Police Unions: Obstacles to Criminal Justice Reform and Police Accountability

by Douglas Ankney

This article examines how police unions have used their contracts or Collective Bargaining Agreements ("CBA") and lobbied for special legislation known as the Law Enforcement Officers Bill of Rights ("LEOBR") to create a system of special protections for police officers that are tantamount to an alternate, internal justice system that simultaneously shields bad cops and stalls reforms that would hold those officers accountable. Such a system allows individuals unfit for duty to engage in further official misconduct who should have been disqualified from serving as a sworn law enforcement officer. The current system will continue to erode public confidence in both the front-line officers and those charged with overseeing them.

Special Privileges That Shield Corrupt Cops

On October 20, 2014, a White Chicago police officer shot and killed a 17-year-old Black man named LaQuan McDonald. Five officers at the scene, including the shooter, said that McDonald had been slicing tires with a three-inch knife. According to these officers, when they arrived on scene, McDonald began waving the knife in an “aggressive, exaggerated manner and lunged at them,” forcing one officer to shoot and kill the teen in self-defense.

Two months later, Craig Futterman from the University of Chicago and Jamie Kalven of the Invisible Institute announced that an anonymous whistleblower had informed them of a police dashboard video that would cast the shooting in a completely different light. They also found a civilian witness to the shooting who said that police “shooed witnesses away” after the shooting. And in May 2015, the manager of a nearby Burger King told the local news that immediately after the shooting, police officers deleted all the restaurant’s surveillance video footage from the time period surrounding the incident.

Finally, in November 2015, a state court ordered the release of the dashcam video in response to freelance journalist Brandon Smith’s Freedom of Information Act request. The video showed the teenager walking away from officers with the knife at his side in his hand furthest from the officers. All avenues of escape were blocked by officers’ vehicles, and no civilians were within his reach. Officer Jason Van Dyke is seen exiting his patrol car. He takes a step toward McDonald and shoots him in the abdomen. McDonald immediately falls to the ground. Van Dyke then unloads his clip into the teen’s body, firing 16 rounds in 14 seconds as “white puffs of smoke become visible.”

Based on the video, Van Dyke was charged with murder. It was discovered that he had been named in more civilian complaints than 96.7% of all Chicago police officers since 2001. Of 20 citizen complaints against him, 10 of them alleged he used excessive force, two involved the use of a firearm, and one claimed he used racial slurs. A jury awarded one of his victims $350,000 after finding that Van Dyke “employed excessive force during a traffic stop.”

Shockingly, the Chicago Police Department had never pursued disciplinary action against Van Dyke or even flagged his behavior as being a problem. Instead, four officers lied on his behalf to cover up a murder. And one or more officers sent witnesses away and deleted the surveillance video footage. How did this happen?

Illinois, like at least 40 other states, permit police officers “to bargain collectively with regard to policy matters directly affecting wages, hours, and terms and conditions of employment.” 5 ICSA § 315/4. Courts have interpreted phrases such as “terms and conditions of employment” to allow or require police management to negotiate the internal procedures used to investigate and punish officers suspected of misconduct. See, e.g., Union Twp. Bd. of Trs. v. Fraternal Order of Police, Ohio Valley Lodge No. 112, 766 N.E.2d 1027 (Ohio 2001).

The parties to these negotiations are usually the government entity charged with managing the particular police agency (e.g.,
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the state, city, county, township, etc.) and the unions representing the officers. The contracts negotiated between the parties are commonly referred to as Collective Bargaining Agreements or CBA.

Additionally, Illinois is one of at least 16 states that has a Law Enforcement Officer Bill of Rights or LEOBR. The LEOBR is a statute passed by the state legislature. As discussed below, it is the special privileges contained in these CBA and LEOBR that prevent the discipline and removal of officers like Van Dyke, resulting in ongoing abuses, even murders, of the public by dangerously unfit officers.

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the U.S. Supreme Court ruled that when a state creates an expectation of employment, the public employee has a property interest in keeping that employment. The employee may not be terminated for misconduct without a prior hearing. The hearing must comport with due process, requiring notice and an opportunity for the employee to respond to the accusation. But police-union CBA and LEOBR grant police special privileges during the disciplinary process not available to other public employees.

Stephen Rushin, assistant professor from the University of Alabama School of Law, conducted an in-depth review of the LEOBR from 16 states and 178 CBA with police departments from American cities with populations of 100,000 or more. The CBA are estimated to cover approximately 41% of all of America’s “frontline police officers,” a term excluding ranking officers such as sergeants, lieutenants, captains, etc. The states with a LEOBR employ roughly 37.4% of all municipal officers.

Rushin identified seven provisions that are commonly found in the LEOBR and CBA that shield or protect frontline officers suspected of engaging in misconduct from being held accountable. He characterized these seven provisions as: (1) Delays Interview, (2) Provides [Officer] Access to Evidence Before Interview, (3) Limits Consideration of Disciplinary History, (4) Limits Length of Investigation or Establishes Statute of Limitations, (5) Limits Anonymous Complaints, (6) Limits Civilian Oversight, and (7) Provides for Arbitration. At least one of these provisions was found in about 88% of the CBA and in 13 of the 16 LEOBR.

The most unjustifiable provision is number (1), Delay of Interviews. Rushin found that 50 of the CBA have a required waiting period before an officer suspected of wrongdoing may be interviewed. The delay privilege is also found in seven of the LEOBR.

In Illinois, after an incident or complaint of possible misconduct (such as use of excessive or lethal force), investigators must wait 48 hours before questioning any officer involved in the incident or questioning any officer who may have witnessed the incident. This waiting period is allegedly for the purpose of allowing officers to secure either the presence of an attorney or a union representative. In Maryland’s LEOBR, this waiting period is five business days (and it can be extended by the police chief). And in Louisiana’s LEOBR, it is a whopping 30 days.

Police unions have also argued these periods are necessary as “cool-down periods” on the premise that officers are under tremendous stress, and the cool-down period is necessary to enable the officer to better recollect what happened during the incident in question. But the scientific evidence does not support this theory.

Critics of these provisions argue that the only logical purpose is to give officers time to invent a cover story to evade accountability for wrongdoing. And it would appear the critics have the more plausible explanation.

According to Professor Rushin, it is a “best practice” for investigators to question officers involved in shootings or other incidents of possible misconduct as soon as possible because any delays in questioning may impair the ability to uncover what happened. This is supported by a report authored by Aziz Z. Huq and Richard H. McAdams from the University of Chicago Legal Forum. They write that the 1999 and 2003 guides to the collection and use of eyewitness evidence prepared by the Department of Justice, under different Attorneys General, advise: ‘Plan to conduct the interview as soon as the witness is physically and emotionally capable.’ The 2003 guide explicitly explains: “Once the witness is capable, any delay in conducting the interview should be minimized as there will be less detailed information as time goes on.” According to Huq and McAdams, “[t]he National Forensic Science and Technology Center similarly advises that ‘[t]he timely interviewing of witnesses is crucial to the solution of a crime. Witnesses to crimes must be identified, secured, [and] questioned at the scene.’”

All individuals involved in the incident
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should be separated immediately to prevent officers from conspiring to create a story that exonerates all officers of misconduct. Another reason for separation is so that each person will give an independent account, i.e., if one witness hears other witnesses giving an account that is different from his or her personal recollection, he or she may give an altered account simply to corroborate that given by the other witnesses.

Federal consent decrees in Los Angeles, Seattle, New Orleans, and Albuquerque bear this out. Those decrees require independent investigators to report to the scene of a serious use of force as soon as possible. Witnesses are separated and investigators take statements from the involved officers and witnesses while at the scene of the incident.

In Illinois State Police v. Fraternal Order of Police Troopers Lodge No. 41, 751 N.E.2d 1261 (Ill. App. Ct. 2001), the police union argued that the delay period required in the CBA applied not only to internal investigations of officer misconduct but also to investigations of officers suspected of criminal conduct. The Illinois Court of Appeals ruled that interrogation delays "contravene [the] internal affairs division's 'ability to investigate crimes' because the division 'presented the undisputed testimony that the element of surprise is very important in conducting a criminal interrogation.' The same principle should hold true when investigating police misconduct that may not be criminal.

In cases of suspected use of excessive force, it would not be readily clear if it were a criminal investigation. That is, if the amount of force is not justified, then it is either the crime of assault and battery or homicide. Yet these investigatory delays apply before any determination can be made of whether a lawful amount of force was employed.

Professor Rushin’s provision (2) that requires suspected officers be provided the evidence before they are interviewed is also very disturbing. The CBA between the city of Miami, Florida, and the Fraternal Order of Police, Miami Lodge No. 20 requires that before an officer suspected of wrongdoing may be interviewed all identifiable witnesses must be interviewed beforehand, and the officer must be given "all witness statements, including all other existing subject officer statements, and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recordings relating to the incident under investigation.” It would be inconceivable to most police officers if they had to provide this evidence to a criminal suspect before interrogating him or her.

What plausible reason can be put forth to justify such a provision? Is it to allow a false story to be concocted that comports with the available evidence?

 Provision (3), limiting consideration of an officer’s disciplinary history, was present in 87 of the CBA and in two of the LEOBR examined by Professor Rushin. For example, in 2018, the CBA between the city of Cleveland and the Cleveland Police Patrolmen’s Association provided that if an officer is suspended for disciplinary reasons that suspension cannot be considered at any future disciplinary hearing if the suspension was three or more years in the past.

And in many CBA, disciplinary records are destroyed. Honolulu’s contract specifies that all disciplinary records be removed from an officer’s personnel file after two years and destroyed after four years. In Baton Rouge, complaints of sexual misconduct or harassment are destroyed after five years. In Cincinnati, records of officer misconduct resulting in a suspension of up to 30 days are kept for only three years, but records of disciplinary suspensions lasting longer than 30 days “may be” kept “up to five years.”

Such provisions shield officers engaging in a pattern of abusive, unconstitutional, and even criminal conduct from being detected. Further, if an officer is suspended for using excessive force and is then found guilty of using excessive force a second time, basic principles of fairness require that the earlier incident ought to be considered when deciding the penalty for the current infraction. Is that not the same principle of justice behind criminal statutes that provide increased penalties for repeat offenders such as “driving under the influence, second offense?” Is that not why courts review a defendant’s presentence report?
and consider any prior criminal convictions?

Professor Samuel Walker of the University of Nebraska at Omaha explains how destroying disciplinary records prevents officer accountability: “Early Intervention Systems (EIS) have emerged as a ‘best practice’ in law enforcement over the past twenty years. EIS are included in all of the settlements (consent decrees, memoranda of agreement, negotiated settlement agreements) negotiated by the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice. An EIS is a computerized data base of officer performance. It includes anywhere from five to 25 performance indicators (e.g., uses of force, citizen complaints, resisting arrest charges, being named in a civil suit against the department). An EIS includes all citizen complaints and all reported uses of force regardless of the outcome of the department investigation of each incident. The basic principle is that an EIS should capture the most complete picture of an officer’s performance. Most citizen complaints are not sustained, but it is a revealing indicator of an officer’s performance if an officer receives complaints at a much higher rate than peer officers. Meaningful police accountability requires as full a picture of an officer’s performance record, and any procedure for expunging records is an impediment to accountability.”

Professor Rushin identified limitations on the length of investigations of complaints (provision (4), above) as being problematic to holding officers accountable. While it is easy to see why an officer has a right to a timely investigation and disposition of any allegations against him or her, some of these limitations on investigations are absurdly short. In Anchorage, Alaska, internal investigations of civilian complaints must be completed within 45 days. In Lincoln, Nebraska, complaints alleging misconduct more than 45 days earlier cannot be investigated. In Columbus, Ohio, it is 90 days. In San Antonio, Texas, and Seattle, Washington, it is 180 days. These are but a few examples.

But Professor Rushin also included in provision (4) contracts that establish a statute of limitations on complaints. Again, the reasonableness of requiring complaints to be filed within a certain time from when the alleged misconduct occurred is clear. Primarily, the task of identifying and locating witnesses is affected by delay in reporting misconduct. Additionally, delay will affect a witness’ memory. But some instances of police misconduct do not even become known until after a statute of limitations has run. As an example, between 1972 and 1991, Chicago Police Commander Jon Burge and his “midnight crew” tortured over 100 people in Chicago’s impoverished South Side with electric shocks, beatings, smotherings, and simulated Russian roulette. Burge was fired in 1993 but remarkably not because of his decades of horrific violence. As evidence of his misconduct began to come to light, Chicago could not investigate because the CBA required that misconduct occurring more than five years earlier could not be investigated. (This became known as the “Burge rule.”)

Another troubling provision found in 32 of the CBA and four of the LEOBR is that of limiting anonymous complaints. Some CBA require the complaint to be in the complainant’s own handwriting and accompanied with a sworn affidavit. Often, victims of assault by officers are afraid to report for fear of retaliation by that officer or by his colleagues. Undocumented immigrants fear legal repercussions from reporting. In these cases, police misconduct goes unreported. If an anonymous complaint provides adequate

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details of misconduct and names potential witnesses, why shouldn’t it be investigated? Anonymous tips are often sufficient to investigate private citizens for potential criminal conduct. Why shouldn’t they similarly be sufficient to investigate allegations of official misconduct by police?

Another type of provision Professor Rushin found in 41 of the CBA and three of the LEOBR related to limiting the power of civilian oversight boards. As early as 1928, the Los Angeles Committee on Constitutional Rights urged that private citizens should examine citizen complaints. One of the first national reports to identify and discuss police misconduct as a nationwide problem was the Wickersham Commission Report, which recommended that police departments establish civilian agencies to help victims of police misconduct file complaints.

However, it was not until recently that civilian review boards (“CRB”) began to notably increase – from 13 in 1980 to around 70 in 1995. One estimate in 2003 claimed CRB existed in some form in around 80% of large police departments in the U.S.

But police unions have used CBA to block the ability of CRB to oversee police discipline. In fact, as explained below, police unions did not begin to resurface and reach political prominence until the 1960s, and opposition to civilian review was one of its chief rallying cries.

In Cleveland’s CBA, the civilian Police Review Board is prohibited from exercising any disciplinary power. In San Antonio, the Citizen Advisory Action Board is limited to making only advisory disciplinary recommendations and may not undertake any independent investigations of police misconduct. In Austin, only the Chief of Police decides the appropriate discipline, and no member of the civilian panel may publicly agree or disagree with the chief’s decision. These are but a few examples.

But one of the most troubling provisions found in 115 of the CBA examined by Professor Rushin relates to disciplinary decisions being subjected to arbitration. In general, arbitration is beneficial in the context of the public employee grievance process. Primarily because most public employees are prohibited by law from engaging in a strike, arbitration provides a forum to adjudicate perceived abuses and unfair treatment. But the manner in which arbitration serves to keep unfit police officers on the street to the peril of the public is a genuine travesty of justice.

As discussed above, for a host of reasons, many complaints against police are not even investigated. If a complaint is investigated, rarely is it determined to be “founded” or “substantiated.” An examination of 56,384 complaints of officer misconduct against police from the Chicago Police Department (“CPD”) from 2001 through 2015 revealed that the CPD determined 95.34% of those complaints were unsubstantiated and required no action. It is a rare occurrence for a complaint to result in disciplinary action. And if a penalty is imposed upon the officer found guilty of misconduct, the officer may appeal or grieve the decision to an arbitrator. Unbelievably, the arbitrator is often an attorney selected either by the union or by the officer who has been convicted of misconduct. The arbitrator’s decision is final. And in almost every case, the penalty that was meted out to the officer found guilty of professional misconduct is reduced or reversed.

According to a December 2, 2014, report from theatlantic.com, of the then most recent 15 arbitration cases in Oakland, California, where officers had appealed their punishments, the punishments were revoked in seven cases and reduced in five others. In Minnesota, where officer Derek Chauvin is accused of killing George Floyd, almost half of all officers who are fired because of egregious misconduct are reinstated after they appeal. In 2017, then-Oklahoma City Police Chief Bill City indicated that about 80% of penalties imposed against officers for misconduct are reduced or revoked in arbitration. Arbitrators often reduce or revoke penalties based on precedent. If an officer found guilty of misconduct can show that his penalty is more severe than the discipline received by another officer for the same misconduct, the rule is that the current officer cannot be punished more severely.

In an August 2017 report from The Washington Post, it was revealed that since 2006 America’s largest police departments had fired at least 1,881 officers for misconduct. Those departments were ordered to rehire 451 (24%) of them. At least 33 of those rehired had been charged with criminal offenses, and 17 had been convicted. The records of the firings/rehirings were from 37 police departments, and all 37 had one thing in common: a police union contract that guaranteed an appeal of disciplinary decisions.

In 2005, Boston Police Department (“BPD”) Officer Balthazar DaRosa was arrested for being drunk and disorderly at a nightclub but was released after being taken to the police station. Three months later, DaRosa drove his cousin away from that same club after the cousin shot and killed a man in the parking lot. The cousin has never been apprehended. The BPD fired DaRosa in 2010, saying both events at the club violated department policy. DaRosa appealed, and the arbitrator overturned the firing. The BPD was forced to rehire DaRosa in 2012 and pay him $50,111 in lost wages.

Since 2006, arbitrators have ordered Washington, D.C., to rehire 39 officers. More than half of these rehirings were ordered because the arbitrators concluded the department had missed a deadline during the internal investigation. One of those officers,
Michael Suggs-Edwards, was fired after being convicted of sexually abusing a 19-year-old woman in his patrol car. In 2015, an arbitrator ordered that Suggs-Edwards be rehired.

In Oakland, California, officer Hector Jimenez shot and killed an unarmed man. Seven months later, he killed another unarmed man, shooting him three times in the back as he ran away. The city of Oakland paid $650,000 to the dead man’s family and fired Jimenez. After Jimenez appealed through his police union, he was reinstated and awarded back pay.

Usually, it is the police chief who orders the firings that are later overruled by arbitrators. “It’s demoralizing, but not just to the chief,” said Charles H. Ramsey, former Washington, D.C., chief of police. “It’s demoralizing to the rank and file who really don’t want to have those kinds of people in their ranks. It causes a tremendous amount of anxiety in the public. Our credibility is shot whenever these things happen.”

**Accountability Roadblocks**

In May 2015 — in the wake of the killing of Freddie Gray while he was in the custody of Baltimore police officers — Professor Samuel Walker produced a report titled “Impediments to Accountability” wherein he analyzed the contract between the city of Baltimore and Baltimore City Lodge No. 3, Fraternal Order of Police Unit 1. His analysis also included the LEOBR of Maryland.

Professor Walker first explained it is “completely unreasonable” that an officer cannot be questioned for 10 days (now amended to “five business days”) following an incident requiring an investigation by the department. As mentioned earlier, the alleged purpose for the five-day delay is to allow involved officers to secure representation before questioning. But Professor Walker observed that a union representative is available almost immediately after the incident and referenced a widespread joke that the police union representative arrives on the scene before an investigator from internal affairs does.” Professor Walker then cited how the delay contravenes “best practices.” He concluded that the mandated delay is unreasonable and unacceptable.

Professor Walker also took issue with the LEOBR’s provision that an officer can be interrogated only by another sworn officer. This prevents the creation of an independent CRB as exists in Washington, D.C., San Francisco, and New York City where citizen complaints are investigated by members of the public who are not sworn officers. The provision “is an impediment to citizen oversight of the police and an obstacle to building legitimacy and trust in the police as recommended by the President’s Task Force on 21st Century Policing,” according to Professor Walker.

Paragraph 3.106.1 of the LEOBR is another provision that shields unfit officers from accountability. While the provision requires law enforcement agencies in Maryland to maintain a list of officers “who have been found guilty or alleged to have committed acts which bear on credibility, integrity, honesty, or other characteristics that would constitute exculpatory or impeachment evidence,” at the same time, it prohibits demotion, dismissal, suspension without pay, or a reduction in pay for officers placed on that list. An officer who is determined to have committed acts that demonstrate he or she has problems related to “credibility, integrity, or honesty” should not be allowed to continue on a police force. Law enforcement officers may arrest, detain, and use force — even lethal force. These powers granted to officers demand the highest in moral character and ethical
behavior. How can a police department have officers with impaired credibility, integrity, and honesty that makes them unfit to even testify in a courtroom - and have so many of these tainted officers that it necessitates the keeping of a list? How can the public have any faith in such a police department? (In August 2020, the Maryland State Attorney at Baltimore, Marilyn J. Mosby, identified a whopping 305 officers “with integrity issues or allegations of integrity issues that would in essence put them in jeopardy from testifying.”) Why are these officers still carrying a gun and a badge? Maintaining them on the force “is an impediment to police accountability and serves to undermine public trust and confidence in the police.”

The Baltimore contract also states that notice of disciplinary actions may not be made public. This inhibits transparency and erodes any public confidence that the police department is disciplining officers for misconduct. Citizens have a right to know how an officer of excessive force – was disciplined. In most – perhaps all – states, the discipline of lawyers and medical professionals is made public. Those employees generally work for private agencies and certainly are not authorized to use force against the public. Why should police officers, who are public employees, be treated differently?

Paragraph 3-104(c) of Maryland’s LEOBR requires all complaints alleging brutality to be signed and sworn to by either the aggrieved party, a member of that party’s family, or a person with firsthand knowledge of the incident. All such complaints must be filed within 366 days of the incident. If a complaint does not comply with these provisions, an investigation that may lead to disciplinary action is prohibited. This prohibits anonymous complaints and complaints made by phone or email. What if injuries from excessive force prevent a complaint being filed within 366 days?

Reuters examined 82 police union contracts of large cities across the U.S. in 2017 and found that 20 cities allow officers found guilty of misconduct to substitute sick leave, holiday, or vacation time in lieu of suspensions. And according to the Police Union Contract Project at checkthepolice.org, 40 cities and three states have agreements indemnifying officers, requiring cities to pay all costs related to misconduct – including all legal fees and settlements.

One of the goals of suspensions is similar to fines. A financial loss is meant to “hurt,” in order to correct errant behavior. But allowing officers to substitute vacation days or holiday time in lieu of suspension defeats this purpose. Additionally, when a civil suit results in a judgment against an officer or officers for egregious misconduct, the size of the award and attendant attorney fees should prompt changes in that police department. This is especially true if punitive damages are awarded. But when the city (or rather the insurance company as in most cases) pays these judgments, neither the involved officers nor the department is affected financially, so there’s no tangible incentive to change behavior and practices.

Control and Conformity

According to Wesley Slogan, author of Why Reform Fails, police managers “worry about laziness, corruption, racial profiling, and excessive force, and they do not trust rank-and-file officers on any of those dimensions.” Police administrators tend to be obsessively preoccupied with control and conformity of the rank-and-file. But police work inevitably requires discretionary judgment on the part of officers. And this means rules cannot always be followed.

Often, general rules do not provide meaningful guidance. This opens the door to rules not being consistently enforced. One officer is punished for violating a rule while another officer is not. Rank-and-file officers see this as arbitrary and discriminatory. This is the primary reason the relationship between rank-and-file officers and management is dominated by feelings of mistrust and uncertainty. Front-line officers believe discipline is meted out, not because of misconduct, but based on how well an officer is “liked” by upper management, whether the officer has criticized the chief or the department, and other personal opinions on matters not related to the alleged misconduct. To many rank-and-file officers, upper management is illegitimate, seeking to blame others when things go wrong.

For reasons discussed below, these officers also feel that the public is against them. They believe that people do not understand what they face each day or what they are up against.

Upper management pushes for an aggressive style of policing, especially in the era of the War on Drugs. When officers behave as “warriors” to carry out this style of policing, things go wrong, and management and the public blame the officers. Officers are evaluated on the number of arrests made, quantity of contraband seized, number of tickets/citations written, and similar quantitative metrics. All that matters in some departments is number of arrests, etc. One officer complained, “You don’t get recognized and rewarded for helping a homeless person get permanent housing, but you get recognized for arresting them again and again and again.”

According to Saki Knafo in “A Black Police Officer’s Fight Against the N.Y.P.D.”, the era of so-called “broken windows policing” was based on the idea “that police would cut down on serious crimes by making it clear that even trivial ones wouldn’t go unpunished.” Rank-and-file officers were ordered to indigent neighborhoods predominantly populated by people of color.

For example, in predominantly Black Bedford-Stuyvesant, officers issued more than 2,000 summonses a year between 2008 and 2011 to people riding their bicycles on the sidewalk. But in predominantly White Park Slope, an average of eight tickets a year were written for the same offense. When these racial inequities were uncovered, it was the rank-
and-file who were held primarily to blame.

Negating themselves, with some justi-
fication, to be under attack by upper
management and by the public, the rank-and-
file generally behave as a tightly knit group of
officers fiercely loyal to one another. This tends
to promote an “us against them” worldview.
The dynamic has been referred to as “the blue
wall of silence” and “the blue line.”

The rise of police unions began with
the rank-and-file. In the late 1800s and early
1900s, workers in every industry, including
police, sought unionization to improve pay
and working conditions and to gain some
control over their work lives. In 1919, Boston
police worked shifts of up to 17 hours per
day, working from 73 to 98 hours per week.
They had to buy their own uniforms, which
in some cases was almost 10 percent of their
annual pay. From 1898 until 1913, they did
not receive any pay raise even though the cost
of living doubled during the same period.

In August 1919, Boston police formed a
union affiliated with the American Federation
of Labor (“AFL”). The chief of police then sus-
pended 17 union leaders. The following day,
nealy 75% of Boston’s police officers walked
out in protest. Violence and looting ensued.

Governor Calvin Coolidge sent in troop-
ers who fired into the crowd, killing nine and
wounding 23. It stopped the looting. But it
also brought the collapse of AFL-affiliated
police unions and created a backlash against
unionization of government employees in
general.

Police unions did not make a comeback
until after World War II. In addition to local
unions in various cities, some affiliated with
the American Federation of State, County,
and Municipal Employees founded in 1915
and the national Fraternal Order of Police
founded in 1932. States began passing laws
permitting collective bargaining by govern-
ment employees with Wisconsin being the first
to do so in 1959.

Unions gained a lasting foothold in
America’s police departments in the late 1960s
as rank-and-file officers believed they were
under attack. The Civil Rights Movement of
the 1960s criticized abusive police conduct,
often portraying police as a symbol of an un-
just society. The movement challenged racism
and police brutality. One common caricature
was to depict the police as “pigs.”

Students protesting America’s involve-
ment in Vietnam were often beaten and
clubbed by police. Police were shown on TV
clubbing young Black people marching for
basic civil rights. The Black Panther move-
ment practiced militant self-defense against
abusive police.

Community activists also pushed for
reform within police departments as a solu-
tion to community unrest. Protests against
excessive force were widespread.

For example, in July 1964, demonstra-
tions and protests erupted in Harlem after
a White police officer shot and killed Black
teenager. By 1966, 43 cities were the site of
protests over perceived police brutality and
racism, with burning buildings and looting.
Many cities sought to reign in their police
forces through CRB.

Police also perceived the federal courts’
new rulings about constitutional procedures
as an assault on law enforcement. In Mapp v.
Ohio, 367 U.S. 643 (1961), the U.S. Supreme
Court held that all evidence obtained by un-
lawful searches and seizures was inadmissible.
Three years later, the Supreme Court held in
Escobedo v. Illinois, 378 U.S. 478 (1964), that
statements made by a suspect during inter-
rogations after he had requested a lawyer
could not be used in any prosecution. Then

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Police Unions & Accountability (cont.)

in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that police had to both inform a suspect of his Fifth Amendment rights to remain silent and to counsel and honor those rights when invoked. Police, especially the rank-and-file, perceived these opinions as obstacles to their ability to investigate, arrest, interrogate, and fight crime.

