials, exonerations, and pardons for torture victims, especially those who had been on death row; criminal prosecution of Burge; recognition of Chicago police torture by the United Nations Committee Against Torture; and a reparations regime for torture victims, their families, and their communities.

None of these goals were achieved easily or swiftly. Jon Burge retired as a police commander with a full pension, but by 2003, official inquiries into his behavior had begun. Finally, in 2010, Burge was convicted of perjury and obstruction of justice, and he served five years in federal prison.

In 2009, the state of Illinois enacted the Torture Inquiry and Relief Act, which mandated the review of torture claims and the reference of credible claims to the criminal courts.

Reparations proved to be the most difficult hurdle. First officially proposed by Black People Against Police Torture and the National Conference of Black Lawyers in 2006, the drive for reparations coalesced around a series of demands: a formal apology; financial compensation; free education at Chicago City Colleges for victims and their families; the construction of a center to provide psychological counseling, health care, and vocational training for victims; the teaching of the history of police torture in Chicago public schools; and the construction of a public memorial for torture victims.

Spearheaded by the activists at Chicago Torture Justice Memorials (“CTJM”), the push for reparations gained momentum over the next few years. Finally, after the movement gained the support of Amnesty International,
the UN Committee Against Torture, and several Chicago city aldermen, the mayor’s office was ready to negotiate. The settlement was announced on May 6, 2015, before the full city council and included a powerful public apology by then-Mayor Rahm Emanuel. All the demands put forward by CTJM were met, including $100,000 compensation for surviving victims of torture.

Implementation has not been seamless, but mostly the work has gotten done. Money for victims was distributed in 2017, and the Chicago Torture Justice Center opened in the same year. Changing school curriculum met with some public resistance but was put in place early 2018. A memorial has been designed, but as yet, no money is allocated for construction. The victory was put into perspective by torture victim Darrell Cannon: “something that sets a precedent ... reparations given to Black men tortured by some white detectives. It’s historic.”

Source: truthout.org

How COVID-19 Forces New Releasees Into ‘Survival Mode’

by Dale Chappell

Imagine trying to get a job, health care, housing, or any other basic need without an ID, with every government office you need in order to get on one closed because of the coronavirus pandemic. Those released from prison during these trying times report they are finding themselves resorting to violating parole or probation just to survive.

“I’ve just had to put myself into survival mode,” one releasee in New Jersey, who wished to remain anonymous, told The Intercept. Without a government ID, he took a job as a food delivery driver for Uber Eats – without having a driver’s license. This is because just as he was released from prison the state closed down all driver’s license offices during the pandemic. He had no way of getting a state ID from the driver’s license office. After being pulled over by a sympathetic cop who didn’t take him back to jail, he now makes deliveries by bike.

Former prisoners already face major roadblocks to basic necessities like jobs, housing, and healthcare. And those thrown in jail or prison are usually already poor to being with. After years locked up, they typically come out even poorer. Yet they’re expected to find approved housing, hold a steady job, and to pay for their own healthcare after being ignored by the prison medical system for so long. This “survival mode” is their best option when all of this is out of reach. “Without access to something as basic as an ID, you’re still inside while you’re outside,” said Anthony Dixon, director of community engagement at the Parole Preparation Project in New York.

Even when the government offices do reopen, most prison releasees can’t obtain an ID because they don’t have the correct documents, like a birth certificate and Social Security card, among other documents required by the state. The fact that prison officials are usually required to obtain these documents prior to a prisoner’s release often gets ignored. Dixon says one or two out of every five prisoners he has worked with leave prison without these documents.

Advocacy groups had been working on this problem long before the pandemic hit. “Before the shutdowns, we were making headway in streamlining the process to get people driver’s licenses,” Kelly Orians, co-director of the nonprofit First 72+ reentry program in New Orleans, told The Intercept.

“When the COVID crisis hit, so much of the progress we made was lost,” and now that people are being released from prison, “everything seems hopeless.”

People are still being released from prison, and the backlog for services keeps going. This ensures that former prisoners will continue to be stigmatized and punished after their release, if they can stay out of jail long enough.

Source: theintercept.com

Policing and Racial Bias

by Kevin Bliss

Recent incidents of police shootings of unarmed civilians such as Michael Brown in Ferguson, Missouri; Tamir Rice in Cleveland, Ohio; and Breonna Taylor in Louisville, Kentucky, have sparked an interest into the psychology of the police and the effects of stereotyping. Studies have shown the relationship between racial profiling and critical decision-making. Findings suggest that increased weapons training and conscious counterstereotyping may help correct policing practices and establish trust between communities and police.

Researchers Rebecca Hetey and Jennifer Eberhardt reported in 2018 that evidence is sufficient to establish that racial bias exists in the criminal justice system. Blacks are more apt to be arrested, convicted and sentenced to more time than Whites.

The Association for Psychological Science (“APS”) July/August Observer reports that Heather Kleider-Offutt, Alesha Bond, and Shanna Hagerty went further to say that this racial bias is even more pronounced if the person’s features are more Afrocentric, i.e. darker skin, wide nose, big lips, etc. They report these racial responses may be more automatic than conscious and therefore completely unavoidable.

Writing in Current Directions in Psychological Science, APS Fellow Keith Payne found that if a subject were to make a decision about potential firearms in conjunction with Black or White males at their own pace, their accuracy was not affected. However, if the decision must be made quickly, subjects studied were more apt to confuse a hand tool with a firearm if they were shown a Black person in conjunction with it.

He said, “Such a bias could have important consequences for decision making by police officers and other authorities interacting with racial minorities, even for those who are actively trying to avoid it.”

Reinoud Kaldewaij, Saskia Koch, Wei Zhang, Mahur Hashemi, Floris Klumpers, and Karin Roelofs showed that a combination of an aggressive personality coupled with high testosterone levels led to poor emotional control and bad decision making in challenging situations.

