Lashawn Jermaine Johnson spent his 30s in prison law libraries. As he put it in an interview, that was “the only place you were going to find freedom” in prison. Sitting at one of a dozen desktop computers with windows overlooking a quad, Johnson dug through past convictions of the assistant United States attorney who prosecuted him for cocaine trafficking in Billings, Montana.

What he found not only set him free but called into question the convictions of many others behind bars.

James Seykora had been prosecuting federal drug cases for decades in Billings, the largest city in the state with a population just shy of 110,000. Local defense attorneys described him as a hard worker who dutifully sought the harshest penalties for drug crimes. One called him a “trained pitbull” and said “the people to blame were his bosses.” In 2004, he won an award for his sheer number of drug convictions.

But it turned out Seykora had a history of misconduct, including hiding deals he made with key witnesses in exchange for their cooperation and testimony.

In one case, Seykora gave immunity to a key government witness in exchange for taking the stand. Then, in front of a judge and a jury, he allowed the witness to swear she didn’t recall “any promises” in exchange for testifying.

In Johnson’s case, a federal judge found Seykora engaged in similar misconduct when he allowed the judge and jury to believe a key witness against Johnson, Heather Schutz, had only “bare hope” for leniency in her Las Vegas prostitution charges in exchange for her testimony. Seykora actually had promised her “personal benefit” that was a “concrete and quantified reality.”

As Johnson, who served nearly nine years for trafficking cocaine, poured through court records in the prison library, he said he found case after case in which Seykora was caught hiding deals with witnesses. Judges found the federal prosecutor had a habit of allowing juries and judges to believe people testifying for the prosecution had nothing to gain when, in fact, he had already promised them immunity, sentence reductions, and more. Despite this, Seykora was still allowed to handle federal drug prosecutions in Billings.

Johnson quickly gave the material he gathered in the law library to his attorney, who filed a motion to reverse the conviction due to prosecutorial misconduct. The Billings U.S. Attorney’s Office declined to charge Johnson again, and a judge ordered him “released from custody” in February 2015. He now lives in Las Vegas and has young children.

Seykora retired as a prosecutor in 2012 and currently is a municipal judge in Hardin, Montana, a small town of about 3,500 people and a short drive from Billings. He did not return phone calls seeking an interview.

In 2014, the Justice Department’s Office of Professional Responsibility began looking into Seykora. The OPR was established after the Watergate scandal “to ensure that Department attorneys perform their duties in accordance with the high professional standards,” according to its website.

Two years later, in 2016, while OPR was apparently still investigating Seykora’s actions, Michael Cotter, then U.S. attorney for Billings and current chief of the state’s Office of Disciplinary Counsel, apparently decided to take matters into his own hands. In a highly unusual move, Johnson’s attorney Colin Stephens said, Cotter sent letters to the defense attorneys of people Seykora had convicted to let them know about the prosecutor’s history of repeated misconduct.

Stephens said the letters essentially re-opened any case Seykora had prosecuted. “We just opened Pandora’s box,” he said. “It’s a big
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HRDC conducts only one annual fundraiser; we don’t bombard our readers with donation requests, we only ask that if you are able to contribute something to our vital work, then please do so. Every dollar counts and is greatly appreciated and will be put to good use. No donation is too small (or too big)!

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- We prevailed in a lawsuit against the Palm Beach County Sheriff’s Office in Florida for holding juvenile offenders in solitary confinement and denying them educational programs. The case settled in November 2018, and resulted in a number of reforms at the jail.
- HRDC filed First Amendment censorship lawsuits against the Michigan DOC, the Marshall County Jail in Tennessee and the Forrest County Jail in Mississippi; we also settled a censorship case against the Cook County Jail in Chicago, and a federal court ruled in our favor on liability in a suit against the Southwest Virginia Regional Jail Authority in Virginia.
- As part of the Campaign for Prison Phone Justice, we submitted comments to the FCC opposing a proposed merger between two of the nation’s largest prison telecoms, Securus and ICSolutions. The FCC then recommended denial of the merger, and it was withdrawn in April 2019.

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Prosecutorial Misconduct (cont.)

deal when the government cheats.”

Cotter declined to discuss the case.

Given his experience, Johnson said, he wonders if it really is a big deal when a pros-
secutor breaks the rules. “He still gets to sit on the bench and practice his crooked law,” he
said.

The DOJ’s Black Hole

An Intercept investigation into how federal prosecutors around the country are
disciplined when they break the rules shows a secretive, flawed system that is not getting
any better despite decades of public outcries and Justice Department promises to ensure
accountability.

To this day, many federal prosecutors handling cases ranging from drug trafficking
to white-collar crime walk away largely unscathed from misconduct charges, even after
decisions and news stories related to substantive
judges determine and describe in published opinions how they committed serious of-
fenses, such as intentionally hiding evidence and allowing witnesses to lie to juries. But in
their rulings, judges almost always omit the name of the prosecutor. And even if the pro-
secutor’s alleged misconduct is so grave that the OPR ends up investigating, the agency goes to
great lengths to conceal anything that could possibly identify them.

Vanita Gupta, a former Justice Depart-
ment official who is now president of the Leadership Conference on Civil and Human
Rights, said transparency is crucial for the public to trust prosecutors who are “acting on
behalf of the people.”

In its annual reports and investigative summaries — the latter is a new addition to
what’s already published in annual reports — the agency “alternates the use of gender
pronouns” to shield prosecutors’ identities in every narrative of how they violated the
rules and what should be done to hold them accountable.

Ellen Yaroshfsky, a legal ethics expert
who serves on the New York State Commit-
tee on Standards of Attorney Conduct as well as other state ethics committees, said there is
such a lack of transparency that “on the out-
side, we don’t know anything.”

“You really don’t know what they’re in-
vestigating,” she said.

Gupta equated it to the public’s right to
know if a police officer has a history of brutal-
ity. “It’s important for people to know if there
are repeat offenders,” she said.

OPR is entrusted with investigating al-
legations of professional misconduct of federal prosecutors, Department immigration judges,
as well as law enforcement personnel that fall under its jurisdiction. The OPR decides which
allegations to investigate and then determines whether or not the attorney committed profes-
sional misconduct.

According to the agency’s procedures,
OPR shares its findings with the Professional Misconduct Review Unit — established by then-Attorney General Eric Holder in December 2010, after federal prosecutors intentionally hid evidence in the political corruption case against the late Sen. Ted
Stevens — without making a disciplinary recommendation. PMRU can then either uphold or overturn OPR’s findings and re-
commend discipline such as suspension or an
admonition letter.

After PMRU has reviewed the case, OPR
is supposed to notify state bar authorities of any misconduct findings that involve viola-
tions of state bar rules, so those agencies and
courts can take disciplinary action if needed.

But whether or not — or how — the
government at any level ensures any discipline actually happens is unclear.

With nicknames like the “roach motel”
and “Bermuda Triangle” — where complaints against federal prosecutors go in, but they
never come out — OPR for decades has been
criticized for improperly handling allegations of misconduct and not following through
to ensure federal prosecutors actually are
disciplined.

Yaroshfsky said the OPR is a “black
hole.” The agency has its own internal stan-
dards, she said, recalling how, in 1998, H.
Marshall Jarrett, then chief counsel and direc-
tor of the OPR, tried to “open up the process
but, unfortunately, it didn’t go anywhere.”

The Intercept reached out to all state
agencies charged with disciplining attorneys.
Out of those willing to talk, only a few had a record of receiving a recommendation from
OPR to discipline a federal prosecutor. Most
said they didn’t recall any contact from OPR.
Some said they had never even heard of the
federal agency.

Many states also pointed to privacy when
asked for details about federal prosecutors and
any discipline for misconduct. In some states,
these documents would be confidential unless
the state had filed formal charges — and even
then, knowing the name of the prosecutor
Prosecutorial Misconduct (cont.)

would be crucial and nearly impossible given all the redactions.

Rebecca Farmer, who was spokesperson for the State Bar of California when The Intercept called, said most state agencies are not properly tracking whether or not an attorney facing discipline is a prosecutor, which limits the ability to report on data.

“There is not a button you can check that’s like ‘prosecutor,’” she said.

Hamilton “Phil” Fox III, the disciplinary counsel of the D.C. Bar, which has a history of disciplining federal prosecutors, said in his experience, OPR “does a very thorough job,” but “there is a very elaborate chain of command,” and it “takes them a very long time.”

“After OPR issues a report, there are several bishops that have to bless that particular baby before it becomes final,” he said.

He said OPRs’ turnaround time on investigations involving federal prosecutors in local D.C. courts prompted him to decide to handle those cases himself moving forward.

In Wyoming, Bar Counsel Mark Gifford said everything is confidential — including whether or not the federal government has asked his agency to discipline a federal prosecutor — unless the state Supreme Court issues a public reprimand.

“I’ve been doing this job going on eight years, and I typically see 175 complaints against lawyers a year,” Gifford said. “I don’t recall seeing a complaint against a federal prosecutor.”

But now, for the first time since the OPR was created in 1975, the agency might be forced to open its files on prosecutors it has investigated. In a scathing ruling last August, the United States Court of Appeals for D.C. demanded OPR stop using “vaporous justifications” to deny requests for investigative reports on prosecutors and instead give the public access.

Nothing to See Here

An examination of OPR documents shows prosecutors continue to avoid discipline for serious misconduct despite Holder’s creation of the PMRU.

The PMRU was meant to ensure “a more efficient and uniform system” for investigating and disciplining federal prosecutors. But four years after it was created, the Government Accountability Office found the agency wasn’t following through to ensure prosecutors were disciplined; some who were supposed to be punished were getting bonuses.

Now, eight years later, a large majority of DOJ employees who face allegations of professional misconduct — including federal prosecutors — continue to retire, resign, or move on to another position before any discipline, according to OPRs notoriously vague annual reports.

The reports scrub all identifying details, but they include narratives describing how prosecutors coerced a witness, misled the court, and failed to disclose how a star witness was implicated in the crime, among other infractions.

For instance, in one criminal case described in OPR’s 2017 annual report, a federal prosecutor failed to turn over to defense attorneys a document “containing government promises made to a cooperating witness” and then allowed that witness to testify that the “government had made her no promises in exchange for her testimony.”

OPR investigated and “concluded that the attorney acted in reckless disregard of her obligations.” The PMRU agreed, in part, saying it was “reckless disregard” to not correct the witness who lied on the stand but that the prosecutor only “exercised poor judgment” by not turning over the document showing the witness got a deal in exchange for her testimony.

In the end, the prosecutor simply left the Justice Department.

“Because the DOJ attorney had resigned from the Department before the PMRU completed its review, no discipline could be imposed,” OPR said in the report, which omitted any details that could identify the case or prosecutor.

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In another case, a federal prosecutor “violated multiple obligations under the United States Constitution, federal statute and case law, DOJ policy, and state bar rules,” according to OPR’s 2013 annual report. Among other things, the prosecutor repeatedly withheld important evidence.

“The DOJ attorney’s conduct, taken as a whole, amounted to a wholesale failure of her duty to represent her client, the United States, diligently and competently, in violation of state bar rules,” the OPR concluded.

The unnamed prosecutor retired after reviewing and commenting upon OPR’s draft report. PMRU told the OPR to notify state disciplinary authorities of its findings. However, it’s nearly impossible to know what, if anything, happened next. Yaroshfsky said the reports and the names of prosecutors should be public.

“It’s critical to build trust in the government — we need to have more transparency and accountability,” she said. “There ought to be data available, not only when they find misconduct but also when they don’t — we need to see how many cases were reviewed, the nature of those cases, what the allegations are and result.”

A review of OPR documents shows the office historically launched most of its investigations based on judicial opinions finding egregious federal prosecutor misconduct. Between 2000 and 2010, the majority of OPR’s investigations — an average of 56 a year — stemmed from judicial opinions. But between 2011 and 2018, that number dropped dramatically to an average of about eight or nine per year.

The drop doesn’t reflect the attention judges have been giving prosecutorial wrongdoing in recent years. In the last decade, judges have been key in bringing to light cases of prosecutorial misconduct, such as the Danziger Bridge case in Louisiana.

Yaroshfsky said if it weren’t for judicial opinions, we might not know about even the most significant misconduct cases.

“Take the Stevens case that led to the independent Schuelke report, ordered by a judge, after which OPR got involved,” she said. “It’s really because the judge had undertaken it — if it had gone to OPR directly then it’s really unclear what would have happened.”

In OPR’s annual reports, the office used to describe some of its closed investigations and what, if any, discipline it recommended. Among the most severe penalties included in these examples — and there is no way to know what examples are not included — is a 14-day suspension without pay for a prosecutor who “engaged in intentional professional misconduct” by “making threats to have the defendant arrested and forced to take a ‘perp walk,’” among several other infractions. Unlike the previous ones, the 2018 annual report omits any details of how PMRU handled discipline in individual cases.