At the same time, the rank-and-file had no protection against misconduct charges and punishment. They had no means to submit grievances to upper management. Unsurprisingly, they joined unions that fought for due process protections in CBA, lobbied for those protections in the LEOBR, opposed CRB, and argued against constitutional procedural reforms. The legacy of the 1960s is the CBA and LEOBR with disciplinary provisions that protect officers from accountability for misconduct, limit CRBs, and oppose reform efforts.

Union Opposition to Reform, Transparency, and Oversight

The Violent Crime Control and Law Enforcement Act of 1994, now codified at 34 U.S.C. § 12601, permits the U.S. government to prosecute civil suits against any government entity to enjoin and remedy any pattern or practices of unconstitutional policing committed by law enforcement agencies under the control of municipalities or states. First, the Department of Justice ("DOJ"), via the Attorney General, authorizes an investigation of a particular police agency's practices and procedures. If a pattern of misconduct is found, the DOJ is authorized to file a lawsuit. The suit can then either be settled through a consent decree where the government agency agrees to consent decrees.

But a troubling trend is emerging when the DOJ files suit against the government agency: The police union joins the suit as an intervener pursuant to Federal Rule of Civil Procedure, Rule 24. The union claims it has an interest at stake in the litigation and hinders reform efforts by blocking any reform in a consent decree that negatively affects any provision in the CBA. Union leaders do not see constitutional, lawful policing as their goal: the leaders believe their goal is to protect the interests of their members.

For example, in Cleveland, the CBA called for destruction of officer disciplinary records in as little as six months for minor infractions and up to six years for serious incidents. In 2015, a consent decree entered into between the DOJ and the city of Cleveland called for the city to “negotiate with the union” to have disciplinary records to be kept for 10 years. This provision still has not come to fruition because of union opposition.

What this means is the federal government is constrained by police unions when trying to initiate reforms to correct unconstitutional practices and procedures. Ayesh Hardaway of Case Western University School of Law examined the 26 consent decrees negotiated by the federal government via § 12601 since 1997. In only two of them is there any language indicating a DOJ stance that the terms of the decree took precedence over a conflicting CBA. The majority required the governing agency to work with the union to try to implement the decree.

A recurring problem caused by unions and the CBA is the practice of destroying disciplinary files after a few months or years. Lack of these records hinders the DOJ’s ability to investigate and uncover longstanding patterns and practices of misconduct. And it is small wonder that unions strenuously resist any effort to reform this practice.

Insignificant but necessary changes spark vigorous opposition. Before the consent decree, the Cleveland CBA required that citizen complaints against officers had to be in the complainant’s own handwriting with his or her signature. If the complainant was illiterate, it could be audio recorded. The consent decree of 2015 provided that the city would work with the union to revise the CBA to allow for electronic and telephonic complaints in addition to third-party and anonymous complaints. Union President Detective Steve Loomis voiced great dissatisfaction with the change and vowed to fight all terms of the decree that violated the union contract.

Unions strenuously resist efforts to make police departments more transparent. In "Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct," Katherine J. Bies of the Stanford Law School writes: "[C]ourts, activists, and scholars have offered two main arguments for why the public benefits from access to officer disciplinary files. First, the public has an interest in accountable and transparent decision-making by government officials. Second, providing public access to personnel files not only promotes public confidence in the ability of the police to police themselves but also builds greater trust and mutual respect between the officers and the community they have sworn to serve."

Yet police unions vigorously fight to keep officer disciplinary records hidden from public eyes. As discussed above, LEOBR and CBA call for the destruction of disciplinary files after short periods of time. But unions have not stopped there.

In 1968, the California state legislature passed the California Public Records Act ("CPRA") on the premise that the ability to access information about state officials was a "fundamental and necessary right of every person in [California]." In 1974, the California Supreme Court recognized that a criminal defendant has a right to discover the contents of police officers’ personnel files. The defendant in *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974), was charged with battery of a police officer. Arguing self-defense, the defendant requested discovery of the officer’s file to demonstrate prior use of excessive force. The Court reasoned that the defendant was “entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.”

In response to the Court’s decision, the Los Angeles Police Department (“LAPD”) shredded over four tons of police misconduct files to prevent defense attorneys and the public from gaining access to them. The scandal then prompted lower courts to dismiss charges because the prosecution and the LAPD had destroyed the records.
The police unions, in turn, pushed for the passage of SB 1436 (a.k.a. “Pitchess Law”). The purpose of SB 1436 was to make police officer personnel records confidential. Records may be obtained only by filing a “Pitchess motion.” The motion requires a specific showing that the records hold evidence of the officer’s dishonesty, theft, moral turpitude, or prior use of excessive force. If the showing is made, a judge examines the records to determine if any information will be released. If any information is released, the party who sought it cannot share it with anyone—including the public, the press, or even another party to the legal action.

California Attorney General Evelle Younger wrote to Governor Edmund Brown, “It [SB 1436] has the unanimous support of every major law enforcement association in California, and represents a substantial step forward in protecting the rights of law enforcement officers in this state.”

The California Highway Patrol Department argued: “Peace officers should be afforded the same rights to privacy as are private citizens. The recent proliferation of overzealous [criminal defense] attorneys attempting to dig into officers’ personnel records on the chance of finding some incident that can turn the heads of jury members, has established the need for this legislation.”

One police chief wrote: “The enactment of SB 1436 will solve many of the problems arising out of the ... [Pitchess decision] by prohibiting discovery of unfounded, anonymous, or outdated citizen complaints against peace officers. Such complaints could hardly be considered relevant to an issue at trial, yet the courts have been allowing discovery of such records. Even more distressing, the courts have been routinely dismissing cases involving offenses against a peace officer if the records sought are no longer in existence.” Isn’t it ironic that the chief would complain about the dismissals due to missing records when it was the LAPD that destroyed the records, forcing the courts to dismiss cases?

With the support of every major police union in California, it is no wonder SB 1436 passed unanimously in both houses of the state legislature in 1978. A parallel example is what happened in New York with the passage of section 50-a of New York Civil Rights Law.

In 1973, New York passed its Freedom of Information Law (“FOIL”). In People v. Sumpter, 347 N.Y.S.2d 670 (1973), the defendant was charged in a narcotics case. The defense subpoenaed the NYPD, seeking the “personnel records” of two officers. Since the evidence against the defendant would largely consist of the involved officers’ testimony, the Court ruled that the prosecutor must make available to the Court “any information in its possession or in the Police Department’s possession which might go to the issue of the defendant’s guilt, including evidence affecting the credibility of such officer.”

The unions immediately went on the offensive, culminating in the passage of § 50-a, which made all “personnel files ... confidential and not subject to inspection or review without the express written consent of such police officer, firefighter, firefighter/paramedic, correction officer ... except as may be mandated by lawful court order.” As with SB 1436 above, § 50-a prohibits the public and the press from accessing the disciplinary files or personnel records of police officers. The records can be accessed for purposes of legal proceedings. But this requires meandering through a series of procedural steps, and even then, the records are provided only to a judge who then makes available from the records only those portions believed relevant to the judicial proceeding.

In Copley Press, Inc. v. Superior Court, 141 P.3d 288 (Cal. 2006), the California Supreme Court extended the protections of SB 1436 to apply to records of an officer’s administrative appeal of sustained misconduct charges even when those records are maintained by someone other than the officer’s employer. In response to the Copley Press decision, activists sought the passage of SB 1019—“sunshine legislation” that would allow local governments to publicly disclose police disciplinary records.

Union opposition to SB 1019 was fierce, and in 2006, the bill died in committee. In 2007, it passed in the Senate, but owing to union opposition, it died in the Assembly committee. SB 1286 – another “sunshine bill” – died in committee in May 2016, again due to union opposition.

Police unions, many of which have multi-million-dollar budgets, oppose reform efforts that would hold officers accountable and make internal disciplinary procedures open to the public. Through political action committees to distribute campaign funds supporting sympathetic political candidates, elaborate computer systems to track bills in state legislatures, and hiring of professional lobbyists, police unions have developed well-organized political opposition to reforms. Additionally, police unions have used tactics such as organized strikes or “blue flu” epidemics, work slowdowns, and ticket-writing campaigns to force politicians to bend to their demands. Even though accountability and transparency are in the public interest, police unions argue that such measures are against the public good. For example, they claim making disciplinary records public will keep citizens from filing complaints due to fear of exposure. The unions also argue that exposure risks officer safety by exposing information to criminals. And they even argue that making the records public will
subject the officer to embarrassment, causing the officer to perform deficiently.

**Signs of Hope**

Finally, California passed SB 1421 that became effective on January 1, 2019. The law allows any member of the public to request, via the CPRA, law enforcement and prison guard records regarding officer-involved shootings, use of force leading to death or great bodily injury, and sustained complaints of sexual assault and dishonesty in reporting, investigating, or prosecuting a crime. And in June 2020, the Illinois Supreme Court ruled that the city of Chicago may not destroy records of misconduct that are more than five years old, despite a CBA provision that requires city officials to do so.

Activists are pushing to have police disciplinary procedures removed from collective bargaining. The Interim Report from the President’s Task Force on 21st Century Policing recommends drafting and implementing those procedures with the involvement of police management, rank-and-file officers, and the community.

Law Professor Deborah Ramirez of Northeastern University in Boston recently authored a paper arguing for mandatory liability insurance for police officers. She posits that the city could initially buy the policies. But officers whose misconduct made them a higher risk would see their premiums increase just as drivers whose reckless conduct causes their rates to rise. If the officer cannot afford the increased premiums, he cannot work as an officer.

Additional suggestions for reform include attempts to persuade unions that holding officers accountable and allowing transparency are not against the best interest of the rank-and-file. Discipline, including the removal of dangerous, unfit officers, serves to increase public trust and cooperation with officers. Surely all can agree — even police unions — that officers who engage in police brutality, abusive behavior, and official misconduct must be held accountable.

Sources: reuters.com; Katherine J. Bies, Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct; Stephen Rushin, Police Union Contracts; Samuel Walker, Impediments to Accountability; Ayesha Bell Hardaway, Time is not on Our Side: Why Specious Claims of Collective Bargaining Rights Should not be Allowed to Delay Police Reform Efforts; Aziz Z. Huq & Richard H. McAdams, Litigating the Blue Wall of Silence, How to Challenge the Privilege to Delay Investigation; checkthepolice.org; baltimoresun.com; Catherine Fisk & L. Song Richardson, Police Unions; washingtonpost.com; npr.org; abajournal.com; theatlantic.com; nytimes.com; DaigleLawGroup.com; capitolnewsillinois.com.

**Police Unions & Accountability (cont.)**

**Fourth Circuit Announces Discretionary Conditions of Supervision Must Be Orally Pronounced at Sentencing**

*by Anthony Accurso*

The U.S. Court of Appeals for the Fourth Circuit reversed and remanded for resentencing a case because the U.S. District Court for the Western District of North Carolina imposed 26 conditions of supervision as part of its written order, but had made no mention of supervision conditions at sentencing.

Cortez Lamar Rogers was one month into his term of post-release supervision in 2017 when he was busted during a controlled drug bust. He led officers on a dramatic high-speed chase, which ended after officers deployed spike strips to stop his vehicle.

In addition to his state charges, which included fleeing and eluding arrest, Rogers had his supervision revoked by the district court. He admitted to violating his supervision by committing a new crime, and he and the Government agreed on 24 months’ imprisonment at his sentencing for the violation.

The court then stated it would impose an “additional term of supervision of 12 months.” There was a brief discussion about whether Rogers needed drug or mental health treatment — both parties agreed he did not — and then the court ordered the proposed sentence imposed.

A defendant has the right to be present when he is sentenced. Fed. R. Crim. P 43(a) (3). District courts in the Fourth Circuit uphold this right by oral pronouncement at a sentencing hearing. United States v. Lawrence, 248 F.3d 300 (4th Cir. 2001). Since defendants are not present when the written judgment is entered, the oral pronouncement is controlling. United States v. Diggles, 957 F.3d 551 (5th Cir. 2020) (en banc).

The Fourth Circuit announced that district courts are required to either read the conditions aloud at sentencing or incorporate them from an earlier document made available to the defense prior to sentencing. This will give defendants an opportunity to object to any condition the defense believes is not derived from the court’s “individualized assessment of the defendant and the [statutory] factors.” Quoting United States v. Wroblewski, 781 Fed. App’x. 158 (4th Cir. 2019).

Indeed, the Court noted it would have been required to vacate Rogers’ sentence regardless of how it instructed courts to proceed because, “Many of the discretionary conditions listed in Rogers' written judgement are recommended by the Guidelines only under circumstances not present in this case or are not recommended by the Guidelines at all.”
Deal Presented by Kentucky Prosecutor Evidence of Effort to Smear Breonna Taylor

by Casey Bastian

Jamarcus Glover was offered a plea agreement on July 13, 2020, by Commonwealth attorney Tom Wine. Glover is a convicted felon with a history of drug trafficking. The plea would reduce the likely 10-year prison sentence on charges of criminal syndication, drug trafficking, and gun charges to mere probation.

What would Glover need to do to get such a sweet deal?

Simple. Implicate his ex-girlfriend as a participant in his criminal activities. Except his ex was 26-year-old Breonna Taylor, the emergency room technician killed in her home by Louisville police during a botched drug raid March 13 and during which time her then-boyfriend Kenneth Walker shot an officer. Glover would need to sign a statement alleging that Taylor was part of his “organized crime syndicate” as he “trafficked large amounts of crack-cocaine, methamphetamine, and opiates” in the Louisville area, according to a draft copy of the proposed plea agreement. Glover also had to allege that the “handling of all his money” was done by the person living in Taylor’s home.

Glover refused to implicate Taylor, stating, “There was nothing never there or anything ever there, and at the end of the day, they went about it the wrong way and lied on that search warrant and shot that girl out there.”

Wine did not initially respond to media inquiries for a comment. Many feel that the offer was an effort to assist police to avoid accountability in Taylor’s death. Her family lawyer, Sam Aguiar, describes the offer as demonstrating the lengths to which those within the police department and Commonwealth’s Attorney went to after Breonna Taylor’s killing to try and paint a picture of her that was vastly different from the woman she truly was,” adding, “The fact that they would try to even represent that she was a co-defendant in a criminal case more than a month after she died is absolutely disgusting.”

Evidence shows that officers executed the no-knock warrant at Taylor’s home. Her boyfriend, Kenneth Walker, opened fire as officers entered the apartment believing them to be intruders, striking Officer Jonathan Mattingly. Officers responded, and Taylor was shot five times, according to her death certificate.

The question remains: Why were law enforcement targeting the home of Taylor at all? Glover had been the primary target and had used Taylor’s address on bank statements. Glover was observed by police retrieving a package from the Taylor home and then driving to a “known drug house” in January. In addition to that information, the search warrant affidavit stated that Glover could be using the home to keep money and drugs; no money or drugs were found by police. After the raid, Glover did say in a jail call that Taylor had about $14,000.00 of his money. Only then did Wine state his office was aware of information, which included jail calls by Glover, implicating Taylor.

Ted Shouse, a Louisville-area criminal defense attorney, believes the strategy is to destroy Taylor “because she is destroying them. And they want Jamarcus Glover to do it for them because their efforts have failed. So they offer him a bribe, basically. All you have to do is smear her.”

Glover continues to deny any involvement by Taylor. Many believe that even if Taylor had been involved with Glover during his criminal activity, it would not justify what’s been done to her both during the raid and the Glover plea process. This is just one more example of an avoidable tragedy as the result of an abusive, unwinnable “war” on drugs. Now, it has become a war on the truth, too. How important can combating drug crimes be if law enforcement will plead it down to save themselves?

Source: courier-journal.com, reason.com, The Grio, WDRB.com

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Attacking the Guilty Plea: Waivers, Breaches, and Getting More Time After a Successful Challenge

by Dale Chappell

In this final column based on my book, WinningCites: Attacking the Guilty Plea, we’ll go over how plea waivers and breaches of plea agreements impact challenging a guilty plea, and we’ll also dig into one of the most-asked questions I hear: Can I get more time if I get convicted again after attacking my guilty plea? (Spoiler alert: It can happen.)

Waivers in Plea Agreements

Over 67 percent of plea agreements in 2015 had waivers, and these waivers are usually boilerplate language that the government uses in all of its agreements. Rarely are these waivers negotiated by defense counsel, and they’re so common that defendants often accept them as a necessary evil to pleading guilty.

But a defendant can’t just waive his rights without having notice of those rights. In United States v. Chua, 349 F. Supp. 3d 214 (E.D.N.Y. 2018), Judge Jack Weinstein criticized the government for using a “blanket” waiver barring a defendant’s right to challenge his guilty plea or sentence, without listing the rights he would be waiving. The judge “amended” the waiver to address each of the rights the defendant had that he would be waiving (or not waiving).

Any waiver in your plea agreement barring a challenge to your guilty plea is an “affirmative defense” that the government must invoke. Federal Rule of Civil Procedure 8(c)(1) lists affirmative defenses that a responding party must raise or else they’re forfeited. Because the civil rules apply to habeas corpus proceedings in federal court and because a habeas proceeding (including a 28 U.S.C. § 2255 proceeding) is a “civil proceeding,” the government is required to raise any waivers that are in your plea agreement for them to be effective.

While a court may not invoke the waiver itself, it can – and usually does – ask the government to indicate whether they’re going to invoke the waiver. See Burgess v. United States, 874 F.3d 1242 (11th Cir. 2017) (explaining this process and vacating a § 2255 denial where the district court invoked the collateral attack waiver).

When interpreting waivers in plea agreements, the court refers to contract law since plea agreements are “contracts.” Santobello v. New York, 404 U.S. 257 (1971). Under the principles of contract law, any ambiguities in the plea agreement (the contract) is construed against the drafter of the contract (the government).

Collateral Attack Waivers Versus Appeal Waivers

Because a plea agreement is construed strictly against the government, when a waiver says that you’re waiving your right to “appeal,” courts have held that this waiver doesn’t also apply to collateral attacks, which include challenges under 28 U.S.C. §§ 2254 (by state prisoners) and 2255 (by federal prisoners). See Hunter v. United States, 160 F.3d 1109 (6th Cir. 1998).

However, the same rules that apply to appeal waivers equally apply to collateral attack waivers. This means that any exceptions that would apply to appeal waivers also apply to collateral attack waivers. We go over some of common exceptions next.

Exception: Waiver Not Knowing and Voluntary

Not only must your guilty plea be “knowingly and voluntarily made,” but any waiver of your rights in a plea agreement must be knowing and voluntary. United States v. Ruiz, 536 U.S. 622 (2002). The Supreme Court in Ruiz stressed that this means you’re aware of “the relevant circumstances and likely consequences” of the waiver.

What would make a waiver not knowing and voluntary? Several things, but a few have generally been accepted as negating a waiver. For example, just as ineffective assistance of counsel (“IAC”) can render a guilty plea not knowing and voluntary, IAC in negotiating a plea agreement can render a waiver (as well as the agreement itself) invalid. Hurlow v. United States, 726 F.3d 958 (7th Cir. 2013); Padilla v. Kentucky, 559 U.S. 356 (2010) (the negotiation of a plea agreement is a “critical stage” of a criminal proceeding requiring effective assistance of counsel).

A more controversial issue that makes a waiver not knowing and voluntary is when the prosecution withholds favorable evidence from a defendant. In Chua, Judge Weinstein acknowledged that the Second Circuit had not yet addressed whether such an egregious act by the government could invalidate a collateral attack or appeal waiver. But citing the prevalence of guilty pleas in the criminal justice system, he concluded that when the government withholds evidence, the right to attack a conviction is not waived. “This right is retained as part of the ‘voluntary and knowing’ exception,” he said. Be aware that not all the courts are on the same page here, and the Supreme Court hasn’t yet addressed the issue. See Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010) (discussing this point).

Lack of notice of the nature of the charges also would render a guilty plea waiver not knowing and voluntary. Frederick v. Ward, 308 F.3d 192 (2d Cir. 2002) (a defendant must have “real notice of the true nature of the charge” for a waiver to be valid).

Exception: A Change in the Law

When the law changes and invalidates a conviction (or sentence), some courts have held that a waiver doesn’t bar a challenge based on that new law. This includes major court decisions applying retroactively, as well as changes in the law by lawmakers. For example, when the Supreme Court retroactively invalidated the residual clause of the Armed Career Criminal Act in Johnson v. United States, 135 S. Ct. 2551 (2015), some courts held that a collateral attack waiver doesn’t bar a challenge to the now unconstitutional sentence. E.g., United States v. Cornette, 932 F.3d 204 (4th Cir. 2019). The reasoning there was that the district court never had authority to impose the sentence because it’s an illegal sentence. But not all courts agree. In United States v. Barnes, 953 F.3d 385 (5th Cir. 2020), the court cited Cornette but disagreed with its ruling, upholding a waiver in the face of an unconstitutional sentence. This same reasoning could apply to waivers of guilty plea challenges.

However, the same court that allowed the challenge in Cornette, despite a waiver, recognized that not all changes in law nullify a waiver. “A plea agreement, like any contract, allocates risk. And the probability of a favorable change in law occurring after a plea is one of the normal risks that accompanies a guilty plea,” the court said in United States v. Archie, 771 F.3d 217 (4th Cir. 2014). But this “risk” goes both ways. When the government tried
to reinstate charges it tossed under a plea agreement after a defendant later successfully challenged his conviction due to a retroactive change in the law by the Supreme Court, a district court refused to allow this, citing Archie's “risk” with plea agreements. *Diri v. United States*, 2019 U.S. Dist. LEXIS 175043 (W.D.N.C. 2019).

**Exception: Impermissible Factors**

The Supreme Court has recognized several instances where a waiver couldn't bar a challenge when a conviction (or sentence) is based on “constitutionally impermissible factors.” E.g., Menna v. New York, 423 U.S. 61 (1975) (guilty plea did not bar challenge under Double Jeopardy Clause); *Blackledge v. Perry*, 417 U.S. 21 (1974) (guilty plea did not bar prosecutorial vindictiveness challenge). And every court has held that race may not play a factor in a conviction or sentence, despite any waivers. See *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992).

**Exception: Miscarriage of Justice**

A waiver may not bar a challenge to a “miscarriage of justice,” such as actual innocence. In *United States v. Viera*, 674 F.3d 1214 (10th Cir. 2012), the court established four situations that would amount to a miscarriage of justice to invalidate a waiver: (1) when the district court relied on an impermissible factor (noted above), (2) IAC in negotiating the plea agreement with the waiver, (3) an illegal sentence, or (4) “where the waiver is otherwise unlawful.” Unsurprisingly, actual innocence was also found to be a miscarriage of justice to avoid a waiver. *McCann v. Mangialardi*, 357 F.3d 782 (7th Cir. 2003).

**Breach of a Plea Agreement Voids a Waiver**

If the government breaches your plea agreement, any waiver you had in it barring a challenge goes out the door. In *Santobello*, the Supreme Court found that the government’s breach of a plea agreement allowed a defendant to seek a remedy despite the waiver. The Court suggested that the trial court could require “specific performance” of the agreement, or it could allow withdrawal of the guilty plea. This is where contract law comes into play. Specific performance is simply giving the aggrieved party the benefit it was supposed to get in the agreement, by the court enforcing the agreement.

The court made an important ruling in *Santobello*, holding that the government’s breach of the plea agreement is a due process violation. It’s important because while there’s no constitutional right to a plea agreement, when one is accepted by a defendant he’s afforded constitutional protections thereafter. Habeebs corpus challenges are all about constitutional violations.

If you breach the plea agreement, the government then has the right to withdraw the agreement or to request specific performance, the same options you have. If the plea agreement is withdrawn, you’ll be starting over as if you’d never pleaded guilty. See *Ricketts v. Adamson*, 483 U.S. 1 (1987) (upholding death sentence after plea agreement with reduced charges vacated and reconviction on more serious charges when defendant breached agreement by refusing to testify).

A successful withdrawal of your guilty plea, however, is not a breach of your plea agreement. *United States v. Newbert*, 504 F.3d 1080 (1st Cir. 2007) (upholding district court’s ruling that withdrawal of guilty plea was not breach of plea agreement).

**Getting More Time After a Successful Guilty Plea Challenge**

Can you end up with more time if you successfully challenge (withdraw) your guilty plea? The short answer is yes. But not always. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Supreme Court ruled that a longer sentence as a “penalty” for a successful challenge to a conviction is unconstitutional. But *Pearce* was about a higher sentence after a successful appeal and retrial, not a challenge to a guilty plea.

The Court later distinguished its holding in *Pearce* when a defendant successfully challenged his guilty plea but then lost at trial and got a longer sentence. In *Alabama v. Smith*, 490 U.S. 794 (1989), the defendant was originally sentenced to 30 years after a guilty plea. But then, he overturned that conviction on appeal and went to trial. When he lost, he got life plus 150 years. The judge said he was “too lenient” the first time.

Was this vindictive? Perhaps. But the Supreme Court upheld the harsh sentence, reasoning that evidence not normally brought to light during a guilty plea that comes out at trial can play a big part in a judge’s sentencing decision.

In *United States v. Rodriguez*, 602 F.3d 346 (5th Cir. 2010), it was the jury that handed out a harsher sentence and not the judge who originally sentenced the defendant upon reconviction after a guilty plea was successfully challenged. The new sentence was upheld by the court, saying that the jury didn’t know about the original sentence and therefore didn’t have a “personal stake” in it.

These cases suggest that when a sentence after a successful guilty plea is based on new facts or is imposed by someone having nothing to do with the original sentence, a harsher sentence is constitutionally permissible.

**Conclusion**

Plea agreements almost always contain waivers. But these waivers are not always obstacles to challenging a guilty plea. There are exceptions. Understanding the scope of the waiver and how it relates to your challenge will help guide you around that obstacle.

*Editor’s note: This is the fifth 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 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 (prisoners emailed accepted).*

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**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?

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Criminal Legal News

November 2020
The Supreme Court of Pennsylvania concluded that Article I, Section 10 of the Pennsylvania Constitution, prohibition against double jeopardy, bars retrial because the prosecutor’s misconduct that evinced a conscious disregard for a substantial risk of harm deprived the defendant of his right to a fair trial.

In 2002, Walter Smith told police that Clinton Robinson killed Margaret Thomas. Later that same year, Smith was shot 12 times and killed outside a bar in Philadelphia. Moments after Smith was shot, his companion, Debbie Williams, went to him and picked up his black baseball cap that was lying in the street with a bullet hole in it. After the police arrived, they took Williams to the police station to give a statement. At the station, Williams gave the black baseball cap to Detective Burns and told him that Smith had been wearing it when he was shot.

The cap was assigned property receipt number 2425291. (A property receipt is a typed report that contains information about the item, including a description and the results of any forensic analysis. The property receipt number functions as a computer database key to enable prosecutors and police to view this information.)

Testing of the black cap at the crime lab revealed the presence of Smith’s blood under the brim. A red baseball cap was also found lying in the street 9 feet from Smith’s body. Officer William Trenwith photographed the red cap at the scene and recovered it as evidence.

The cap was assigned property receipt number 9001070.

The case remained unsolved until Bryant Younger, a jailhouse informant seeking leniency on his drug convictions, told police in 2005 that he overheard Kareem Johnson state that he (Johnson) had killed Smith to prevent him from testifying against Robinson. Police obtained a DNA sample from Johnson and submitted it along with the red cap for testing. The testing revealed that Johnson was one of the contributors of DNA found in the red cap’s sweatband. Johnson was charged with capital murder.

Because the prosecutor did not request the criminalistics report from the crime lab that details the different evidence submitted for testing and the results of those tests, the Commonwealth proceeded to trial on the assumption that there was only one baseball cap – the red one – containing both Smith’s blood and Johnson’s DNA.