These researchers believe that extensive firearms training, practice in weapon identifying, and conscious counterstereotyping training will help to combat poor policing practices. They said the only way to establish trust between police and the community they serve is through legitimacy of their actions, and the only way to do that is if police make fair decisions and treat everyone with equal fairness.

Source: psychologicalscience.org

Criminal Legal News
New Colorado Law Kills Qualified Immunity for Cops

by Dale Chappell

Colorado became the first state to pass a law prohibiting law enforcement officers from invoking qualified immunity as a defense when they're accused in a lawsuit of violating a citizen’s civil rights. Hopefully, the law passed in June will start a trend in other states and lend support to a bill introduced in Congress on June 4, 2020, to do the same for federal civil rights lawsuits.

As part of a police reform bill introduced by Colorado Governor Jared Polis, called “Enhance Law Enforcement Integrity Act,” the new law says “qualified immunity is not a defense to liability pursuant to this section.” It also bans chokeholds, limits when police can shoot at fleeing suspects, and requires police to use body cameras and make the footage available to the public.

Qualified immunity, a hot topic lately, is a commonly used affirmative defense protecting law enforcement from lawsuits arising from alleged civil rights violations by officers committed in the line of duty. It was created by the U.S. Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967), where a group of men filed a federal civil rights lawsuit after they were arrested and convicted in Mississippi for violating a state segregation law by mixing races in a bus terminal. When the Supreme Court later declared the law unconstitutional, they filed their lawsuit. The Supreme Court ruled that the police weren’t expected to “predict” that the law was unconstitutional and therefore they weren’t liable for the illegal arrests. Qualified immunity stems from the idea that unless “clearly established” law exists prohibiting an officer’s conduct, he’s immune from liability, no matter how egregious his actions may be.

Colorado’s law disqualifying qualified immunity, however, only applies to state lawsuits. “What Colorado did in this bill, which I think is really creative,” says Benjamin Levin, an associate professor at Colorado Law, “it creates a state cause of action in Colorado State courts, for people whose rights have been violated under the Colorado State Constitution.”

University of Denver law professor Alan Chen adds, “the importance of this is that it gives Colorado citizens a credible vehicle for enforcing their state constitutional rights against law enforcement officers.”

Critics of limiting or abolishing qualified immunity for law enforcement officers say it’s needed to ensure protection for officers’ split-second decisions in life-threatening situations. But “that doesn’t mean that the police are going to lose every [lawsuit] just because they don’t have qualified immunity,” says Chen. “There are other reasons why the plaintiffs might not necessarily prevail.” And the new law’s supporters have said as much, noting the change in law in Colorado only creates a lane for relief and doesn’t guarantee the outcome.

The new law goes into effect on July 1, 2023.

Sources: courthousenews.com, unlawfulshield.com

From Detroit: How Not to Use Facial Recognition in Policing

by Anthony Accurso


In January 2020, Robert Julian-Borchak Williams was working at an automotive supply company when he received what he thought was a prank phone call directing him to turn himself into the Detroit P.D. When he arrived home from work, he quickly learned it was not a prank, as he was handcuffed before his wife and two daughters.

He was booked Thursday afternoon, which included a mugshot, fingerprinting, and DNA sampling.

Around noon the next day, during his interrogation, he was shown a blurry photo from a security camera taken at a Shinola store where five timepieces worth $3,800 total were shoplifted in October 2018.

“Is this you?” asked one detective.

The second photo, a close-up of the first, also was on the table. Williams held it up to his face to contrast how much it definitely did not look like him.

“No, this is not me,” said Williams. “You think all Black men look alike?”

Williams turned over another paper on the table, which revealed a photo of the suspect next to a photo from his state driver’s license, and he again pointed out that they were clearly not of the same person.

“I guess the computer got it wrong,” said one of the detectives, seeming chagrined.

Williams was released that night on bond. He appeared in court two weeks later for an arraignment, at which time the prosecutor moved to dismiss the case, though without prejudice.

The prosecutor later explained a witness from the store had not been asked to look at a photo line-up, and Williams might be charged again if the witness positively IDs him.

After the ACLU of Michigan got involved, a more complete picture emerged of why Williams was arrested in the first place.

An investigator at a loss prevention firm hired by Shinola sent a still image from the surveillance camera to a Detroit P.D. representative, who uploaded the photo to the state’s facial recognition software database. The software, operated by DataWork Plus out of South Carolina, ran the image through two algorithms – one by Japanese tech giant NEC and the other by Rank One Computing of Colorado – which compared the suspect’s photo to 49 million others, including the state driver’s license database.

The software would have generated a row of results from each algorithm along with “confidence” scores next to them. Williams’ picture was among the results, and his picture was included in a “6-pack photo lineup” shown to the loss prevention firm’s employee. She positively “identified” him, and this led to his eventual arrest.

Clare Garvie, a lawyer at Georgetown University’s Center on Privacy and Technology, said of facial recognition software, “I strongly suspect this is not the first case to misidentify someone to arrest them for a crime they didn’t commit. This is just the first time we knew about it.”

The National Institute for Standards and Technology has found that facial recognition algorithms work better to ID White men but work less well on women and minorities, likely because of a lack of diversity used to develop the underlying databases.

“On the question of false positives — that is absolutely factual, and it’s well-document-
ed,” said James White, an assistant police chief from Detroit, during a hearing on the use of facial recognition software in policing. “So that concerns me as an African-American male.”

The ACLU filed on behalf of Williams to remove his info from Detroit’s criminal databases, secure a dismissal with prejudice so he won’t be charged again, and to get an apology from the Detroit P.D. The prosecutor, Kym L. Worthy, has since apologized, though she added, “This does not in any way make up for the hours that Mr. Williams spent in jail.”

There is nothing to prevent this from happening again, though the department updated its facial recognition policy in July 2019 so that it is only used to investigate violent crimes. Though a misidentification for a violent crime could have far worse results if police use overwhelming force to arrest a misidentified person.