It’s next to impossible to know which federal prosecutors the OPR has found guilty of misconduct, what discipline it recommended, and what, if any, discipline authorities actually imposed. The most severe professional penalty for prosecutorial misconduct is disbarment. A 1976 Supreme Court decision ruled that prosecutors are immune from any civil action, even in the worst cases of misconduct.

Under the Freedom of Information Act, The Intercept has been regularly requesting reports and other information about closed investigations in which the OPR found a federal prosecutor committed misconduct. Each request has resulted in heavily redacted documents or the same blanket denial the D.C. appeals court recently criticized.
The Intercept’s survey of state disciplinary bodies, however, turned up a handful of recent and ongoing actions against federal prosecutors — some well publicized.

In Louisiana, for instance, the state disciplinary board disbarred a federal prosecutor, Sal Perricone, in December 2018 after misconduct in the case forced a judge to reverse the convictions of five police officers a jury had found guilty of shooting, killing, and injuring unarmed people on the Danziger Bridge in New Orleans after Hurricane Katrina.

Court records show the federal OPR completed its investigation into Perricone and his colleague, Jan Mann, in December 2013 and found they had committed intentional misconduct when they posted about the case anonymously — during the trial — in the comments section on a newspaper website.

However, Rep. Cedric Richmond of Louisiana said the report “illustrated that a greater level of oversight is necessary to avoid any future impropriety.”

In November 2012, Richmond wrote a public letter to Holder criticizing the OPR for its “slow pace and possible major oversights” investigating into the Perricone misconduct case.

Richmond introduced a bill in May 2015 that would transfer oversight of federal prosecutors from the OPR, which is within the Justice Department, to the Office of Inspector General. The bill didn’t pass, but he has introduced it in every session since then. In January 2019, the House passed the legislation and sent it to the Senate.

The Intercept also requested records concerning investigations into Seykora. OPR issued a typical “Glomar response,” neither confirming nor denying the existence of such an investigation even though it is a matter of public record in the Montana Supreme Court.

In October 2017, OPR concluded Seykora should be punished for his misconduct and referred the case to the state to determine the appropriate discipline.

In September 2018, the state Office of Disciplinary Counsel ruled that Seykora must pay a $313 fine and face a public letter of reprimand. In its ruling, the disciplinary counsel stated that the public letter and fine “adjudicates” Seykora from similar accusations as an assistant U. S. attorney.

“You know it’s a slap on the wrist, I guess,” Stephens said. “It’s a really light one.”

Johnson was dismayed.

“How could someone get away with this for so long?” he asked from his home in Las Vegas. “I lost eight and a half years of my life, and I’m still trying to get back into society with this institutionalized mind.”

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Massachusetts Supreme Court Suppresses Evidence Obtained Following Illegally Prolonged Traffic Stop, Orders New Trial

by Douglas Ankney

The Supreme Judicial Court vacated the convictions of Paulos Tavares, ruling that the trial court failed to suppress evidence that was obtained as the result of an officer extending a vehicle stop without probable cause, which made the evidence the proverbial fruit of the poisonous tree.

John Lima was driving his sister’s Nissan Altima when another vehicle pulled alongside him and fired up to eight gunshots at him. Lima later died at a hospital from three gunshot wounds.

Eyewitness Nicholas Melo told police he heard eight or nine loud bangs before seeing a tan-nish-gold Chevy Malibu Max with a sloped back round the corner near his house, hit the curb, and speed down the street. Melo stated the car would have scrape marks under the left front and right rear from hitting the curb.

The day after the shooting, Detective Christopher McDermott told Brockton Police Detective Michael Schaaf of the shooting and summarized Melo’s description of the Malibu Max.

Schaaf and State Police Trooper Robert Fries were then assigned warrant apprehension duty.

Later that afternoon, Schaaf observed a grayish-green Chevy Malibu driving in the opposite direction with three occupants. Schaaf believed the passenger in the back seat to be Jose Correia, an individual with an outstanding arrest warrant.

Schaaf and Fries reversed their direction and stopped the Malibu. As Schaaf approached the vehicle, he realized the rear...
passenger was not Correia but recognized him as Eddie Ortega.

Schaaf asked the driver, Christopher Hanson, for his driver’s license. While Hanson produced his license, he told Schaaf that Tavares—the front seat passenger—had rented the car. But Tavares stated that his girlfriend, Deolinda Andrade, had rented the Malibu.

Schaaf then asked to see the rental agreement. Since none of the occupants were listed on the agreement, Schaaf made the men exit the vehicle. After the men left on foot, Schaaf suspected the vehicle might have been used in the previous night’s shooting.

He contacted McDermott, who then ordered the vehicle towed to the police station. McDermott then contacted the rental agency and told them Hanson had been driving the vehicle.

The rental agency immediately terminated the rental agreement, so McDermott did not return the car to Andrade. Instead, he had Melo come to the police station. When Melos arrived, he immediately identified it as the Malibu he had seen. And the car had fresh scrape marks on its undercarriage consistent with hitting the curb.

After receiving permission from the rental company, the car was searched. Among other things recovered were three fingerprints identified as belonging to Tavares. Based on statements Tavares made to others implicating himself as the murderer, he was arrested.

Tavares, claiming illegal seizure during Schaaf’s stop of the Malibu, moved to suppress evidence of: (1) Melo’s identification of the vehicle, (2) the scrape-mark damage to the vehicle, and (3) Tavares’ fingerprints in the vehicle. The trial court denied the motion, and Tavares was convicted of three charges, including first-degree murder. He appealed to the Supreme Judicial Court.

The Court observed that under the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights a person has the right to be free from all unreasonable searches and seizures. A motor vehicle stop is a seizure of all individuals detained in the stop. Whren v. United States, 517 U.S. 806 (1996). The police may stop a motor vehicle to “make a threshold inquiry where suspicious conduct gives the officer reason to suspect that a person has committed, is committing, or is about to commit a crime.” Commonwealth v. Silva, 318 N.E.2d 895 (Mass. 1974). To be a valid stop, it must be “based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer’s experience.” Id.

When deciding the constitutionality of the stop, courts must determine whether the initiation of the investigation was permissible under the circumstances and whether the scope of the search was justified by the circumstances. Id.

An investigatory stop is permissible when an officer believes an occupant of the vehicle has a warrant for his arrest. Commonwealth v. Owens, 609 N.E.2d 1208 (Mass. 1993). But a valid investigatory stop “cannot last longer than reasonably necessary to effectuate the purpose of the stop.” Commonwealth v. Amado, 48 N.E.3d 414 (Mass. 2016). The scope of the stop may be extended beyond its initial purpose only if the officer is confronted with facts giving rise to a reasonable suspicion that “further criminal conduct is afoot.” Commonwealth v. Cordero, 74 N.E.3d 1282 (Mass. 2017).

If there is no evidence of further criminal activity, the officer may not prolong the stop or expand the inquiry. Commonwealth v. Buckley, 90 N.E.3d 767 (Mass. 2018). Under what has become known as the “fruit of the poisonous tree” doctrine, the exclusionary rule bars the use of evidence derived from an unconstitutional search or seizure. Commonwealth v. Fredericq, 121 N.E.3d 166 (Mass. 2019).

But the failure to suppress unconstitutionally seized evidence is a “harmless error” if it can be shown beyond a reasonable doubt that the evidence had no effect on the verdict. Chapman v. California, 386 U.S. 18 (1967).

The Massachusetts Supreme Court concluded that Schaaf made a valid investigatory stop because he believed a passenger named Correia had an outstanding arrest warrant. However, once Schaaf realized the passenger was not Correia, the stop should have ended. Instead, Schaaf unlawfully extended the stop and seizure by asking Hanson for his driver’s license and by asking to see the rental agreement.

The subsequent impounding of the vehicle and search of it were therefore illegal, and the recovered evidence constitutes fruit of the poisonous tree. Since it was not shown beyond a reasonable doubt that the unlawfully seized evidence had no effect on the verdict, the Court determined the failure to suppress the evidence was not a harmless error.

Accordingly, the Supreme Court reversed the denial of the motion to suppress, vacated Tavares’ convictions, and remanded for a new trial consistent with the Court’s opinion. See: Commonwealth v. Tavares, 126 N.E.3d 981 (Mass. 2019).
Why Juries Need Expert Help Assessing Jailhouse Informants

Informants are highly motivated to lie. But jurors don’t always have the information or skills to discern the truth.

by Alexandra Natapoff, The Appeal

In February 2010, I was asked to testify as an expert witness to educate a jury about jailhouse informants, the focus of much of my work. The case, State of Connecticut v. Leniart, was a grim one: an awful, violent, depressing case involving murder, rape, and a missing body. It is the kind of case for which convicted defendants often receive life sentences and, therefore, the kind for which informants are richly rewarded when the government wins.

Most of the main witnesses in the case were informants hoping for a deal. One was the alleged accomplice—a convicted sex offender, serving 10 years for a different felony sexual assault. He admitted to raping the victim and testified to avoid being charged with murder himself. He also testified because the prosecutor promised not to oppose his early release if he cooperated. Three other witnesses were jailhouse snitches who claimed that the defendant personally confessed to them while in jail. Two of them admitted that they were testifying in order to get reduced punishment.

But the trial judge did not let me testify on behalf of the defense. She did not think that my expert testimony would help the jury, which ultimately convicted the defendant of capital murder.

On Sept. 10, the Supreme Court of Connecticut upheld that conviction and agreed with the trial judge’s decision: The Court assumed that the jury was already well-informed about the many types of rewards given to jailhouse informants; how jailhouse informants gather and sometimes fabricate evidence; and how informants sometimes collude.

But all too often, jurors get it wrong. Over 45 percent of innocent people on death row were convicted because of a lying criminal informant, according to a 2004 report from Northwestern University School of Law. “That makes snitches the leading cause of wrongful convictions in U.S. capital cases,” the report concluded. We know this because dozens of innocent defendants in these serious cases were eventually exonerated after jurors erroneously believed informant testimony.

Informants are highly motivated to give persuasive, believable testimony in exchange for their own freedom. They can also receive money, drugs, sex, food, and phone privileges when they cooperate with jail officials. Some scour the newspapers, pay other inmates for information, or get family members to pull court records so that they can come up with incriminating testimony against their cellmates. Some jurors may already know about these sorts of practices; many will not.

Recent psychological research also tells us that jurors are not terribly skilled at figuring out when informants are lying. According to one study, even when jurors are told that informants have deep incentives to lie, jurors often do not fully appreciate the significance of that information. Expert testimony could alert jurors to common misperceptions and mistakes and help them become better informant lie detectors.

More fundamentally, most jurors need educating because informants operate in a secretive, clandestine criminal world about which the government strongly resists disclosure. In its decision in Leniart, the Connecticut Supreme Court wrote that jurors do not need expert help, in part because informant problems “have been exposed by the media.” But it is precisely because the criminal system is so secretive about its own informant deals and debacles that investigative journalism has been crucial to uncovering its dysfunctions.

Secrecy threatens accuracy. When unformed jurors believe lying informants, it leads to wrongful convictions. The Connecticut Supreme Court should have given the jury better tools to do the all-important job of figuring out the truth. But this case is equally disturbing for its sordid picture of informant culture. Most of the main witnesses in the case were incentivized with promises of reduced punishment for their own crimes. The accomplice was especially blunt. As he put it in his testimony, the government told him outright that people who commit murder and rape can walk away “with a slap on the hand” when they become informants.

The good news is that Connecticut passed landmark legislation in July, establishing new protections against jailhouse informant misuse. These include stronger disclosure requirements and mandatory pretrial hearings in rape and murder cases so that judges can screen out especially unreliable informants. These new provisions will make it easier for jurors to figure out whether informants are telling the truth.

Wrongful convictions are an obvious cost of using incentivized informants. But the problem runs deeper. Tolerating informant crime erodes the integrity of our justice system. To be sure, it can produce real benefits—think of the FBI mafia informants who helped dismantle the mob, or the corporate cooperators who brought down Enron. But the widespread, underregulated practice of bargaining with criminals over leniency takes an enormous civic toll. It sends the message that the most heinous crimes will be ignored in exchange for information. It announces that we are running, not a justice system, but a marketplace, and often an unreliable one at that. This is a terrible message to send to victims, to criminals, and to communities.

Alexandra Natapoff is Chancellor’s Professor of Law at the University of California, Irvine School of Law, and author of Snitching: Criminal Informants and the Erosion of American Justice. She also maintains the educational website Snitching.org.