In his opening statement, the prosecutor said that Johnson “got in real close” to shoot Smith at point-blank range because “the hat that was left at the scene in the middle of the street has Kareem Johnson’s sweat on it and has Walter Smith’s blood on it.” Then Trenwith testified that when he recovered the red cap from the scene he saw drops of fresh blood underneath the cap’s brim.

Lori Wisniewski, the forensic scientist who had performed the DNA testing, also testified for the Commonwealth, stating that Smith’s blood and Johnson’s DNA were both found on “the hat.” And in closing argument the prosecutor said: “Do you know who says the killer wore the hat? Walter Smith says the killer wore the hat. He says it with his blood. There is no other way Walter Smith’s blood could have gotten on the underside of this hat... unless the person who killed Walter Smith was standing close to him while he shot and killed him.... [And] DNA evidence... says, hey, this is Kareem Johnson’s sweat on the sweatband, he is the major contributor, the very hat that has Walter Smith’s blood on the brim.”

The jury convicted Johnson, and he was sentenced to death. His judgment was affirmed on appeal.

Pursuant to an open-records request filed in conjunction with a petition under the Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, a forensics report was generated in 2011 that showed a red hat and a black hat were analyzed and that Smith’s blood was found only on the black hat. The Commonwealth then agreed that Johnson was entitled to a new trial, and the court entered an order to that effect.

Johnson then filed a supplemental discovery motion seeking to develop evidence to support a motion to bar retrial based on double-jeopardy principles and prosecutorial overreach. The common pleas court held a hearing on the motion that spanned several days. The prosecutor admitted that he made mistakes but denied they were intentional or that he intentionally sought to deprive Johnson of a fair trial. He admitted that two differing property receipt numbers should have prompted him to investigate and that he should have obtained a criminalistics report before bringing a capital case. Trenwith stated that he had testified to seeing blood on the red cap because he was ‘going on the assumption’ the blood was there based on the forensic scientist’s testimony at the preliminary hearing.

Based on the testimony at the hearing, Johnson moved to bar retrial. In ruling on the motion, the judge said “it is unfathomable to me to believe that what Officer Trenwith saw on the hat were, quote, ‘fresh drops of blood.’” The judge based his statement on the fact that Trenwith had made no notes or documentation of observing blood on the red cap and on the fact that Trenwith – an experienced crime-scene investigator – took no photographs of the underside of the cap, which he most certainly would have done if he had observed blood on the cap’s underside. The judge also said it was “more than negligence” that the Commonwealth took a capital case to trial “without even awaiting a full criminalistics DNA analysis.”

But the judge credited the prosecutor’s testimony and concluded that “this gross series of almost unimaginable mistakes by experienced police officers and an experienced prosecutor” wasn’t intentional. Finding that Johnson’s trial had been a “farce,” but that the prosecutor hadn’t acted in bad faith, the judge denied the motion to bar retrial. Johnson took an interlocutory appeal of the denial, and the Superior Court affirmed. The Pennsylvania Supreme Court then granted Johnson discretionary review.

The Court observed that “[b]efore September 1992, Pennsylvania’s double jeopardy protections had been viewed as coextensive with those of the Fifth Amendment in light of ‘identical textual and policy considerations.” Commonwealth v. Simons, 522 A.2d 537 (Pa. 1987). The Double Jeopardy Clause “protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.” United States v. Dinitz, 424 U.S. 600 (1976). The Clause protects a defendant’s interest in having his fate decided by his first jury. Id.
Prior to the U.S. Supreme Court's decision in Oregon v. Kennedy, 456 U.S. 667 (1982), prosecutorial overreaching – misconduct intended to provoke a defense motion for mistrial or actions otherwise taken in bad faith to deprive the defendant of a fair trial – triggered double jeopardy protections and barred a subsequent trial. Lee v. United States, 432 U.S. 23 (1977). But in Kennedy, the U.S. Supreme Court ruled that the “overreaching test” was unworkable and further ruled that the Fifth Amendment bars retrial only when the government’s actions were “intended to goad the defendant into motion for a mistrial.”

The Pennsylvania Supreme Court subsequently concluded that the double jeopardy clause of the Pennsylvania Constitution applies broader protections than the Fifth Amendment, holding that Pennsylvania’s Constitution “prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial,” Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992). Because of the interest that the public has in a reasonable expectation that those charged with crimes will be prosecuted, barring retrial is an extreme sanction that must be limited to only those cases where the actions of the Commonwealth were particularly egregious. Commonwealth v. Burke, 781 A.2d 1136 (Pa. 2001).

The Court recognized that many other jurisdictions have departed from strict adherence to the Kennedy rule, instead defining overreach as when the prosecutor’s prejudicial misconduct was done with either knowledge of or indifference to a significant risk of mistrial or reversal on appeal. (See opinion for collection of cases from various states.) These other jurisdictions have essentially reasoned that such conduct by the prosecutor contravenes one of the main objectives of double jeopardy protections, viz., a defendant should not have to choose between (1) having his fate decided by his first jury notwithstanding that the proceedings were infected with serious errors or (2) enduring a new proceeding from the beginning with the expense, anxiety, and disruption and with the government in a better position to marshal evidence and anticipate defense strategy. The test should focus on the effect of the prosecutor’s misconduct regardless of intent. State v. McLaugherty, 188 P.3d 1234 (N.M. 2008).

The Pennsylvania Supreme Court concluded that “[u]nder Article I, Section 10 of the Pennsylvania Constitution, prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken recklessly, that is, with a conscious disregard for a substantial risk that such will be the result.”

The Court then applied this standard to the instant case, recounting the prosecutor’s “unimaginable mistakes” and concluding he acted with a “conscious disregard” when he undertook no re-evaluation of his understanding of the evidence even though he was aware of two differing property receipt numbers, had heard testimony indicating his witnesses were speaking of two different caps, and failed to request or await a criminalistics report. And it was beyond dispute that the consequences of the prosecutor’s actions included prejudice to Johnson to the point of denying him a fair trial, the Court concluded. Accordingly, the Court reversed the judgment of the Superior Court and remanded the matter for an entry of an order granting Johnson’s motion to preclude retrial. See: Commonwealth v. Johnson, 231 A.3d 807 (Pa. 2020).
The 1971 Stanford Prison Experiment Showing Authoritarian Abuse Still Relevant Today

by Michael Fortino, Ph.D.

You may not remember the 1971 Stanford University Prison Experiment. Maybe you were not yet born, but the outcome of this infamous study depicted a reality where everyday people, when assigned the role of “jailer,” almost immediately morph into sadistic, power-hungry, conformists who manage to find pleasure in abusing their prisoners. The study is as relevant in analyzing today’s unbridled prison guards or police officers, as it was in a controlled environment nearly 50 years ago.

The experiment was the brainchild of Stanford University psychology professor Dr. Philip Zimbardo, who provided unequivocal proof that, under the right conditions, power and authority often blur the lines of right and wrong and corrupt the psyche to perform unthinkable acts, including the abuse of our fellow human.

The 1971 study recruited 24 students to participate in a roleplay experiment in which nine would be assigned as “jailers” or “prison guards” and 15 would be assigned as captives. The experiment took place in the basement of one of the Stanford buildings, which was converted into a makeshift jail, complete with impenetrable jail cells. The structure was designed to assure that the “imprisoned” students could not casually intervene out of fear for the wellbeing of his fellow human.

The roleplay would be performed over a two-week period but was subsequently shut down after only five days because the student guards became so physically and verbally abusive to student prisoners that irreparable harm seemed likely. Zimbardo was forced to intervene out of fear for the wellbeing of his imprisoned students who displayed signs of extreme stress, anxiety, and helplessness as a result of the excessive force and abuse being levied against them.

Was it the role that each student played when assigned the authority as “guard,” or did these student guards already have a violent and controlling disposition prior to their assignment? The answer was obvious to Zimbardo in that the selection process was entirely random, and the students selected as “jailers” showed no obvious sign of aggression when compared to those selected as “prisoners.” Zimbardo’s findings suggest that it is the role given to the student “guards” that changed their personality and relaxed their sense of conscience. The title of “jailer,” in and of itself it seems, inspired a larger than life, more authoritarian role, and one that seemed to permit them to believe they could act with impunity.

Fast forward to today. As we view the scenes on national news that illuminate from the flat screens in our living room, we become mesmerized by the violence playing out in the streets of cities like Portland, Rochester, Kenosha, or Minneapolis. Suddenly, we find ourselves taking sides with a certain faction of that unrest, and we allow a small part our personality to become enraged even while sitting alone at home. We experience anger, frustration, stress, or helplessness, depending on the social narrative we have adopted for ourselves. The Stanford experiment may actually play out in our life as we view world events from the sidelines. We find ourselves deeply committed to the narrative with which we have aligned. We take sides and often block out the opposition’s perspective as nonsense or doublespeak. Even from our living room, we find ourselves playing the role of protestor, anti-protestor, or law enforcement, and we fantasize about how we might make a difference. We grow more emotionally vested from the energy that radiates out of our television or computer screen, and we begin to realize that we relate to the role of authoritarian or that of victim, but seldom are we able to appreciate both.

Consider a recent scene involving a group of protesting mothers in Portland, each standing side by side in a show of resistance with interlocked arms. These “moms,” clad in bicycle helmets, took up a position in front of other protestors both as a show of solidarity and also as a statement that they wished to protect fellow protestors from police brutality. They believed that their presence, as a group of non-violent, peaceful moms, would likely curtail police from further brutality. The moms were dead wrong. It seems that several military-clad law enforcement officers assigned to contain the protest perceived these particular protestors as different from any other and, as such, proceeded to spray tear gas in the face of several “moms” in a show of force that suggested, “we have the authority, you don’t.”

What compelled these officers to act with such unnecessary aggression? Was it the uniform? Was it the energy from the street? Was it the sense of camaraderie and loyalty they held for their fellow officers as part of a larger systemic mission? Zimbardo would likely suggest that their sense of authority in that environment devolved into something known as “structural violence.”

Dr. Bandy X. Lee, a forensic psychiatrist at Yale School of Medicine, attests that, much like the Stanford Prison Experiment, it is “about the influence of institutional structure. In defense of such overzealous or authoritarian actions by individuals representing law enforcement, we make the convenient excuse that it is merely the actions of ‘a few bad apples.’” Lee, however, believes that such acts of aggression are a product of “structural violence,” which she describes as “the most lethal form of violence.”

Punishment v. Therapy

“Structural violence” is borne out of an authoritarian regime or a culture of punitive rules and laws. It is the mindset that believes punishment, rather than behavioral therapy, is a more effective means of criminal justice. Consider the prison system. One may simply evaluate a prison system’s record on re-offense and recidivism. The U.S. maintains one of the worst recidivism rates on the world stage yet qualifies as one of the most punitive systems, housing more prisoners per capita and under longer sentences than any other country in the world. Simply put, it is failure on multiple levels.

Societies such as those found in the Netherlands, Germany, and Switzerland follow a very different criminal justice and penal philosophy. The premise for these advanced countries is to focus on reform rather than retribution. From the moment of entry, the system is designed to focus on re-entry back to society. These penal systems are staffed predominantly by behavioral psychologists and social workers dedicated to behavioral enhancement. The programming is designed to assimilate a prisoner back to his community as a productive member of society. Prisoners are often housed in apartment-style living quarters where they are tasked with maintain-
ing a budget while supporting a work schedule. They are praised for accomplishments rather than condemned for simply having been incarcerated. And, in many of these more advanced penal systems, prisoners are released with a sealed record so that no one in society is aware that the prisoner was ever incarcerated. To brand an individual as a felon for life is considered ludicrous by most advanced countries. Their mission is to give prisoners a true second chance at life.

Unfortunately, the opposite is true for the American penal system. In fact, nearly every aspect of the system is designed to disenfranchise a prisoner in an attempt to assure that he or she remains a “ward of the state” for life. Most prisoners, upon entry, are immediately dehumanized and are identified simply as a file number. Prison guards are instructed to use first names, never to shake hands or interact on a personal level, and they are discouraged from offering compliments or encouragement to even the most productive prisoner. “Correctional officer” is the epitome of oxymoronic, yet it is used throughout the American penal system.

We also must consider the number of prisoners in the U.S., both state and federal, who perish at the hands of violent authorita-

ian guards. According to another contributor to the authoritarian theory of “structural violence,” Dr. David Reiss, also a professor at Yale, states that, “under certain circumstances, people can act in ways that are very sadistic, that are very authoritarian, that are not part of what they consider their usual personality.”

**‘Dr. Jekyll and Mr. Hyde’**

We see this every day in America’s prisons. Correctional officers who travel to work from their home in a suburban neighborhood who have families, attend church, volunteer as coaches, and are otherwise good, decent, God-fearing individuals until they arrive “at the office.” Many guards as well as police officers undergo a kind of “Dr. Jekyll and Mr. Hyde” metamorphosis when they begin their shift. Some guards arrive onto the prison yard with a certain vengeance against their captives. They take on the role of disciplinarian driven by a certain vengeance against their captives. They take on the role of disciplinarian driven by a personal crusade to punish those in prison for the prisoner’s previous misdeeds.

We see the same disposition displayed by police officers arriving on scene at a protest. All too often, these are the same individuals who deny that they are cruel, sadistic, or imposing, and they are often the very officers who receive praise and promotion from their superiors after an act of aggression. Reiss goes on to suggest, “it’s a process of first having to get past the denial and acknowledge that there is a problem.”

An observation that came out of the Stanford experiment was gleaned from the students who played the role of prisoner. They each felt powerless at the hands of their captors, and they began to believe that there was nothing they could do or say that would make a difference in those who were given the authority to imprison them. This very sentiment seems to resonate among many of the anti-authoritarian protesters who petition for justice through peaceful protests yet find their plea for change simply falling on deaf ears. Most believe that individual officers are compassionate and have empathy for a system in need of reform, but they play a role during the protest and often find themselves acting as part of a cohesive fighting unit commissioned to “defeat the enemy.”

Once an officer dons the uniform, he or she now represent the “authoritarian rule” of “law and order.” The regime takes on a personality of its own, tasked with the mission of presenting an overwhelming show of force to
Powerful New Tool Reveals Federal Sentencing Problems

by Dale Chappell

A POWERFUL NEW DATABASE COMBINES data from multiple sources in order to provide more useful information about federal sentencing.

The ground-breaking service is a first of its kind and has been an eye-opener about what’s really going on in federal sentencing.

This new tool is called JUSTFAIR (Judicial System Transparency Through Federal Archive Inferred Records), and it was developed by the Institute for the Quantitative Study of Inclusion, Diversity, and Equity (“QSIDE”) in Williamstown, Massachusetts. It’s a collection of nearly 600,000 records on federal sentencing gathered from several public sources and then refined to provide important sentencing data that couldn’t have been found in just one place before. It links information about defendant demographics, their crimes and sentences, and — most importantly — details about the judges who imposed the sentences.

It’s the first large-scale database that links all of this information — and it’s free. While the U.S. Supreme Court held in Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), that “the First Amendment guarantees of free speech and press ... prohibit the government from summarily closing courtroom doors,” the government has made it nearly impossible for the public to see what does go on in the nation’s federal courts by dividing up this information in bits and pieces and storing it at several locations. Sometimes the same agency stores federal sentencing data in two different places in the same building, none of it linked together.

For a person to exercise his constitutional right to access courtroom proceedings, it might take countless hours of research just to gather some basic information. JUSTFAIR puts all of that together in one place, at qside-institute.org/justfair.

The purpose of JUSTFAIR

THE BIG IDEA BEHIND JUSTFAIR IS TO expose the sentences handed out by federal judges. Included in the data is not only the names of the judges but also details about the defendant, such as race. One thing researchers found in developing JUSTFAIR was that some federal judges give higher sentences to minorities versus White defendants.

A graph revealed by researcher Chad Topaz from QSIDE showed this trend. “30+ judges display ... statistically significantly different sentencing behavior by race,” he wrote.

In order to figure this out, the public would have to somehow attend hundreds of thousands of federal proceedings in court every year. That’s because “the opacity of the federal criminal court system impedes the public in a number of ways,” QSIDE said in its executive summary detailing JUSTFAIR. “The unavailability of judge data is one of the most frustrating aspects of the study of federal sentencing,” the summary explains.

There are 94 federal district courts across the country and in the U.S. territories, such as Puerto Rico and Guam, and each state has at least one federal court, with some states having up to four of them (CA, NY, and TX). JUSTFAIR gathers statistics from all of these courts on (1) demographic characteristics of the defendant, (2) statutes of the convictions, (3) factors influencing the recommended sentence, (4) a breakdown of the sentence, including fines, probation, and prison time, (5) the court and date of sentencing, (6) the name and background information, and (7) which president appointed the judge.

The creators of JUSTFAIR say these details are important because federal sentencing was supposed to be a transparent and fair process. After all, that’s why Congress created the U.S. Sentencing Commission (“USSC”), which in turn created the U.S. Sentencing Guidelines (“Guidelines”) to provide more uniform sentencing across the country.

Prior to the Guidelines, sentencing judges had broad discretion to impose any sentence they wanted within the statutory limits. Often, sentences for the same crime would vary widely based on the location of the court. Even though the Guidelines are only “advisory” and judges still have discretion, the Guidelines are given great weight in determining the proper sentence and in deciding whether a sentencing judge abused his discretion imposing a sentence.

The problem, JUSTFAIR creators say, is that judges are still not held accountable because the USSC blocks judges’ information from the public. JUSTFAIR then had to dig into numerous sources, all publicly available, to fill in the holes.

JUSTFAIR’s Sources

TO CREATE JUSTFAIR, researchers consolidated data mainly from five sources: (1) the USSC, (2) the Federal Judicial Center’s Integrated Database (“FJC”), (3) the Public Access to Court Electronic Records System (“PACER”), (4) Wikipedia (for background on the judges), and (5) the FJC’s Biographical Directory of Article III Federal Judges.

Here’s what JUSTFAIR includes from each source:

- United States Sentencing Commission: The USSC is an independent agency of the federal court system created by Congress under the Sentencing Reform Act of 1984. Its mission is to “collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues.” The USSC also serves as an information hub on federal sentencing for entities like Congress and the courts, as well as for academic purposes and criminal defense lawyers.

The information the USSC collects is open to the public for free. An entire data set can be downloaded with a median size
of approximately 73,000 records per year archived, beginning in 2001. From the thousands of variables available in the database, JUSTFAIR narrowed them down to just 16 for each record.

- Federal Judicial Center: The FJC is an agency of the U.S. federal court system that tracks details of civil and criminal cases, appeals, and bankruptcies. It was established in 1967 and dedicated to the “research and study of the operation of the courts.” While the FJC’s records date back to the year 1900, JUSTFAIR’s data compilation begins with 2001, to align with the data from the USSC. Even then, this includes almost 1.5 million records.

Most of the FJC data is about identifying the sentencing court, the total prison time given, and the statute of conviction. Researchers also used FJC’s Biographical Directory of Article III Federal Judges to include some background on the sentencing judges, such as length of service, education, professional career, the president who appointed them, and the confirmation process.

- Public Access to Court Electronic Records: PACER is the service that directly accesses federal court dockets and allows access to some court documents. It was established in 1988 but wasn’t made available to the public until 2001. There are several limitations to PACER in gathering data. First, it’s not free. PACER charges 10 cents per page accessed (and sometimes more), and court documents are often several pages. Next, each court maintains its own records database. Finally, PACER requires a ‘docket number’ to access a case docket.

Juriscraper combined with PACER can reveal data on the sentencing judges by their initials. JUSTFAIR uses Juriscraper to complete the docket number to include the extension with the judge’s initials. For example, docket number 2:01-CR-00071 entered into Juriscraper for the U.S. District Court for the District of Maine returns “2:01-CR-00071-DBH USA v. BLAKE.” The “DBH” extension stands for Judge David Brock Hornby.

- Wikipedia: Wikipedia contains a master list of U.S. district courts, and from it, JUSTFAIR’s researchers obtained judges’ names, life spans, active years, and even a judge’s dedicated Wikipedia site (if available). Using the judge’s initials on the docket (noted above), researchers were able to link judge names from Wikipedia to those initials.

All cleaned up and verified, there were 1,639 active federal judges from 2001 to the present. Wikipedia, unlike FJC’s database, contains information for the several judges of the district courts in the U.S. territories. FJC doesn’t count those judges because territory district judges are not “Article III judges” under the U.S. Constitution.

JUSTFAIR’s Process

All of this data were processed at the Ohio Supercomputer Center through the Mathematical Biosciences Institute at The Ohio State University. Researchers say their data are 98.1 percent accurate. To verify the data, JUSTFAIR randomly sampled records from CourtListener and compared the data. CourtListener is a free service that provides archived access to the text of 3.6 million judicial opinions collected from PACER. They limited their searches to only criminal cases, and if there wasn’t a match, researchers looked to other sources for verification, like news outlets.

More than one judge assigned to a case created a problem. When a different judge got assigned to a case in a later postconviction proceeding, this threw off the judge data. JUSTFAIR’s researchers manually corrected the database in these cases.

Some courts are not included, mostly because they don’t provide judge information on sentencing. This includes the S.D.W.V., S.D. Tex., N.D. Ill., M.D. Tenn., E.D.N.C., D.N. Mar. Is., and D. Guam.

A Critical Finding by JUSTFAIR

As researcher Chad Topaz noted, federal judges imposed different sentences for similarly situated defendants based on race, according to the data revealed by JUSTFAIR. For example, if Judges A and B are in the same district and Judge A’s treatment of minorities compared to Judge B’s is vastly different, this suggests that Judge A treats minorities more harshly.

However, researchers caution that there are variables not in JUSTFAIR that could account for some disparity by race in sentencing. But they say the data suggest that racial disparities at sentencing are widespread. “Once data about how judges differ on the basis of race are publicly released, that may place pressure on judges to change their sentencing patterns so that they treat different races equally,” JUSTFAIR’s executive summary says.

Then again, researchers noted that once judges are exposed they may alter their sentencing patterns to reduce the appearance of bias, another unwanted consequence. Still, the benefits of transparency outweigh the costs, researchers say. “If that data indicate[] that judges are outliers in one direction or another, it seems to me more likely than not that the scrutiny of those judges will be more likely to make sentencing genuinely consistent and fair than to achieve a false consistency,” one researcher wrote.

JUSTFAIR also found that Republican-appointed federal judges handed down longer sentences to minorities than did Democratic-appointed judges. Lower income defendants also got hit with longer sentences than their richer counterparts, data reveal.

Conclusion

By combining several reliable and publicly accessible sources on federal sentencing, JUSTFAIR provides as complete a picture as possible about what goes on in the nation’s federal courts at sentencing. This is the first time this data have been revealed to the public, and it should expose some of the inequalities and injustices of federal sentencing that organizations and agencies have tried to pinpoint and fix for decades.


Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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

Please contact Kathy Moses at kmoses@humanrightdefensecenter.org, or call (561) 360-2523, or write to: HRDC, SPP Debit Cards, P.O. Box 1151, Lake Worth Beach, FL 33460.
Campaign Zero Advocates for Police Accountability

by Jayson Hawkins

In most states across America, an employee can be fired at any time for any reason. Only Montana provides some protection after six months on the job; otherwise, employment in America is an “at will” affair. Unless, of course, you are a police officer, in which case collective bargaining agreements and the unconditional advocacy of a union, at taxpayer expense, makes it almost impossible to get fired, even for cause.

The public outrage over the death of George Floyd while in police custody has fueled calls for police reform in a variety of areas, but one thing that has particularly infuriated reform advocates is the difficulty in getting bad cops fired. The advocacy group, Campaign Zero, has made this problem the center of its reform drive, and as public awareness grows, the effort is picking up steam and allies.

The most-often cited cause behind the difficulty in firing police officers is the power of police unions. Like many public sector unions, police unions operate quite differently from traditional organized labor. While they do negotiate for pay and benefits, the core of police union advocacy is the protection of its members from the consequences of their actions, including the organization of legal defense teams at the taxpayers’ expense.

Campaign Zero published a list of protections negotiated for by the union representing Derek Chauvin, the now-former officer accused of killing George Floyd, and the other officers of the Minneapolis Police Department. These protections include disqualifying complaints that are submitted too many days after an incident, not allowing officers to be interrogated immediately after an incident, giving officers access to information before an interrogation, and preventing information on past misconduct from being retained in an officer’s file on being made available to the public.

As a result, despite the fact that 500 Minnesota police officers were convicted of a crime over the last 25 years, three-quarters of them were never internally disciplined by their departments. It is literally easier to convict a policeman of a crime than to get him fired. Traditional labor coalitions, of which police unions are generally a part, have struggled with this discrepancy, but until recently, little has been done. The killing of Floyd, however, has galvanized the push for change in this area as well. In June 2020, the Seattle branch of the AFL-CIO formally expelled the local police union, and a petition is circulating to do the same at the national level.

Even when police officers get fired or convicted of a crime, the secrecy of police records allows them to sometimes relocate and reenter law enforcement. USA Today identified 32 police officers who were fired, convicted of a crime, or found guilty of serious misconduct but later went on to become police chiefs or sheriffs in other jurisdictions. These officers included sexual predators and perpetrators of domestic abuse, along with the more common witholding evidence and falsifying records.

Without a nationwide database of officer misconduct, crossing a state line offered those disgraced officers a clean slate.

Sixth Circuit Finds IAC for Failure to Raise ‘Clearly Foreshadowed’ Change in Law on Appeal

by Dale Chappell

The U.S. Court of Appeals for the Sixth Circuit held on August 20, 2020, that appellate counsel’s failure to raise a “clearly foreshadowed” change in decisional law that would’ve led to a likely change in the outcome was ineffective assistance of counsel (“IAC”) sufficient to excuse procedural default and allow habeas corpus relief.

Freddie Chase was convicted and sentenced in a Michigan state court in 2013 to a mandatory term of imprisonment based on facts found not by a jury (or admitted by him) but by his sentencing judge. Under state law at the time, a judge was required to impose a longer sentence under the Michigan sentencing guidelines and could not depart from that range absent “a substantial and compelling reason.” Mich. Comp. Laws § 769.34(3).

Three days after Chase’s sentencing, the U.S. Supreme Court held in Alleyne v. United States, 570 U.S. 99 (2013), that a law requiring a mandatory minimum sentence based on judge-found facts violates the U.S. Constitution. Because Chase’s sentence was on direct appeal when Alleyne was decided, the new rule applied retroactively to his case. Griffith v. Kentucky, 479 U.S. 314 (1987).

But Chase’s appellate lawyer never raised an Alleyne issue on appeal. In fact, he didn’t raise anything except a juror-instruction claim. To be fair, the Michigan Court of Appeals had rejected in other cases that Alleyne rendered Michigan’s sentencing scheme to be unconstitutional, and had Chase’s lawyers raised it on appeal, it would have been denied under existing law.

That decision, though, was roundly criticized by a later Michigan Court of Appeals decision, and numerous challenges to Michigan’s sentencing guidelines were filed citing Alleyne. Still, Chase’s lawyer never raised the issue, even after the Michigan Supreme Court granted leave in a case that would eventually overturn that initial Michigan Court of Appeals ruling on Alleyne. As a result, numerous defendants challenged Michigan’s sentencing scheme under Alleyne — except Chase. His direct appeal was denied as the Alleyne debate was raging in the Michigan Supreme Court.