In the meantime, Williams’ five-year-old daughter has taken to playing “cops and robbers,” accusing her father of stealing things and insists on “locking him up” in the living room. Williams and his wife are considering whether their daughters need therapy to cope with seeing their father arrested for something he clearly didn’t do.

Sources: nytimes.com

Minnesota Cops Use Contact Tracing to Track Protestor Networks
by Anthony Accurso

MINNESOTA OFFICIALS HAVE USED A VARIETY OF DIGITAL SURVEILLANCE TOOLS TO TRACK PROTESTORS, BUT NOW THEY OPENLY ADMIT TO USING CONTACT-TRACING APPS TO DO SO.

According to Minnesota Public Safety Commissioner John Harrington, officials in the state have been using contact-tracing to map protestor affiliations and movements. This has led officials to conclude that much of the protest activity is being fueled by people from the “outside coming in.” Harrington was circumspect about which apps or processes commonly used for contact-tracing are now being used against protestors, though a Twitter feed titled “Minnesota Contact Tracing,” which has been leaking police activities, did specify that officials are contact-tracing arrestees.

This is just the latest tool of big tech to be deployed against law-abiding citizens. Minnesota Police and the Minnesota Fusion Center have also been employing other well-known tech to track citizens. Briefcam, Ring doorbell cameras, Axon police bodycams, ShotSpotter, and license plate readers collect hundreds of thousands of hours of video footage that is analyzed by software such as Clearview AI to identify individuals through facial recognition algorithms.

CCTV footage is also now being fed through Arxys Milestone software, which uses “video motion detection” and “video analytics” to identify and build profiles about citizens.

This means that every time you leave your house, your neighbor’s Ring doorbell adds this bit of data to your “profile.” When you drive or take public transit, police can identify where you work and which route(s) you take to get there. Any time you buy something, or literally do anything online, this gets added to your profile. Where you eat, worship, or go to the doctor is now readily available.

Police can also request “geofence warrants,” which ID anyone who walked into a specified area, such as a protest location, and get info about what they post to social media during this time.

When you add these tools to a willingness by (some) police to extrajudicially target citizens, especially minorities, and most police organizations and unions to justify this as just another way to keep us “safe,” a truly frightening picture emerges. Whether nationwide protests will have any impact on these surveillance activities in the future is yet to be written.

Source: zeroedge.com

When Police Caught Lying, the Spin Begins
by Ed Lyon

TRADITIONALLY, POLICE HAVE BEEN THE ONES TO CALL WHEN A COMMON CITIZEN HAS BEEN ASSAULTED, ROBBED, HAD HIS HOME BURGLED, OR A CAR STOLEN. THEY WERE CALLED NOBLE, EVEN HONORABLE NAMES LIKE BLUE KNIGHTS OR NEW CENTURIONS WITH THE MOTTO “TO PROTECT AND SERVE” ON THEIR FOUR-WHEELED CHARIOTS. HOWEVER, SOMETHING HAS GONE TERRIBLY WRONG.

Many police officers have become the opposite of what they were meant to be. Even when caught on video committing atrocities against the citizens they swore to protect, they downplay and even get away with the evil they have done by lying and spinning the facts.

Take for example Buffalo, New York, on June 4, 2020. In clear daylight, the city’s Emergency Response Team (“ERT”) marched toward peaceful protesters. Two ERT cops shoved an elderly man down with such force that when the victim’s head hit the ground an audible “thunk” is heard as blood runs from one ear. The ERT leaves him.

The cops tell the press he “tripped and fell.” The Lie.

Then a video of what happened appears on Facebook, YouTube, and Instagram. Uh oh: The Truth.

A Buffalo police captain explains the cops’ perspective was based on a camera behind the 59 member ERT, so it appeared “the subject [victim] had tripped and fallen.” The Spin.

In Minneapolis, when journalists, medical staff, and others returned to their cars after demonstrations, they found their tires had been slashed.

Cops attributed the destruction to rioters. The Lie.

Bystander video shows the cops slashing those tires with knives. The Truth.

Press Release: Police only “deflated” those tires to prevent “vehicles [from] driving dangerously and at high speeds in and around protesters and around law enforcement.” The Spin.

Did you hear the one about New York City cops claiming that $2.4 million in Rolex watches were stolen from a jewelry store in the city? The Lie.

A store spokesman later stated no watches of any kind were stolen. They had been removed from the display cases. The Truth.

Well, how do the cops spin that one? Matter dropped, subject ignored. Same Difference.

If a tree falls in a forest and there is no one around to hear it, did it make a sound?

If cops kill a citizen on a Minneapolis street and there are no bystanders to video-record it, did the cops really kill him?

Sources: slate.com, gizmodo.com
George Floyd’s death has led to intense scrutiny of the Minneapolis Police Department, including a State Department of Human Rights investigation launched June 2 to determine if the police have engaged in discriminatory practices. Statistics show their use of force against Blacks (about 20 percent of the population) is at a rate seven times that of Whites (about 70 percent of the population).

Floyd was being arrested for allegedly using a counterfeit bill at a convenience store when one of the arresting police officers, Derek Chauvin, applied a controversial body pin by placing his knee on the back of Floyd’s neck for 8 minutes and 46 seconds. Floyd’s air passage was constricted from the technique, and Floyd died as a result. Chauvin was fired and charged with second-degree manslaughter and second-degree murder. Bowling Green State University criminologist Philip Stinson said, “In my experience, applying pressure to somebody’s neck in that fashion is always understood to be the application of deadly force.”

Stinson was also concerned that the three other police officers surrounding Chauvin did not attempt to intervene even though they knew they were being filmed, indicating that they had no problem with the excessive use of force. “Whatever the officer was doing was condoned by his colleagues,” said Stinson. “They didn’t seem surprised by it at all. It was business as usual.”