This article originally appeared in The Appeal (theappeal.org), a nonprofit criminal justice news site, on Sept. 23, 2019; reprinted with permission. Copyright, The Appeal, a project of Tides Advocacy.
A s societal standards continue to evolve, devolve, and change for better or worse, legislatures continue to enact laws to prohibit illegal acts and protect people. New technology always opens opportunities for improvement, as well as attendant avenues for less-than-stellar individuals to take advantage of law-abiding citizens. Legislatures respond in the only way they know: They pass more laws. At what point does passing more and more and more laws just become crazy?

The U.S. Department of Justice (“DOJ”) attempted to do a count of the number of actual criminal laws (presumably federal ones) on the statute books in the 1980s.

The DOJ wound up ceding defeat, perhaps because they were frantically trying to enforce the estimated 300,000 or so laws.

Attorney Mike Chase, author of the book How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender, points out that if he broke just one law every day, it would only take “800 years to finish the job.”

Making matters far worse is Congress granting government regulatory agencies the authority to promulgate regulations that carry the force and effect of law. This creates an entirely new set of laws that shouldn’t be, but really are. Just plain crazy. If you doubt this, try selling runny ketchup. Still in doubt? Try removing a steaming pile of llama poop from a quarantine facility. Need more convincing? Go to a national park and make an “obscene gesture” at a passing horse. Whatever constitutes an “obscene gesture” would have to be defined by the charging bureaucrat as it is a sure bet the horse would not care if you gestured at it one way or the other.

A recent SCOTUS decision underscores the sheer insanity of this situation. Alaska state cops arrested a citizen for disorderly conduct (as vague a crime as making obscene gestures). Their stated reason for the arrest was to punish the man because he expressed an opinion that hurt their feelings. To begin with, punishment is assessed by judges or juries, not by cops. That is called due process of law, supposedly guaranteed by the Fourteenth Amendment. Secondly, since when is merely expressing an opinion, an act supposedly protected by the First Amendment, an act of disorderly conduct?

Apparently these weighty constitutional amendments must have escaped the notice of at least five of the nine SCOTUS Justices. The case was affirmed because probable cause for the arrest was believed to exist, which in turn apparently trumps violations of the Constitution. With its uncountable number of vague laws, the government itself has become the less-than-stellar individual body that is taking advantage of its law abiding citizens (though with so many laws on the books, can anyone truly be a law abiding citizen?).

Source: reason.com

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Roadmap for Filing a Second or Successive § 2255 Motion Under Davis

by Dale Chappell

The U.S. Attorney’s Manual passed out to federal prosecutors just after the Antiterrorism and Effective Death Penalty Act (“AEDPA”) was passed in 1996 had an interesting observation: “Under the AEDPA, federal prisoners will rarely be able to file second or successive motions.” But then came along Johnson v. United States, 135 S. Ct. 2551 (2015), and now United States v. Davis, 139 S. Ct. 2319 (2019), allowing scores of second or successive motions under 28 U.S.C. § 2255 (“SOS 2255”). As Judge Bev Martin of the U.S. Court of Appeals for the Eleventh Circuit noted in one of her dissenting opinions arguing on behalf of prisoners, “In a short time span, our court got thousands of authorization applications raising Johnson claims.” For almost two decades, the U.S. Attorney’s manual was right. And then it was not, thanks to the Supreme Court.

This article is intended to provide a roadmap for those who have already used up their one good shot at § 2255 relief to get back into federal district court with a SOS 2255 motion. This discussion is focused on getting your motion before the district court, not what the district court might do with your motion. Keep in mind that I have limited space to cover this complex and nuanced subject; SOS 2255 procedures could fill an entire book. I should know; I wrote a book on this topic.

Getting Your Foot in the Door

If you have previously filed a § 2255 motion that was denied on the merits or dismissed “with prejudice,” the only way you can file another motion with a Davis claim is to get authorization from the Court of Appeals. And getting that authorization is a must. Every court has held that the authorization requirement to file a SOS 2255 motion is a jurisdictional bar, so, it’s the first thing you need to do. Williams v. United States, 927 F.3d 427 (6th Cir. 2019) (discussing the jurisdictional aspects of § 2255).

How do you get authorization? That’s what we’re going to talk about. First, Davis must be considered “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” under § 2255(h)(2). That’s a mouthful in one sentence, but luckily Davis has already been declared by several courts to meet this strict criterion. The next thing you have to show is that Davis applies to your case, which means that you have to show your 18 U.S.C. § 924(c) conviction was based on the residual clause (and, yes, it’s a “conviction” and not a sentencing enhancement). Finally, you must file your SOS 2255 application in the Court of Appeals within one year of the Davis decision. Let’s take all of this step-by-step.

1. Davis is Retroactive for § 2255 Relief

Just like its sibling Johnson, which declared the residual clause of the Armed Career Criminal Act (“ACCA”) dead in the water and was declared to be a decision with retroactive effect by the Supreme Court under § 2255(h)(2), courts have held that the Davis decision declaring the residual clause of § 924(c) is also a new rule that qualifies to allow a SOS 2255 motion. In re Hammond, 931 F.3d 1032 (11th Cir. 2019). This not only goes for SOS 2255 motions but also for first time § 2255 motions filed directly in the district court under § 2255(f)(3). That provision allows a motion based on a “newly recognized” retroactive right by the Supreme Court, and Davis undoubtedly fits that description. Carter v. United States, 2019 U.S. Dist. LEXIS 147187 (C.D. Ill. 2019).

So far, no court has even questioned whether Davis is retroactive for § 2255 purposes. And in light of the Supreme Court’s clear instruction in Welch v. United States, 136 S. Ct. 1257 (2016), on why Johnson is retroactive for § 2255, it’s unlikely any court will declare that Davis isn’t retroactive.

Tip: State unequivocally in your application that Davis is a new constitutional rule that is retroactive for § 2255 because it is a “substantive” rule, which meets the requirements of § 2255(h)(2). Not all courts have said that Davis is retroactive yet, but no court has said that it is not retroactive.

2. Convincing the Court Davis Applies to Your Case

You must show that Davis actually applies to your case for the Court of Appeals to grant authorization to file another § 2255 motion in the district court. The statute governing this screening process, 28 U.S.C. § 2244, says that “the court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing” that it meets the criteria in § 2255(h).

In plain English, a “prima facie showing” simply means “a sufficient showing of possible merit to warrant a fuller exploration by the district court.” Bennett v. United States, 119 F.3d 468 (7th Cir. 1997). “Prima facie” literally means “on its face,” which would seem to require the court to take just a quick look at your SOS 2255 application to see if you meet the § 2255(h) criteria. If only things were so easy.

Unfortunately, Courts of Appeals give lip service to the prima facie requirement in the statute and go above and beyond a mere quick look, usually digging into your case to see if you would actually win your claim if they granted authorization. But that’s not what the standard is supposed to be. As discussed in my September 2019 CLN column, “Obtaining Relief Under Davis in the Wake of Johnson,” the Courts of Appeals are divided over how deeply they must look before they can grant authorization to file a SOS 225 motion in the district court.

As my column explained, five circuits (the Fourth, Sixth, Seventh, Ninth, and D.C. Circuits) have held that you must show your conviction “may have been” based on the now-unconstitutional residual clause, while seven of them (the First, Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits) have set the bar much higher, requiring that your conviction “more likely than not” rested on the residual clause.

Some courts, like the Eleventh Circuit, have imposed yet another bar to filing a SOS 2255 motion, allowing just one application with the same claim to be filed. For example, the Court in In re Baptiste, 828 F.3d 1337 (11th Cir. 2016), cited § 2244(b)(1) to hold that an application with the same claim as an earlier application that was denied must be dismissed. Section 2244(b)(1) says that “a claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” While it specifically says that this limit applies only to state prisoners filing under § 2254 (and not federal prisoners filing under § 2255), the Court said “it would be odd
what some public defenders did with Johnson court while your application is pending. That's as soon as possible. Some have even mentioned your application in the Court of Appeals as to avoid this dilemma in those courts is to get 294 F.3d 674 (5th Cir. 2002). The only way Fierro v. Cockrell, in the district court you'll be on time. authorization to file your SOS 2255 motion the Court of Appeals sits on your application Court of Appeals. Most courts say that your motion is timely claim, and that clock started on June 24, 2019. Supreme Court’s decision in Davis was referring to: “under section 2254.” If that’s not available, then cite any recent case law showing it now falls under the residual clause, and therefore it was the only option your judge had at the time.

3. You Must File Your Davis Claim Within One Year of Supreme Court’s Decision

You have one year from the date of the Supreme Court’s decision in Davis to file your claim, and that clock started on June 24, 2019. Most courts say that your motion is timely filed on the date your application is filed in the Court of Appeals. Orona v. United States, 826 F.3d 1196 (9th Cir. 2016). This means that if the Court of Appeals sits on your application until after June 24, 2020, before granting you authorization to file your SOS 2255 motion in the district court you’ll be on time.

However, a few courts have said that your motion isn’t “filed” until it’s actually in the district court and that your application does not toll the one-year clock. So, if the Court of Appeals takes more than a year to grant you authorization, some courts say too bad. Anstey v. Terry, 2019 U.S. Dist. LEXIS 131174 (S.D.W. Va. 2019); Fiero v. Cockrell, 294 F.3d 674 (5th Cir. 2002). The only way to avoid this dilemma in those courts is to get your application in the Court of Appeals as soon as possible. Some have even mentioned a “place holder” motion filed in the district court while your application is pending. That’s what some public defenders did with Johnson applications.

The one-year limit, though, is not a jurisdictional bar and can be waived or ignored by the government. This means that if the government doesn’t bring it up then the court is not obligated to address it. But if the court itself brings it up on its own, it must allow you the chance to argue why your motion is on time. Day v. McDonough, 547 U.S. 198 (2006).

Tip: Get your application in as soon as you can to the Court of Appeals. If you are in the Fourth or Fifth Circuit, which don’t toll the clock while your application is pending in the Court of Appeals, file a “place holder” motion in the district court explaining why you are doing so. This is still an unclear area of law, but it’s an option that has been used by the public defender’s office in order to cover the bases there.

Procedures for Filing a Davis Claim

Usually, there is a form supplied by the Court of Appeals clerk to file your application for a SOS 2255 motion with the court for authorization to file a Davis claim in the district court. It’s really nothing more than a screening tool for the court and is not designed to shed light on your claim. Most Courts of Appeals require you to use this form, but a handful do not. At the moment, the Third, Seventh, and Eighth Circuits expressly say the form is not required. To be safe, though, use of the form will ensure that you cover all the bases. If you don’t use the form, your “motion” filed in the Court of Appeals for authorization must contain all the same elements as the form.

Since there’s not enough room on the form to adequately explain why your application meets the “prima facie showing” standard noted above, all of the courts allow you to add supplemental pages or attach a memorandum in support to your application. This is true even though the form says “Do not submit separate petitions, motions, briefs, arguments, etc.”

Courts of Appeals for the Third, Fourth, Fifth, and Ninth Circuits also require you to attach your “proposed” § 2255 motion to your application. The First Circuit, however, has a rule that specifically says not to attach your proposed motion to your application. The rest of the Courts of Appeals haven’t said one way or the other but have accepted the proposed motion in support of the application.

Conclusion

Filing a Davis motion will largely mirror the steps used for filing Johnson motions. But be aware that the SOS 2255 procedures are still evolving, and what may have been good for early Johnson motions may not apply anymore. It also means that some of the earlier attempts by the courts to limit Johnson relief may no longer apply, either. For example, see the Williams opinion cited above (holding that much of the SOS 2255 statutes are no longer jurisdictional bars anymore).

One thing is for sure: AEDPA purposely makes it difficult to file more than one § 2255 motion. Understanding these rules and procedures will go a long way in making that road a little smoother.

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By Kent Russell

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Criminal Legal News

December 2019

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Oregon Supreme Court Explains PCR ‘Escape Clause’ Availability for Untimely Filed Petitions
by Mark Wilson

The Oregon Supreme Court held that an untimely post-conviction relief ("PCR") proceeding may be filed if the legal and factual basis for a claim could not have been accessed, and a reasonable person would not have thought to investigate the existence of that claim within the applicable two-year statute of limitations.

In a companion case issued the same day (see below), the Court drew a line between those cases that fall within the so-called "escape clause" in ORS 138.510(3) and those that do not.

Somalia refugee Abdalla Dahir Gutale arrived in the U.S. as a teenager in 2003. When Gutale was 20 years old, he was charged with several Oregon crimes for having sex with a 16-year-old girl in April 2010.

Gutale pleaded guilty to a misdemeanor sex crime, and the remaining charges were dismissed. Under Padilla v. Kentucky, 559 U.S. 356 (2010), Gutale's trial attorney was required to inform him of the potential immigration consequences of his guilty plea. However, neither trial counsel nor the court gave Gutale any indication that his plea exposed him to any immigration consequences, even when he stated, on the record, that he was pleading guilty because he wished to travel and to become a U.S. citizen. Gutale's conviction was entered on June 3, 2010.