Months later, the Michigan Supreme Court decided People v. Lockridge, 870 N.W.2d 502 (Mich. 2019), overturning the Michigan Court of Appeals decision and holding that Alleyne indeed rendered the state’s mandatory sentencing guidelines in question unconstitutional. Chase then moved for postconviction
relief in state court, claiming that his appellate lawyer was ineffective for failing to raise the Alleyne issue on direct appeal. This motion was denied. The court ruled that Chase was procedurally barred from raising the claim because he didn’t raise it on direct appeal and couldn’t show “good cause and actual prejudice” to surmount that bar. His appeals of that denial were summarily denied.

Chase then filed a federal habeas corpus petition under 28 U.S.C. § 2254 in the U.S. District Court for the Eastern District of Michigan, raising the same claim. This petition was denied; the court concluded that the Alleyne claim “would not have been obvious to appellate counsel at the time he prepared [Chase’s] direct appeal.”

On appeal to the Sixth Circuit (the fifth court to hear Chase’s claim), the Court appointed counsel and granted a certificate of appealability on whether Chase’s lawyer was ineffective to excuse the procedural default.

IAC can excuse procedural default if a habeas petitioner can show cause and prejudice for failing to raise the claim on direct appeal. Edwards v. Carpenter, 529 U.S. 446 (2000). The two-prong IAC standard under Edwards v. Carpenter, 529 U.S. 446 (2000), is the measuring stick for such claims: (1) “the defendant must show that counsel’s performance was deficient” and (2) “that the deficient performance prejudiced the defense.”

While a lawyer isn’t required to “predict” a change in the law, an attorney can be found deficient if she fails to raise a claim whose merit is clearly foreshadowed at the time; the Court reiterated. “It is hard to see how the decision to omit an Alleyne claim in favor of raising an obviously weaker claim was a reasonable decision,” the Court explained.

The Court pointed to a divided Michigan Court of Appeals panel in People v. Lockridge, 849 N.W.2d 388 (Mich. Ct. App. 2014), which led the Michigan Supreme Court to overturn the initial Michigan Court of Appeals decision upholding the state’s sentencing scheme as unconstitutional after Alleyne. The two concurring opinions in the Lockridge Court of Appeals decision “clearly and forcefully detailed in why Alleyne rendered Michigan’s sentencing scheme unconstitutional,” the Court said. Chase’s appellate counsel should have been aware of this controversy at the appellate court and was therefore deficient, the Court concluded.

The Court then found that counsel’s deficient performance prejudiced Chase. The showing here requires a “reasonable probability that, but for counsel’s defective performance, [Chase] would have prevailed on appeal.” He didn’t need to show he would have received a different sentence but only “that had appellate counsel raised the Alleyne issue on appeal, there is a reasonable probability that Chase would have received a new sentencing proceeding,” the Court said.

“If Chase’s attorney had included an Alleyne claim in his direct appeal, Chase would have received relief from the Michigan Supreme Court — just like the many other defendants who, like Chase, filed applications for leave to appeal to Michigan’s highest court.” In light of Alleyne and the Michigan Supreme Court’s subsequent decision in Lockridge, “Chase’s mandatory minimum sentence would be contrary to clearly established federal law” to allow federal habeas relief.

Accordingly, the Court reversed the denial of habeas relief and remanded to the district court with instructions to conditionally grant relief and “remand to the state sentencing court for sentencing proceedings consistent with this opinion and the United States Constitution.” See: Chase v. Macauley, 971 F.3d 582 (6th Cir. 2020).
**Ninth Circuit: Use of Unconvicted Conduct Too Dissimilar to Charged Offense Violates Due Process**

by Dale Chappell

The U.S. Court of Appeals for the Ninth Circuit held that the use of unconvicted criminal conduct that was too dissimilar to the charged offense to obtain a conviction violates a defendant’s due process rights and granted habeas corpus relief, vacating a murder conviction and death sentence.

Martin James Kipp was arrested in January 1984 and charged with the rape and murder of Antaya Howard in Huntington Beach, California. The State also alleged a “special circumstance” that Kipp intended to murder Howard during the rape. He took his case to trial, and the prosecution introduced evidence of another rape and murder it alleged Kipp also committed. Even though Kipp was not convicted of that other crime, the prosecution was allowed to offer the jury all the evidence of that offense to show Kipp’s propensity to commit such a crime.

The other crime was the rape and murder of Tiffany Frizzell, who was found dead in September 1983 in her hotel room in Long Beach. The cause of death was strangulation, and there was evidence of a sexual assault. Kipp’s fingerprints were found in her hotel room. Howard was also strangled. Sexual assault was presumed, but no evidence was found. The trial court found the two crimes were similar enough and instructed the jury that the Frizzell case was admissible “if it warrants an inference that if the defendant committed another act, he committed the act charged.”

The case against Kipp in the Howard case was largely based on witness testimony that Kipp was the last person seen with Howard at a bar before she was found dead and that his clothes were “soiled” after that night with her. For half of the trial, the prosecution focused on the Frizzell case and the evidence found there. The jury deliberated for three days and found Kipp guilty of the charges. He was convicted criminal conduct that was too dissimilar to the charged offense to obtain a conviction.

On appeal to the Ninth Circuit, Kipp maintained his argument that his due process rights were violated by the Frizzell evidence. The Court concluded that the two crimes were not similar enough to permit use of the Frizzell evidence in the Howard case.

**AEDPA Deference to the State Court**

Before the Court could hear Kipp’s habeas appeal, it had to determine the standard of review. The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a harsh restriction on federal courts hearing habeas petitions by state prisoners. Under 28 U.S.C. § 2254(d), a federal court may only grant habeas relief if the state court’s decision was (1) contrary to clearly established federal law (i.e., a U.S. Supreme Court holding) or (2) an unreasonable determination of the facts. However, if a state court fails to address the facts, a federal court may review them de novo or anew. The Court found that deference under § 2254(d)(2) applied because the state court adequately addressed the facts and denied Kipp’s claim on the merits.

A state court unreasonably determines the facts under § 2254(d)(2) when it either (1) neglects to make a finding of fact when it had the duty to do so, (2) makes factual findings under an incorrect legal standard, (3) uses a “defective” procedure for finding facts, (4) misstates the record in making findings of fact, or (5) ignores evidence that supports the petitioner’s claim. These were just some examples the Court gave, finding that the state court’s error here fell under the fifth example.

**Comparing the Howard and Frizzell Cases**

The state court noted several “shared characteristics” between evidence in both the Howard and Frizzell cases. It cited the victims’ young age, the victims’ gender, both were strangled, the victims’ bodies were carried to an area belonging to the victims, both bodies were covered with bedding, their upper bodies were partially clothed and the lower unclothed, the clothing was damaged, and their legs had bruises.

The state court called this a “highly distinctive pattern” to allow evidence from the Frizzell case in the Howard case against Kipp. The Ninth Circuit disagreed, saying that “some of the characteristics are unfortunately generic features of many rape-murders.” The only fact that was similar, that their upper bodies were partially clothed, was contradicted by the record, the Court noted. In photographs introduced by the State, Frizzell’s upper body was clothed and “unmistakably covered,” the Court said.

“More importantly, the state court failed to mention any of the differences between the two crimes, differences that far outnumber the similarities,” the Court said. It offered a dozen important distinctions between the two cases, including the evidence that Frizzell had been sexually assaulted and Howard had not (in fact, the rape charge against Kipp in the Howard case was later dismissed by the court for lack of evidence). There was also evidence that the cause of death for the two victims was not the same method, Frizzell’s body had defensive wounds and Howard’s didn’t, and Frizzell’s bra was taken by her killer but Howard’s wasn’t.

“We conclude that the state court’s determination that there was a ‘highly distinctive pattern’ between the Howard and Frizzell crimes was unreasonable in two ways,” the Court said. First, the court misstated the record in finding that Frizzell’s body was found the same way as Howard’s. Second, and more importantly, the court ignored evidence that supported Kipp’s claim that the crimes were too dissimilar to allow inference of connection during the trial.

“We therefore conclude that the state court’s fact-finding process itself was defective and renders the resulting finding that there was a highly distinctive pattern to justify admission of the Frizzell evidence unreasonable under section 2254(d)(2).”
The Merits of Kipp's Claim

Having found that the state court unreasonably determined the facts of the case to forgo deference to the state court's decision, the Ninth Circuit turned to Kipp's claim. A due process violation occurs when “the admission of evidence rendered the trial so fundamentally unfair as to violate due process.” Larson v. Palmateer, 515 F.3d 1057 (9th Cir. 2008). According to the Court, the admission of evidence from other crimes violated due process here because the prosecution's case was “solely circumstantial;” the crimes alleged were similar, the prosecutor relied on the other crime's evidence at several points during the trial, and the other crime was “emotionally charged.”

Absent the Frizzell evidence, the case against Kipp was circumstantial, the Court said. “Based solely on the evidence presented about the Howard crime, the jury could have at most inferred that Kipp was with Howard the night in question, and they might have had sex.” The Court also concluded that “the prosecution expressly relied on the Frizzell evidence to prove the necessary intent to rape and intent to murder while attempting to rape.”

Furthermore, “the jury was exposed to extensive evidence of both crimes, such that Kipp appeared to be on trial for a double rape-homicide, without the means of defending himself against the Frizzell charges,” the Court explained.

The Court found the state court's error prejudiced Kipp. To show prejudice, Kipp had to prove ‘grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.” The Court concluded that Kipp met his burden of proof. The Court observed, “The prosecution needed the Frizzell evidence to show Kipp's intent to rape and intent to kill during attempted rape.” This evidence was “critical,” the Court said.

Accordingly, the Court reversed the denial of Kipp's federal habeas petition and remanded with instructions to issue a conditional writ of habeas corpus. See: Kipp v. Davis, 971 F.3d 939 (9th Cir. 2020).

Writer's note: This is a rare case where a federal court found a state court unreasonably determined the facts under § 2254(d) to grant habeas relief. It is highly instructional on what a court must do to reach such a conclusion, which of course could guide a state prisoner who intends to bring a habeas claim to federal court based on an unreasonable determination of the facts by a state court. The opinion cites numerous cases on the aspects of bringing and evaluating these types of claims. Thus, it is highly recommended reading for all habeas corpus practitioners.

Fifth Circuit Grants Habeas Relief Because Detective's Testimony of Witness Identification of Defendant Violates Confrontation Clause

by Dale Chappell

In a case where a prosecutor pulled statements from a detective during testimony before a jury that tied a defendant to the crime – and without that witness testifying in court himself – the U.S. Court of Appeals for the Fifth Circuit held that this violated the Confrontation Clause under the U.S. Constitution.

The crime was a robbery during which Justin Atkins and Lawrence Horton allegedly beat and robbed a man after he cashed a check. Horton later went to the police and told them Atkins did the crime and that he was merely a lookout. Both were arrested, and Atkins was eventually convicted by a jury of robbery and aggravated battery.

The conviction came after a Louisiana state prosecutor asked the detective on the stand before the jury: “Did you in fact speak with Lawrence Horton?” The detective said he did, and the prosecutor asked if Horton had implicated anyone in the crime. “Based on the information he provided I was able to obtain a warrant. Q: For whom? A: Justin Atkins.”

After Atkins' appeals were exhausted, he made his way through the postconviction process in the state courts. He was rejected at every step. Filing a federal habeas corpus petition under 28 U.S.C. § 2254, Atkins argued that he was denied his Sixth Amendment right to confront the witnesses against him. The Fifth Circuit granted a certificate of appealability on the issue.

Under the Sixth Amendment's Confrontation Clause, the accused shall enjoy the right “to be confronted with the witnesses against him.” The U.S. Supreme Court has prohibited “testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross examination.” Crawford v. Washington, 541 U.S. 36 (2004). The Supreme Court has further held that a detective reading a codefendant's confession before a jury, even omitting the defendant's name, violated the Confrontation Clause because it “obviously” referred to the defendant. Gray v. Maryland, 523 U.S. 185 (1998).

The state postconviction court here, however, concluded that the detective's testimony was only made “to explain the sequence of events leading to the arrest” of Atkins. State v. Calloway, 324 So. 2d 801 (La. 1975). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), the only way the federal court could grant Atkins relief was if the state court's decision was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court” or “an unreasonable determination of facts in light of the evidence.” 28 U.S.C. § 2254(d).

“Detective Dowdy may not have used Atkins' name, but surely there was no doubt in jurors' minds that Horton had implicated Atkins,” the Fifth Circuit explained. “This was clear because Dowdy testified that based on what Horton said, Dowdy obtained an arrest warrant for Atkins.” Construing the Supreme Court's decisions on the Confrontation Clause, the Fifth Circuit has held that “officers cannot refer to the substance of statements made by a nontestifying witness when they inculpate the defendant.” United States v. Kizze, 877 F.3d 650 (5th Cir. 2017).

Because the state court's reasoning in denying Atkins relief was an “unreasonable application of Gray,” the Court concluded that Atkins' rights under the Confrontation Clause were violated. “Detective Dowdy testified that Horton, a nontestifying witness, implicated Atkins and the prosecution likewise referenced that testimony in its closing argument. Such testimony violates the Confrontation Clause,” the Court concluded.

Accordingly, the Court reversed the denial of Atkins' habeas petition and remanded so the district court can grant the relief requested.” See: Atkins v. Hooper, 969 F.3d 200 (5th Cir. 2020).

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Idaho Supreme Court Announces False Rape Allegations May Be Admitted Regardless of When Made

by Anthony Accurso

The Supreme Court of Idaho clarified the rule of evidence regarding the admissibility of prior false allegations of rape made by victims, announced a three-part test to assess the admissibility of such evidence, and vacated a defendant’s conviction.

Steven Michael Chambers was charged with raping N.S. in June 2016. N.S. claimed she met Chambers at his house, that he punched her in the abdomen, and then forced himself on top of her while raping her.

During preliminary hearings, Chambers sought to admit evidence per I.R.E. 412 that, six months after N.S. alleged he raped her, N.S. filed an identical claim against another man, and the detective in that case declined to arrest or charge the suspect. Indeed, the suspect claimed N.S. had visited him and had consensual sex, and the suspect was cooperative to the point of passing a polygraph test. Further, evidence showed N.S. had deleted all text messages, including sexting and provocative photos, from her phone after contacting 911 in both cases.

The trial court interpreted the language of I.R.E. 412 as not permitting the evidence because the other allegation occurred after N.S. accused Chambers and was therefore not “made at an earlier time.” The court also determined the evidence would result in a “confusion of the issues,” a “mini-trial within the case,” and “unfair prejudice.”

Chambers entered a conditional Alford plea and was sentenced to a 10-year unified sentence with two years fixed, which was suspended in favor of three years of supervised probation. Chambers then timely appealed.

The Idaho Supreme Court analyzed the text of Rule 412. Since it is a judicial rule and not a statute, its analysis merely begins with the rule’s wording but also “may be tempered by the rule’s purpose.” State v. Montgomery, 408 P.3d 38 (Id. 2017).

Rule 412 is part of a jurisprudence known as “rape shield laws.” It prevents defendants from admitting evidence of a victim’s prior sexual behavior to prevent “potential embarrassment and sexual stereotyping.” See Fed. R. Evid. 412’s note on its 1994 amendment. However, because a history of false rape allegations can, and should, affect a victim’s credibility, I.R.E. 412 allows for the admission of false allegations of sex crimes made at an earlier time.

While the district court rejected the admissibility of the evidence of N.S.’s other rape allegation because it occurred after her claim against Chambers, the Idaho Supreme Court found no such temporal requirement. Referring to the model rules the judicial committee likely used to draft the rule in 1987, the note to the model rule states, “[i]t matters not that the sexual behavior took place after the alleged offense but before trial rather than before the alleged offense.”

The Idaho Supreme Court also decided that the district court applied a conflicting test under Rule 403, instead of the proper test under Rule 412, because the test for the latter only mentions “unfair prejudice,” not “confusion of the issues” or “misleading the jury” as the former does.

The Court announced a three-part test for courts going forward to determine whether evidence of a purported false allegation is admissible as follows: (1) the district court must determine, by a preponderance of the evidence, whether “the allegations of the purported victim are false,” (2) whether the evidence is relevant to the current offense and (3) whether “the probative value of such evidence outweighs the danger of unfair prejudice.”

Accordingly, the Court vacated Chambers’ conviction and remanded to the district court with instruction to allow him to withdraw his Alford plea and for it to conduct a revised hearing on the admissibility of the evidence under the revised test. See: State v. Chambers, 465 P.3d 1076 (Ida. 2020).

Indiana Supreme Court Announces New Analytical Framework for Review of Substantive Double Jeopardy, Overruling Richardson

by Douglas Ankney

The Supreme Court of Indiana announced a new analytical framework for reviewing claims of substantive double jeopardy, overruling Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

A jury convicted Jordan Wadle of Operating a Vehicle While Intoxicated Causing Serious Bodily Injury (“OWI-SBI”), OWI Endangering a Person, Leaving the Scene of an Accident — Elevated to a Level 3 Felony Due to the OWI-SBI Conviction, and OWI with breath alcohol content (“BAC”) of 0.08 or more. He was sentenced to an aggregate term of 16 years with two years suspended to probation.

The court of appeals applied Richardson’s “actual evidence” test and concluded Wadle’s convictions for leaving the scene and OWI-SBI violated the Indiana Double Jeopardy Clause.

The court of appeals applied the same reasoning to the two OWI convictions and concluded they were based on the same act of drunken driving as the convictions for OWI-SBI and leaving the scene of an accident. It remanded with instructions for the trial court to vacate all of Wadle’s convictions on double-jeopardy grounds except for the conviction for leaving the scene of an accident. The Indiana Supreme Court granted the State’s petition for transfer, vacating the decision of the court of appeals.

The Court observed “[t]he Indiana Double Jeopardy Clause, as with its federal counterpart, stands as a bedrock principle of our fundamental law.” Historically, the prohibition against double jeopardy relied on either a former acquittal or former conviction of an offense and applied a procedural bar to a successive prosecution on that same offense. Twice in Jeopardy, 75 Yale L.J. 262 (1965).

But as statutory laws created new and overlapping offenses, the concern became that multiple charges and multiple punishments could occur for the same offense in a single trial. A History of Double Jeopardy, 7 Am. J. Legal Hist. 283 (1963). This brought forth two strands of double jeopardy: procedural (successive trials for the same offense) and substantive (multiple charges and punishments for the same offense during one trial). Elmore v. State, 382 N.E.2d 893 (Ind. 1978).
Under the Richardson framework, resolving claims of double jeopardy relies on one of two tests: (1) statutory elements test or (2) actual evidence test. The statutory elements test is summed up as follows: where the same act violates two distinct statutes, each statute must require proof of an element not found in the other to escape a double jeopardy bar. Blockburger v. United States, 284 U.S. 304 (1932). The actual evidence test looks to whether two or more offenses are the same based on how the evidence actually presented at trial is applied to each element of the offense. Richardson. Additionally, in Indiana and some other states, a conviction for both an offense and a lesser included offense is prohibited. I.C. §§ 35-38-1-6 and 35-41-4-3.

Because the “same offense” test in Richardson attempts to combine these tests into one comprehensive test, it has created more confusion than clarity. (See opinion for detailed explanation.) The Court opined that, with regard to substantive double jeopardy, “[t]he statutory elements’ test and the ‘actual evidence’ test have both proven inadequate.” To remedy this, the Court ruled that Indiana’s Double Jeopardy Clause protects against only successive prosecutions for the same offense, i.e., procedural double jeopardy. Protection against substantive double jeopardy comes from other state constitutional protections, viz., Article 1, §§ 13 & 16; Article 7, §§ 4 & 6. The new analytical framework to review for substantive double jeopardy requires courts to first determine if the statutes under which the charges are brought permit multiple punishments. If yes, there is no double jeopardy. If it’s not clear, then courts must apply included-offense statutes. If neither offense is included in the other, then there is no double jeopardy issue. If one offense is included in the other, then the Court must examine the facts underlying those offenses. If based on those facts the defendant’s actions were “so compressed in terms of time, place, singleness of purpose, and continuity of action” to constitute one transaction, then the offenses may be charged as alternative sanctions only, and the defendant cannot be cumulatively punished for each offense.

The State conceded and the Court concluded that under the new framework the convictions for both OWI endangering a person and OWI with a BAC of 0.08 or more violates double jeopardy. Regarding the other two convictions, the Court observed that the conviction for OWI-SBI requires a person to cause serious bodily injury to another when operating a motor vehicle while intoxicated. The leaving the scene of an accident conviction requires those same elements, plus leaving the accident without rendering necessary assistance. Analyzing these charges under the new framework, the Court concluded that neither statute authorizes multiple punishments. Consequently, the Court then examined to see if one offense is an included offense of the other. The Court concluded that the OWI-SBI is included in the leaving the scene of an accident. Following the new framework, the Court then looked at the facts to determine if both offenses are the same. Because Wadie’s actions were “so compressed in terms of time, place, singleness of purpose, and continuity of action,” the Court considered them the same transaction. To remedy the double jeopardy violation, the Court remanded to the trial court with instructions to vacate the OWI-SBI conviction but affirm the leaving the scene conviction. Because that conviction alone justified the sentence, the Court further instructed that Wadie’s sentence of 16 years with two years suspended to probation was to be left in place. See: Wadie v. State, 151 N.E.3d 227 (Ind. 2020).

### New Book from Prison Legal News

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by Christopher Zoukis

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Federal Judge Criticizes Qualified Immunity and Challenges SCOTUS to Abolish It

by Anthony Accurso

In a recent decision dismissing a defendant’s lawsuit against a police officer on the basis of qualified immunity, Judge Carlton Reeves of Mississippi filed a 72-page opinion that challenges the morality of the doctrine of qualified immunity, provides an in-depth history of the doctrine, and concludes with a challenge to the U.S. Supreme Court to abolish it.

Clarence Jamison was driving to his home in South Carolina after vacationing in Arizona, where he had purchased a Mercedes convertible. On July 29, 2013, as Jamison was passing through Pelahatchie, Mississippi, Officer Nick McClendon noticed a “Black man driving a Mercedes” and decided to pull him over. At trial, McClendon claimed the temporary tag was bent and the license number was obscured, but during the stop he told Jamison that police had received a tip that the Mercedes was stolen and contained 10 kilos of cocaine. Nearly two hours later, after McClendon had caused about $4,000 worth of damage to the vehicle while searching it and had inspected it with a drug dog, he let Jamison go on his way.

“Thankfully, Jamison left the stop with his life,” Reeves said in his opinion. “Too many others have not.”

Jamison filed a lawsuit against McClendon under 42 U.S.C. § 1983. Because of the doctrine of qualified immunity, the case turned on whether it was “clearly established” that what McClendon did violated Jamison’s Fourth Amendment rights. Because Reeves could not point to a prior case that contained the “precise offensive conduct,” McClendon prevailed on qualified immunity.

Reeves’ opinion discussed how § 1983 had its roots as part of the Ku Klux Act of 1871 and was designed to protect newly freed Blacks and their White allies from persecution and retaliation by the Klan and their racist supporters in government and law enforcement.

Qualified immunity is the result of decades of jurisprudence where the Supreme Court has slowly but steadily neutralized the remedies available under § 1983. Qualified immunity “now protects all officers, no matter how egregious their conduct, if the law they broke was not clearly established,” said Reeves. It applies “to all but the plainly incompetent or those who knowingly violate the law.”

However, Reeves laid out that, just as the Supreme Court created qualified immunity, it could abolish it as well. The Court did something similar when it sanctioned “separate but equal,” which it later abolished in Brown v. Board of Education.

Various legislative initiatives also seek to modify or abolish qualified immunity, depending on how “progressive” the prospective bill’s authors are. A U.S. Senate bill that would disallow immunity even if the offensive conduct is not “exactly” like prior violative conduct ended in committee. A U.S. House bill would remove immunity for officers after they have been found to have violated a citizen’s rights previously and were then “decertified” by a national board. But these legislative efforts fall far short of abolishing qualified immunity in the country’s highest court.

“Judges have invented a legal doctrine to protect law enforcement officers from having to face consequences for wrongdoing,” wrote Reeves. “And the harm in this case to one man sheds light on the harm done to the nation by their manufactured doctrine.”

See: truthout.org, washingtonpost.com

Fifth Circuit Reverses Conviction Based on Prejudicial Prosecutorial Misconduct

by Douglas Ankney

The U.S. Court of Appeals for the Fifth Circuit reversed Thaddeus Beaulieu’s felony criminal contempt conviction based on the prosecutor’s remarks that rose to the level of prejudicial misconduct.

During an interview with FBI Agent Steven Rayes, Beaulieu identified various individuals in carjackings and bank robberies. Rayes memorialized the interview in an FBI form bearing the number 302 (“302”). Assistant U.S. Attorney Michael McMahon called Beaulieu to testify against two of the men he had named. Beaulieu refused to testify, invoking his Fifth Amendment privilege against self-incrimination. The U.S. District Court for the Eastern District of Louisiana appointed Cynthia Cimino as counsel for Beaulieu. The following day, the Department of Justice (“DOJ”) granted Beaulieu immunity from prosecution under 18 U.S.C. §§ 6002-6003. Beaulieu still refused to testify, and he was charged with felony criminal contempt. The district court appointed McMahon to prosecute the charge. Cimino withdrew as counsel, and new counsel was appointed.

Cimino was called as a witness by the defense. She testified that two letters had been provided that offered Beaulieu immunity. In a letter dated April 25, 2018, the prosecutor stated he would not use any statements Beaulieu made in his testimony against him in a prosecution for making a false statement, obstruction of justice, or perjury. Cimino further testified that a letter from the DOJ on the following day formally granted immunity under § 6002, but that section permits prosecution for perjury and for giving a false statement. Cimino also testified that McMahon had stated, regarding the offer of immunity, he would prosecute Beaulieu to the fullest extent of the law if Beaulieu testifed in any way differently from what was written in the 302. Cimino additionally testified that Beaulieu told her that three of the statements written by Rayes in the 302 were not accurate; consequently, if Beaulieu testified in agreement with the 302 he opened himself to prosecution for perjury and making a false statement. But if he testified truthfully in contradiction of the 302, he would be prosecuted by McMahon.

During Cimino’s cross examination, McMahon argued with Cimino, denying that he had told her he would prosecute Beaulieu if he testified differently from the 302. And during closing, McMahon made two arguments not supported by any facts in evidence: (1) he told the jury that Beaulieu had refused to testify because he feared being labeled as a “rat” and (2) that he (McMahon) had never told Cimino he would prosecute Beaulieu. McMahon also

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argued that the jury should convict because failure to do so would disrespect the judge and the court.

The jury convicted Beaulieu, and he appealed. He argued, inter alia, that his conviction should be vacated based on prosecutorial misconduct.

The Fifth Circuit observed that in order for Beaulieu to prevail he had to show (1) the prosecutor made an improper remark and (2) that he was prejudiced thereby. United States v. Fields, 483 F.3d 313 (5th Cir. 2007). McMahon's arguing with Cimino and contradicting her with his statements (using his role as prosecutor to be a witness); his arguments based on evidence not presented at trial; and his urging the jury to convict, not based on the evidence, but because a failure to convict would disrespect the judge, were all textbook examples of prosecutorial misconduct. United States v. Young, 470 U.S. 1 (1985).

As to prejudice, the "determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." United States v. Mendoza, 522 F.3d 482 (5th Cir. 2008). In answering that question, courts may consider (1) the magnitude of the prejudicial effect of the statements, (2) the efficacy of any cautionary instructions, and (3) the strength of the evidence of the defendant's guilt. Id.

The Government conceded Beaulieu easily satisfied the first two prongs, and the Court concurred. The Court also reasoned Beaulieu proved the third prong.