Dave Bickling, former member of the civilian police review authority for Minneapolis and now a board member for the Communities United Against Police Brutality, said the neck restraint used was not one approved under city policy because it applied pressure on the front of the neck.

Many police departments have banned the use of all forms of neck restraints because of the risks they pose. This incident, Bickling said, was indicative of the racism that has been apparent in Minneapolis’ police department. “This has been years in the making,” he stated. “George Floyd was just the spark.”

Since 2012, there have been over 2,600 citizen complaints filed against Minneapolis police. A study released in 2015 by the U.S. Department of Justice showed that 3.5% of Minneapolis’ 86,000 Blacks said they were subjected to the use of force during their most recent contact with the police. Only 1.4% of Whites made similar claims. Documented uses of force showed that 58% of such instances were used against Blacks, which translates to Blacks being seven times more likely to experience use of force by police than Whites.

Bickling stated that the city routinely failed to hold police accountable for excessive force actions.

Chauvin had already been the recipient of 17 civil complaints prior to the Floyd incident. “If discipline had been constant and appropriate, Derek Chauvin would have either been a much better officer, or would have been off the force,” he said. “If discipline had been done the way it should be done, there is virtually no chance George Floyd would be dead now.”

Source: nytimes.com

Risk Assessment Tools Perpetuate Inherent Biases and Prejudices

Critics contend that the new bail reform risk assessment (“RA”) tools are corrupted in use and perpetuate the same racial and monetary biases that brought the practice of bail assignment into question to begin with.

Most states view Kentucky as the best example of utilization of RA tools in the U.S. In 2011, it was the first state to implement the use of RA in deciding bail. According to a 2018 study, the number of people released pending trial at that time increased by 13%.

By 2016, more than half that gain disappeared. Laws changed and judges were given more leeway to ignore recommendations. No oversight existed on the use or rejection of RAs. Kentucky Center for Economic Policy research director Ashley Spalding said judges tended to ignore the results. “They’re overriding the findings of the risk assessment tool,” she said. “In practice, we’re seeing that it is often disregarded.”

A 2019 study showed that judges were more apt to ignore the recommendation for release of Blacks in the moderate risk category than Whites. “Judges see the moderate risk label, and for white defendants, moderate risk was interpreted as low risk, and for Black defendants, it was interpreted as a signal of higher risk,” stated Megan Stevenson, professor at George Mason University and author of the study.

The Laura and John Arnold Foundation developed the Public Safety Assessment, which Kentucky began using in 2013. It is now the most widely used model in the U.S. Reform advocates say the criteria used to determine a risk category does not appear to be causal but correlative. Data entered by clerks, says The Intercept, are prone to errors and unavailable to the public or defendants for review or rebuttal.

Pilar Weiss, director of the Community Justice Exchange, said RAs have become “a totally political, manipulated, secret process. They’re these flawed, racist, classist tools that purport to be based on science that are how the system is making decisions about people’s freedoms and their liberties.”

Predictive RAs work by seeding an algorithm with as much court data as possible. The data are then correlated with characteristics that indicate potential risk value for rearrest or failure to appear on the assigned court date based on data from other defendants with similar characteristics.

Critics contend that the correlative risk values are compared with already biased data based on past records of rearrest or failure to appear when this data have been inherently racist and biased throughout history. Additionally, relying on correlative data, and not causal data, gives emphasis to odd characteristics.

One RA factor is whether the defendant has an official place of residence. Those who do not are considered high risk. Yet a study conducted in Cook County, Illinois, showed that 99% of defendants who were deemed high risk but released before trial anyway showed
up for court without a new arrest — virtually the same percentage as those deemed moderate or low risk.

The Leadership Conference on Civil and Human Rights drafted a letter in 2018, which was endorsed by over 100 other organizations, arguing against the current failing RA practice and listed six recommendations that would help reduce the bias and prejudice inherent in RAs — such as allowing adversarial hearings for those determined “at risk” and automatic release for everyone else, making release instead of imprisonment the default. [1]

Source: theintercept.com

New ‘Barcode’ System Puts DNA Sample to the Authenticity Test
by Anthony Accurso

Researchers have developed a new system that could be used to ensure that the evidence processed in a laboratory is the same evidence that was collected in the field (e.g., from a crime scene).

Engineers from Duke University and NYU’s Tandon School of Engineering have demonstrated a method of adding a sample of artificially created genetic material to evidence, which will allow lab workers to match the samples processed in the lab. “If you think about conventional encryption techniques, like security for a smartphone, there’s usually a passcode that only one person knows,” said Mohamed Ibrahim, a system-on-chip designer at Intel Corp. and a Ph.D. graduate of Duke. “Our idea is to inject non-harmful material into genetic samples immediately when they are collected in the field that act as a similar password. This would ensure that the samples are authentic when they reach the processing stage.”

Most genetic identification is done using polymerase chain reaction (“PCR”), a technique for sequencing a few short sections of human DNA, which can be used to accurately identify the person who left biological material at the scene of a crime. The FBI has identified 13 sites on the human genome which, when compared amongst many samples, ensures that each sample will provide reliable identification of its source. This method is far cheaper than sequencing a person’s entire genome, which still runs about $1,000 per sample. And as PCR systems become more widespread, manufacturers are developing new ones that are smaller and cheaper.

Ibrahim, and his colleagues Krishnendu Chakrabarty, Tung-Che Liang, Ramesh Karri, and Kristin Scott, developed the system to address the growing presence of cyberbiosecurity threats by developing a unique “bar code” made of DNA pairs that, when read through a PCR device, can identify from where the source was collected.

For instance, a forensic team can have unique “bar coded” genetic material that is added to crime scene evidence, which is “scanned and verified” in the lab to ensure the right sample is being processed. “When the right primers are used to unlock a barcode, you should get a positive result,” said Ibrahim. “If you don’t, then that means that the sample is not genuine. Some sort of switching or alteration has occurred.”