Two years later, Immigration and Customs Enforcement ("ICE") agents detained Gutale and initiated deportation proceedings against him on June 4, 2012. It wasn't until then that Gutale discovered he could be deported as a result of his 2010 misdemeanor sex abuse conviction.

In May 2013, Gutale filed an Oregon PCR proceeding, alleging that his trial counsel was ineffective for failing to advise him of the immigration consequences of his 2010 guilty plea. The State moved to dismiss the proceeding as barred by the two-year statute of limitations imposed by ORS 138.510(3).

Gutale argued that he did not know trial counsel had been ineffective until he was subjected to deportation proceedings and learned, at that time, that he had pleaded guilty to a deportable offense. He also argued that he had no reason to suspect that he would suffer immigration consequences or that his attorney had failed to provide him with legally required advice.

The trial court acknowledged that if Gutale’s claims were true, he would have a strong ineffective assistance of counsel claim under Padilla. Nevertheless, the court dismissed the action, concluding that the information underlying Gutale’s claim "would have been available" to him because Padilla "already had been decided."

The Oregon Supreme Court reversed, holding that "being reasonably available means more than just that a petitioner could have found the law if he or she had looked. Instead, a ground for relief is reasonably available only if there was a reason for the petitioner to look for it."

Oregon’s Post-Conviction Hearing Act is a collateral appeal that provides "the primary mechanism by which a person who has been convicted of a crime may allege constitutional errors that were not and could not have been, raised during the underlying criminal proceeding or on direct appeal," the Court explained. "Those errors frequently involve allegations that counsel was unconstitutionally ineffective and inadequate in his or her handling of the criminal case," the Court added.

Under ORS 138.510(3), PCR claims must be brought within two years of the date that the conviction becomes final. The statute contains an "escape clause," however, allowing a petitioner to bring a "ground for relief... which could not reasonably have been raised" within the two-year limitations period.

Given that Gutale’s conviction became final on June 3, 2010, his May 2013 PCR proceeding was filed beyond the two-year statute of limitations. The question, then, is whether the ORS 138.510(3) “escape clause” authorizes his untimely action.

A claim "could not reasonably have been raised earlier if the ground for relief was not known and was not reasonably available," the Court instructed. "That is true for both the factual and legal basis for a ground for relief."

The Court rejected the State’s argument that Gutale’s action was untimely because people are presumed to know the law. "Being reasonably available means more than just that a petitioner could have found the law if he or she had looked," the Court instructed.

“Instead, a ground for relief is reasonably available only if there was a reason for the petitioner to look for it.”

The Court ultimately concluded that the governing standard is "very similar" to the "discovery rule" standard in other contexts. It "requires assessing both whether the petitioner reasonably could have accessed the ground for relief and whether a reasonable person in petitioner’s situation would have thought to investigate the existence of that claim."

Importantly, the Court found it significant that Gutale was an unrepresented petitioner. "Although counsel may be responsible for knowing that there may be immigration consequences to a criminal conviction," the Court did "not presume that to be the case for an individual petitioner, unless there is a factual basis for concluding that the petitioner knew that there may be immigration consequences to his or her conviction."

Applying that standard, the Court held that Gutale’s PCR action came within the "escape clause" because "he might have found the ineffective assistance of his counsel if he had looked for it, but he had no reason to look for it before being detained by ICE."

Accordingly, the Court held that the trial court improperly granted the State’s motion to dismiss because there was no factual record establishing that Gutale "had information about the immigration consequences of his conviction" within the two-year limitations period. See: Gutale v. State, 435 P.3d 728 (Ore. 2019).

Mental Health Issue
On the same day, the Oregon Supreme Court issued its decision in a companion case brought by Ricardo Perez-Rodriguez who immigrated to the United States from Argentina as a six-year-old boy in 1977.

Perez-Rodriguez was a lawful permanent resident when he went to a hospital emergency room on August 27, 2011. He began acting erratically in the waiting room and attacked and injured a security guard who was attempting to assist him.

When police arrived and read Perez-Rodriguez his Miranda rights, he said "I didn’t do anything wrong" and "I hear voices, and I wish I wouldn't listen to them."

On January 6, 2012, Perez-Rodriguez...
pleaded guilty to felony attempted second-degree assault. The trial court did not inform Perez-Rodriguez that his conviction could result in potential immigration consequences, as required by ORS 135.385(2)(d).

However, his plea petition warned that there may be deportation consequences if he was not a U.S. citizen.

During sentencing, trial counsel informed the court that Perez-Rodriguez “unfortunately has had a long history of suffering from significant mental health problems and on this date was not on his normal prescribed medication.”

The trial court ultimately imposed a 36-month prison term and 36-month post-prison supervision term. The court ordered a mental health evaluation and that Perez-Rodriguez stay on his psychiatric medication as conditions of supervision. Perez-Rodriguez’s conviction became final on February 16, 2012.

In June 2014, ICE sent Perez-Rodriguez a Notice to Appear, charging him with deportation on August 26, 2014.

In June 2015, Perez-Rodriguez filed a PCR action, alleging that trial counsel was ineffective for failing to advise him of the immigration consequences of his guilty plea, in violation of Padilla. He claimed that his attorney told him only that he should “keep his fingers crossed.”

While acknowledging that his petition was untimely, Perez-Rodriguez alleged that his case fell within the escape clause of ORS 138.510(3) “because his mental health conditions interfered with his ability to understand that he had a post-conviction claim.” He offered evidence that he suffers from schizoaffective disorder, including “hallucinations, paranoia, delusions, and disorganized speech and thinking.” He also suffers from borderline intellectual functioning, which is defined as “below average cognitive ability (generally an IQ of 70-85),”

Nevertheless, the trial court granted the State’s motion to dismiss, finding that “petitioner has failed to establish good cause” for filing an untimely petition.

The Supreme Court affirmed the dismissal, distinguishing the case from Gutale. “In this case, but not in Gutale, petitioner was told at the time of his plea that there might be immigration consequences to his conviction, even though he was not told

that there certainly would be immigration consequences,” the Court found. “Unlike the petitioner in Gutale, petitioner in this case allegations facts putting him on notice of potential immigration consequences for his criminal conviction.”

Given that he was told of the risk of immigration consequences at the time of his conviction, the Court found that “it was incumbent on him to determine what those immigration consequences might be and whether his trial counsel had failed to accurately communicate those consequences to him.”

The Court declined to decide whether a PCR petitioner’s mental illness and intellectual disability may ever justify applying the escape clause because “the parties’ arguments on that question are significantly underdeveloped” and “the question is not an easy one.”

While acknowledging that “courts frequently consider mental illness or intellectual capacity as part of a statutory or common law tolling rule” when applying statutes of limitations, the Court found that it need not resolve that question in the present case.

“Even if a petitioner’s mental illness and intellectual disability could justify applying the escape clause,” the Court found that Perez-
Eighth Circuit Vacates Sentence for Improper Supervision Length After ACCA Enhancement Removed

by Anthony Accurso

The U.S. Court of Appeals for the Eighth Circuit held that after the defendant’s ACCA enhancement was struck his sentence must be vacated because the court lacked jurisdiction to impose more supervision than allowed by statute.

Travis Ryan Raymond was convicted on possession with intent to distribute methamphetamine under 21 U.S.C. § 841(a)(1) and (b)(1)(C) and being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) in 2014. The district court also determined that five of his Minnesota state priors constituted violent felonies, which triggered a 15-year mandatory minimum under § 924(e). The court sentenced him to two 15-year prison terms, one for each count, to be served concurrently and imposed a five-year term of supervision (also the minimum under the ACCA).

Raymond’s sentence was upheld on appeal, four months before the Supreme Court issued its decision in Johnson v. United States, 135 S. Ct. 2551 (2015). Because Johnson struck down the ACCA provision that classified three of his priors as violent felonies, Raymond filed a timely motion under 28 U.S.C. § 2255. The district court agreed that the ACCA statutory minimum no longer applied but denied relief because “his 15-year sentence still fell within the sentencing range recommended ... on the drug count.”

With the assistance of the Public Defender’s Office, Raymond filed a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure, seeking reconsideration of his § 2255 petition. This was denied on the same grounds as his § 2255 motion. Raymond was granted a certificate of appealability from the district court, and the Eighth Circuit reversed.

“An error of law may be remedied under § 2255 only when it constitutes a fundamental defect which inherently results in a miscarriage of justice.” United States v. Addonizio, 442 U.S. 178 (1979). When denying his petition, the district court relied on Sun Bear v. United States, 644 F.3d 700 (8th Cir 2011), which stated, “if the same sentence could have been imposed, then a defendant is not entitled to habeas relief.”

The Court determined that Sun Bear was distinguishable because it dealt with Guidelines sentences, not mandatory minimums. Under Cravens v. United States, 894 F.3d 891 (8th Cir 2018), the ACCA’s residual clause caused sentences to be issued which were “imposed in violation of the Constitution.”

Using the improper standard, i.e., Sun Bear instead of Cravens, is a legal error that amounts to an abuse of discretion under City of Duluth v. Fond du Lac Band of Superior Chippewa, 702 F.3d 1147 (8th Cir 2013).

Further, the Court found the error was not harmless because the maximum term of supervision allowed by statute absent the ACCA enhancement was only three years, and the district court was without jurisdiction to impose a sentence beyond the maximum.

The only catch for Raymond was that, in light of Quarles v. United States, 139 S. Ct. 1872 (2019), his prior for third-degree burglary may again qualify as an ACCA predicate, so the Court remanded with instructions for the district court to consider the merits of Raymond’s ACCA challenge in light of Quarles.

Accordingly, the Court vacated the denial of Raymond’s 60(b)(6) motion because the district court failed to apply the appropriate legal standard for assessing his ACCA claim. See: Raymond v. United States, 933 F.3d 988 (8th Cir. 2019).

Second Circuit Clarifies Conditions for Releasing a Defendant on Bail to Home Detention With Private Armed Security Guards

by Douglas Ankney

The U.S. Court of Appeals for the Second Circuit clarified the circumstances when a defendant’s bail may include home confinement coupled with private armed security guards.

Jean Boustani applied for bail pending trial, proposing conditions that included home confinement under supervision of private security guards paid for by Boustani.

The district court denied bail, finding that Boustani posed a flight risk because: (1) the charges against Boustani of conspiracy to commit wire fraud, conspiracy to commit securities fraud, and conspiracy to commit money laundering were serious; (2) Boustani faced a possible lengthy sentence if convicted; (3) the evidence against Boustani was strong; and (4) of Boustani’s deceptive actions, along with his access to substantial financial resources, frequent international travel, and ties to foreign countries without extradition. Additionally, the district court considered that releasing Boustani to a privately funded jail would lead to disparate treatment between him and his codefendants, who might pose flight risks for similar reasons but lacked the financial resources available to Boustani.

Boustani appealed. The Second Circuit opined that under the Bail Reform Act, a court is required to order the pretrial release of a defendant on personal recognizance or after execution of an appearance bond “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any
other person or the community.” 18 U.S.C. § 3142(b). If the court determines the defendant is a flight risk, it must release him “subject to the least restrictive further condition, or combination of conditions, that ... will reasonably assure the appearance of the person.” § 3142(c)(1)(B). The court must order detention if it finds no condition or combination of conditions will assure the person’s appearance and the safety of other persons. § 3142(c).

In determining the sufficiency of the condition or conditions, the court considers several factors that include: (1) the nature and circumstances of the charges; (2) the weight of the evidence; (3) the history and characteristics of the defendant; and (4) the danger posed by the defendant’s release. United States v. Sabhnani, 493 F.3d 63 (2d Cir. 2007).

The Government must prove, by a preponderance of the evidence, both the risk of flight and the absence of conditions that would reasonably assure the appearance of the defendant. Id.

The Second Circuit had previously recognized that, in limited circumstances, a court may release a defendant to home confinement in which the defendant pays for private armed security guards. Id. But since Sabhnani, the Second Circuit had observed in non-precedential summary orders that pretrial release under those conditions may not be appropriate for wealthy defendants when similarly situated defendants of lesser means would be detained. United States v. Esposito, 749 F. App’x 20 (2d Cir. 2018). It is a fundamental principle of fairness that the law protects “the interests of rich and poor criminals in equal scale, and its hand extends as far to each.” Smith v. Bennett, 365 U.S. 708 (1961).

The Court determined that the private-security condition of Sabhnani is appropriate only where a defendant was found to be a flight risk and would be detained primarily because of his wealth. By contrast, if similarly situated defendants of lesser means would be detained, then a wealthy defendant cannot avoid detention by relying on his funds to pay for private detention.