To convict, the Government had to show Beaulieu (1) received a specific court order, (2) he violated the order, and (3) did so willfully. United States v. Allen, 587 F.3d 255 (5th Cir. 2009). Evidence that Beaulieu willfully violated the order to testify was lacking. That is, if McMahon did in fact threaten to prosecute Beaulieu if he corrected errors in the 302, then the jury could determine that his refusal to testify was to avoid committing perjury and not a willful violation of a court order. Fed. Power Comm'n v. Metro. Edison Co., 304 U.S. 375 (1938). The Government's only evidence disputing McMahon's threatened prosecution came from McMahon himself — which he offered inappropriately. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987).

The Court concluded Beaulieu was prejudiced.

Accordingly, the Court vacated his conviction. See: United States v. Beaulieu, 2020 U.S. App. LEXIS 27749 (5th Cir. 2020).

Arizona Supreme Court Declares Gang-Association Statute Unconstitutional

by Dale Chappell

The Supreme Court of Arizona held on September 1, 2020, that a statute increasing a misdemeanor charge to a felony for merely being part of a gang is unconstitutional on its face as a violation of substantive due process, affirming a trial court's dismissal of the charges.

In two separate incidents, Christopher Arevalo allegedly verbally threatened someone and was charged with two counts of threatening or intimidating someone under A.R.S. § 13-1202(B)(2). Normally, such a charge would be a misdemeanor under Arizona law, but it was further alleged that Arevalo was a gang member. As such, the charges were automatically bumped up to felonies.

Arevalo moved in the trial court to dismiss the charges or to at least reduce them to misdemeanors, arguing that the gang-association enhancement under the statute making them felonies is unconstitutional. The court agreed and dismissed the charges, holding that § 13-1202(B)(2) violates due process by punishing someone for associating with a gang.

The State appealed and won. The court of appeals held that § 13-1202(B)(2) "does not penalize mere membership in a criminal street gang — it penalizes the added menace inflicted when a criminal street gang member is engaged in criminal conduct." The Arizona Supreme Court granted review to answer whether the gang-association provision is unconstitutional, characterizing it as "a recurring issue of statewide importance."

Under § 13-1202(B)(2), threatening or intimidating someone "is a class 1 misdemeanor except that it is a class 6 felony if ... the person is a criminal street gang member." The question was whether mere association with a gang violates the Due Process Clause of the U.S. and Arizona Constitutions, which both state that no person shall be deprived of "life, liberty, or property without due process of law."

In this "facial" constitutional challenge to the statute, Arevalo was required to show that "no set of circumstances exists under which the act would be valid," the Court explained, quoting United States v. Salerno, 481 U.S. 739 (1987). Reviewing a statute for constitutionality, the Court was required to "presume" it is constitutional and then to follow one of three levels of review. First, under strict scrutiny, a statute is constitutional "if it is necessary to promote a compelling state interest and the statutory restriction is narrowly tailored."

The next level is intermediate scrutiny, which the statute survives if the state's interests are "reasonable, not arbitrary, and have a fair relation to those goals." Under the lowest level, the rational basis standard, a statute survives if it "has any conceivable rational basis to further a legitimate governmental interest."

"We conclude that § 13-1202(B)(2) fails even rational basis review," the Court said, "because it does not require a nexus between threatening or intimidating and gang membership." The Court pointed to Scales v. United States, 367 U.S. 203 (1961), in which the U.S. Supreme Court ruled that "the punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity." And that link (or nexus) between the status and the criminal activity "must be sufficiently substantial" to satisfy the Due Process Clause, the Scales Court explained.

The Court here found that § 13-1202(B)(2) (2) does not require a nexus between gang association and criminal conduct. "Indeed, it permits sentencing enhancement based on gang status even if the crime is wholly unrelated to a defendant's gang membership," the Court observed.

The Court also found that the court of appeals erred by adding an "added menace" criterion to the statute, rewriting the statute to make it constitutional. "We cannot, and will not, rewrite the statute to save it," the Court said and "disavowed" prior cases that had included such a criterion to save the statute such as State v. Meeds, 421 P.3d 653 (Ariz. Ct. App. 2018).

Noting that other courts in Tennessee and Florida, for example, have similarly held gang membership penalties unconstitutional for lack of nexus, the Court concluded that § 13-1202(B)(2) is facially unconstitutional in all respects.

Accordingly, the Court affirmed the trial court's dismissal of Arevalo's charges and remanded to the trial court. See: State v. Arevalo, 470 P.3d 644 (Ariz. 2020).
Mississippi Supreme Court Vacates Capital Murder Conviction Obtained With Bite Mark Comparison Evidence

by Matt Clarke

On August 27, 2020, the Supreme Court of Mississippi held that a change in the guidelines of the American Board of Forensic Odontology ("ABFO") prohibiting testimony that bite mark comparison could be used to identify an individual constituted new evidence that could be used in postconviction proceedings to challenge a conviction based largely on such evidence. The Court vacated the murder conviction and death sentence and remanded the case for a new trial.

On February 2, 1992, smoke from a small, smoldering fire led to the discovery of the body of Georgia Kemp, 84, in her house. An autopsy determined that she had been beaten,raped, strangled, and stabbed; however, no bite marks were found on her body, which was subsequently buried.

Three days later, the doctor who performed the autopsy requested an additional study of Kemp's body, which was exhumed and examined under ultraviolet light by Dr. Michael West, a forensic odontologist. He discovered otherwise invisible marks on the right breast, right side of the neck, and right arm. He used dental impressions of Eddie Lee Howard, Jr.'s teeth to perform a "wound duplication test with ink" and determined that the mark on the right breast was "without doubt inflicted by" and the other marks were "consistent with" Howard's teeth. Howard was charged with capital murder. At trial, he made "strange comments" and exhibited "numerous incidents of paranoid behavior," but the court did not hold a competency hearing.

The evidence against him was that he lived two blocks away from Kemp; told a de-
tective that “the case was solved” and that he “had a temper and that’s why this happened,” testimony that he liked to bite his girlfriend on the neck and breast during intercourse; he smelled of burnt wood or clothes the day after the murder; and Dr. West’s testimony, which was within the ABFO guidelines at the time.

West testified that the marks on Kemp’s neck and arm were “consistent with” Howard’s teeth, and the mark on her breast was an “identical” match to Howard’s dental impression. He said he had “no doubt” Howard left the mark.

Howard was convicted of capital murder, sentenced to death, and ultimately unsuccessful in his appeals and postconviction relief attempts.

In 2010, the Mississippi Supreme Court granted his request for postconviction DNA testing. No male DNA or semen was found on Kemp’s clothing or bedsheets or in her sexual assault kit or fingerprint scrapings, but male DNA not belonging to Howard was discovered on the blade of the knife used to stab her.

In 2013, the ABFO revised its guidelines to prohibit testimony that a bite mark can be matched to an individual in cases such as Howard’s, where the potential number of suspects is unknown.

Another revision in 2016 banned such testimony in all cases.

In 2015, Kemp filed a motion to vacate his sentence based on the DNA evidence and the new ABFO guidelines. The trial court denied the motion, ruling that Kemp’s DNA evidence did not warrant a new trial because it did not identify “a different perpetrator” and that evidence challenging bite mark comparison was not new evidence. With the assistance of court-appointed attorney William Tucker Carrington, Kemp appealed.

The en banc Mississippi Supreme Court concluded that, contrary to the ruling of the trial court, a reasonable juror could “surely conclude that the presence of another man’s DNA on the knife blade” pointed to a different perpetrator. Additionally, the changes in the ABFO guidelines that prohibited West’s testimony “matching” Howard’s dental impression to the bite mark was new evidence and relevant — especially in light of the fact that West touted his ABFO credentials during his testimony.

The Court held that, “[g]iven the inadmissibility of Dr. West’s identification of Howard as the biter, the absence of forensic evidence putting Howard at the scene of the crime, and the newly discovered presence of another man’s DNA on the murder weapon,” a jury would probably find Howard not guilty in light of the new evidence.

Accordingly, the Court vacated the conviction and sentence and remanded the case to the trial court with instructions to grant Howard a new trial. See: Howard v. State, 2020 Miss. LEXIS 293 (2020).

First Circuit: Dangerousness of Machine Guns Not Justification for Above-Guidelines Sentence

by Dale Chappell

The U.S. Court of Appeals for the First Circuit held on August 3, 2020, that the U.S. District Court for the District of Puerto Rico’s focus on the dangerousness of machine guns and their link to brutal crimes in general are not permissible reasons to impose a sentence above what the Guidelines recommend for a defendant.

When Julian River-Berrios was seen with a federal fugitive in Puerto Rico, he was arrested for being a felon in possession of a firearm and for that possession being a “machine gun” under 18 U.S.C. §§ 922(g)(1) and (922)(o) (1). When the Government realized he wasn’t a felon, it had to drop the felon in possession of the machine gun.

The presentence report established that River-Berrios was a first-time offender and that the U.S. Sentencing Guidelines range (“GSR”) for his offense was two- to two-and-a-half years in prison. The Government recommended a sentence at the bottom of that range.

Instead, the district court gave a speech about guns and violence in Puerto Rico and imposed a three-and-a-half year sentence. The court noted that “modern machine guns can fire more than one thousand rounds a minute allowing a shooter to kill dozens of people within a matter of seconds.” It continued that machine guns are only available on the black market and that “violent crimes and murder are occurring at all hours of the day in Puerto Rico, in any place on the island, even on congested public highways, in shopping centers, public basketball courts, and at cultural events.”

But River-Berrios’ possession of a machine gun had nothing to do with any of that. He had never used it to commit a crime and said he kept it to protect his family. It was a modified Glock pistol enabled to fire automatically, which made it a ‘machine gun’ by law. 26 U.S.C. § 5845(a). He appealed the above-Guidelines sentence.

Under 18 U.S.C. § 3553(a), a sentencing court “shall consider” certain factors and state on the record its reasons for imposing a sentence. While this doesn’t have to be an exhaustive explanation, “the explanation must elucidate the primary factors driving the sentence,” the First Circuit has held. While a sentencing court may deviate from the GSR, it must provide a sufficient reason for doing so, the Court reiterated.

Here, the sentencing court wrote two short sentences about River-Berrios’ character but “then dwelled at some length on the pervasiveness of violent crime,” the Court said. “The sentencing court appears to have relied on nothing beyond the mere fact that the offense of conviction involved a machine gun,” which the Court described as a “non-violent and victimless crime.”

The problem was that the district court’s focus on the dangerousness of the machine gun ignored that the sentencing Guidelines already accounted for that in establishing the recommended sentence for such an offense. “When a sentencing court relies on a factor already accounted for by the sentencing guidelines to impose a variant sentence, it must indicate what makes that factor worthy of extra weight,” the Court said.

The district court didn’t do that here. Even though the court cited the § 3553(a) factors for its sentence, “the section 3553(a) factors must be assessed in case-specific terms,” the Court said. Those factors apply to any defendant and are “generic,” it noted.

“The sentencing guidelines are meant to cover the mine-run of particular crimes, thus ensuring a modicum of uniformity in sentencing,” the Court explained. A district court may only go above the GSR “if some special characteristic attributable either to the offender or to the offense of conviction serves to remove a case from the mine-run.” That did not happen in this case, the Court concluded.

Accordingly, the Court vacated Rivera-Berrios’ above-Guidelines sentence and remanded for resentencing within the recommended GSR. See: United States v. Rivera-Berrios, 968 F.3d 130 (1st Cir. 2020).

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by Matt Clarke

The U.S. Court of Appeals for the Eleventh Circuit ruled U.S.S.G. § 5Gl.3(b)(l)’s “a court shall adjust the sentence” for time served on a related state crime is mandatory once the section’s requirements are met. Acknowledging a circuit split on the issue, it ruled that a § 5Gl.3(b)(l) adjustment does not change the sentencing range and thus is not “advisory” pursuant to United States v. Booker, 543 U.S. 220 (2005).

Christopher Henry pleaded guilty in Alabama state court to stealing eight firearms during a business burglary. Because of his prior convictions – one for assault and 10 for burglary – he was sentenced to 20 years in prison.

Two years later, Henry pleaded guilty in federal court to being a felon in possession of a firearm – based on his theft of the firearms. His presentencing investigation report showed a Guidelines range of 130 to 162 months but was reduced to the statutory maximum for his crime, 120 months. The court sentenced him to 108 months.

Henry requested a downward adjustment of his sentence for the 24 months he had already served on the state burglary conviction pursuant to U.S.S.G. § 5Gl.3(b)(l). Citing his lengthy criminal history, the court declined to adjust the sentence. When Henry objected that the adjustment was mandatory because of the use of “shall” in the section, the court replied that, “Congress gets to say ‘shall,’ but the Sentencing Commission doesn’t get to say ‘shall.’”

On appeal, the Eleventh Circuit noted that § 5Gl.3(b)(l) specifically states that “the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of confinement will not be credited to the federal sentence by the Bureau of Prisons.” The Court ruled that use of the term “shall” makes the adjustment mandatory provided the defendant has served time on a related, undischarged state sentence that the Bureau of Prisons is not going to credit toward the federal sentence.

The Court noted that there was no dispute as to whether the section’s requirements had been met. The only dispute was whether Booker rendered the Sentencing Guidelines advisory, as some circuits have held or implied.

The Court explained that the Booker Court concluded that the practice of judges finding facts during sentencing that increased the mandatory sentencing range under the Guidelines violates a defendant’s Sixth Amendment right to have a jury determine fact issues. To remedy this, a separate majority of the Booker Court invalidated 18 U.S.C. § 3553(b)(l), which made the Guidelines’ sentencing range mandatory. The Booker Court ruled that the sentencing range was always advisory.

The Court ruled that Booker made the sentencing range advisory but did not also make all other provisions of the Guidelines advisory. Specifically, sentencing requirements that do not enhance a sentence based on judicial factfinding or impose a sentence within the Guidelines range are still binding on sentencing courts provided they do not conflict with federal statute or the Constitution, according to the Court. According to the Court, § 5Gl.3(b)(l) is one such requirement.

The Court explained that § 5Gl.3(b)(l) does not affect the Guidelines range. Instead, the judge’s sentences (inside or outside the range) then adjusts the sentence according to the section. Since this does not affect the Guidelines range, it remains mandatory even after Booker.

Accordingly, the Court vacated Henry’s sentence and remanded the case to the district court for resentencing. See: United States v. Henry, 968 F.3d 1276 (11th Cir. 2020).

Kansas Supreme Court Announces Residual Clause of Law Prohibiting Knife Possession by Felons Unconstitutionally Vague

by Anthony Accurso

In a decision issued on July 17, 2020, the Supreme Court of Kansas struck the residual clause of the state’s statute prohibiting possession of a knife by a convicted felon due to its definition being unconstitutionally vague.

Christopher M. Harris was a convicted felon on post-release supervision when he was observed in an altercation with another man on a street in Wichita, Kansas. An officer turned his spotlight on the men, and Harris dropped an object, which turned out to be a pocket knife with a 3.5-inch serrated blade.

Harris was charged with aggravated assault, criminal use of a weapon, and criminal possession of a weapon by a convicted felon. Before trial, Harris moved to have the possession charge dismissed on the grounds that the statute is unconstitutionally vague.

K.S.A. 2019 Supp. 21-6304 defined a knife as “a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character.” The portion of this statute after the word “or” is the residual clause, and the portion of the law under which both Harris and the State agreed he was prosecuted.

Harris also sought to introduce evidence that his parole officer had issued a letter, which stated, “You are allowed to have a pocket knife less than 4 inches in length while on post release.”

The district court denied these motions because Harris’ knife was clearly “a cutting instrument of like character,” and he should have understood the law’s clear language prohibiting his possession of it. Regarding his parole officer’s statement, the court said it was not “an official interpretation of the statute.”

Harris proceeded to trial and was found guilty on the sole charge of criminal possession of a weapon.

On appeal, the Court of Appeals upheld the district court’s ruling regarding the statute’s constitutionality but found that K.S.A. 2016 Supp. 21-5111 subs. (aa)(5) and (p)(2) define his parole officer as “a public officer” who was “authorized to interpret the statute.” Therefore, excluding her statement from the trial was in error, and the outcome of Harris’ trial would have likely been different.

Both Harris and the State appealed this decision to the Kansas Supreme Court, which, to define the review, decided that Harris’
pleadings argued for a facial (unconstitutional in every circumstance with respect to everyone), as opposed to an as-applied (unconstitutional as to a specific person under a specific set of facts), constitutional challenge to the statute in question.

The Court reiterated that in order to not be constitutionally vague a statute must meet two requirements. The lower courts properly referenced the first requirement. A “statute that either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the Fourteenth Amendment to the United States Constitution and is thus void for vagueness.” State v. Richardson, 209 P.3d 696 (2009).

The Court explained that the lower courts glossed over or entirely missed the second requirement that states: “The law must provide explicit standards for those who apply it or it will amount to an impermissible delegation of basic policy matters by the Legislative branch to policemen, judges, and juries for resolution on an ad hoc and subjective basis.” Grayned v. City of Rockford, 408 U.S. 104 (1972).

Thus, even a law that is very clear may nonetheless be unconstitutional if it makes everyone a violator. This is a world in which “almost anyone can be arrested for something.” Nieves v. Bartlett, 139 S. Ct. 1715 (2019). It is this overbreadth which was the basis for invalidating the residual clause of the federal Armed Career Criminal Act in Johnson v. United States, 576 U.S. 591 (2015) (“We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause ... invites arbitrary enforcement.”).

And arbitrary enforcement was exactly what the Kansas Supreme Court pointed to in this case. The State prosecuted Harris for possessing a 3.5-inch blade. However, the Kansas Department of Correction Division of Community and Field Services Supervision Handbook states, “An ordinary pocket knife with a blade no longer than 4 inches is not considered by law to be a dangerous knife, or a dangerous or deadly weapon or instrument.”

Regarding this intra-government disagreement, the Court noted, “Even without any bad faith on the part of the government ... the circumstances present us with an unmistakable instance of arbitrary enforcement of an inherently subjective standard.” Thus, the Court held “that the residual clause in K.S.A. 2019 Supp. 21-6304 is unconstitutionally vague.”

Accordingly, the Court vacated Harris’ conviction and remanded with instruction to dismiss the criminal possession charge. See: State v. Harris, 467 P.3d 504 (Kan. 2020).

Maryland Court of Appeals: Odor of Marijuana Alone Doesn’t Provide Probable Cause to Arrest and Search Person

by Anthony Accurso

The Court of Appeals of Maryland held that the odor of marijuana emanating from a person alone does not provide police with probable cause to support an arrest and warrantless search incident to the arrest.

Rasherd Lewis was in a convenience store in Baltimore City on February 1, 2017, when officers got a tip that someone matching his description was “potentially armed.” Officers located Lewis, but the tip was not, by itself, sufficient to search or arrest him. Officers ordered the patrons of the store to leave, and when Lewis was passing them, Officer Burch said he smelled the odor of burnt marijuana on him.

Officers searched him and found a non-criminal amount of marijuana, plastic baggies, $367 in cash, and a handgun. Lewis was charged with criminal possession of a firearm. He filed a motion to suppress the firearm on the ground that the search was unconstitutional, but the motion was denied. Lewis was convicted in a bench trial and sentenced to three years’ incarceration with all but 90 days suspended, and three years’ probation. Lewis appealed the results of the suppression hearing.

The Court of Special Appeals affirmed the results of the suppression hearing by relying on Robinson v. State, 152 A.3d 661 (Md. 2019). In Robinson, the Court of Appeals ruled that the odor of marijuana emanating from a vehicle justified a search of the vehicle because “possession of ten grams or more of marijuana, crimes involving the distribution of marijuana, and driving under the influence of a controlled dangerous substance have not been decriminalized in Maryland.”

On appeal to the Court of Appeals, Lewis argued the search of a person, outside the context of a vehicle, is separate and due greater deference than the search of a vehicle. The Court of Appeals agreed.

The Fourth Amendment to the U.S. Constitution and the Maryland Declaration of Rights, article 26, prohibit unreasonable searches of a person or property. This right is “subject to only a few specifically established exceptions.” Grant v. State, 141 A.3d 138 (Md. 2016). Two of these are the automobile exception and the search incident to arrest exception. Pacheco v. State, 214 A.3d 505 (Md. 2019). “The distinction between the two exceptions is at least in part due to the diminished expectation of privacy that justifies the automobile exception ... as compared to the unique, significantly heightened constitutional protections afforded a person to be secure in his or her body.” Id.

The Court of Appeals noted that Pacheco was not available when the Court of Special Appeals decided Lewis’ direct appeal, and thus that court relied solely on Robinson. However, as established in Pacheco, greater protections are attached to searches of a person since Maryland decriminalized marijuana possession. As possession of less than 10 grams and use of marijuana carries only a civil penalty (a fine), the smell of marijuana cannot be used to infer that a person is committing or has committed a felony or misdemeanor. Thus, officers lacked probable cause to arrest Lewis or conduct a search incident to arrest, so both the arrest and subsequent search were in violation of Lewis’ constitutional rights.

Also, in a concurring opinion to Lewis’ direct appeal and noted by the Court of Appeals, Judge Arthur voiced concern that if the odor of marijuana is sufficient to establish probable cause then “it is not difficult to imagine scenarios in which police officers would have probable cause to arrest and search someone whose only exposure to marijuana is from second-hand smoke.... I would have thought that the reform of Maryland’s marijuana laws was intended to reduce rather than facilitate intrusive searches in circumstances such as these.” It is this reason, in combination with greater protections afforded to individuals to be free from unreasonable searches of their person vis-à-vis vehicles, that guided the ruling of the Court of Appeals.

Accordingly, the Court reversed the Court of Special Appeals and remanded the case with instructions to grant the motion to suppress. See: Lewis v. State, 233 A.3d 86 (Md. 2020).
California Court of Appeal: ‘Violent Victim Rule’ Doesn’t Require Defendant to Have Had Knowledge of Victim’s Propensity for Violence

by Douglas Ankney

Division Eight of the California Court of Appeal for the Second Appellate District held that a trial court abused its discretion when it excluded evidence of a homicide victim’s prior violent acts.

Neil Efren Delrio exchanged gunfire with his cousin, Raul Prieto. According to Delrio (the only eyewitness), Prieto became angry and pulled his nine-millimeter handgun because he believed Delrio was snubbing him, i.e., not speaking to him, “ducking” him, etc. Delrio testified he was “in fear of [his] life” after Prieto racked a round into the gun’s chamber and raised it toward him. Delrio testified he then pulled his own .40 caliber pistol and fired at Prieto. Prieto fired once in return. Delrio then fired again before getting into his vehicle and driving off. Prieto continued firing at Delrio as he drove away.

Prieto died from two bullet wounds to his abdomen. A .40 caliber bullet was recovered from his body. From the scene of the shooting, police recovered two .40 caliber cartridge casings and 15 nine-millimeter cartridge casings. Delrio’s vehicle had multiple bullet holes, and a bullet fired from Prieto’s weapon was found in the car.

Because Delrio intended to claim self-defense, prior to trial, he sought to admit evidence of Prieto’s propensity for violence – including evidence of two incidents of Prieto’s domestic violence. Delrio sought to admit the 911 call of the woman who lived with Prieto who reported that he was schizophrenic, not taking his medicine, choked her, and had a firearm. He also sought to have the woman testify. Prieto had ultimately been convicted of domestic violence in connection to this incident. The trial court deferred ruling until trial.

At trial, Delrio testified that he had been unaware of the domestic violence before the shooting.

Because Delrio had been unaware of this prior to the shooting, the trial court refused to allow the evidence, reasoning that the evidence did not factor into Delrio’s decision to pull his weapon and fire. Delrio was convicted of numerous offenses, including second-degree murder. He appealed. He argued, inter alia, that the trial court abused its discretion when it excluded the evidence of Prieto’s propensity for violence.

The Court of Appeal observed “evidence of people’s character is inadmissible when offered to prove their conduct on specified occasions.” Evidence Code § 1101(a). But there are exceptions. One exception is the violent victim rule. Id. This exception allows a defendant to introduce evidence that a victim had a propensity for violent aggression.

In the instant case, the evidence of Prieto’s domestic violence would have aided Delrio’s effort to prove that Prieto was violently aggressive and had pulled his gun first, which forced Delrio to resort to deadly self-defense. People v. Wright, 703 P.2d 1106 (Cal. 1985). The trial court was incorrect, as a matter of law, in ruling that Delrio had to have prior knowledge of Prieto’s past bad acts. Delrio was not seeking to admit the evidence to demonstrate that he was fearful of Prieto based on Prieto’s past bad acts. Instead, Delrio’s theory was that Prieto’s violent character was circumstantial evidence for the jury to consider when deciding how Prieto acted at the scene. As such, it was admissible without Delrio’s prior knowledge of it. People v. Shoemaker, 135 Cal.App.3d 442 (1982); 1 McCormick, Evidence (8th ed. 2020) Character and Habit, § 193 (“This line of proof and counterproof openly relies on the victim’s tendency to act in accordance with a general trait of character – a violent or a peaceful disposition. Consequently, it does not require proof that the defendant was aware of the victim’s violent reputation or acts.”).

Physical evidence demonstrated who was involved in the shooting, who fired which weapons, and which weapon killed Prieto. The crucial fact question for the jury was whether Prieto was the aggressor. If Prieto was first with his hand on a gun, the prosecution would have a hard time disproving the claim of self-defense. Evidence tending to show Prieto by nature was violently aggressive would have been directly on point. The Court concluded the error was not harmless. Accordingly, the Court reversed Delrio’s conviction. See: People v. Delrio, 2020 Cal. App. LEXIS 830 (2020).

Ninth Circuit: Mere Passage of Time Doesn’t Attenuate Evidence From Initial Constitutional Violation

by Douglas Ankney

The U.S. Court of Appeals for the Ninth Circuit ruled that the passage of eight months from the time of the unlawful seizure of Nikolay P. Bocharnikov until he gave his statement to law enforcement did not sufficiently attenuate the statement from the seizure.

In July 2017, a police aircraft flying over Gresham, Oregon, was struck by a green laser, temporarily blinding the pilot. The plane’s equipment was able to determine the laser was beamed from Bocharnikov’s residence. After midnight, officers from the Multnomah County Sheriff’s Department (“MCSD”) arrived at the residence. Bocharnikov, wet from his shower and wearing only his boxer shorts, came to the door.

When asked about the laser, he said “[i]t was the kids.” An officer then handcuffed Bocharnikov, sat him on the front steps of his house, explained “the seriousness of the incident,” and said that they “were there only to recover the laser in question.” Bocharnikov then admitted to shining the laser at the plane, stating he did not think it could reach that far. After apologizing, he handed over the laser to the officers. The officers released Bocharnikov and left.

Eight months later in March 2018, FBI Special Agent Adam Hoover of the FBI Joint Terrorism Task Force questioned Bocharnikov at his residence. Hoover asked if he “could ask some follow-up questions regarding the laser strike from the previous summer.” Almost immediately Bocharnikov said it “was a stupid thing to do” and “it was a mistake.” Their conversation lasted between 20 and 40 minutes.

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Bocharnikov was indicted on one count of aiming a laser at an aircraft in violation of 18 U.S.C. § 39A. He moved to suppress his statements to Hoover because they were tainted by the illegality of the detention and interrogation by the MCSD. The district court denied the motion, ruling that the March 2018 interview “was not a continuation of the July 2017 interrogation.” The court reached this conclusion based on Bocharnikov’s willingness to speak with Hoover, the different circumstances of the two interviews, and the time that elapsed between the two interviews.

Bocharnikov appealed. On appeal, the Government conceded that MCSD’s initial encounter with Bocharnikov violated at least the Fourth Amendment but that Hoover’s encounter with him was sufficiently attenuated from the initial encounter.