This new system, if widely adopted by forensic investigators, will not address the host of other processing errors that have plagued forensics labs across the country, as those problems are the result of human carelessness or worse. But removing the chance for this kind of human error is a much-needed positive step. [1]

Source: pratt.duke.edu, forensicmag.com

New York Police Act With Impunity During Protests
by Kevin Bliss

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

Government watchdog organization Broadcastify, which allows citizens to listen in on police and emergency band radio broadcasts, aired police transmissions as protestors moved June 1 into the 77th Precinct of Brooklyn. A police officer can be heard yelling, “Shoot the motherfuckers.”

While another responded with, “Don’t put that over the air.” Human rights activists said this is just another example of a long pattern of violence without fear of repercussion that is prevalent in law enforcement. While being called to protect and serve the public, police are instead engaging in combat with protestors.

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

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

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

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

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

Will making police records transparent hold more officers accountable? [1]

Source: theintercept.com, northjersey.com, vox.com
Police Unions Buy Their Way Out of Reform

by Kevin Bliss

The Guardian investigated two decades’ worth of campaign financial records in New York City, Los Angeles, and Chicago and found that police and police unions at the state and local levels have donated at least $87 million to politicians who work to block law enforcement reform.

Federal contributions during the same period have totaled $47.3 million.

The Guardian asserts unions and police use spending as a tool to defeat reform measures. They strategically target and donate to key politicians who show a history of being against reform policies and enhancing police accountability. This type of spending has dramatically increased in the last 10 years, explaining why most reform bills have been defeated even in the face of all the high-profile police shootings.

Los Angeles unions alone have spent $64.8 million on campaign contributions to block reform. The Los Angeles County Professional Peace Officers Association stated in a letter to its 8,000 members that they need donations of at least $2 million more to be used in establishing “collaborative relationships” with influential lawmakers.

University of California, Berkley, professor Dan Schnur said, “Law enforcement is going to spend its money defensively — instead of pushing for changes in the law that work to their benefit, their primary goal is one of self-preservation.”

Los Angeles police unions have contributed $751,000 to the city council’s ad-hoc committee on police reform chaired by Herb Wesson, Jr., who is accused of using his position to block attempts at police accountability; $110,000 to city council public safety committee chair Monica Rodriguez, staunch supporter of the police department; and $25,000 to city council budget committee chair Paul Krekorian, who advanced a 7% funding increase in February for the Los Angeles Police Department.

California unions also have used campaign contributions to help block the proposed ban on the death penalty and to pass a counterproposal that actually sped up execution times. Additionally, they have donated more than $752,000 to all of the state assembly’s law enforcement committee members.

Reform advocates have worked for years in New York to have the legislature repeal state law “50-a,” which shields police misconduct records from access by the public. According to The Guardian, New York police unions have spent about $1.3 million to see that repeal efforts were blocked.

The killing of George Floyd has had a tremendous impact on reform views. Governor Andrew Cuomo, accused of blocking the repeal of 50-a in the past has switched his position since the Floyd killing and now supports repealing the law. “The murder of George Floyd was just the tipping point,” he said.

John Kaehny of the government transparency nonprofit Reinvent Albany said, “The day before George Floyd, this legislation was going nowhere. It did a 180 after the Floyd protests.”

Source: theguardian.com

Police Violence and the 14th Amendment

by Jayson Hawkins

The due process clause of the 14th Amendment to the U.S. Constitution provides that “no person shall be deprived of life, liberty, or property without due process of law.” The intent of the amendment was to restrain government actors from arbitrary or capricious acts of violence, imprisonment, or confiscation.

The 14th Amendment was one of several constitutional changes made in the wake of the Civil War. The necessity of guarantees outlined in the due process clause had become all too apparent in the Reconstruction South. The authors of the amendment reported to Congress that across the South orchestrated campaigns of violence and intimidation were being carried out against freed Blacks by White police officers. In the summer of 1866, for example, policemen were instrumental in leading organized attacks on Blacks that left hundreds dead. The conclusion of Congress, and the state legislatures that would ratify the amendment, was that without new constitutional guarantees, state and local governments in the South would not respect the lives or fundamental rights of Black citizens.

The amendment was duly ratified, and Congress enacted the Civil Rights Act of 1873, which encoded the amendment in Chapter 42 § 1983 of the U.S. Civil Code. The U.S. Supreme Court, however, was reluctant to acknowledge the sea change the 14th Amendment represented. It took the Court over 40 years to even recognize that the due process clause was applicable to state and local governments.

To make matters worse, the Court crafted the concept of qualified immunity to shield individuals from personal liability. The idea of qualified immunity is that a person acting under color of law is not personally liable for violating someone’s civil rights unless that person knew or should have known they were violating clearly established law. Added to this shield against personal liability is the essentially blanket immunity government agencies enjoy via the 11th Amendment. Together, these protections have allowed the courts to regularly refuse to hold police officers and their departments accountable.

In addition, the Supreme Court’s standard on excessive police force is so murky that it renders the bar set by qualified immunity nearly impossible to overcome. In Graham v. Connor in 1989, the Court ruled that cases of excessive police force must be judged by asking what was “reasonable” under the circumstances and defers to the judgment of police officers to determine what force could be necessary in a particular situation. When applying this standard, finding a clear violation for purposes of qualified immunity is extraordinarily difficult.

The refusal of the Court to give full effect to the due process clause has essentially robbed the 14th Amendment of any meaningful force. As a result, the federal protections designed in Reconstruction to rein in police violence have remained dormant. The terrible history of police brutality, especially against people of color, that has plagued America for so long will likely continue unless the accountability demanded by the Constitution is enforced by the Court.
Prison Education Guide
Christopher Zoukis
ISBN: 978-0-9819385-3-0 • Paperback, 269 pages

Prison Education Guide is the most comprehensive guide to correspondence programs for prisoners available today. This exceptional book provides the reader with step by step instructions to find the right educational program, enroll in courses, and complete classes to meet their academic goals. This book is an invaluable reentry tool for prisoners who seek to further their education while incarcerated and to help them prepare for life and work following their release.