Boustani wasn’t detained primarily because of his wealth, but he was detained for the reasons stated by the district court. Additionally, persons of lesser means, such as his codefendants, would be detained merely because they lacked financial resources.

Accordingly, the Court affirmed the district court’s order denying bail. See: United States v. Boustani, 932 F.3d 79 (2d Cir. 2019).

Flaws in Mobile Phone Records
Free Danish Prisoners

by Jayson Hawkins

Over 10,000 criminal cases have come under review in Denmark due to doubts that have arisen about how reliable evidence taken from cellphone geolocation software actually is. As of mid-September 2019, 32 prisoners have been released as a result of demanding their convictions be overturned because they were based on faulty data.

Danish authorities also placed a two-month moratorium on the use of such data to obtain new convictions, a move that has postponed almost 40 trials. The director of the nation’s public prosecutions, Jan Reckendorff, admitted the decision was drastic but necessary.

“We simply cannot live with the idea that information that isn’t accurate could send people to prison,” Reckendorff commented to the Danish state broadcasting system.

Police found several problems with how geolocation data were collected, including mislocating specific cell towers, tying calls to the wrong towers or to multiple towers at the same time, registering only selected calls, and mixing up the sources of text messages.

Reckendorff said it was possible for such mistakes to locate innocent people at crime scenes as well as give criminals false alibis.

Jakob Willer, a spokesperson for Denmark’s telecoms industry association, stated that the software and its applications were never intended to gather evidence but rather to maintain a means of communication among users. “We should remember: data is created to help deliver telecom services, not to control citizens for surveillance.”

Other instances of flawed geolocation data have been recognized in South Africa and the U.S., including a family in Kansas that had been harassed by law enforcement “countless times” because of a digital mapping company’s inaccurate findings.

Denmark has taken a stand as the first country to officially challenge the validity of geolocation software as evidence.

“Until now, mobile data has had a high significance and value in courtrooms because this kind of evidence has been considered almost objective,” said Karoline Normann, head of the criminal law committee for the Danish national law society. “This situation has changed our mindset about cellphone data. We are probably going to question it as we normally question a witness or other types of evidence, where we consider circumstances like who produced the evidence, and why and how.”

Source: theguardian.com
Tell Me What I Want to Hear, Not What I Need to Hear: How Confirmation Bias Causes Wrongful Convictions

by Dale Chappell

What if I invited you to a conference at a fancy hotel where experts would present solid evidence that questions the validity of something you strongly believe, like maybe climate change? Would you come? What if those experts instead were to speak in support of your views, instead of challenging them? Now, would you come?

Most of us would go to the conference that supports our views. Why? Because we don’t like to be told we’re wrong. We seek confirmation in what we think and feel. It’s why we watch one TV news channel over another and why we read one newspaper rather than another. We seek out what we want to hear. Maybe it’s a survival instinct. But one thing’s for sure: We all suffer from this. It’s what experts call “confirmation bias.”

A recent study published in the Northeastern University Law Review by D. Kim Rossmo and Joycelyn M. Pollock, professors at Texas State University, exposed how confirmation bias infects criminal prosecutions. They analyzed 275 criminal cases overturned because of actual innocence and identified the most common causes of wrongful convictions in the top 50 of those cases.

What they found was that the thing we all deal with, confirmation bias, was the most common error that put innocent people in prison, sometimes for decades.

What Is Confirmation Bias?

In his book, How Judges Think, former U.S. Court of Appeals Judge Richard Posner defined confirmation bias as: “the well-documented tendency, once one has made up one’s mind, to search harder for evidence that confirms rather than contradicts one’s initial judgment.” Rossmo and Pollock further describe confirmation bias as a type of “selective thinking” and that once we form a hypothesis, our inclination is to confirm rather than refute it. They found that cognitive biases, such as confirmation bias, operate at a “below-conscious” level and are not intentional or deliberate decisions.

For example, the study concluded that confirmation bias could cause a detective to take evidence that supports his theory at face value without much thought, but then scrutinize evidence that contradicts his theory, looking for any reason to reject it. In other words, the detective is looking for information that is consistent with what he already believes.

This “top-down” processing is what Dr. Daniel Reisberg, chairman of the psychology department at Reed College, described as a person’s view being heavily influenced by their belief of what they are “supposed to see,” and that once this filter is in place, it’s hard to “undo” that pattern and still be objective.

In short, you could say that confirmation bias is simply the desire to prove ourselves right, rejecting the fact that we might possibly be wrong.

Confirmation Bias’ Influence in Wrongful Convictions

The study found that confirmation bias was “the most connected causal factor by a significant margin” in wrongful convictions in criminal cases. They called confirmation bias the “pivotal position” in the cause of wrongful convictions. This is because faulty assumptions by law enforcement officers and prosecutors while trying to prove themselves right infected everything else that happened in the case, from what evidence got admitted to what witnesses were called or not called.

The study showed that confirmation bias, coupled with tunnel vision and a rush to judgment, switches a case from an evidence-based investigation into a suspect-based one, in an effort to solve the case. Soon there’s a “sunk cost” effect, they say, where detectives and prosecutors think they’ve invested too much into a case to even consider the possibility that they may be wrong. At this point, the study explained, even solid evidence that the suspect may not be the right guy gets discredited or outright ignored in order to not upset the momentum of closing the case.

How Does Confirmation Bias Influence Prosecutors in a Criminal Case?

Prosecutors are supposed to be an objective “check and balance” on who gets arrested and charged in a case, the study noted, but prosecutors suffer from confirmation bias the same as anyone else involved in solving a case. In fact, the study says prosecutors have even more of an interest sometimes in the outcome, and their confirmation bias therefore has an even more profound effect on the case.

Prosecutors are supposed to charge someone with a crime only if they have probable cause to believe they’re guilty. But because prosecutors often have a stronger connection to the victim of a crime, confirmation bias can lead to an “excessive zeal” to get a conviction, the authors say, despite evidence that might point in a different direction and to a different suspect.

Prosecutors are also trained to obtain convictions, the study pointed out. They count convictions as “racking up points,” making it difficult for prosecutors to ignore scoring points for their team (and their own career).

High-profile cases that cause a “media frenzy” can further drive prosecutors to do whatever it takes to resolve the case, the study showed. Even other prosecutors and law enforcement agencies can pressure a prosecutor to ignore crucial evidence and uphold a wrongful conviction. This almost happened in the 1989 “Central Park Jogger” case, when DNA evidence in 2002 exonerated the five men convicted of raping the jogger, after another man confessed and his DNA matched the crime scene DNA. Inexplicably, former prosecutors and New York Police Department detectives criticized the district attorney’s office for agreeing to drop the charges.

For prosecutors who hold their positions by election, an election year can be a driving force to aggressively pursue a conviction in a high-profile case. Take, for example, the Duke University Lacrosse Team rape case in 2007. Michael Nifong, the Durham County, North Carolina, prosecutor was in a hotly contested election, and the case presented him a chance to shine in the media.

Nifong made numerous public statements that the students were guilty, and he set out to prove this before all the evidence was gathered. Confirmation bias, the study’s authors said, caused Nifong to overstep bounds to secure a conviction, even ordering a lab technician to falsify a DNA report. Eventually, the State Attorney’s Office sent outside prosecutors in who dropped all the charges. Nifong was promptly disbarred.

In a disturbing case in 2004 in Wilmington, Illinois, the murder of a missing three-year-old girl was quickly pinned on the girl’s father by a prosecutor who was seeking...
re-election. The prosecutor promptly charged Kevin Fox, the girl’s father, with murder and announced that he was going to seek the death penalty. He also made public statements about the victim’s previous sexual abuse at the hands of Fox – which were false.

Fox sat in jail for eight months until a newly elected and different prosecutor dropped the charges, after a review of the case showed he didn’t commit the crime. Years later, the real murderer, Scott Eby, was found after his DNA turned up as a match in a DNA database. He was in prison by then for yet another murder and rape. Eby left other evidence at the scene, which investigators ignored because they were so focused on Fox: a pair of boots with “Eby” written on them.

Fox sued, and a jury awarded him $15.5 million after a seven-day civil trial, which was later reduced on appeal to $8.1 million in 2008.

In 1991, Westchester County, New York, District Attorney Jeanine Pirro, pursued the conviction of 15-year-old Jeffrey Deskovic, after police found one of his classmates raped and murdered in a park in Peekskill. The study’s authors called the investigation into Deskovic a “classic confirmation bias pattern”: when DNA evidence excluded Deskovic, prosecutors changed their theory of the case to continue focusing on him. They never considered that someone else committed the crime.

Instead, Pirro said Deskovic didn’t rape the victim but killed her in a rage after he caught her having sex with someone else. She said Deskovic was in love with the victim, even though the victim’s friends said he never had anything to do with her. Deskovic was convicted after he confessed to the crime during an interrogation, then sat in prison for 16 years before Barry Scheck, of the Innocence Project of New York, proved by DNA evidence that someone else had committed the crime: a man already in prison for rape and murder.

Pirro is no longer a prosecutor and is now a Fox News host who opines on criminal cases.

Preet Bharara was the U.S. Attorney for the Southern District of New York for over seven years before President Trump abruptly fired him in 2017. He said in his 2019 book, Doing Justice, that the cause of a wrongful conviction in a high-profile international terrorism case in Spain in 2004 was the result of a “culture conducive to confirmation bias” within the FBI. The arrest of Brandon Mayfield, a completely innocent person in Portland, Oregon, was nothing more than confirmation bias and a hesitation to challenge the senior agents’ first conclusions that Mayfield was their man. Despite that, officials in Spain told the FBI that Mayfield wasn’t the guy; they locked him up and insisted he was the terrorist they were looking for. Eventually, someone listened to reason, and they realized Mayfield had nothing to do with the terrorist attack in Spain. ‘An innocent man was accused and forever injured because of a failure to sufficiently reconsider,’ Bharara said.

How to Prevent Confirmation Bias From Infecting a Criminal Case

The study found that 88 percent of the cases analyzed suffered from biased evidence evaluation. The authors suggested that better procedures for evidence collection, evaluation, and analysis would prevent many wrongful convictions. Of course, efforts to shield evaluation of evidence from confirmation bias was a major point for the authors.

The authors also suggested that training programs to “de-bias” investigators would help “mitigate” confirmation bias in criminal cases. Flawed decision-making because of confirmation bias was behind most wrongful convictions; the study found. While awareness of confirmation bias helps, training on better decision-making is what would help the most, they said.

The study further found that independent reviews of unsolved cases also would do much to cut down confirmation bias in criminal investigations. The authors noted a policy in the United Kingdom that after a certain amount of time, an unsolved murder is reviewed by a senior officer with no involvement with the case. If the case is high-profile, the officer is brought in from a different agency.

The study stressed that overall a wrongful conviction is an “organizational accident” with many small failures combined to produce the tragedy. No single “root cause” could be identi-
**Civil Death Laws: When Life is Death**

*by Jayson Hawkins*

Certain human rights are inalienable, even for incarcerated individuals. When Joshua Davis received a shot of insulin in 2018 that was tainted with other prisoners’ blood, the resulting lawsuit against the institution that risked exposing him to a host of deadly diseases should have been a slam dunk. Yet an unusual issue prevented the suit.

According to Rhode Island law, Davis was already dead.

An archaic state statute defines anyone sentenced to life as “civilly dead,” which renders their civil rights null and void. Not only do they lack the ability to sue, they cannot be lawfully married or divorced, nor can they hold title to any property. This holds true even if they eventually regain freedom.

The idea of civil death traces its roots to the Classical Greeks and Romans. Criminals facing execution were barred from military service, voting, and other civic privileges.

The Germanic tribes utilized “outlawry,” a similar concept wherein those guilty of certain crimes lost all rights and protections within the community. Much later, the English incorporated civil death into the common laws, and it made its way to America with the colonists. An 1871 court ruling in Virginia declared convicted felons had no rights and existed solely as “slave[s] of the state.”

English common law only applied civil death to felony convictions, but almost all felonies used to be capital crimes. Lengthy prison terms began to be substituted for the death penalty over the years for many crimes, but rather than also eliminating civil death, many U.S. states opted to widen its definition. Civil death laws, however, have remained a part of American law.
incarceration. A judge refused to annul the original union simply because of his temporary “death,” thus leaving his (ex) wife married to both men.

A Missouri court ruled the legal paradoxes of civil death unconstitutional in 1976, agreeing that it was “an outdated and inscrutable common law precept.” Civil death nonetheless remains on the books of New York and Rhode Island, though only the latter enforces it. Other states that long ago overturned their own statutes have found ways to retain several effects of civil death. Rights such as having certain occupations, voting, and running for office remain forbidden for many felons even after serving their time.