The Ninth Circuit observed that “[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.” The “exclusionary rule” provides that evidence obtained through a violation of the Fourth Amendment should be excluded from trial. Wong Sun v. United States, 371 U.S. 471 (1963). The rule applies to the direct fruits of a Fourth Amendment violation and indirect fruits of the illegal search if they “bear a sufficiently close relationship to the underlying illegality.” United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998).

The Government bears the burden of proving the taint of the prior illegality has been attenuated enough to allow the statements made during the second interrogation into evidence. United States v. Cell, 568 F.2d 1266 (9th Cir. 1977). Because the Government conceded that MCDS illegally detained Bocharnikov, the Government must prove his second statement was voluntary and that it was “sufficiently an act of free will to purge the primary taint.” Brown v. Illinois, 422 U.S. 590 (1975). That is, the Government must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.” Oregon v. Elstad, 470 U.S. 298 (1985). Three factors are relevant to make this determination: (1) the temporal proximity of the search to the confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. United States v. Shelter, 665 F.3d 1150 (9th Cir. 2011).

The first factor weighed in Bocharnikov’s favor. Even though eight months had elapsed between interviews, one of the first things Hoover said was that he was there to “ask some follow-up questions.” By using this phrasing, the second encounter was a de facto extension of the first incident, the passage of time notwithstanding, the Court determined.

With regard to the second factor, there were no intervening circumstances to separate the interviews. This factor weighed in favor of Bocharnikov.

As for the third factor, nothing shows the MCSD’s misconduct was purposeful or flagrant. The officers were understandably focused on securing the laser to prevent any further threats to aircraft. Still, the Government conceded that the facts did not rise to create exigent circumstances to sustain a warrantless arrest in a home. While this factor tilted slightly against suppression, it was not dispositive in light of the other factors.

The Court concluded that the Government failed to carry its burden of proving Bocharnikov’s statements were sufficiently attenuated from the earlier illegal seizure. His statements should have been suppressed.

Accordingly, the Court reversed the district court’s denial of the motion to suppress. See: United States v. Bocharnikov, 966 F.3d 1000 (9th Cir. 2020).

N.J. Supreme Court Announces Defendant Has Right to Question Cooperating Witness About Plea Deal and Possible Sentence Exposure Even When Witness Faced Same Exposure as Defendant

by Douglas Ankney

The Supreme Court of New Jersey ruled that a defendant has a right to question a cooperating witness about a plea deal and the witness’ possible sentencing exposure before accepting that deal even if the witness’ exposure was the same as the defendant’s. At the heart of this case were two divergent interests: (1) a defendant’s right to confront an accuser to expose the witness’ motivation for lying versus (2) a jury possibly deadlocking or voting to acquit after hearing what sentence the defendant might receive upon a guilty verdict.

Tiffany Taylor, Javon Clarke, and Michael A. Jackson were arrested and charged in connection with a burglary at the residence of L.G. Because of Clarke’s priors, a possible sentence of up to five years in prison could be enhanced to 10 years. Clarke accepted a cooperating plea offer in which he agreed to testify against Jackson and Taylor in exchange for a three-year sentence. But the trial judge urged modification of the agreement to provide for Clarke being sentenced to only 180 days in the county jail and probation.

At trial, Clarke testified that Jackson picked him up on the morning of the burglary, drove him to L.G.’s residence, and broke a window of the residence to gain entry. On cross-examination, the defense attempted to question him about his possible sentence exposure of five years’ imprisonment enhanced to 10 years to show that the offer of three years was his motivation for falsely implicating Jackson. The State objected on the grounds that the testimony would prejudice the jury because Jackson faced the same charges as Clarke. That is, the jury would discern that Jackson would face five years if convicted, which may influence them to acquit or deadlock to avoid subjecting him to that punishment.

The trial court sustained the objection, ruling that the defense could discuss the three-year offer and the actual sentence of 180 days in jail and probation but not the maximum sentencing ranges. Jackson was ultimately convicted. On appeal, the Appellate Division affirmed, rejecting Jackson’s argument that the trial court deprived him of his right to confront an adverse witness when it limited his ability to cross-examine Clarke. The New Jersey Supreme Court granted Jackson’s petition for certification.

The Court observed “[t]he Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee the right of defendants to confront witnesses against them.” A defendant has the right to explore, via cross-examination, a witness’ motivation in testifying. Delaware v. Van Arsdall, 475 U.S. 673 (1986).

However, there are limitations on this right when confronted with competing inter-
The Supreme Court of Missouri held that a circuit court erred when it excluded testimony from Kane Carpenter’s expert witness relating to the accuracy of witness identifications.

In October 2016, a young white man (“Victim”) was approached by two black men, hoodies pulled low to cover their faces. It was dark and the nearest street light was some distance away. One of the men lifted his shirt, showing Victim what appeared to be a handle to a pistol. The man said, “Give me what you have or I’ll shoot you.” The two men took Victim’s iPhone, earbuds, e-cigarette, and nicotine cartridge.

Victim observed the two men run into an alley. Victim then borrowed the phone of a nearby pedestrian and phoned police. Two officers met with Victim within seconds. Less than five minutes elapsed from the time of the robbery until a description of the robbers went out over the police radio. Within two minutes, other officers radioed that they had detained two suspects and asked that Victim be brought to location for a show-up identification.

When Victim was brought to location, Carpenter was seated on the curb with another black male. Both were in cuffs. Neither wore a hoodie. A spotlight shown on both men. Victim identified both men as the robbers and identified Carpenter as the one with the gun who had threatened to shoot Victim.

The two men were arrested. Officers conducted a search of the area, beginning with the location from where the men were arrested back through the alley to the location of the robbery. They recovered two discarded hoodies; the iPhone and earbuds; and the e-cigarette and cartridge. They were unable to locate a pistol or anything resembling the handle of a pistol.

Prior to trial, Carpenter served notice that he would call Dr. James Lampinen to testify as an expert about factors that can impact eyewitness identifications generally. The State moved that such testimony should be excluded based on State v. Lawhorn, 762 S.W.2d 820 (Mo. 1988). The circuit court granted the State’s motion.

At trial, Victim testified he was “one hundred percent certain” Carpenter threatened and robbed him. At the close of evidence, the court instructed the jury, including Carpenter’s tendered Instruction No. 9 that listed the 17 factors juries are to consider when evaluating eyewitness testimony. The jury convicted, and Carpenter appealed. His sole argument was that the circuit court erred in excluding Lampinen’s testimony.

The Missouri Supreme Court observed that when a circuit court’s ruling is based upon an incorrect legal premise, it is an abuse of discretion. State v. Taylor, 298 S.W.3d 482 (Mo. 2009). The circuit court relied on Lawhorn when determining Lampinen’s testimony was inadmissible. When Lawhorn was decided, the rule in Missouri was “expert opinion testimony should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.” Because eyewitness identifications “are within the general realm of common experience of members of a jury and can be evaluated without expert assistance,” the Missouri Supreme Court affirmed the circuit court’s decision in Lawhorn to exclude expert testimony related to eyewitness identifications.

However, the Court explained that Lawhorn has since been abrogated by R.S.Mo. § 490.065.2 (Supp. 2018). Of the many requirements regarding expert testimony listed
under § 490.065.2, the one relevant to this appeal is that the expert testimony “will help the trier of fact to understand the evidence or to determine a fact in issue.” Even if the issue is one of common experience or knowledge of a jury, expert testimony is now permitted. This is in agreement with the “clear trend” toward admission of expert testimony “for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification.” People v. Lerma, 47 N.E.3d 985 (Ill. 2016).

Jurors are persuaded by the confidence with which an eyewitness identifies a defendant. Expert testimony provides the scientific basis as to why a witness can be “100% certain” but 100% wrong at the same time. Jeffrey S. Neuschatz et al., A Comprehensive Evaluation of Showups, 1 Advances in Psychol. & Law 43 (M.K. Miller & B.H. Bornstein eds., 2016). Lampinen’s testimony would have given context and meaning to the factors of Instruction No. 9 that influence accuracy of identifications, including: if defendant and Victim are of differing races, lighting, whether a weapon was used, length of time for observation, and show-up identifications. Lampinen would be prohibited from expressing any opinion as to whether Victim’s identification was accurate (that is within the province of the jury to decide). People v. McDonald, 690 P.2d 709 (Cal. 1984). But Carpenter had a right to present relevant expert evidence on those factors that affected Victim’s accuracy. State v. Wood, 580 S.W.3d 566 (Mo. 2019).

While some evidence other than identification supported conviction (recovery of Victim’s property and hoodies not far from Carpenter), it was far from certain based on that evidence that Carpenter was guilty. Consequently, the likelihood that Lampinen’s testimony would have altered the outcome was high.

Accordingly, the Court vacated the judgment and remanded for a new trial. See: State v. Carpenter, 2020 Mo. LEXIS 289 (2020). [1]

Seventh Circuit: Solo Masturbation Near Fully Clothed and Sleeping Child Does Not Constitute Production of Child Pornography

by Anthony Accurso

The U.S. Court of Appeals for the Seventh Circuit held that a conviction under 18 U.S.C. § 2251(a) for production of child pornography cannot be sustained where the defendant only engaged in sexually explicit conduct near a minor when the images were produced.

Prior to law enforcement serving a search warrant and inspecting his computer in August 2017, Matthew Howard made two videos showing himself masturbating near his sleeping and fully-clothed, 9-year-old niece. Howard pleaded guilty to several charges relating to the possession, receipt, and distribution of child pornography under §§ 2252(a)(2) and (a)(4) but went to trial on the production counts.

After a lengthy battle over the jury instructions pertaining to the elements of the crime, the district court allowed the jury to convict him if it found, in pertinent part, that, “The defendant knowingly used [his niece] to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.”

The Government argued to the jury: “This isn’t about what [his niece] did or didn’t do. The law says you look at what did the defendant use [his niece] to engage in masturbation, did the defendant use [his niece] to exhibit his genitals. It doesn’t say anything about what [his niece] engaged in.”

Howard was convicted and sentenced to concurrent terms of 25 years in prison on each count, along with shorter concurrent terms for the non-production counts. He appealed, arguing that the statute’s language does not support the jury instructions, which reflected the Government’s theory of the expansive types of conduct criminalized by the statute.

Section 2251(a) states in relevant part: “Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct...”

The Government’s theory of the case rested on an expansive definition of the verb ‘use’ and a reading of the word ‘any’ to allow for the prosecution of Howard on the grounds that he violated the law when he “used” his niece to engage in sexually explicit conduct and filmed it.

The Court observed that this “case represents a peculiar application of the statute. The videos in question do not depict a child engaged in sexually explicit conduct; they show Howard masturbating next to a fully clothed and sleeping child.”

The Court concluded “the videos are not child pornography” and rejected the Government’s expansive reading of the statute for two reasons. First, the other words near the term ‘use’ in the statute “require some action by the offender to cause the minor’s direct engagement in sexually explicit conduct.” According to the Court, reading the verb ‘use’ out of this context would violate the doctrine of noscitur a sociis, where a word “is known by the company it keeps” and the courts must “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.” Yates v. United States, 574 U.S. 528 (2015).

The same applies to the word ‘any,’ said the Court, which clearly refers to the minor “when the statutory text is read in context and as a coherent whole rather than seizing on small parts of it and reading those parts in isolation.”

Second, the Government’s interpretation also violates the doctrine that “Laws dealing with a single subject, or in pari materia (“in a like matter”), should if possible be interpreted harmoniously.” Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 252-55 (2012). The Court said of similar statutes, “[s]pecifically, this cluster of statutes penalizes ... material involving the use of a minor engaging in sexually explicit conduct.” Quoting from § 2252(a)(4)(B).

The Government tried to argue that § 2251(a) doesn’t mention “child pornography” and therefore shouldn’t be read to require that what Howard produced actually be child pornography, but the Court noted that phrase “does not appear in any of the [related] statutes either.”

Thus, the Court rejected the Government’s theory of the case that Howard could be prosecuted based on his sexually explicit conduct alone.

Accordingly, the Court vacated his convictions under § 2251(a) and noted that the Government waived the opportunity to retry him on both counts. See: United States v. Howard, 968 F.3d 717 (7th Cir. 2020). [2]
The U.S. Court of Appeals for the Fourth Circuit expanded the First Step Act’s “covered offense” for crack cocaine sentence reductions to include all of the federal statute penalizing crack cocaine offenses, even if the change would not affect the penalty range for a particular offense. As a result, all three provisions penalizing crack cocaine are included under the First Step Act, regardless of the drug amount.

In 2009, Albert Woodson was sentenced to just under 13 years in federal prison for distributing 0.41 grams of crack cocaine. When the First Step Act was passed, he filed for retroactive application of the Fair Sentencing Act of 2010 (“FSA of 2010”), which lowered the threshold for crack sentences for each provision of 21 U.S.C. § 841(b)(1). However, the U.S. District Court for the Northern District of West Virginia ruled that since Woodson’s sentence was under § 841(b)(1)(C) and would have remained under the same penalty range, he didn’t qualify under the First Step Act.

On appeal, Woodson argued that the First Step Act modifies § 841(b)(1)(C), and his offense is thus a “covered offense” to qualify under the First Step Act. The Fourth Circuit agreed. Under 21 U.S.C. § 841(a), it is unlawful to manufacture, distribute, dispense, or even possess with intent to do so, a controlled substance like crack cocaine. The penalties for such an offense depends on the drug amount and falls under § 841(b)(1)(A), (B), or (C).

While the FSA of 2010 raises the threshold amount of crack cocaine for all three provisions of § 841(b)(1), the problem for Woodson was that his amount of crack cocaine stayed under § 841(b)(1)(C), both before and after the First Step Act made the FSA of 2010 retroactive to his case. Therefore, District Judge Irene M. Keeley held that Woodson’s penalty provision under § 841(b)(1) didn’t change, he wasn’t eligible for First Step Act relief and denied his motion without reaching the merits of his claim.

But the Fourth Circuit found that Woodson did qualify under the First Step Act because his conviction was a “covered offense,” and the drug amount has nothing to do with it. “A defendant has committed a ‘covered offense’ – and is therefore eligible for a First Step Act reduction – if he was convicted under a statute the statutory penalties for which were modified by section 2 or 3 of the First Step Act,” the Court explained.

The Court’s reasoning was that it (and other courts) have considered (b)(1)(A) and (b)(1)(B) to have been “modified” by the FSA of 2010. Offenses falling under those provisions, the Court said, had been deemed “covered offenses” for the First Step Act. But the FSA of 2010 also changed (b)(1)(C), the Court noted. Prior to the FSA of 2010, any amount of crack less than 5 grams fell under (b)(1)(C); afterward, that amount went up to 28 grams. That, the Court said, was a “modification” of (b)(1)(C) to make any crack offense falling under it a “covered offense.”

The Court rejected the Government’s argument that Woodson’s statutory penalty range had to change in order for him to qualify under the First Step Act. "The relevant change for purposes of a ‘covered offense’ under the First Step Act is a change to the statutory penalties for a defendant’s statute of conviction, not a change to a defendant’s particular sentencing range as a result of the First Step Act’s modifications," the Court explained. "The First Step Act shifted the entire sentencing scale for crack cocaine trafficking offenses."

The Court said that even when a defendant stays within the same penalty range, such as in Woodson’s case, this might have an “anchoring effect on their sentence.” The Court explained: Woodson’s half gram of crack cocaine was 8.2 percent of the original upper end of (b)(1)(C)’s 5 grams. But after the FSA of 2010, that half gram was just 1.5 percent of the upper range of 28 grams. "A district court may find this shift relevant to determining the appropriate sentence for a particular offender," the Court suggested.

Accordingly, the Court held that the FSA of 2010 modified all of the penalty provisions under § 841(b)(1), making any crack cocaine offense a “covered offense” under the First Step Act, and remanded for the district court to determine the merits of Woodson’s motion. See: United States v. Woodson, 962 F.3d 812 (4th Cir. 2020).

California Supreme Court Reverses Murder Conviction and Death Sentence Because Police Failed To Honor Defendant’s Request for Counsel

The Supreme Court of California reversed the murder conviction and death sentence of Paul Nathan Henderson because the police continued to question him after he made an unambiguous request for counsel.

Henderson was arrested on July 5, 1997, in connection with a home invasion of a mobile home that resulted in the death of Reginald Baker and an assault on his wife Peggy Baker.

Detective Wolford and Officer Herrera of the Cathedral City Police Department interviewed him. He waived his Miranda rights. The officers said they were investigating crimes against the Bakers at the Canyon City trailer park on June 22, 1997. When asked if he went to the trailer park, the following exchange occurred:

Henderson: “Uhm, there’s some things that I, uhm, want uh ...”
Wolford: “Did you go to the trailer park, that night?”
Henderson: “[Want], want to speak to an attorney first, because I, I take responsibility for me, but there’s other people that ...”
Herrera: “What do you ...”
Henderson: “I need to find out ...”
Herrera: “Paul.”
Henderson: “I need to find out.”
Herrera: “Paul, what do you accept responsibility for?”
Henderson: No response.
Herrera: “Do you accept responsibility for what happened inside that trailer park? Is that what you’re talking about? Do you accept responsibility ...”
Henderson: “I never ...”

The officers continued with asking him how he took responsibility, pressing him to help himself, to think of his family, and the like. Eventually, Henderson admitted to the crimes.

Henderson moved to exclude his statements from evidence. The trial court denied his motions. It found that he had validly waived his Miranda rights and that he did not unambiguously invoke his right to counsel later in the interview. The court found that Henderson’s statement could have meant he wanted an attorney before answering any further questions or his statement could also have meant he wanted to talk to an attorney about the issue of incriminating others before he would answer questions incriminating others. The court concluded that since there were several reasonable interpretations that could be placed on Henderson’s statement about an attorney it wasn’t an unambiguous or unequivocal request as defined in Davis v. United States, 512 U.S. 452 (1994).

Henderson was convicted of numerous felonies, including first degree murder, and sentenced to death. On appeal, he argued, inter alia, that the officers violated his Fifth Amendment right against self-incrimination as defined by Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona, 451 U.S. 477 (1981).

The California Supreme Court observed that after a defendant has waived his Miranda rights he may reinvoke them during the interrogation, and if he clearly and unequivocally does so, police must immediately stop all questioning, Edwards. Police may not resume questioning until counsel is provided or the suspect reinitiates contact. Id. Edwards sets forth a bright-line rule that all questioning must cease after an accused invokes his or her right to counsel. Smith v. Illinois, 469 U.S. 91 (1984). Without such a rule, the authorities—through badgering overreaching—might wear down an accused and persuade him to incriminate himself even though he had requested counsel. Id.

Ambiguous or equivocal references to an attorney are not sufficient. Davis. The suspect must express his desire for counsel with sufficient clarity that a reasonable police officer would understand the statement to be a request for an attorney. Davis. When determining if a suspect’s request is clear and unambiguous, courts may not look to his responses to questions after the request to determine if counsel was requested. Smith.

However, statements like “maybe I should talk to a lawyer” or “it would probably be a good idea for me to get an attorney” are equivocal statements and are not a clear statement that the accused is requesting an attorney, Davis.

In the instant case, Henderson’s request for counsel was clear. Merely because he stated why he wanted counsel (he wanted to take responsibility and he wanted counsel before incriminating others) did not make his request ambiguous, according to the Court. Questioning should have immediately ceased at that point, and any statement made by him afterward should have been suppressed. Maryland v. Shatzer, 559 U.S. 98 (2010).

The erroneous admission of statements made in violation of the Fifth Amendment is reviewed under Chapman v. California, 386 U.S. 18 (1967), which requires the People “to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” The standard is satisfied only if “[t]here is no reasonable possibility that the verdict would have been more favorable to defendant had [the] statements not been admitted.” People v. Bradford, 939 P.2d 259 (Cal. 1997). Confessions are highly persuasive evidence of a defendant’s guilt. People v. Cabill, 853 P.2d 1037 (Cal. 1993).

The Court noted that Henderson’s statements were the “centerpiece of the prosecution’s” evidence to prove the identity of the perpetrator of the crimes. Thus, the Court concluded that the People failed to meet its burden under Chapman.

Accordingly, the Court reversed the judgment in its entirety and remanded the case to the trial court for further proceedings. See: People v. Henderson, 2020 Cal. LEXIS 4869 (2020).

Wisconsin Supreme Court: Officers Wrongly Inventoried Vehicle for Towing, Requiring Suppression of Evidence

by Anthony Accurso

The Supreme Court of Wisconsin held that the Court of Appeals erred when it affirmed the denial of a suppression motion because officers were not acting in their role as “community caretakers” when they inventoried a defendant’s vehicle for towing following a traffic stop.

Alfonso Lorenzo Brooks was pulled over for driving no less than 15 mph over the speed limit late one summer night in 2014. He exited the freeway and legally parked in a mixed commercial and residential neighborhood where, during the stop, the sheriff’s deputies ascertained that his driver’s license had been suspended. As they were issuing him citations for speeding and driving on a suspended license, they informed him that they were required to have his vehicle towed because he could not legally drive.

Brooks protested, saying that the vehicle belonged to his girlfriend and that she would arrive shortly to obtain the vehicle. The deputies said they could not allow an additional non-official person at the scene of a traffic stop, and they began a tow inventory search on the vehicle. They discovered a firearm in the trunk area and then promptly arrested Brooks for being a felon in possession of a firearm.

Brooks filed a motion to suppress the evidence recovered during the search of his vehicle on the grounds that the search violated the Fourth Amendment of the U.S. Constitution because there was no legitimate reason to tow the vehicle. His motion was denied, after which he pleaded guilty and was sentenced.

On appeal, the Court of Appeals held, in an unpublished opinion, that the officers were acting under the “community caretaker” exemption to the Fourth Amendment and upheld the circuit court’s denial of his suppression motion.

The Supreme Court of Wisconsin considered whether the “community caretaker” doctrine authorized law enforcement officers to seize a vehicle without a warrant when, subsequent to a traffic stop, they discover the driver and sole occupant of the vehicle does not have a valid driver’s license.


The Court first decided that two separate “seizures” had occurred. The first was when
Brooks was pulled over and received two citations. This seizure ended when he was informed he could merely be ticketed and released. The second began when officers performed the tow inventory. As the first seizure was ending, it could not justify the second. And “because there is a presumption against warrantless seizures, the State bears the burden of proving the community caretaker doctrine justified seizure of the vehicle Brooks was driving.” See State v. Payano-Roman, 714 N.W.2d 548 (Wis. 2006).

In the community caretaking role, officers may act “to permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities.” South Dakota v. Opperman, 428 U.S. 364 (1976).

The State claimed officers needed to tow the vehicle, so it was not “unattended for an unanticipated amount of time” and thus subject to vandalism. The Court rejected this because, as Brooks was initially not under arrest, he could have protected the vehicle until its owner, his girlfriend, arrived.

The State claimed it was required to tow the vehicle under a duty to “reunite the car with its registered owner.” The Court also rejected this claim as “nothing about the situation suggested [Brooks] might not be in lawful possession of the vehicle” or that he could not return it after he finished borrowing it.

Next, the State claimed it was also under a duty to ensure “the efficient movement of vehicular traffic” because Brooks’ vehicle was “potentially impeding traffic along the side of the street.” However, as Brooks had contended the vehicle was legally parked and the State offered no evidence to the contrary, the Court found that the State failed to carry its burden of proving the reasonableness of the search. “Even now, the State’s most definitive argument on the subject is that the vehicle ‘potentially impeded traffic,’” chided the Court. “And we will not base our analysis on speculation.”

The State hastily claimed that the towing and search were pursuant to policies of the Milwaukee County Sheriff’s Department, though the State failed to articulate with which policy it was in accord. But even this was true, it still would not prevent the Court from conducting “a case-by-case application of constitutional requirements,” explained the Court. State v. Gay, 492 N.W.2d 311 (Wis. 1992).

Accordingly, the Court concluded that the State failed to prove the tow inventory search was executed as part of law enforcement’s community caretaking function, vacated Brooks’ conviction, and remanded to the circuit court to grant his motion to suppress the firearm as the fruit of an illegal search. See: State v. Brooks, 944 N.W.2d 832 (Wis. 2020).

Sixth Circuit: Michigan Courts’ Procedure Allowing Appellate Counsel’s Withdrawal Unconstitutional

by David M. Reutter

The U.S. Circuit Court of Appeals for the Sixth Circuit held that Michigan courts unreasonably applied clearly established federal law by allowing a defendant’s appellate counsel to withdraw and failing to appoint replacement counsel. The Court ordered a new first-tier appeal in Michigan courts.

The Court’s August 14, 2020, opinion was issued in an appeal brought by Michigan prisoner Daniel M. Pirkel. He was charged with 17 crimes that occurred in a few short months in 2007. At a January 24, 2008, plea hearing, Pirkel expressed reservations about entering a plea. The plea court allowed him 90 minutes to read the police reports. When it reconvened, two charges were dropped, and Pirkel pleaded no contest to the remaining charges. The court accepted the pleas after a colloquy into knowingness and voluntariness.

Prior to sentencing, Pirkel wrote the court to express that he was “in no way comfortable with anything pertaining to my case such as my plea, my lawyers, and my mental state.” The court said it had reviewed the tape of the plea hearing and would not allow withdrawal of the plea. It then sentenced Pirkel to 20 to 50 years on two counts of assault with intent to murder and two years for a firearms offense to run consecutively. The remainder of the sentences were concurrent to the assault with intent to murder.

John Ujlaky was appointed as Pirkel’s appellate counsel. In a letter to Pirkel, Ujlaky said he “found no issue of even colorable merit to pursue on [Pirkel’s] behalf.” He asked Pirkel to agree to terminate his appointment as counsel. Pirkel responded by raising issues, including withdrawal of his plea and ineffective assistance of counsel.

In a motion to withdraw as counsel, Ujlaky stated that he conducted a full review of the transcripts and other documents, corresponded with Pirkel, communicated with his trial counsel, and provided advice to Pirkel. Again, he asserted there were no appealable issues. The plea court agreed with his assessment at the hearing, and it allowed Ujlaky to withdraw. It denied Pirkel’s request to appoint new counsel, stating its “only obligation is to appoint one attorney for appellate review in a plea case.”

Proceeding pro se, Pirkel appealed. He argued his trial counsel was ineffective on several grounds. He also asserted Ujlaky was ineffective for raising an ineffective assistance of counsel claim and for withdrawing. Finally, he argued the plea court violated the Constitution by failing to appoint new counsel. The appellate court denied the appeal for “lack of merit in the grounds presented.” The Michigan Supreme Court declined review.

Pirkel then filed a federal habeas corpus petition. The magistrate judge found he failed to exhaust several claims and ultimately recommended the petition be dismissed. The district court dismissed the case and denied a certificate of appealability (“COA”).

The Sixth Circuit granted Pirkel’s application for a COA and appointment of counsel. On appeal, both parties agreed Pirkel’s claims were exhausted in state court, so the Sixth Circuit reviewed his claim of being denied the right to appellate counsel and challenge to the procedure for counsel’s withdrawal.

In Halbert v. Michigan, 545 U.S. 605 (2005), the Supreme Court ruled that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants convicted on their pleas, who seek access to first tier review in the Michigan Court of Appeals. In Anders v. California, 386 U.S. 353 (1963), the Supreme Court instructed that the proper procedure for appellate counsel to withdraw requires the filing of a brief referring to anything in the record that might arguably support an appeal, allow the defendant to raise any points he chooses to, and the court must make its own investigation to determine whether the appeal is “wholly frivolous.”
The Sixth Circuit found the procedure used to allow Ujlaky to withdraw failed to "afford adequate and effective appellate review" to Pirkel. First, the determination of whether there are appealable issues must be made "by the appellate court, not every court appealed from," the Court explained. "Next, Ujlaky failed to file a brief drawing attention to anything in the record that might arguably support Pirkel's appeal," the Court stated.