The Habeas Citebook: Ineffective Assistance of Counsel, Second Edition
Brandon Sample & Alissa Hull
ISBN: 978-0-9819385-4-7 • Paperback, 275 pages

The Habeas Citebook: Ineffective Assistance of Counsel is the first in a series of books by Prison Legal News Publishing designed to help pro-se prisoner litigants identify and raise viable claims for potential habeas corpus relief. This book is an invaluable resource that identifies hundreds of cases where the federal courts have granted habeas relief to prisoners whose attorneys provided ineffective assistance of counsel.

Dan Manville

The Disciplinary Self-Help Litigation Manual, Second Edition, by Dan Manville, is the third in a series of books by Prison Legal News Publishing. It is designed to inform prisoners of their rights when faced with the consequences of a disciplinary hearing. This authoritative and comprehensive work educates prisoners about their rights throughout this process and helps guide them at all stages, from administrative hearing through litigation. The Manual is an invaluable how-to guide that offers step-by-step information for both state and federal prisoners, and includes a 50-state analysis of relevant case law and an extensive case law citation index.

The Habeas Citebook: Prosecutorial Misconduct
Alissa Hull

The Habeas Citebook: Prosecutorial Misconduct is the second in PLN Publishing’s citebook series. It’s designed to help pro se prisoner litigants identify and raise viable claims for potential habeas corpus relief based on prosecutorial misconduct in their cases. This invaluable title contains several hundred case citations from all 50 states and on the federal level, saving readers many hours of research in identifying winning arguments to successfully challenge their convictions.

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California: Marissa Cruz and Paea Tukuafu filed a civil rights lawsuit against the city of San Jose police in August 2020, claiming they were “battered and bruised” by cops and subject to unreasonable search and entry. The two were celebrating ahead of Cruz’s 22nd birthday at a Holiday Inn in May 2019 when a noise complaint against the couple turned into a beating, which was captured on body camera video and aired by ABC News. Officers asked the couple to lower the volume of their music. But things went south when officers asked for identification. “Both Santa Cruz and Tukuafu argued over the necessity of handing over their I.D. for a noise complaint, while police insisted that department protocol demands they identify everyone they come into contact with. Tukuafu eventually relented, but not before another three officers arrived,” legalreader.com reports. “After the couple ‘failed the officers’ ‘attitude test,’” the officers allegedly struck them with batons, tasers and ‘sponge rounds,’ according to the complaint. The couple was transported by ambulance to the hospital for evaluation of ‘serious’ injuries before being booked and spending the night in jail,” according to the complaint. Criminal charges were not filed.

Florida: Bodycam footage from the arrest of an 8-year-old Key West boy with special needs at his school in December 2018 has sparked outrage. Officers tried to handcuff the child—who allegedly hit a substitute teacher—only to discover his wrists were too tiny. In August 2020, the boy’s mother, Bianca N. Digennaro, represented by attorney Benjamin Crump, filed suit against the school district and city alleging violations of the Fourth and Fourteenth amendments and the Americans with Disabilities Act. She said her child “was arrested, taken to jail, finger-printed, DNA-swabbed and had his mugshot taken that day. The boy — who was 3-and-a-half-feet tall and weighed 64 pounds, Crump said — was charged with felony battery. His mother fought the case in court for nine months until a prosecutor dismissed the charges,” abc7.com reports. The suit alleges the officers “used excessive force, that school officials failed to intervene, and that the city and school district violated the Americans with Disabilities Act.” Police Chief Sean T. Brandenburg said the officers were following procedure.

Georgia: State Trooper Jacob G. Thompson was fired and charged with murder and aggravated assault for fatally shooting Julian Lewis, 60, in the forehead after a brief chase over a burned-out tail light, news media report. The incident took place August 7, 2020. Thompson, 27, who is White, was booked into Screven County Jail. Thompson alleges he shot Lewis because he believed Lewis was going to hit him with his car. Thompson reportedly used a Precision Intervention Technique to cause the vehicle to stop in a ditch, reports show. He fired one round, hitting Lewis, who was pronounced dead at the scene. Francis Johnson, a former head of the Georgia NAACP, told the Atlanta Journal-Constitution: “We got lots of messages from people in the community that the habit of ex-trooper Thompson was to racially profile and harass Black and brown people on the highway. This was not shocking to them that this happened.” Lewis, meanwhile, “was no threat as a 60-year-old man just trying to make it home from a convenience store run” to get a grape soda for his wife, said Johnson, an attorney representing Lewis’s family. The U.S. Department of Justice would not confirm or deny a civil rights investigation.

* Be sure to set your phone to require the PIN or password to unlock it before EACH use. After most phones are unlocked, they won’t require a PIN or password again until after a set time of inactivity. Unless the setting is changed to require a PIN or password before each use, anyone can access your information after you’ve unlocked it;

* Disable any digital assistants. You don’t want Siri, Alexa, or Google Assistant to be vulnerable to snitching;

* Set your phone to Airplane Mode. This will prevent law enforcement from tracking you;

* Consider Screen Pinning. Android’s Screen Pinning feature (Guided Access on iOS) allows your phone to display one app while locking everything else. This can be useful if you have to hand over your phone to show identification, but you don’t want police to access anything else; and

* Back up everything on your phone. Protests can turn chaotic quickly. Your phone can be lost, stolen, damaged, or confiscated.

It has been well said that a picture is worth a thousand words. Most phones will capture audio and video even when locked. The ACLU offers an app that uploads footage directly to the cloud, so nothing will be lost if police confiscate your phone, break it, etc. Remember to charge your phone before leaving and check to make sure it has lots of available storage.

Take your stand, change the world for the better, make history, and record it for posterity.