Sonja Deyoe, an attorney representing Joshua Davis and another Rhode Island lifer burned by a steam pipe at the same facility, has brought suit against the state on their behalf. The Civil Death Act, she claims, has denied her clients’ “basic civil, statutory, and common law rights and access to the courts, and imposes an excessive and outdated punishment contrary to evolving standards of decency.” Her argument echoes rulings of other states’ courts and alleged numerous Constitutional violations. “The state could choose not to feed these individuals, deny them medical care, torture them, or do anything short of execute them,” she said.

A number of Rhode Island’s current population of over 200 civilly dead prisoners will have parole opportunities, but courts have not determined if freedom will include legal resurrection. The few lifers who have already been paroled have been hesitant to question their status. The state’s General Assembly agreed on legislation to overturn civil death in 2007 only to have it vetoed by the governor at that time. Multiple bills that would achieve the same end have since been proposed, but not one has passed.[1]

Source: motherjones.com

Massachusetts Supreme Court Suppresses Evidence Obtained After Miranda Warnings Translated into Spanish Deemed Incapable of Conveying Meaningful Advice

by David Reutter

The Supreme Judicial Court of Massachusetts affirmed the suppression of custodial statements where the translation of Miranda warnings into Spanish was inadequate to apprise the defendant of his rights. The Court also reversed the denial of the suppression of evidence taken from the defendant’s cellphone because the consent to search was based on the inadequate warnings. Finally, the Court suppressed cell-site location information (“CSLI”) because the affidavit in support of the search warrant failed to establish probable cause.

The case was before the Court on interlocutory appeals filed by the Commonwealth and the defendant, Pedro Vasquez.

Shortly after the January 2015 shooting death of Vasquez’s girlfriend, he became a suspect. After Vasquez was arrested, it became apparent that he did not have command of the English language. The detectives asked a Spanish speaking officer who was untrained in interpretation to translate the Miranda warnings and interrogation into Spanish. The officer’s translation was as follows: “1. You have the right to remain quiet. 2. Any thing that you say can be against you ... the, of the court. 3. You the right to consult with a lawyer for advice before being and to have him present with you during the interrogation. 4. If you do not have the means to pay, to pay a, and if you wish for it, you the right to be a law, lawyer before being interrogated. 5. If you decide to be now, without the presence of a lawyer, you still have the right to stop the, that any...”

Vasquez subsequently waived his rights, gave a statement, and authorized officers to search his cellphone. The detectives also sought a warrant to obtain the CSLI for the prior 32 days, including the day of the shooting.

Vasquez moved to suppress his statement, search of his cellphone, and the CSLI. The first motion judge suppressed his custodial statements but denied his motion to suppress the search of his cellphone. He also filed a motion to suppress the CSLI, which a second motion judge denied. Both parties appealed.

The Massachusetts Supreme Court agreed with the first motion judge that Vasquez was not adequately advised of his Miranda rights in Spanish. The warnings provided to Vasquez were characterized as fragmented, confusing, and incoherent. Although a translation of Miranda warnings into a defendant’s native language doesn’t have to be “word for word,” it can’t be so ‘misstated to the point of being contradictory or equivocal,’ "Commonwealth v. Bins," 989 N.E.2d 404 (Mass. 2013). The Court determined that the warnings provided to Vasquez in Spanish were incapable of conveying any meaningful advice, and thus, it concluded that he “was unable to execute a knowing, intelligent, and voluntary waiver of his rights.” Therefore, his statements following the warnings were properly suppressed.

In addition, since the Miranda warnings were inadequate, evidence obtained on Vasquez’s cellphone must be suppressed as fruits of the poisonous tree, the Court ruled. Similarly, the Court determined that the warrant application relied on tainted information gathered as a result of the cellphone search, so it ruled that the CSLI must also be suppressed.

Accordingly, the Court affirmed the suppression of Vasquez’s custodial statements and reversed the denials of his motions to suppress evidence obtained on his cellphone and the CSLI. See: Commonwealth v. Vasquez, 130 N.E.3d 174 (Mass. 2019). [2]

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A unanimous Supreme Court of South Carolina held that trial counsel was constitutionally ineffective for failing to present specific details of an alibi defense that the Court said undermined the confidence in the outcome of the trial and remanded for a new trial.

The case started when Anthony Martin was charged with the robbery of a bank in North Augusta, South Carolina, on April 23, 2009 at 12:20 p.m. That time stamp is critical because Martin’s defense was that it would have been impossible for him to be there because he was in Atlanta with his mother, 150 miles away, not even an hour before the robbery. And his mother gave a statement to defense counsel corroborating Martin’s story, stating that she dropped him off at a bus stop at “around 11:15, 11:30.” However, counsel never told the jury the exact time he was dropped off, which would have shown Martin was not in the area during the robbery.

There wasn’t any physical evidence tying Martin to the crime. The only evidence the State had against Martin was three codefendants who said that Martin committed the robbery. The three codefendants who did commit the crime cooperated with law enforcement to get a break in their sentence. Two of them even admitted that they lied to the cops during the investigation in hopes of exonerating themselves. The codefendants all admitted to being friends but hardly knew Martin.

Nevertheless, Martin was convicted of the robbery. He then filed an application for postconviction relief (“PCR”), claiming that trial counsel was ineffective for not giving the jury the full details of his alibi defense. His mother’s statement that counsel admitted he had on file specifically stated that she dropped Martin off at the bus stop in Atlanta “around 11:15, 11:30” on the day of the robbery. Had counsel told the jury this crucial detail, Martin argued, he could not have been convicted of the robbery.

The PCR court denied his application. The court said that Martin didn’t provide his mother’s testimony with his PCR application to support his claim. And the court ruled that the “overwhelming evidence” of his guilt negated any prejudice caused by counsel’s error.

The South Carolina Supreme Court granted Martin’s petition for a writ of certiorari to review the PCR court’s ruling.

The standard two-part test announced by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), for showing ineffective assistance of counsel is (1) that counsel’s errors fell below “an objective standard of reasonableness” and (2) that without counsel’s errors, the result of the proceeding would have been different. Here, Martin’s task was to show the outcome of his trial would have been different absent counsel’s error.

When a PCR applicant claims that counsel failed to pursue an alibi defense (or improperly presented an alibi defense), he “must produce the witness at the PCR hearing or otherwise introduce the witness’s testimony in a manner consistent with the rules of evidence,” the South Carolina Supreme Court instructed in Glover v. State, 458 S.E.2d 538 (S.C. 1995). “Mere speculation what the witness’s testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.” Id.

As far as the “overwhelming evidence” that the PCR court said negated any prejudice to Martin, the Supreme Court said it’s true that overwhelming evidence could negate prejudice. “However, the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination” of evidence so strong that Strickland could not be met. Dubious testimony of witnesses who also committed the crime and now are looking for a break is hardly overwhelming evidence, the Court said.

The jury also asked the trial court during deliberations to rehear Martin’s alibi testimony. The Court said that this means it would have been “reasonable to assume the jury is focusing critical attention” on his alibi, and it was a key part of the defense.

“To state the obvious,” the Supreme Court said, “if the mother’s specific alibi testimony had been presented and believed, it would have made it impossible for Petitioner to travel by car from Atlanta to Aiken County [South Carolina] and participate in the robbery at 12:20 p.m.”

Accordingly, the Court reversed the denial of Martin’s PCR application and remanded for a new trial. See: Martin v. State, 832 S.E.2d 277 (S.C. 2019).

Second Circuit: Federal Habeas Relief Warranted Where State Trial Court’s Evidentiary Rulings Deprived Defendant of Right to Present a Complete Defense

by Douglas Ankney

The U.S. Court of Appeals for the Second Circuit instructed a district court to issue a conditional writ of habeas corpus based on a state court’s erroneous application of evidentiary rules that resulted in the denial of the defendant’s right to present a complete defense.

Paul Scrimo was convicted of murdering Ruth Williams based on the testimony of John Kane. Kane testified that the three of them were in the kitchen of Williams’ apartment when Scrimo strangled Williams because she told Scrimo to “go home to his fat, ugly wife.” Scrimo’s defense was that Kane was the killer.

The DNA evidence, including the skin recovered from beneath Williams’ fingernails, belonged to Kane. To further establish his defense, Scrimo sought to introduce evidence from three witnesses who would testify that Kane sold cocaine to Williams and one of the defense witnesses on the night of the murder. Additionally, Kane had, years earlier, choked one of the defense witnesses after the witness had tried to retrieve money from Kane for some diluted cocaine he had sold to her.

Scrimo clearly explained to the court that the testimonial evidence was for the purpose of establishing the identity of Kane as the perpetrator, i.e., Kane killed Williams as a
result of a drug deal gone bad. The trial court excluded the testimony on the ground that it was collateral evidence of unrelated prior bad acts. Scrimo was convicted.

On appeal he argued, *inter alia*, that the trial court erred when it excluded his evidence. The Appellate Division affirmed, and the New York Court of Appeals denied his leave to appeal. Scrimo then sought relief via a 28 U.S.C. § 2254 petition for a writ of habeas corpus in federal district court. The district court denied Scrimo’s petition, and he appealed to the Seventh Circuit.

The Court observed that a federal court may grant habeas relief to a prisoner convicted in state court if the state court’s decision was contrary to, or an unreasonable application of, clearly established federal law as established by the U.S. Supreme Court. 28 U.S.C. § 2254(d) (1). An unreasonable application of federal law occurs if the state court’s “application of clearly established federal law was objectively unreasonable.” *Williams v. Taylor*, 529 U.S. 362 (2000). It is clearly established federal law that a criminal defendant has a constitutional right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986). The right to call witnesses for the defense is a fundamental right. *Chambers v. Mississippi*, 410 U.S. 284 (1973). But the testimony of witnesses is subject to rules “designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id*.

An error in an evidentiary ruling based on the state’s rules won’t provide grounds for federal habeas relief unless that ruling deprived a defendant of a fair trial. *Washington v. Sbriver*, 259 F.3d 45 (2d Cir. 2001). Errors in evidentiary rulings are subject to the lenient harmless error test and won’t provide the basis for habeas relief unless the error had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

In the instant case, the Second Circuit concluded that the trial court’s erroneous application of New York’s evidentiary rules by excluding the testimony of the defense witnesses as collateral evidence of unrelated prior bad acts violated clearly established federal law that a defendant has a constitutional right to a complete defense. Defense counsel clearly told the trial court that the evidence was being introduced to establish the identity of Kane as the killer and was not being introduced to impeach Kane or show he was a bad person. Consequently, the trial court was adequately apprised that the witnesses’ testimony was relevant to his defense. And since the State’s evidence against Scrimo was weak while the DNA evidence implicated Kane, it was a reasonable conclusion that the excluded evidence had a substantial and injurious effect on the jury’s verdict. The Court explained that “the wrongfully excluded testimony would have introduced reasonable doubt where none otherwise existed.”

Accordingly, the Second Circuit reversed the decision of the district court and remanded with instructions to issue the writ by the 20th calendar day after the Court’s mandate unless the State had by then taken concrete steps to retry Scrimo. See: *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019).

$2.4 Million Paid by Sacramento in Wrongful Death Suit of Stephon Clark

by Kevin Bliss

Two Sacramento, California, police officers, Terrance Mercadal and Jared Robinet, fatally shot Stephon Clark on March 18, 2018, amid accusations of racial profiling and excessive use of force.

The District Attorney (“DA”) stated that the force used was lawful and that no charges would be filed against the men. Now, the City of Sacramento agrees it’s in the city’s best interest to pay a wrongful death settlement of $2.4 million.

On the night of the incident, police received a call that a suspect was breaking into a car in a neighborhood and dispatched several officers and a helicopter to the area. Recordings of the helicopter state that the suspect was “running for the front yard.”

Mercadal and Robinet confronted a man in a back yard with their weapons drawn. One officer yelled, “Gun!” The two immediately fired 20 rounds into the darkness. Helicopter video shows Clark initially going to lie on the ground. Still, the officers fired a dozen more shots into his prone form.

Clark, a 22-year-old black man, was on his way to see his grandmother. He was entering through the back because the front doorbell did not work and neither his grandmother, Sequita Thompson, nor her husband could get around very well.

Clark did not have a weapon on him. The only thing in his possession when they searched the body was his cellphone. Clark was not even the original suspect.

Early release of the camera footage sparked protests across the nation. It was stated that Clark was racially profiled. The police were attacked for excessive use of force. After an investigation by the DA’s office, the decision was made not to file charges, and Mercadal and Robinet were back to work in just a couple of weeks.

“This is a complex case that at its core involves a lawful use of force by Sacramento Police Department officers,” stated City Attorney Susana Alcala Wood.