"Finally, the trial court failed to conduct an independent determination of the merits of Pirkel's appeal." Instead, it relied on Ujlaky's determination of the merits, and it referenced Ujlaky's review in denying new appellate counsel to Pirkel.

In light of these flawed procedures, the Court concluded that Pirkel was denied "adequate and effective appellate review." In cases such as this, the Sixth Circuit presumes prejudice due to the effective denial of counsel on appeal.

Accordingly, the Court reversed the district court's order and remanded to the district court with instructions to issue a conditional writ of habeas corpus, "ordering Pirkel's release if the State of Michigan does not grant him a new state court appeal with the constitutional protections specified in this opinion…." See: Pirkel v. Burton, 970 F.3d 684 (6th Cir. 2020).

**Sixth Circuit Clarifies 'Different Location' in Robbery Guidelines Enhancement Commentary Requires More Than Herding Victims To Different Room**

*by Anthony Accurso*

The U.S. Court of Appeals for the Sixth Circuit clarified that the term "different location" in the U.S. Sentencing Guidelines commentary definition of "abduction" requires more movement than from a sales floor of a business to the back breakroom for the related robbery enhancement to apply.

Tramain Hill pleaded guilty to Hobbs Act robbery and aiding and abetting for his role in the armed robbery of a Universal Wireless store in Coldwater, Michigan, on August 27, 2016. Hill and his codefendants forced three employees and a female customer from the sales floor to the back breakroom at gunpoint. The robbers then looted the store and fled with approximately $42,000 in stolen cellphones and cash.

At sentencing, the district court applied an enhancement under (b)(4)(A) of Section 2B3.1 of the Guidelines because the victims were "abducted to facilitate commission of the offense or to facilitate escape," resulting in an additional four points and a sentencing range of 130 to 162 months. Hill argued that he should merely be subject to a two-point enhancement under (b)(4)(B), which requires that the victims were "physically restrained to facilitate commission of the offense or to facilitate escape," which would result in a Guidelines range of 110 to 137 months.

Citing a similar case from the Fifth Circuit, the district court overruled Hill's objection and sentenced him to 130 months imprisonment. United States v. Buck, 847 F.3d 267 (5th Cir. 2017). Hill timely appealed this decision to the Sixth Circuit.

Because the issue over the application of the enhancement turned "mostly on the meaning of the words in a guidelines," the Court reviewed application of the enhancement de novo. United States v. Bolden, 479 F.3d 455 (6th Cir. 2007).

The issue of application arises from the definition of "abducted" in the commentary notes to Section 2B3.1, which reads as follows: "Abducted means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." Section 2B3.1 cmt. n.1, referencing Section 1B1.1 cmt. n.1(A).

At issue in the present case is how the term "different location" is interpreted, and different Circuits have reached opposing conclusions. Some Circuits have held that different rooms of within the same business premises will not qualify as a "different location." United States v. Whatley, 719 F.3d 1206 (11th Cir. 2013); United States v. Eubanks, 593 F.3d 645 (7th Cir. 2010). In contrast, other Circuits have held "different location" to mean that "any different position in a building counts as a different location." United States v. Buck, 847 F.3d 267 (5th Cir. 2017); United States v. Osborne, 514 F.3d 377 (4th Cir. 2008).

The Sixth Circuit joined the Seventh and Eleventh Circuits in requiring movement beyond another area within the same business premises. The Court decided, based on a comparison of dictionary definitions, that "the phrase 'different location' – by itself – is inherently vague because it can be interpreted at many different levels of generality." Quoting Whatley. Citing common usage, the Court stated that, "When individuals describe the 'location' that has been robbed, they typically refer to the store, bank, or business that was robbed," not just the sales floor. In this context, a "different location" means "anywhere in the world that is not the place just robbed."

Quoting United States v. Archuleta, 865 F.3d 1280 (10th Cir. 2017).

The Court also considered that the Guidelines definition of "abduction" already includes "accompany" in its wording. The Supreme Court noted "accompany" to possibly include "a victim accompanying a robber from one area within a bank to the vault." Quoting Whitfield v. United States, 574 U.S. 265 (2015). Therefore, the Court reasoned, "[i]f the Sentencing Commission meant for that short movement to count, it had no reason to add the phrase 'different location.'"

Finally, the Court noted the two possible enhancements (for "physical restraint" or for "abduction") should define different conduct as one establishes greater culpability through a larger point assignment. Courts have disagreed on whether herding victims into a defined area without physically restraining them even qualifies for the two-point enhancement, so the Court chose an interpretation that would not be satisfied by merely herding people within a business. Thus, the Court determined that Hill's movement of his victims from the sales floor to the back breakroom (and binding them) merely qualifies for the two-point enhancement under (b)(4)(B) for "physically restrain[ing]" his victims.

Accordingly, the Court reversed and remanded for resentencing with instructions that the two-level physical-restraint enhancement, not the four-level abduction enhancement, be used. See: United States v. Hill, 963 F.3d 528 (6th Cir. 2020).
Fed Position on Pot Pushing Vets to Black Market  
by Jayson Hawkins

The walls in Alex’s home are decorated with medals earned from two tours as a Marine serving in Iraq. He returned to the U.S. in 2007 at age 21, psychologically scarred by a war that left him suffering from Post-Traumatic Stress Disorder (“PTSD”) and crippling anxiety. Veterans Affairs (“VA”) doctors offered him anti-anxiety drugs, but Alex refused after having watched so many fellow vets become addicted to the legal medications. He turned instead to alcohol, numbing the pain with a bottle of vodka a day until developing a possibly lethal pancreas inflammation. Over the next year, Alex managed to quit using alcohol and cope with his emotional issues by smoking marijuana, which has legal status in his home state of California.

For Alex and other vets like him, pot allows them to function despite the traumas they have experienced. Clinical studies have affirmed the benefits of marijuana and cannabidiol, a nonintoxicating extract from cannabis plants, in the treatment of anxiety, insomnia, and chronic pain, and recent trials have supported the use of pot to ease PTSD symptoms. Laws in 33 states and counting have recognized such findings and have legalized either medicinal or recreational marijuana use, and a November 2019 Pew Research Center poll showed that two out of three Americans now favor legalization. Nevertheless, the federal government has thus far maintained its position that pot is a Schedule I narcotic, no different from cocaine or heroin, which has left veterans like Alex in a difficult spot.

Several factors have pushed vets into the black market to buy marijuana. Regardless of the drug’s legal status in their state, vets are leery about frequenting legal dispensaries because of the federal database that is kept of customers. Vets fear this information could be used to cut their disability or other benefits.

Another issue is that many vets own licensed firearms, yet it is a federal crime to possess guns or ammunition if one is also a user of “any controlled substance.”

Perhaps the biggest factor forcing vets into the black market, though, is price. Sean Kiernan, president of the nonprofit Weed For Warriors Project, reports that self-medicating with pot from a legal dispensary costs around $50 a day. With the government paying out only about $3,000 monthly to fully disabled veterans, half their check would go up in smoke.

A number of federal laws have been proposed to create a more workable pot policy for vets. The VA Medicinal Cannabis Research Act of 2019 would order the VA to test the effects of marijuana for treating PTSD, chronic pain, and other issues, while the Veterans Equal Access Act of 2019 would enable healthcare providers at the VA “to provide recommendations and opinions to veterans regarding participation in State marijuana programs.” Both measures passed the House but have progressed no further.

Sue Sisley, a doctor whose research has supported the therapeutic use of pot to treat PTSD, said vets have been frustrated by the lack of political action.

“They see bills like that come and go every session,” she said. “I think the vets feel like these efforts are futile, and that’s why they’ve gone underground with their home grows and sharing community.”

Even the traditionally conservative American Legion, the biggest organization representing veterans, has gotten on board with changing federal policy regarding marijuana.

“Society has changed,” the Legion’s national legislative director Melissa Bryant, said. “We’ve come around on recognizing that cannabis could be an effective means of alternative therapy and medication.”

Source: politico.com

Minnesota Supreme Court: Coercion Statute Unconstitutionally Overbroad  
by Anthony Accurso

In a decision issued July 22, 2020, the Supreme Court of Minnesota ruled that Minnesota Statutes Section 609.27, subd. 1(4) (2018) (“the coercion statute”) is overbroad on its face, violates the First Amendment to the U.S. Constitution, and must be struck in its entirety.

John Joseph Jorgenson was charged under the coercion statute after he contacted R.C., the father of his girlfriend J.C., and demanded $25,000 in exchange for not releasing a video of J.C. – in which she discussed smoking marijuana – to various agencies, including the Minnesota Department of Human Services, J.C.’s employer, and J.C.’s professional licensing board.

Jorgenson moved to dismiss because, among other reasons, the statute violates the First Amendment. The district court granted his motion on this ground, and the court of appeals affirmed. The State then appealed to the Minnesota Supreme Court.

The Court described the statute as follows: "Section 609.27, subdivision 1, provides that anyone who orally or in writing makes a ‘threat’ falling into any one of six enumerated categories, and who ‘thereby causes against the other’s will to do any act or forebear doing a lawful act is guilty of coercion.’ Subdivision 1(4), one of the six categories, criminalizes a threat to expose a secret or deformity, publish a defamatory statement, or otherwise to expose anyone to disgrace or ridicule. If the threat within the meaning of section 609.27, subdivision 1 ‘fails to cause the intended act or forbearance,’ it is still a crime as an ‘attempt to coerce.’ Minn. Stat. Section 609.275 (2018)."

To prevail, Jorgenson needed to establish that a substantial number of a statute’s applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” State v. Hensel, 901 N.W.2d 166 (Minn. 2017). The Court found subd. 1(4) sweeps widely indeed.

First, it covers all “threats,” not just “true threats.” The former includes harm or loss against a person or their property, while the latter includes “intend to commit unlawful violence.” Virginia v. Black, 538 U.S. 343 (2003).

Second, it applies even if the threat or deformity is true, the defamatory statement is accurate, or the facts that might lead to disgrace or ridicule are real. “Thus, the statute criminalizes statements in the realm of social or political conflict where threats may well be part of a marketplace of ideas, broadly conceived to embrace the rough competition that is so much a staple of political discourse.” United States v. Velasquez,
Third, the statute criminalizes speech regardless of whether the intended victim takes or forebears from any action in response.

And finally, it criminalizes speech ‘even if the recipient of the threat does not suffer any pecuniary loss or any loss at all.” Thus, the statute does not require “any tangible harm or injury – not even hurt feelings.”

The Court explained that it must also “ask whether the protected speech and expressive conduct [criminalized here] make up a substantial portion of the behavior the statute prohibits compared with conduct and speech that are unprotected and may be legitimately criminalized.” Matter of Welfare of A.J.B., 929 N.W.2d 840 (Minn. 2019).

The Court, after testing some examples during oral argument, found a “multiplicity of examples” where a threat that has real “social value” would be criminalized by the statute. It noted that “[s]uch speech occurs in the worlds of government, business, academia, sports, and culture” and “may well be at the core of matters of public concern.” Thus, the Court found the statute criminalizes a “substantial portion” of protected speech.

In sum, on its face, the statute criminalizes so much protected speech that it cannot survive scrutiny under the First Amendment. The only remaining issue was whether the Court was required to strike the whole statute or merely portions of it.

First, the State invited the Court to limit the statute’s reach by interpreting the word ‘threat’ to encompass only unlawful threats. However, the Court noted subds. 1(1)-(3) expressly use the word ‘unlawful,’ while subd. 1(4) does not. Clearly, the Legislature intended to criminalize even lawful threats, and with regards to narrowing instructions, the Court remains bound by Legislative words and intent and cannot rewrite the statute to make it constitutional.” In re Welfare of A.J.B.

And second, the suggestions by the State and in amicus briefs regarding severing portions of the statute would have required “major surgery” and still would criminalize a substantial amount of protected speech, the Court stated. Thus, as “[s]everances is not the solution,” the “remaining option is to invalidate the statute.” Hensel.

Accordingly, the Court upheld the ruling of the court of appeals by holding that Minn. Stat. Section 609.27, subd. 1(4) (2018) is facially unconstitutional. See: State v. Jorgenson, 946 N.W.2d 596 (Minn. 2020).

Less Lethal Munitions Still Deadly

by Ed Lyon

In the late 1960s, a young Ohio National Guard soldier fatally wounded a person protesting the Vietnam War at Kent State University. It was not the first or the last time this would occur.

Incidents like these probably went a long way to inspiring the development of less lethal munitions used by police at demonstrations that become disruptive and even riotous. Less lethal munitions may work in theory, but over several decades, their use has probably maimed and killed more demonstrators than real bullets.

According to Plumas County Sheriff’s Office Deputy Chief Ed Obayashi, the primary objective for using them is "to inflict pain to gain compliance and to disburse a crowd," he told USA Today. He added that if demonstrators remain noncompliant with police instructions, "firing on the overall crowd could be justified."

Less lethal munitions are actually viewed as lifesavers by giving police a "knock down option to disable threats from a safe distance without killing the target." This further enables police administrators and supervisors to downplay less lethal munitions' misuse as "conduct violations rather than weaponry problems."

The three most common types of less lethal munitions are bean bags, rubber bullets, and paintball rounds filled with chemical irritants. As benign as these items may sound, they are at times anything but.

A rubber bullet is actually a hard rubber cylinder, 40 millimeters (mm) in diameter. Some are tipped with a thin layer of sponge or foam. They are fired from an actual military grenade launcher.

A bean bag is a nylon sack full of lead shot, fired from a 12-gauge shotgun. They are not the striped, pillow covering material housing beans many of us remember from our early grade school days.

Either of these may reach velocities approaching 200 mph. If a baseball pitched at 95 mph, striking a batter's head can maim and even kill the batter, a lead shotfilled nylon bag or a 40 mm diameter hard rubber cylinder traveling at 200 mph can, and often has, maimed and killed protesters.

The use of various “chemical irritants” in today’s already over-polluted world speaks for itself as to lethality levels, especially for a demonstrator who is hit directly in his or her face.

In Los Angeles, California, during the 2000 Democratic National Convention, attorney Carol Sobel was hit between the eyes with a bean bag round as she placidly stood in a peaceful crowd. Later a protester there lost an eye to a less lethal munition. Seven years later, several dozens of migrants’ rights demonstrators were injured when police fired volleys of less lethal munitions at them.

At the University of Arizona, Tucson, in 2001, a student lost an eye to a bean bag round when a riot broke out over a ball game.

In Oakland, California, approximately 60 Iraq War protesters were injured by wooden pellets, cousins to rubber bullets, in 2003. Eight years later, Iraq War veteran Scott Olsen was attending an Occupy Oakland demonstration when a bean bag round hit the left side of his skull, fracturing it and damaging his brain. He had to relearn how to speak. “The city ultimately agreed to a $4.5 million settlement with Olsen,” USA Today reports.

In Miami, Florida, attorney Elizabeth Ritter suffered a head injury at a 2003 protest. She was one victim among many. A video surfaced of police supervisors laughing about the use of force a day after a rubber bullet hit her forehead.

In Boston, Massachusetts, after a 2004 Red Sox victory, bystander Victoria Snelgrove was hit in the eye with a paintball round containing chemical irritants. The round entered her brain through her eye, killing her.

Hundreds of protesters across the country sustained less lethal munition injuries at protests sparked by the police killing of George Floyd.

Whether caused by malice, indifference, or lack of training, police have demonstrated on dozens of occasions that they are incapable of using less lethal munitions without maiming or killing people. Yet, if these are taken away, retired Los Angeles County, California Sheriff’s Deputy Sid Heal points out that, “we’re going to have to go to something else, and it will probably be harsher.”

Source: usatoday.com
The murder of Ahmaud Arbery was shockingly mishandled by local police from the very beginning. Two White men chased down and shot a young Black man, and yet they had not been charged two months later, despite the fact that the whole event was caught on tape. Not surprisingly, when the Georgia Bureau of Investigation (“GBI”) took over the case, most onlookers saw it as a step in the right direction. The history of the GBI, however, does not inspire confidence, especially when the case involves delivering justice for a Black man.

Nearly 600 Black people were killed in lynchings in Georgia between 1877 and 1950, and multiple observers have chronicled the insidious presence of the Ku Klux Klan at every level of Georgia law enforcement in those years, as well as the lasting impact of that presence in the often toxic relationship between Georgia police and the Black community. The GBI is not free from this taint. Founded in 1937, one of the earliest directors of the GBI was Sam Roper, a local Klan leader who later became its Imperial Wizard. Even after the overt presence of the Klan was removed, the GBI has repeatedly been accused of failing to hold law enforcement accountable for excessive force and for botching cases involving Blacks.

For example, The Washington Post recently found that a GBI investigation cleared a narcotics task force of excessive force in raids that left a revered dead and an infant in a burn unit, but once the U.S. Justice Department got involved, multiple civil rights violations were brought before a grand jury. Radley Balko, the reporter who wrote the column, concluded that the GBI “probably shouldn’t be trusted to conduct unbiased, thorough investigations of other law enforcement officers.”

The GBI’s record on wrongful convictions is equally disturbing. Two men sent to prison on the basis of GBI testimony have recently been cleared after serving close to 20 years. More troubling is the case of Devonia Inman, a Black man who has been in prison for more than two decades even though the GBI matched DNA from the crime scene to a man who went on to commit at least two other murders and is now serving a life sentence in federal prison.

The GBI got involved in the Ahmaud Arbery case after local police dismissed it, but video of the murder spread on the internet. The two White suspects were connected to local police. One of them, Gregory McMichael, had worked for both the local police department and prosecutor’s office.

Their assertion that Arbery was a suspect in a string of local burglaries and became violent when questioned was accepted by local and county law enforcement. The fact that Arbery had a criminal record was enough to convince them that the killing was justified.

Once the GBI took over, both suspects were arrested, and many observers are cautiously hopeful for two reasons. The first is that the GBI does not have any direct relationship with the suspects, so the conflict of interest that almost certainly swayed local officials is absent. Secondly, GBI’s new director Vic Reynolds had won the public’s confidence by showing a commitment to professionalism and improved race-relations. His awareness, that this investigation is not just about the killing of Arbery but also holding those who tried to cover it up to account, was highlighted at a press conference to announce the arrest of Arbery’s killers. Reynolds assured the public that “this case is an active, ongoing investigation.”

The actions of the GBI and its new director would seem to indicate that they grasp the importance of the moment and how crucial it will be to unequivocally move beyond the Bureau’s troubled past.

Source: theintercept.com

Blue Lives Matter More: Georgia Introduces Hate Crime Bill Designed to Protect the Cops

by Michael Fortino, Ph.D.

In the summer of 2020, a summer of discontent, a summer ripe with pandemic lockdowns and street protests, the Georgia Legislature chose not to address the unrest and concerns of protesters but rather to double down on the side of law enforcement. They decided to give police and first responders more legalized protections and powers, including immunity from nearly any civil action brought against them. On August 12, 2020, Georgia passed, by a thin margin, the controversial bill HB-838/AP, under a vote that was split down the conservative/liberal party line.

Law enforcement has always enjoyed various protections that relate to this unique and dangerous line of work, but in recent years, states such as Georgia have begun to expand such protections leaving the public with a “David and Goliath” disadvantage. Law enforcement has enjoyed “qualified immunity,” a nearly impermeable legal shield that provides an officer with immunity from nearly any civil lawsuit. This one-sided protection has successfully provided them the ability to act with impunity in almost any scenario short of acts involving premeditated criminal intent or outright murder.

Police have also enjoyed safety behind the iron curtain of labor unions. Beyond these protections, law enforcement, for many years, has been given preferential treatment, even judicial bias, from courts and prosecutors. It may well be these very protections that have encouraged law enforcement to adopt the authoritarian culture that triggered the protests—a culture where “show of force” and “social dominance” among police have become commonplace. Now, in the midst of civil disdain for police brutality and unbridled aggression, Georgia felt the need to expand protections for law enforcement.

“HB 838 was hastily drafted as a direct swipe at Georgians participating in the Black Lives Matter protests who were asserting their constitutional rights,” said Andrea Young, executive director of the American Civil Liberties Union of Georgia.

Passed by the Georgia House and Senate, and signed into law under Governor Brian Kemp, the stand-alone bill, sponsored by Hitchens, Lott, Jasperse, Gravley, and Lumsden, is basically an act that “unapologetically backs the blue,” according to Kemp. Since the Georgia Legislature was unable or unwilling to come up with a bill that addresses true hate crimes...
against minorities, even in the wake of the killing of George Floyd, Ahmaud Arbery, and many others, it introduced this new hate crime bill that, with few exceptions, further shields cops in Georgia regardless of circumstance or cause and even provides them with a legal sword.

The bill’s language addresses “bias-motivated intimidation for damages to person or property a public safety officer (i.e., police man) or a first responder may suffer during the officer’s performance of his duties.” No doubt all the images we see daily on newscasts of burning police vehicles or the destruction of a police precinct seemed to make a strong impression on Georgia’s conservative lawmakers. Instead of attempting to address the underlying issues that have led to this rash of civil unrest, Georgia politicians have stacked the deck against protesters by legislating more ways for law enforcement to act with impunity.

In fact, HB 838/AP reads: “A peace officer shall have the right to bring a civil suit against any person, group of persons, organization, or corporation, or the head of an organization or corporation, for damages, either pecuniary or otherwise, suffered during the officer’s performance of official duties, for abridgment of the officer’s civil rights arising out of the officer’s performance of official duties, or for filing a complaint against the officer which the person knew was false when it was filed....”

The “blue line” is now an electric fence—get near it, and you’ll get shocked. The fortress of law enforcement abusing its authority. Often, these acts result in seemingly avoidable injuries or deaths. So some of the more liberal cities have made promises to do just that; budgets have been slashed in several metropolitan areas.

In June, Minneapolis was the first of any large city to actually pledge to wholly disband its police department, though now some council members are retreating from it becoming actual policy.

Several other communities have begun only a defunding process, with at least 13 cities eliminating officer positions and cutting department budgets. Among them are New York City, Atlanta, Los Angeles, Austin, Salt Lake City, Kenosha, and Norman.

Organizers are obviously requesting that police departments be dismantled. They desire a shift of funds to other programs that focus on violence prevention, safety, and community health. The result may not be what is actually being demanded. What city leaders are doing is merely transferring budgetary allocations to the hiring of private security. In some communities, these cuts resulted in privatization, not less policing.

During one June weekend alone, the city of Chicago hired three security firms, including AGB Investigative Services, to supply 100 unarmed guards to protect businesses on the city’s South and West sides. The cost was a staggering $1.2 million.

Private security forces are flooding into many large cities like Seattle and New York. Minneapolis council members hired protection for themselves at $4,500 per day. Portland approved a $10 million contract with G4S Security Solutions during the recent uprisings. Minneapolis and Denver both passed resolutions to eliminate school resource officers – while retaining 100 armed and unarmed security personnel for those same schools. It appears even the federal government is amenable to this resolution. The Department of Homeland Security hired Federal Protective Service in July to also respond in Portland.

And it’s not just governments turning to private security forces. Wealthy home and business owners are hiring these groups for property protection during the protests.

The recent surge is accelerating a neoliberal policing trend that has been embraced for almost 20 years. Detroit, Oakland, Baltimore, and Atlanta have been supplementing police with private security for a decade. Civil liberty groups are concerned that private security could become typical. The U.S. has 666,000 police officers, while there are more than 1.1 million private security operators.

AGB employs 750 guards in 12 states; FPS has 13,000 nationwide. Demand in the market is the highest ever, and AGB is looking to “hire as many guards as possible,” says VP Tifair Hamed.

Many believe private guards are the solution to police violence. However, like “community policing” and similar reforms, it seems to simply exacerbate the very problems for which solutions are being sought. In reality, private security receive less oversight, only a fraction of the formal training, and complaints or even shootings by them are rarely, if ever, investigated. It is not even clear what legal protections citizens have regarding private guards. These groups are also exempt from the Freedom of Information Act and other state open-records laws. The public may never know what happens, and even if there is a clear problem, there is no board of commissioners to address complaints.

AGB’s Hamed says the company’s employees “come from the neighborhood which we’re protecting” in Chicago. Chicago Aldermen Matt Martin tweeted: “We’ve heard from hundreds of neighbors this week who feel police make them feel less safe, not more. We need to take these concerns seriously, and not add unaccountable security officers to the streets.”

Source: truthout.org

Promises to Defund the Police Lead to Increase in Private Security Forces on City Streets

by Casey Bastian

All across America, mostly peaceful protests have advanced cries to defund the police. This increasing demand is in response to too many recent examples of law enforcement abusing its authority. Often, these acts result in seemingly avoidable injuries or deaths. So some of the more liberal cities have made promises to do just that; budgets have been slashed in several metropolitan areas.

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Source: truthout.org
The Proliferation of Police Procedures over the past few decades has made virtually everyone who owns a TV familiar with the climactic scene in the interrogation room—detectives trap a suspect in a lie or inconsistency even as they lean in to physically corner the suspect.

This tactic, known as the Reid technique of interviewing, is intended to raise the suspect’s anxiety level, which in turn makes him or her feel vulnerable and reliant on the mercy of the interrogator. While this seems more civilized than past methods, such as simply beating someone until they confess, the coercive nature of the Reid technique can still generate false confessions.

Advocates for criminal justice reform have been pushing for less invasive tactics, yet recent changes to the way many police departments conduct their business has been spurred by another source entirely—the coronavirus pandemic.

The tight confines of an interrogation room are no longer practical at a time when the safety of both suspects and law enforcement is at a premium. Interviews with suspects in several cities have been moved outside, such as in Clearwater, Florida, where interrogations take place at a safe social distance in the department’s parking lot. In Miami, a decision was made in mid-March to only question suspects inside in extreme cases, such as rapes or murders.

“If it’s something like a single auto theft, and we already have the evidence we need, we’re forgoing a formal interview,” said Assistant Chief Armando Aguilas of the Miami Police Department.

Philadelphia has begun relying on body cameras to record interviews on site rather than risk doing it inside the department.

“We’ll probably continue this practice even after the pandemic is over, because we’re getting to question people on the scene when their memory is fresh and before they clam up about coming to talk to us,” said Chief Inspector Frank Vanore.

Cases of a sensitive nature, such as sex crimes, are still conducted in Philadelphia’s law enforcement offices to assure victims and others of confidentiality.

Other cities have turned to videoconferencing sites like Zoom and Skype, so interviews can be done from another room in the precinct or even another location. Not surprisingly, some police have complained that these social distancing measures have hampered their ability to “break” suspects through intimidation. Others have said masks interfere with seeing facial expressions indicative of lying. In the absence of being able to observe non-verbal cues like fidgeting, police may find it difficult to effectively steer an interview.

Critics have pointed out, on one hand that such concerns are based largely on pseudoscience and, on the other, that the benefits of socially distant interrogations outweigh the negatives for both suspects and cops. Recording each interview, as in Philadelphia, and conducting them outside invites public oversight—a protective measure for all parties when trust between police and their communities has been at issue. A video record also enables courts to determine if coercion was involved. For law enforcement, videoconferencing allows its most skilled interviewers to handle the task even if they are not on the scene.

Some die-hards may blame the virus for the passing of the Reid technique, but industry insiders believe the days of physical intimidation in police work were numbered. Dave Thompson, vice president of operations at interrogation consultants Wicklander-Zulastifski & Associates, noted, “That style was hopefully already beginning to be eradicated, but what’s happening with COVID is accelerating that.