Source: gizmodo.com

| Protecting Your Phone at Protests | by Douglas Ankney |

As of the date of this article, protests continue against police brutality and systemic racism in the wake of the murder of George Floyd. While racism and police brutality are at least as old as America itself, Floyd’s death appears to be a catalyst that brought formerly silent folks into the street to march and raise their voices in unison demanding change. For the newbies (and for the veterans) who attend these protests, gizmodo.com offers these valuable suggestions for protecting the privacy of cellphones:

* Be sure to set your phone to require a PIN or password. The courts have ruled that it doesn’t violate the constitution if the police force you to unlock your phone using your thumb, facial recognition, or other biometric. But police cannot compel you to reveal a password or PIN;
Illinois: Police agencies in the state have received $4.7 million in military gear since President Trump lifted restrictions President Obama put in place on a federal surplus program, chicagotribune.com reports. Consider that Kane County found itself with a 10-foot-tall armor-protected truck once deployed for combat in Iraq. The sheriff was not impressed with the message this kind of vehicle for SWAT transport would deliver. “It’s a way of brandishing your police power and it’s not necessary,” Ron Hain said. “I don’t like it and I don’t think the public likes it.” Aislinn Pulley, co-founder of the Chicago chapter of Black Lives Matter, agreed. “It’s a message of intimidation and terror. It’s the same message that is used overseas when our military occupies someone else’s country,” said Aislinn Pulley, co-founder of the Chicago chapter of Black Lives Matter. “And what is that message? The message is we will destroy you; we will kill you if you step out of line.” The sheriff ordered the truck back to the garage.

Kentucky: State Police have settled a wrongful conviction lawsuit with Susan Jean King, kentucky.com announced in August 2020. King had sued then-Trooper Todd Harwood and other defendants in 2015. She contended they falsified evidence to gain her conviction. In the arrest warrant, the detective failed to note she “weighed 108 pounds and had only one leg and no prosthetic,” courier-journal.com reports, undercutting his claim that she killed her boyfriend, Kyle “Deanie” Breeden, by dragging him and throwing his 187-pound body off a bridge into the Kentucky river, according to kentucky.com. King served over six years in prison for the 1998 killing. She pleaded guilty to manslaughter in 2008 despite asserting her innocence. Her charges were dismissed in 2014, two years after Richard Jarrell allegedly confessed to the killing, media news report. “The Kentucky Court of Appeals vacated King’s conviction after she had been released from prison on a 10-year sentence, calling it an ‘egregious violation’ of justice, and prosecutors in Spencer County decided not to retry her,” courier-journal.com reports. In addition, Jarrell later recanted his confession, though the lead investigator was accused of forcing it, according to a separate lawsuit.” In a settlement, State Police agreed to pay $750,000 in damages, WDRB-TV reports, citing King’s attorneys.

Massachusetts: Three current and six retired Boston police officers face charges after being accused of overtime pay fraud at an evidence warehouse, CBS Boston reports on September 2, 2020. Said U.S. Attorney for the District of Massachusetts Andrew Lelling: “These officers are charged with stealing taxpayer money, year after year, through fraud. Beyond the theft of funds, this kind of official misconduct also erodes trust in public institutions, at a time when that trust is most needed.” According to lawandcrime.org reports, retired officers charged include: “Sergeant Gerard O’Brien, 62; Sergeant Robert Twitchell, 58; Officer Henry Doherty, 61; Officer Diana Lopez, 58; Officer James Carnes, 57, Officer Ronald Nelson, 60. The current officers, who have been suspended without pay pending the outcome of the case: Lieutenant Timothy Torigian, 54; Officer Michael Murphy, 60; Officer Kendra Conway, 49.” The officers are accused of turning in “false and fraudulent overtime slips” and are said to have “collectively embezzled over $200,000 in overtime pay” between May 2016 and Feb. 2019. “At the same time, the Boston Police Department was receiving more than $10,000 per year in federal grants (that was from 2016 to 2018).”

New Mexico: Las Cruces will pay $6.5 million to the family of Antonio Valenzuela, who died in February 2020 during a traffic stop by Las Cruces police, CNN reports. The now-fired officer, Christopher Smelser, who faces a second-degree murder charge, “allegedly used a vascular neck restraint on Valenzuela, a maneuver which has since been banned by the department during apprehensions,” CNN reports. After Valenzuela was pulled over, police learned he had a warrant for a parole violation, the Doña Ana County District Attorney’s Office stated. Valenzuela fled on foot and police chased him and deployed a Taser twice ‘without affecting him,’ a district attorney’s news release states. “Body-camera footage released by authorities appears to show Smelser tackling Valenzuela.” In addition, “Smelser was heard saying, ‘I’m going to F*cking hell you out, bro.’” The victim “died from ‘asphyxial injuries due to physical restraint,’ and methamphetamine was listed as a significant contributor to his death, the Office of the Medical Investigator ruled.” Paramedics attempted to save Valenzuela but could not, the district attorney’s office said. The city of Las Cruces, which denies liability, notes that “The police department has never authorized, provided training, or implemented a policy that allows the use of choke holds and has prohibited the use. The use of vascular neck restraint, which is not a choke hold, was prohibited by policy by the former chief of police. It is well established law that police officers are already required to intervene in instances where another officer violates a person’s civil rights.”

Maine: More than 50 bills that passed committees are ones that would eliminate cash bail for many low-level crimes, reduce the number of kids in juvenile justice, and “help community services keep people experiencing a mental health crisis out of jail,” said Rep. Charlotte Warren’s (D-Hallowell), House chairwoman of the criminal justice committee, who’s been working a long time on this. Among the pressing items on Warren’s list are a bill to reform the county jail funding system, a bill to reduce the population at the troubled Long Creek Youth Development Center, a measure aimed at drug sentencing reform and one supported by all prosecutors in the state to help reduce court caseloads. “If the session does not resume, the process would begin anew.” It would be a real shame to not go back and have to start the process all over again in January. There was a lot of hard work that went into the bills, and a lot of negotiating and compromise,” said Meagan Sway, policy counsel with the ACLU of Maine.