Clark left behind two boys, ages 1 and 3. A wrongful death suit was filed on the family’s behalf in January, and in September, the city of Sacramento agreed to settle for $2.4 million. Each of the children will have $893,113 placed in a trust fund for them that they can access when they turn 22.

“In this case, the city of Sacramento has determined that this partial resolution of the lawsuits filed on behalf of Mr. Clark’s family is in the best interest of our community,” said Wood. She believes it a step toward healing a community.

Sources: thefreetoughtproject.com, nydailynews.com

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Risk Assessments in Cook County Ineffective
by Jayson Hawkins

Risk assessments have been championed as a tool to help remove bias from criminal justice decisions. While there have been improvements in some areas, overall performance has fallen short of many expectations. Cook County, Illinois, began using the Public Safety Assessment ("PSA") four years ago as a means of reducing its pretrial jail population, but data show it has consistently overestimated the actual risk of releasing incarcerated individuals who have yet to be convicted of a crime.

The PSA was intended to gauge which individuals were more likely to commit new crimes, especially violent ones, prior to trial as well as the risk of their failing to appear at scheduled court dates. The tool does this by classifying each person into a low, moderate, or high risk category. This recommendation is then taken into consideration by a judge who determines if a defendant should be freed and what conditions should be imposed upon that freedom.

Judges at Cook County’s Central Bond Court decide the fates of about 90 individuals a day, typically in under a minute for each case. Although other factors are considered, PSA scores weigh heavily on the decisions. Almost every person rated as high risk faces jail time unless they can post bail, except roughly a third of these cases, which are given no opportunity at bail whatsoever.

For those rated low risk, about 75 percent are set free at their bond hearing. Criticism has come after statistics from October 2017 to December 2018 show that among those freed before trial who were ranked high risk for violence, 99 percent did not incur any additional violent charges. This percentage was essentially no different than those in moderate or low categories. This has brought into question the value of risk assessment scores altogether. As a New York Times op-ed observed, “If these tools were calibrated to be as accurate as possible, then they would simply predict that every person is unlikely to commit a violent crime while on pretrial release.”

Cook County had the nation’s biggest jail population in 2015, 90 percent of which were pretrial detainees. It started applying the PSA that year to reduce that number and, within months, saw a 15 percent increase in low-risk prisoners freed without a cash bond; however, that gain was countered by even fewer high-risk defendants being released. Use of the PSA thus made virtually no difference in the overall jail population.

Seeking a more effective solution, the circuit court ordered judges to no longer demand cash bond in most cases and place “the least restrictive conditions” on defendants to assure they would appear in court and not threaten public safety. After this order was enacted in September 2017, the jail population dipped almost 20 percent. Over 97 percent of low-risk defendants are now released, yet fewer than half deemed high risk gain any measure of freedom before trial. That might be acceptable if PSA scores reflected real dangers, but data have shown risk categories bear little relation to rates of rearrest for violent crime.

California Supreme Court: Where Electronics Search Condition of Probation Is Not Reasonably Related to Future Criminality, Condition Is Invalid
by Douglas Ankney

The Supreme Court of California held that where an electronics search condition of probation is not reasonably related to future criminality the condition is invalid under People v. Lent, 541 P.2d 545 (Cal. 1975).

In 2014, the juvenile defendant (identified as “Ricardo”) was declared a ward of the court and placed on probation stemming from his involvement in two burglaries.

The juvenile court imposed various probation conditions, including drug testing, prohibitions on using illegal drugs and alcohol, and associating with people who use drugs. Ricardo objected because there was no indication drugs were associated with his crimes. The judge dismissed the objection because Ricardo had told a probation officer that “he wasn’t thinking” when he committed his offenses and later stated that he had stopped smoking marijuana because it “did not allow him to think clearly.”

Another probation condition required Ricardo to “[s]ubmit ... electronics including passwords under [his] control to search by Probation Officer or police officer with or without a search warrant at any time of day or night.”

Ricardo challenged this condition as “not reasonably related to the crime or preventing future crime.” The juvenile court upheld the condition on the premise that “minors typically will brag about their marijuana usage ... on the Internet....”

Since Ricardo had said he wasn’t thinking when he committed the offenses and also said marijuana did not allow him to think clearly, the court concluded Ricardo meant he was using marijuana when he committed the offenses; therefore, the electronic monitoring condition was upheld.

Ricardo appealed. The Court of Appeal rejected Ricardo’s contention that the electronics search condition was unreasonable but struck the condition as being too broad. It remanded to the juvenile court to impose a narrower condition limiting searches to only electronic data of Ricardo’s involvement.
with drugs. The Supreme Court of California granted Ricardo further review.

The Supreme Court observed that a condition of probation that requires or forbids conduct that is not itself criminal is valid if that conduct is reasonably related to future criminality. Lent.

A condition of probation will not be held invalid unless it: (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct that is not itself criminal, and (3) requires or forbids conduct not reasonably related to future criminality. Id. The Lent test is conjunctive, meaning all three prongs must be satisfied to invalidate a probation condition. People v. Olguin, 198 P.3d 1 (Cal. 2008). “[A] reasonable condition of probation is not only fit and appropriate to the end in view but it must be a reasonable means to that end. Reasonable means are moderate, not excessive, not extreme, not demanding too much, well balanced.” People v. Fritchey, 2 Cal.App.4th 829 (1992).

The Court observed that a cellphone search is highly intrusive, exposing to the government far more than the most exhaustive search of a house: A phone contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home. Riley v. California, 573 U.S. 373 (2014). The fact that a search of cellphone records might aid a probation officer in ascertaining whether a defendant is complying with other conditions of probation is insufficient to justify the impairment of the constitutionally protected interest in privacy. People v. Bryant, 10 Cal. App.5th 397 (2018).

The People conceded that Ricardo easily satisfied the first two prongs of Lent: the search of his electronic devices bear no relationship to his burglary offenses, and using those devices is not criminal conduct. As for the third prong, the Court agreed with Ricardo’s skepticism of the juvenile court’s finding that teens routinely brag about drug abuse online, and the Court was skeptical of the juvenile court’s finding that Ricardo was using drugs at the time of his crimes. But, even if those findings were true, requiring Ricardo to submit his electronics for searching is excessive, extreme, and demanded too much and is, therefore, unreasonable. Fritchey. The Court rejected the Attorney General’s argument that any search condition facilitating supervision of probationers is “reasonably related to future criminality.”

The Court observed that under that standard, courts would uphold a condition requiring probationers to wear 24-hour body cameras or permit a probation officer to accompany them at all times. While such conditions would enhance supervision of probationers and ensure compliance with other conditions, they would not be reasonable because the burden on the probationer would be disproportionate to the legitimate interest in effective supervision. Bryant.

The Court concluded that Ricardo’s search condition imposed a burden that is substantially disproportionate to the legitimate interests in promoting rehabilitation and public safety; consequently, the condition is not reasonably related to future criminality and is invalid under Lent.

Accordingly, the Court affirmed the judgment of the Court of Appeal striking the electronic search condition and remanded to the Court of Appeal, so it can remand to the juvenile court for further proceedings consistent with the Supreme Court’s opinion. See: In re Ricardo P., 446 P.3d 746 (Cal. 2019).
The U.S. Court of Appeals for the Ninth Circuit held that a sentence under 18 U.S.C. § 3583(k) for revocation of a term of supervised release that was imposed as a result of crimes that occurred in 2005 violated the Ex Post Facto Clause.

In 2007, Tommy Hanson was convicted of one count of possession of child pornography and was sentenced to 96 months' imprisonment followed by 60 months of supervised release. Upon release from prison, Hanson began serving his term of supervised release in June 2012. In May 2017, a jury found Hanson guilty of receipt of child pornography.

He agreed to a combined sentencing hearing for both his 2017 conviction (“conviction”) and his violation of supervised release (“violation”). Probation calculated an advisory sentencing range of 210 to 262 months for the conviction but recommended the statutory minimum of 180 months. For the violation, the probation office informed the court that 18 U.S.C. § 3583(k) required a minimum term of 60 months' imprisonment. Counsel for the Government recommended 20 years for the conviction and 5 years for the violation. Hanson was sentenced to 20 years for the conviction and 5 years for the violation under § 3583(k). To obtain relief, Hanson was required to show (1) an error that (2) was clear and obvious (3) affected his substantial rights and (4) seriously affected the fairness, integrity, or public reputation of judicial proceedings. Puckett v. United States, 556 U.S. 129 (2009). Regarding sentencing errors, the third prong requires a defendant to show “a reasonable probability that he would have received a different sentence” absent the error. United States v. Dallman, 533 F.3d 755 (9th Cir. 2008).

The Court observed that “neither Congress nor any state shall pass any ex post facto law.” U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1. The Ex Post Facto Clause is violated when a statutory amendment that increases a penalty to be imposed upon revocation of supervised release is applied in a case in which the underlying offense was committed before the amendment was adopted, but the conduct that led to revocation of supervised release occurred afterward. United States v. Paskow, 11 F.3d 873 (9th Cir. 1993). Retroactive application of a statute that “raises the penalty” upon revocation of supervised release “from whatever the law provided” when the underlying offense was committed is at odds with the Ex Post Facto Clause. Johnson v. United States, 529 U.S. 694 (2000).

When Hanson was first convicted in 2007, the maximum term of imprisonment the district court could impose after revoking supervised release was two years. 18 U.S.C. § 3583(e)(3) (2005). The Court concluded the district court violated the Ex Post Facto Clause when it sentenced Hanson to five years under § 3583(k).

The Government conceded that the five-year sentence violated the Ex Post Facto Clause and further conceded that Hanson had satisfied the first two prongs of the plain error standard. But the Government argued that Hanson failed to satisfy the third prong because he didn't demonstrate a reasonable probability that he would have received a different sentence absent the error. According to the Government, the district court determined a 20-year sentence was appropriate for Hanson, and had the district court known it could sentence him to only two years for the violation, it would have sentenced him to 18 years for the conviction. The Ninth Circuit rejected that argument, observing that the district court sentenced Hanson to the minimum terms on both the conviction and violation. Had the court known it could sentence Hanson to a term of less than 20 years, there was a reasonable probability it would have done so.

The Ninth Circuit also concluded the fourth prong of the plain error review was met. In Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018), the district court had miscalculated the sentencing Guidelines range resulting in a reasonable probability that the defendant would have received a different sentence absent the error, and the Supreme Court held that the miscalculation "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" because of the risk of unnecessary deprivation of liberty.

Since the district court had combined the sentencing proceedings for the conviction and the violation into one hearing, the Ninth Circuit concluded this was a "sentencing package" case. Sentencing package cases "typically involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction." Greenlaw v. United States, 554 U.S. 237 (2008). In such cases, the appeals court "may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the [18 U.S.C. § 3553(a)] sentencing factors." Id. Accordingly, the Court vacated the sentences for both the conviction and the violation, instructing the district court it was free to fashion an appropriate combined sentence on remand as long as the sentence for the violation was not greater than two years. See: United States v. Hanson, 936 F.3d 876 (9th Cir. 2019).
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The Habeas Citebook: Prosecutorial Misconduct
By Alissa Hull
Edited by Richard Resch

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December 2019
In Landmark Opinion, Colorado Supreme Court Announces Courts May Not Sentence Defendant to Both Prison and Probation in Multi-Count Cases

by Richard Resch

The Supreme Court of Colorado unanimously held that sentencing courts may not impose imprisonment for certain offenses and probation for others when sentencing for multiple offenses in the same case.

Frederick Leroy Allman was convicted of numerous charges, including seven counts of identity theft and two counts of forgery. The court sentenced him to 15 years in prison, followed by a five-year period of parole. In addition, on one of his forgery convictions, the court sentenced him to 10 years of probation to be served consecutively to his imprisonment but concurrently with his parole.

Allman appealed his identity theft convictions and challenged several aspects of his sentencing. The court of appeals rejected all his claims and affirmed; he appealed to the Colorado Supreme Court.

On appeal before the Court, he argued that identity theft is a continuing offense, and thus his conviction on multiple counts should have merged for sentencing purposes. The Court rejected this argument.

It explained that determining whether an offense is continuing “is a matter of statutory interpretation.” People v. Perez, 367 P.3d 695 (Colo. 2016). Quoting Toussie v. United States, 397 U.S. 112 (1970), the Court instructed, “The language of the substantive criminal statute that an offense is continuing when “the explicit language of the substantive criminal statute compels such a conclusion.” A reading of the statute in question, Colo. Rev. Stat. § 18-5-902(1)(a) (2019), clearly reveals an absence of any “language that explicitly defines identity theft as a continuing offense,” the Court observed. It then analyzed the statute as a whole, interpreting each individual provision, to determine whether the legislature nevertheless intended that the offense be treated as a continuing one. The Court concluded it did not and held that identity theft under the statute is not a continuing offense.