Source: usatoday.com

The Danger of Police Dishonesty

by Jayson Hawkins

Police occupy a unique place in a free society. They are empowered to enforce the public will upon the very public that empowers them. They alone are entrusted with the power to use lethal force, while at the same time their safety enjoys special protection under the law. This unique position was born out of necessity as the rudimentary policing power of traditional states proved unequal to the task of maintaining order in an increasingly complex and densely populated world.

Inherent in this system, and essential to its function, is a firm confidence that the police will use their privileged position to carry out their duties with honesty, integrity, and an unwavering loyalty to the law they are charged to enforce. In other words, the police in a free society must have the public trust, for without it, the legitimacy of police power to keep the peace disappears in chaos or the free society degenerates into the tyranny of a police state.

Recent events have shown what can happen when large sections of society lose confidence in the legitimacy of police power, and though the outrage playing out in cities across the U.S. was mostly inspired by repeated incidents of the unjust use of deadly force, many of the same incidents also exposed an equally disturbing problem: The police routinely lie to the public.

It is entirely possible that police dishonesty may be even more destructive to the fabric of law and order than police brutality, because the necessity of police honesty lies at the foundation of the criminal justice system. The sworn testimony of police is critical at nearly every phase of the legal process—from affidavits to arrest reports to testimony in court. If faith in the honesty of police were to be seriously undermined, the whole system would tremble.

Yet the incentives for police to lie are powerful and ubiquitous. The most common is that evidence obtained from illegal searches is constitutionally excluded, which provides a strong motivation to offer false justifications, especially because most police departments base promotions upon an officer’s record of arrests that lead to conviction. Secondly, the use of excessive force can cost an officer his job or result in criminal charges, and officers are therefore tempted to close ranks and blame the victim for the violent escalation of the encounter.

The public, and especially judges and juries, tend to trust police officers and believe their testimony, and while that trust might usually be well-placed, the emergence of a litany of incriminating video evidence has caused many to question deference police have long enjoyed.

In the death of George Floyd, for example, the Minneapolis Police Department issued a statement that asserted Floyd was...
Rights Division as cited by masslive.com. There was no mention of Officer Derek Chauvin kneeling on Floyd’s neck for almost nine minutes. If independent video had not emerged, it is unlikely the official version of the incident would have been questioned. The same could be said of the elderly protestor violently shoved to the ground by Buffalo police whose department falsely claimed the man tripped and fell during a fight between police and protestors.

The video offers proof of police dishonesty. It does not, unfortunately, offer guidance on what to do about it. The prosecutors responsible for punishing police dishonesty are loathe to do so. These prosecutors rely on the public’s reflexive trust in officer testimony, and to even admit that there is a problem would reveal that police perjury is almost never punished. New York and San Francisco are experimenting with different systems to address the problem, but it is far too early to know if either will succeed.

In the meantime, public anger and mistrust only grows with each new revelation of police misconduct, and the dangerous erosion of the foundation of the unique position of police continues apace.

Source: slate.com

DOJ Report: Massachusetts Narcotics Bureau Relied on Excessive Use of Force
by Kevin Bliss

The Narcotics Bureau ("NB") of the Springfield Police Department ("SPD") regularly used excessive force in the commission of its duties, covering its violations through deficiencies in its use of force reporting system.

That’s according to a report by the Civil Rights Division of the U.S. Department of Justice ("DOJ") and the Massachusetts District of the U.S. Attorney’s Office ("USAO") published July 8, 2020.

The NB in Springfield is a small plain-clothes department of 29 when fully staffed and covers the state’s third largest city. It came under public scrutiny after several use of force incidents, culminating in a report of abuse by a sergeant on two juveniles under arrest in 2016.

On April 13, 2018, the DOJ and the USAO began their investigation, reviewing over 114,000 pages of documents, interviewing NB and SPD staff and officials, and speaking with community members and victims. Their conclusion: The narcotics team engaged in a “pattern or practice” of excessive force violating the public’s Fourth Amendment rights.

“Specifically, our investigation identified evidence that Narcotics Bureau officers repeatedly punch individuals in the face unnecessarily, in part because they escalate encounters with civilians too quickly, and resort to unreasonable takedown maneuvers that, like head strikes, could reasonably be expected to cause head injuries,” said the report from the offices of U.S. Attorney Andrew E. Lelling and the Department of Justice Civil Rights Division as cited by masslive.com.

The investigation was the first of its kind under the Trump Administration. Ex-Attorney General Jeff Sessions stated that such investigations were unfair, maligned police departments and forced municipalities to enter into unlawful court-ordered consent decrees. Current Attorney General William Barr said the DOJ would support law enforcement but hold departments that violated the public’s trust accountable.

The DOJ report said systemic deficiencies helped to support narcotics team actions. Department policy did not require officers to report “hands on” uses of force such as punches or kicks. Injury reports were incomplete and often vague. Bureau supervisors did not have a comprehensive policy governing the review of incidents. Because of these policies, there was not one sustained excessive use of force decision against the NB in six years, the report said.

Several recommendations were made: report all use of force incidents and instruct supervisors in the proper review of such reports; adopt new use of force training, avoiding damaging strikes to the head and neck area; revise policies and training to give proper credence to civilian complaints; and adopt additional procedures that will add accountability to police actions.

Lelling stated the SPD and the city “have fully cooperated with this investigation and have made clear their commitment to genuine reform.”

Sources: justice.gov, reason.com

Door Bells and Funeral Bells
by Douglas Ankney

Ring is Amazon’s “smart” doorbell camera company that allows video cameras within users’ doorbells to surveil their porches, sidewalks, yards, and even the streets next to their homes. But Ring has also partnered with some law enforcement agencies, enabling police to directly email requests to Ring’s customers for video footage.

In the first quarter of 2020, police requested customers’ videos over 5,000 times, the Electronic Frontier Foundation reports. While it is not known how many of those requests were granted, it is known that as of June 22, 2020, Ring had partnerships with 1,403 law enforcement agencies (up from about 200 agencies in April 2019). Of those 1,403 agencies, 559 (40%) of them have been responsible for at least one death at the hands of police since 2015. And of the 6,084 reported deaths, agencies in partnerships with Ring accounted for 2,165 (35%) of those deaths.

Ring has turned many police forces into its sales force. Ring has drafted press statements and social media posts for police to promote Ring cameras and to terrify people into thinking their homes are in persistent danger. Yet there is no scientific data to show Ring prevents or reduces crime or makes neighborhoods safer.

Data do show, however, that users of Ring are more likely to report Black people on the community app “Neighbors” as being suspicious. This puts the person at risk of being harassed or even killed by police (one man was fatally shot by sheriff’s deputies the same night he was captured by Ring footage on a woman’s porch, which she then shared on the Neighbors app).

In this era where it’s proven that police engage in racial profiling and abuse of minorities, should Ring assist them with their surveillance that targets Blacks and other minority populations?

Source: eff.org

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Did Two Judges Violate Ethics in Florida Voting Rights Restoration Case?

by Casey Bastian

In 2018, Florida electors passed an amendment to the state constitution allowing the restoration of voting rights to residents convicted of felonies. The amendment, which does not apply to those convicted of murder or sexual offenses, restored the right to any resident who completed “all terms of their sentence.” The amendment clearly mandated “completion” to include discharging any imposed parole or probation requirements. Lawmakers also interpreted the language to include full payment of all imposed fines, restitutions, and fees as part of “complete[ing]” any imposed sentence prior to reinstatement. Florida Governor Ron DeSantis chose to rely on the Florida Supreme Court for a firm interpretation of the amendment’s language and its precise requirements.

Robert Luck and Barbara Lagoa served on the Florida Supreme Court. Both were later selected to serve on the U.S. Court of Appeals for the Eleventh Circuit during the course of these proceedings. During their tenure on the state Supreme Court, Lagoa and Luck participated in oral arguments on the amendment issue. Lagoa was particularly vociferous in her argument supporting that the amendment clearly intended to include payment of all owed monies. Despite both judges hearing the case, neither Lagoa nor Luck contributed to the formal ruling that was handed down in January. The court found that the requirement to pay all owed fines and fees was a form of poll tax but also concluded that the Florida Constitution does allow such a tax to be implemented on the ex-felons as a requirement to having voting rights restored.

The U.S. District Court took up the case immediately after it was handed down by the Florida Supreme Court. District Judge Robert Hinkle ruled that the resulting poll tax may pass Florida constitutional muster, but it violates the federal constitution by premising the right to vote on a person’s wealth. Hinkle ordered an injunction, ensuring ex-felons in Florida could vote if the state could not prove how much someone owed or if the person could demonstrate that he or she were financially unable to pay the entire amount. Somewhere between 750,000 and 1.1 million Florida residents likely have some form of court debt. Shockingly, Judge Hinkle found Florida does not keep reliable records and in some cases cannot even prove how much is actually owed by an individual.

On appeal, the Eleventh Circuit rescinded Hinkle’s order, and the injunction was deemed invalid. The actions of the Eleventh Circuit raised the ire of several members of the Senate Judicial Committee. In a rare procedural move, the Court bypassed the typical three-judge panel, going straight to en banc.

At the federal level, almost all appeals are heard by a panel prior to being heard by the full court or en banc. Doing so caused newly appointed judges Luck and Lagoa to participate in the decision to rescind the injunction. That would be a violation of the Code of Judicial Conduct. Ethically, a judge must recuse when “impartiality may reasonably be questioned” or if the judge had previously “participated” in “other stages of the litigation in a judicial capacity.” Luck and Lagoa clearly participated at the state level. Given Lagoa’s stance there, her impartiality could reasonably be questioned.

Prior to the Eleventh Circuit hearing the case on its merits, Luck and Lagoa were both urged to recuse. There is not a mechanism for forcing recusal. Instead, the judiciary ironically relies on ethics. It appears that the ethical violations of Luck and Lagoa may have tainted these proceedings. Floridians are now forced to accept these violations, the uncommon treatment of the case, and the resulting inability of up to 880,000 residents to cast their votes.

Sources: slate.com, propublica.org

Kettles Are Used for Teas, Kettling is Used for People

by Ed Lyon

There’s a new tool around for the old sheriff in town when it comes to dealing with peaceful protesters. This tool is called kettling, and it has nothing to do with heating water for tea, although its use has probably caused many hapless protesters to get hot under the collar.

The traditional method used by police to control riots or crowds is dispersal. This is effected in many ways like using tear gas or even water cannons. No more people, rioters, protesters, or crowds. Pretty simple.

The U.S. has a combined jail and prison population of 2.3 million of its citizens. If rioters, protesters, or just crowds of people disperse, there is no way to enter them into the nation’s ever-growing ranks of criminals. Kettling solves that problem.

The idea is to confine the rioters, protesters, or crowds in an area from which they are unable to escape. For residents caught outside their homes or passers-by caught up in a kettling operation, they become collateral damage. Even if they are not later convicted of anything, they now have an arrest record.

In early June, a group of over 600 peaceful protesters in Dallas, Texas, were effectively kettled for several hours on the Margaret Hunt Hill Bridge. KUT radio’s Texas Standard Newscast reported that everyone was required to lie face down on hot pavement, then had their hands zip-tied behind their backs. Most received misdemeanor tickets. Some were arrested and jailed, swelling the population of the incarceration nation toward the 2.4 million mark.

On June 11, KUT radio’s Texas Standard Newscast reported that Houston, Texas, police Chief Art Acevedo actually marched with protesters in the city. After Acevedo left the peaceful crowd of protesters, teams of cops moved in, surreptitiously separating small groups from the larger crowd of protesters, kettling the smaller groups for identification to issue tickets or for trips to jail. Acevedo’s marching with protesters appeared to be a tactic designed to lull the testing crowd into complacency then bait them into an area of the city where the geography facilitated this type of maneuver.

This crowd control technique fuels feelings of being trapped by those kettled and often leads to violent reactions. Holding kettled people in such close proximity to each other during the outbreak of COVID-19 only exacerbates infection rates and needlessly endangers lives.

Sources: Texas Standard News, vox.com
Introducing the latest in the Citebook Series from Prison Legal News Publishing

The Habeas Citebook: Prosecutorial Misconduct

By Alissa Hull
Edited by Richard Resch

The Habeas Citebook: Prosecutorial Misconduct is part of the series of books by Prison Legal News Publishing designed to help pro se prisoner litigants and their attorneys identify, raise and litigate viable claims for potential habeas corpus relief. This easy-to-use book is an essential resource for anyone with a potential claim based upon prosecutorial misconduct. It provides citations to over 1,700 helpful and instructive cases on the topic from the federal courts, all 50 states, and Washington, D.C. It’ll save litigants hundreds of hours of research in identifying relevant issues, targeting potentially successful strategies to challenge their conviction, and locating supporting case law.

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Government Treats Protesting Cities as Enemies of the State

by Kevin Bliss

Government watchdog organizations are reporting that multiple government agencies employed high-tech surveillance aircraft over cities with demonstrations over the police killing of Minneapolis resident George Floyd.

On June 2, thousands of protestors took to the streets in major cities across the U.S. to call for an end to police brutality. In response, cities such as Washington, D.C., Portland, Oregon, and Las Vegas, Nevada, sent police out for crowd control. And, after an armed protestor was shot in Las Vegas, the police were joined by the National Guard.

A review of unfiltered flight data examined by Motherboard on ADS-B Exchange showed police in Washington, D.C., employed several RC-26Bs carrying infrared and electro-optical cameras used in counter-narcotic and military combat missions. A letter from Congress to the House Armed Services Committee about these craft reads: “The aircraft is uniquely qualified as the only fixed-winged aircraft to have Title 32 authority to conduct domestic surveillance while maintaining the ability to conduct Title 10 missions abroad.”

Security researcher John Scott-Railton discovered the same craft over Las Vegas as well as aircraft flown by the Texas Department of Public Safety over Houston and California Highway Patrol aircraft being flown over Oakland. In addition, Chris Stelmarski of the political strategy and media consultant firm MVAR Media tweeted several photos of other aircraft over D.C.

U.S. Customs and Border Protection flew unarmed Predator drones over Minneapolis, the FBI had Cessna 560s over D.C., Portland Police Bureau used its own Cessna 172N, New York Police Department used its own Cessna 172N, Oak Park 560s, Utica 560s, and D.C. Police had a Cessna 560 with a TCAS II system.

Police here can fly over property but they “cannot use cameras and drones for aerial searches of property without a warrant,” the Alaska Court of Appeals recently ruled. “The rule stems from a 2012 case in which Alaska State Troopers received a tip about marijuana being grown on a property near Fairbanks,” scnow.com reports. They used a helicopter and a telephoto lens to capture images of the tree-obscured property, photos that they used to obtain a search warrant and arrest owner John William McKelvey. His attorney “filed a motion to suppress evidence, claiming that taking photos from the air to obtain a warrant invaded his client’s right to privacy. The trial court rejected the argument, and McKelvey was found guilty on two charges. The case was heard by the Alaska Court of Appeals in 2018. McKelvey attorney Robert John said the appeal ruling confirmed police in the air can only investigate with their naked eye. They cannot employ technology. They cannot employ drones.”

Arkansas: Arkansas County Sheriff Todd Wright resigned in late August 2020 after a recording surfaced of him repeatedly using the “N” word in a grocery store in DeWitt. Wright had reacted to a casual conversation between Desiree Middlebrooks and a store worker, Nick Clark, who is Black. “That encounter,” arkansasonline.com reports, “led to a racist rant between Wright and Middlebrooks that she secretly recorded as he made verbal threats against her, expressed rage and used racial slurs.” The sheriff, who served the office for 26 years, surrendered his badge and gun August 28 at a special Quorum Court meeting at the Arkansas County Courthouse. “I’m a Christian man. I read my Bible every day,” said Wright. “I am by no means a racist. That video does not show the true picture of me.” Spectators at the meeting, and protesters outside, as well as a former police officer called for his resignation.

Arkansas: Even with fewer people on the road during the pandemic, police in Arkansas are still killing people at the same rate as before, arktimes.com reports. A new ACLU report titled “The Other Epidemic: Fatal Police Shootings in the Time of COVID-19,” finds “fatal shootings by police are so routine that, even during a national pandemic, with far fewer people traveling outside of their homes, police have continued to fataly shoot people at the same rate so far in 2020 as they did in the same period from 2015 to 2019,” arktimes.com reports. “Further, the analysis reveals that Black, Native American/Indigenous, and Latinx people are still more likely than white people to be killed by police.” The shootings occur over a range of offenses, including traffic and minor offenses. The report calls for setting “independent oversight structures with teeth” to ensure officer accountability.

California: On August 31, 2020, two Los Angeles sheriff’s office deputies fatally shot a bicyclist, Dijon Kizzee, who was fleeing after cops tried to stop him for an alleged vehicle code violation, though it was unknown which one. “According to the department, the man then punched a deputy, though police have not provided any evidence to substantiate this claim,” theguardian.com reports. “The man dropped a bundle of clothes and the deputies spotted a black handgun in the bundle, at which point both opened fire,” sheriff’s Lieutenant Brandon Dean told the newspaper. The 29-year-old was then handcuffed, but his body was “left in the streets for hours,” theguardian.com reports. “Following the shooting, more than 100 people marched to a sheriff’s station on Imperial Highway. Some said they didn’t think the shooting was justified while others chanted ‘Say his name’ and ‘No Justice, No Peace.”

News in Brief

Alaska: Police here can fly over property but they “cannot use cameras and drones for aerial searches of property without a warrant,” the Alaska Court of Appeals recently ruled. “The rule stems from a 2012 case in which Alaska State Troopers received a tip about marijuana being grown on a property near Fairbanks,” scnow.com reports. Then they used a helicopter and a telephoto lens to capture images of the tree-obscured property, photos that they used to obtain a search warrant and arrest owner John William McKelvey. His attorney “filed a motion to suppress evidence, claiming that taking photos from the air to obtain a warrant invaded his client’s right to privacy. The trial court rejected the argument, and McKelvey was found guilty on two charges. The case was heard by the Alaska Court of Appeals in 2018. McKelvey attorney Robert John said the appeal ruling confirmed police in the air can only investigate with their naked eye. They cannot employ technology. They cannot employ drones.”
no peace,' the LA Times reported." The killing "was one of more than 10 fatal police shoot-
ings in the LA region since the George Floyd protests erupted at the end of May," theguardian.com reports.

Florida: Clara Paulino, 56, of Miami Shores died after she became trapped in her husband’s Miami Police SUV for about four hours as outdoor temperatures soared into the 90s, miamiherald.com reports. The tragic acc-
cident in August 2020 occurred after Paulino went to the vehicle around 1 p.m., while her husband Arístides slept inside their home after completing his midnight work shift. She found herself trapped in the back seat facing locked doors that had a self-locking mechanism and barred windows and a cage that separates the front and back seats without her cellphone. The locked doors can only be opened by lifting a handle from the outside."It is unknown whether it (the vehicle) was locked or she unlocked it to look for something. Nobody really knows why she was back there or how she got back there ... it’s not a weird thing (for a spouse to go in car), it’s our take-home cars in our driveway, every day,” Matt Reyes, the vice president of the Miami Fraternal Order of Police, told CNN. The Miami-Dade Police Department is investigating.

Florida: Leased office tower space costing $35,000 a month is the new home for Palm Beach County Sheriff Ric Bradshaw and his top brass, the Palm Beach Post reports in August 2020, "paying a rate double that of less prestigious office space," while the sheriff’s existing headquarters is renovated. In addition, Bradshaw paid $4.4 million for a Piper twin engine aircraft. The lease deal was brokered for the sheriff’s office by Il-

Kentucky: Former Trigg County Sheriff Jason Barnes pleaded not guilty at his arraign-
ment September 9, 2020, in Trigg Circuit Court. Barnes faces a grand jury indictment alleging he gave alcohol to an underage person in February 2020 and hampered the testimony of a potential witness, WLKY.com reports, citing the state attorney general. "Months later, Barnes knowingly practiced deceit with the intent to affect the testimony of a potential witness,” that office reports. Barnes "faces a Class A misdemeanor charge of unlawful transaction with a minor and a Class D felony charge of witness tampering.

Maryland: U.S. District Judge Deborah K. Chasanow ruled in September 2020 that the city of Baltimore illegally took part of Ashley Overbey Underwood’s settlement in a police brutality case. Underwood should receive the remaining half of her $63,000 set-
tlement — or $31,500 plus interest, "not the $1 the city wanted to pay” after she broke a gag order, Baltimore Brew reports. The case dates to 2012 when Underwood called 911 to report an attempted home burglary. In response, police beat her and her mother. Charges were dropped but it took years to expunge them from her record, affecting her ability to gain employment. City Council member Brandon Scott apologized to her at a public hearing. It took a lawsuit by the American Civil Liberi-
ties Union of Maryland to challenge "the use of so-called 'gag' orders to settle police mis-
conduct suits,” according to Baltimore Brew.

Ohio: Alicia Kitts of central Ohio was arrested and tased when a school resource officer said she declined to leave the stands at her son’s middle school football game after refusing to wear a face covering, nytimes.com reports. "Get off of me!” she screamed as Logan Officer Chris Smith tried to handcuff her, a video in September 2020 shows. Kitts told the officers she was asthmatic and therefore couldn’t wear a mask. Police released a state-
ment: "It is important to note, the female was not arrested for failing to wear a mask; she was asked to leave the premises for continu-
ally violating school policy.” Kitts was charged with resisting arrest and criminal trespassing. However, Kitts’ lawyer, "Maurice A. Thomp-
son, said in a statement that officials from the Logan-Hocking School District ignored Ms. Kitts when she told them she had asthma and disputed the justification that the officer was enforcing a school policy on masks,” nytimes.

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her award.” Said Deborah Jeon, legal director for ACLU of Maryland: "This order finally brings about well-deserved resolution for Ms. Underwood who, throughout this long ordeal, never wavered in her commitment to fundamental free speech rights, notwithstanding the City’s bullying and thievery.”

Mississippi: Police officers Desmond Barney, Lincoln Lampley and Anthony Fox have all been indicted on second-degree murder charges by a grand jury in the January 2019 death of George Robinson, 61, in Jackson. Barney and Lampley pleaded not guilty in August 2020. Robinson was spotted sitting in his car by the Jackson Police Department cops Jan. 13, 2019, and arrested on misde-
meanor charges after police suspected a drug transaction. The three cops allegedly removed Robinson from his vehicle for noncompli-
ance, body-slammed him on the pavement, and repeatedly struck him in the head and chest,” the clarionledger.com reports. After that, Robinson went home to a motel but was hospitalized hours later. He died a couple of days afterward. The coroner ruled the death a homicide by blunt force trauma. On the day of his arrest, the officers had been on a manhunt in the fatal shooting of a minister during a failed robbery. Lampley still works at the Jackson Police Department; Barney and Fox now work for the Clinton Police Department. Robinson’s family has filed suit.

Illinois: Ninety-five percent of adults in the U.S. want criminal justice reform. That’s according to a poll by The Associated Press-
NORC Center for Public Affairs Research, miamiherald.com reports in June 2020. “The survey, conducted June 11-15, showed 29% believe in a complete overhaul, 40% say there should be major changes, 25% say there should be minor changes, and 5% say no changes are needed,” according to miamiherald.com. However, the survey found that more Blacks support a complete overhaul. “Of Black Americans surveyed, 57% said there needed to be a complete overhaul of the criminal justice system, while 26% of white Americans said the same. Meanwhile, 83% of Blacks described the problem of police violence as “extremely/very serious,” compared to 39% of whites. Forty-
three percent of Blacks said they support reducing law enforcement funding, compared to 22% of whites, according to the poll.” Of police misconduct, 65 percent of those polled thought that cops who cause death or injury are ‘treated too leniently by the justice system.”
News In Brief (cont.)

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respiratory problems. Mr. Thompson said, “and the school district ‘misapplied the law, and misapplied it haphazardly and violently.’”

Pennsylvania: A Redding police officer has been indicted on manslaughter charges in a fatal 2018 shooting of an unarmed man, WCVB.com reports. The incident began when an officer and other cops arrived at a mixed-use lot that included a gas station, repair business and residential apartments after receiving a report of an alleged domestic assault and battery that featured Alan Greenough, 43. But police couldn’t get near Greenough. He had locked himself in his home but later escaped through a window. Officer Erik Drauschke saw someone fitting the man’s description in a parked car. “Mr. Greenough allegedly exited the car with both of his hands inside his sweatshirt pocket. Mr. Greenough allegedly came quickly toward the defendant, refusing to take his hands out of his pockets and yelling ‘...Shoot me, shoot me...’ The defendant allegedly began to back up, then fired twice, striking Mr. Greenough in the chest,” Ryan said in a release. The young man died of his injuries.

Texas: Shaun Lucas has “became one of the rare police officers charged with fatally shooting someone while on duty,” washingtonpost.com reports. On October 5, 2020, Texas Rangers charged the 22-year-old Wolfe City officer with murder in the death of unarmed 31-year-old Jonathan Price. The officer, who is White, had responded to a call October 3 about a possible disturbance at a convenience store in Wolfe City, a town northeast of Dallas. Price, according to news reports, had been trying to diffuse a heated dispute inside the store. Lucas attempted to detain the Black man, who “resisted in a non-threatening posture and began walking away,” the state Department of Public Safety reports. Lucas used a Taser, then shot Price whose hands were raised. The Rangers called Lucas’ actions “not objectionably reasonable and, therefore, not justifiable force.” The officer was fired “for his egregious violation of the City’s and police department’s policies,” the Post reports. #JusticeForJonathan went viral on social media and supporters held a vigil for Price, a city employee, personal trainer and former university football player. A lawyer for the officer claims Price physically resisted and attempted to grab Lucas’ Taser.

Utah: Salt Lake City police Officer Nickolas Pearce faces a second-degree felony charge of aggravated assault after he ordered police dog Tuco to sic Jeffrey Ryans during a domestic violence call April 24, 2020, sltrib.com reports. “Get on the ground!” one officer yelled, as the police canine barked. “Get on the ground or you’re going to get bit!” Bodycam feed shows Ryans’ “was on his knees with his hands in the air,” sltrib.com reports. The dog bit and tore at Ryans’ leg, even as another officer handcuffed him. “Prosecutors began reviewing the case in late August after The Salt Lake Tribune published body camera footage that showed the attack,” sltrib.com reports. The charging document notes the officer praised the dog for its actions. In September 2020, the city’s Civilian Review Board concluded that Pearce violated policy, but Pearce argued he thought Ryans was going to fight. Meanwhile, the city’s “use of police dogs to apprehend suspects was also placed on hold as the city reviewed its policies and practices.”

Washington: A Seattle Police Department officer who last year earned more than the mayor, the police chief or any other city employee, is in the news. Officer Ron Willis made $414,543.06 in 2019, seattletimes.com reports. “He was paid for 4,149 hours of work, not including vacation or sick leave,” according to the news site. “That total means he was paid for working an average of 80 hours a week, about twice as many hours as a typical full-time employee. Willis was paid for working between 90 and 123 hours a week for seven weeks straight last summer, according to a Seattle Times analysis of department data. On six occasions, Willis was compensated for more than 24 hours in a single day, according to the data.” Regarding pay, a 2016 audit report reveals there can be a potential “lag between when an officer worked and when the overtime is entered.”
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Criminal Procedure: Constitutional Limitations, 8th ed., by Jerold H. Israel and Wayne R. LaFave, 557 pages. $49.95. This book is intended for use by law students of constitutional criminal procedure, and examines constitutional standards in criminal cases. 1085

Prisoners' Self-Help Litigation Manual, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 928 pages. $54.95. The premiere, must-have “Bible” of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Includes detailed instructions and thousands of case citations. Highly recommended! 1077


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