Maryland: Video that showed Baltimore cop Leon Riley wrapping an arm around a suspect’s neck in 2019, has raised eyebrows and brought him charges of assault, reckless endangerment and misconduct in office. “In the video, the man can be heard saying, ‘You choking me. You choking me, sir,’ heraldmedia.com reports. “Prosecutors wrote in the indictment that the 29-year-old now-suspended officer did recklessly engage in conduct, to wit: restricting the breathing of a citizen, that created a substantial risk of death or serious physical injury.”

Nebraska: A woman who was arrested in November 2016 during a domestic disturbance call filed a federal lawsuit under a pseudonym, alleging the “Lincoln County Sheriff’s Office committed misconduct and rape” at the jail, Lincoln News Now reports. “Once she arrived in the booking area, she claims she was thrown on the floor, Tased, and left in a restraint chair for hours. After that, she says, she was taken to another room and raped by multiple unnamed employees of the sheriff’s department and then taken to a cell,” Lincoln News Now reports. Her lawyer has complained he has been unable to obtain jail video. The sheriff’s office has denied the accusations.

Nebraska: Hilario Velasquez of Lexington, is suing, along with his sister Sarah Garrett, Cozad police Sergeant John Peden and the city of Cozad for excessive force and failure to properly train law enforcement staff. The lawsuit in federal court, filed in August 2020, says Peden tased Velasquez during an encounter in his sister’s backyard. According to the Lincoln Journal Star: Velasquez was sitting on a swing empty-handed. Peden, accompanied by another
News In Brief (cont.)

officer walked in and demanded to know where their brother was. "It wasn't clear why police were looking for their brother," journalstar.com reports. "Cozad Police Chief Mark Montgomery wouldn't say and declined to comment on the lawsuit. But a 50-second video clip shows what happened next. When Peden told Velasquez he had to leave, Velasquez said they weren't looking for him, and he didn't have anything to do with it. 'Just get up and leave,' Peden told Velasquez, Peden pointing a Taser at him. 'No, my son's in there,' Velasquez said, motioning to the house, a second before Peden shocked him, then kept verbally pressing. 'Get up.' Officers accused the siblings of harboring a fugitive. Velasquez went to jail; his sister was ticketed, but neither ended up being charged.

Tennessee: Three officers in Nashville who wrongfully raided the home of an innocent family on August 18, 2020, have been suspended and an investigation is underway, CNN reports. "The officers who've been decommissioned announced themselves, then began using a battering ram as they executed a warrant in search of evidence connected to a teenager wanted in a property crimes investigation," CNN quoted Interim Police Chief John Drake. "They were not there for a violent criminal or drug raid, he added." Officials later learned the 16-year-old suspect had not lived at that address in several months. The information the officers received was 'stale,' Drake said, and the department failed to do surveillance. "We have to be better than that, and I absolutely assure you, we will be moving forward," he said. All search warrants must now be approved by a deputy chief, he announced, and crime suppression teams will receive extra training.

Utah: Some Black Lives Matter protesters face felony criminal mischief charges, which carry a gang enhancement, the St. George News reports. They "could face up to life in prison if they're convicted of splashing red paint and smashing windows during a protest, a potential punishment that stands out among demonstrators arrested around the country and one that critics say doesn't fit the alleged crime," the St. George News reports. Prosecutors defended the charges, saying "the protesters worked together to cause thousands of dollars in damage." However, "watchdogs called the use of the 1990s-era law troubling, especially in the context of criminal justice reform and minority communities."

Washington: The Seattle Police Department ("SPD") placed a sergeant on leave after

he drove on a sidewalk and allegedly compared protesters to cockroaches, seattle-times.com reports. Videos posted online in August 2020 show the incident. According to the news site: "He appears to complain about Seattle and efforts to cut SPD's budget, saying he used to love Seattle 'but now the city is dirty and gross,' but that 'they pay me like 200-grand a year to babysit ... these knuckleheads every night because they smash up all the businesses.'" A source in the SPD identified the officer as Michael Tietjen, seattle-times.com reports.

Washington, D.C.: Former FBI attorney Kevin Clinesmith pleaded guilty in August 2020 to one felony count of making a false statement, namely altering the text of an email from another official in order to continue surveillance of Carter Page in the 2016 investigation of suspected collusion between the Trump campaign and the Russian government, national media report. Clinesmith was accused of doctoring a document to help justify surveillance of [the] former Trump campaign adviser as part of the 2016 investigation," The Washington Post reports. Clinesmith had been "working on the early Russian investigation into Page and other Trump-connected advisers, then known as Crossfire Hurricane." Page was never charged with wrongdoing.

Wisconsin: Demonstrations over the August 23, 2020, police shooting of Jacob Blake, an unarmed 29-year-old Black father, in the city of Kenosha, drew national attention as thousands of largely peaceful protesters took to the streets and fires destroyed businesses. On the 23rd, Blake was shot in the back multiple times after police responded to a domestic incident. Three officers attempted to arrest him and two deployed Tasers attempting to subdue him, the Kenosha News reported. "As Blake leaned into his vehicle, Kenosha Police Officer Rusten Sheskey, who was holding his shirt, fired his weapon seven times, striking Blake in the back. Blake was left paralyzed by the shooting, according to his family." Meanwhile, Blake’s children — ages 3, 5 and 8 — were inside the SUV, said family attorney Benjamin Crump. "Crump said Blake was attempting to de-escalate a fight between two other people when officers arrived at the scene, drew their weapons and tased him," cbsnews.com reports. At press deadline, Blake was in serious condition. From his hospital room on September 4, he made his first court appearance via video to charges from a domestic abuse case in May, including third-degree sexual assault and misdemeanor counts of disorderly conduct and criminal trespassing. Defense attorney Patrick Cafferty entered a not guilty plea on his behalf.

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