The Court then turned its attention to the crux of its opinion, viz., “whether a court can sentence a defendant to both imprisonment and probation in a multi-count case.” It began its analysis by noting that providing the punishment for crimes is the “prerogative of the legislature.” Vensor v. People, 151 P.3d 1274 (Colo. 2007). A court may “exercise discretion in sentencing only to the extent permitted by statute.” Id. The Court explained that sentencing courts lack “inherent powers to impose probation. Consequently, the Court refined the question at issue to whether the governing statute allows for both imprisonment and probation.

The plain language of the probation statute, § 18-1.3-203, is silent on this specific issue, which led the Court to conclude that a court may not impose both imprisonment and probation. It reasoned that a court’s determination that probation is an appropriate sentence necessarily means that imprisonment is not appropriate. That is, they are mutually exclusive. The Court observed that the statute provides ample guidance and discretion in deciding whether probation is appropriate, but ultimately, the sentencing court must choose prison or probation. The Court explained: “The legislature intended to allow courts to choose only one or the other. Probation is an alternative to prison.”

The Court was sympathetic to the People’s argument that both prison and probation should be permitted where the sentencing court believes it’s in the defendant and public’s best interests to provide a longer period of rehabilitation than the mandatory parole period. It conceded there’s logic in that argument, but the legislature “did not leave that decision to the courts.”

Next, the People argued that the probation statute is offense specific, meaning the parole period applies to one offense while the probationary period applies to another offense, thereby not running afoul of the legislatively required rehabilitation period. The Court rejected this argument as well, stating that it “disregards the structure of the parole scheme as established by the legislature.” By statute, the period of parole is linked to the most serious crime when a defendant is sentenced to prison in a multi-count case, § 18-1.3-401(1)(a)(V)(E). Despite the number of counts, only one period of parole is permitted under the statute. Therefore, the Court concluded the legislature intended the rehabilitative period for a defendant to be case specific, not offense specific.

To bolster its position, the Supreme Court noted that the legislature has prescribed how long a court may order confinement as a condition of probation. By statute, a court may sentence a defendant to confinement up to 90 days or up to two years with work release in conjunction with probation. § 18-1.3-202(1); § 18-1.3-207(1). According to the Court, this is clear evidence that the legislature never intended for the courts to have the authority to sentence a defendant to both prison and probation. If that were not the case, then the foregoing statutory limits on confinement to 90 days and up to two years with work release “would be rendered meaningless in multi-count cases,” the Court explained.

Additionally, the probation statute mandates that “the order placing a defendant on probation shall take effect upon entry.” § 18-1.3-202(1)(a). This means that the legislature “intended for a sentence to probation to begin immediately” and not “to run consecutively to a sentence of imprisonment,” according to the Court.

Finally, the Court determined that the practical consequences of allowing a sentence of both prison and probation serve as further evidence that the legislature never intended courts to have such sentencing authority. When a defendant is released on parole, he or she is under the supervision of the executive branch. On the other hand, a defendant on probation is under the supervision of the judicial branch. A defendant under the supervision of two separate branches of government could be subject to competing terms and conditions for both,” the Court observed and concluded: “The legislature could not have intended for defendants to be simultaneously subject to two separate branches of government during their post-incarceration supervision.”

Based on the foregoing analysis, the Colorado Supreme Court held that “when a court sentences a defendant for multiple offenses in the same case, it may not impose imprisonment for certain offenses and probation for others.” Accordingly, the Court affirmed the court of appeals’ judgment in part, reversed in part, and remanded with directions to return the case to the trial court for resentencing. Allman v. People, 2019 CO 78 (2019).
**Writer’s note:** The Court’s opinion has reportedly resulted in considerable confusion for all affected parties. According to Mesa County District Attorney Daniel Rubinstein, “My biggest concerns are that we can no longer do this and what do we do with those we’ve already done it to? What if they’re already in prison? Are they all released? If the sentence is invalided, we could be back at square one, or worse.” Prosecutors believe defendants who entered into plea agreements are most affected by the opinion. They can rescind their original agreement, reaffirm it, or even “start over.” Since 95% of all criminal cases result in a plea deal, the number of defendants affected could run into the thousands. Defendants who went to trial and were convicted will likely be resentenced, but the underlying conviction will remain unchanged. 

**Maryland Court of Appeals Abrogates Rule Requiring Corroboration of Accomplices’ Testimony and Announces New Rule**

by Douglas Ankney

**The Maryland Court of Appeals** abrogated the rule that required the testimony of accomplice(s) be independently corroborated and replaced it with a new rule.

In August 2015, Sandeep Bhulai’s body was discovered lying next to his vehicle. He had been shot multiple times. The investigation led police to six suspects: Christian Tyson, Keith Harrison, Kareem Riley, Ramart Wilson, Michael Jobes, and Hassan Jones. Jones was implicated solely by the accounts of Tyson, Riley, and Wilson. Jones was arrested on charges of first and second-degree murder, first-degree felony murder, use of a firearm during a violent crime, armed robbery, and conspiracy to commit carjacking.

At Jones’ jury trial, Tyson, Riley, and Wilson testified pursuant to a plea agreement. Tyson testified that he, Jones, Jobes, and Harrison forced Bhulai from his car at gunpoint. Tyson took Bhulai’s cellphone. Jobes, Harrison, and Jones then shot Bhulai several times. Riley testified that he was sitting with Wilson in Wilson’s car when he heard gunshots shortly before the other four men arrived carrying handguns. Jones told Riley to “hurry up and get us away from here, we just shot someone.”

Wilson testified that a photo on his cellphone depicted Jones and the rest of the group. The jury found Jones guilty of conspiracy to commit armed carjacking. He was sentenced to 30 years in prison.

A panel of the Court of Special Appeals reversed, holding that the accomplices’ testimony was not corroborated by other evidence. The Court of Appeals granted the State’s petition for a writ of certiorari on two questions: (1) whether the Court of Special Appeals properly applied the accomplice corroboration rule and (2) should the accomplice corroboration rule be revised to permit a jury to weigh the accomplice’s testimony as long as the jury is properly instructed?

The Court observed that the accomplice corroboration rule requires exactly what its name suggests — that the State must present independent corroboration of accomplice testimony to sustain a conviction. *Williams v. State*, 771 A.2d 1082 (Md. 2001).

The Court then observed that prior to 1911 the accomplice corroboration rule did not exist. In the 1700s, the practice was to discourage convictions based solely on accomplice testimony through the common-law function of the judge advising the jury. Wigmore on Evidence: Evidence in Trials at Common Law, § 2056 (1978). But “in a misguided moment,” this function of the judge was “eradicated from our system.” *Id.* The Court observed that the accomplice corroboration rule was adopted in Maryland in 1911 due to the inherent danger that an accomplice would testify falsely to secure a better deal for himself, to curry favor with law enforcement and the prosecution, or to minimize his own role in the crime. *Luery v. State*, 81 A. 681 (Md. 1911). But, under the accomplice corroboration rule, highly reliable accomplice testimony could not even be presented to a jury when there wasn’t any independent corroboration, while less reliable testimony could be presented as long as there was corroboration.

After explaining the accomplice corroboration rule, the Court turned to the present case and rejected the State’s contention that the group photograph purporting to depict Jones constitutes the requisite independent corroborative evidence. The Court explained that whether the photograph even depicts Jones rests entirely on Wilson’s testimony that it does. An accomplice’s testimony can’t serve to corroborate itself, the Court instructed. *Jeandell v. State*, 34 Md.App. 108 (1976).

Thus, the State failed to corroborate the accomplices’ testimony, and without it, there isn’t legally sufficient evidence to support Jones’ conviction.

The Court then turned its attention on the issue of whether the accomplice corroboration rule should be dropped in favor of the alternative approach that permits defendants to be convicted based entirely on accomplice testimony.

The Court announced its adoption of the alternative approach that allows “the jury to determine the credibility of accomplice testimony following a cautionary instruction.” It instructed: “When accomplices testify to uncorroborated facts, the issue will be the weight of the evidence, not its legal sufficiency and trial courts need only give a cautionsary instruction."

According to the Court, the new rule seeks a better balance by permitting juries to weigh the credibility of the testimony, whether or not it is corroborated, while also cautioning the jury with instruction of the inherent dangers of accomplice testimony. It observed that 32 states, the District of Columbia, the federal courts, Puerto Rico, Guam, and the Virgin Islands have all either not adopted the accomplice-corroboration rule or have abandoned it, and now Maryland joins the majority of other jurisdictions. The Court attached model jury instructions from other jurisdictions to provide guidance on how juries are to be instructed.

Finally, the Court ruled that the newly adopted rule does not apply to Jones in the present case and that the rule applies only prospectively.

Accordingly, the Court affirmed the judgment of the Court of Special Appeals overturning Jones’ conviction and instructed that the “new rule is to be applied to all trials commencing with the date of our mandate.” *See: State v. Jones*, 2019 Md. LEXIS 451 (2019).
Another notable (but ultimately disappointing) ruling about sentence reductions under § 3582(c)(1)(A) after FIRST STEP Act

by Professor Douglas A. Berman, Sentencing Law and Policy blog (sentencing.typepad.com)

As regular readers know, in prior posts I have made much of a key provision of the FIRST STEP Act which now allows federal courts to directly reduce sentences under the (so-called compassionate release) statutory provisions of 18 U.S.C. § 3582(c)(1)(A) without awaiting a motion by the Bureau of Prisons. I see this provision as such a big deal because I think, if applied appropriately and robustly, this provision could and should enable many hundreds (and perhaps many thousands) of federal prisoners to have excessive prison sentences reduced.

But in order for § 3582(c)(1)(A) to have a significant impact, federal judges will need to fully embrace and give full effect to their new authority to “reduce the term of imprisonment” whenever and wherever they find that “extraordinary and compelling reasons warrant such a reduction.” I have flagged here and here and here some notable examples of judges finding notable reasons sufficient to reduce a sentence. But now I have to note a notable new ruling in which a notable judge seems to conclude there are “extraordinary and compelling reasons” to warrant a sentencing reduction, but then still decides not to grant a reduction for reasons that do not seem justified by the provisions of § 3582(c)(1)(A).

This new ruling comes in US v. Brown, No. 4:05-CR-00227-1, 2019 WL 4942051 (S.D. Iowa Oct. 8, 2019), and it is authored by Senior District Judge Robert Pratt. Notably, Judge Pratt was the district judge in the Gall case who gave full effect to the Booker ruling and whose non-incarcerative decision there was ultimately vindicated by SCOTUS. In this new Brown case, Judge Pratt writes an extended, thoughtful opinion about compassionate release and the changes to § 3582(c)(1)(A) brought by the FIRST STEP Act. In so doing, Judge Pratt states that “much about Defendant’s situation is extraordinary and compelling” and yet still “the Court concludes it cannot exercise its discretion to grant release at this time.”

The Brown opinion explains the basis on which Daniel Brown claims his situation is “extraordinary and compelling”: (a) his behavior for a dozen years in prison was “exemplary,” (b) he “suffered a botched surgery while incarcerated” (though he can still care for himself in prison) (c) “his daughter is without a parent” (though an adult who cares for herself) and (d) “he faces a sentence far longer than he would ever receive under modern law.” This last point is a function of Brown having received an extra 300 months (25 years!) because of stacked 924(c) gun counts that would no longer stack now after the FIRST STEP Act. On this point, Judge Pratt further notes that the judge who originally sentenced Brown “concluded the additional 300 months’ imprisonment from the second § 924(c) count was far greater than was necessary to achieve the ends of justice.” And for good measure, as Judge Pratt notes, Brown’s “co-defendant, who eventually ran his own drug operation, was released in April 2018.”

This all sure seems to me to be “extraordinary and compelling reasons [that] warrant a reduction” under 18 U.S.C. § 3582(c)(1)(A), and Judge Pratt essentially says as much. But, disappointingly, after making a strong factual record on Brown’s behalf, Judge Pratt declines any reduction of Brown’s original 510-month sentence with this reasoning:

In this case, compassionate release nevertheless is premature because even if the First Step Act applied retroactively, Defendant would still be in prison. With a lone § 924(c) count, Defendant still faced 210 months in prison. ECF No. 118. Even rounding up to the nearest month and including good conduct credits, Defendant has served 167 months. That is a long stretch by any measure, and perhaps more than appropriate for Defendant’s crimes. Regardless, because Defendant would still be in prison under modern law, any sentencing disparity created by § 924(c) stacking does not, at least yet, provide an “extraordinary and compelling reason” for compassionate release. Thus, despite discretion to consider a broad range of factors, the Court declines to grant Defendant’s motion at this juncture.

This reasoning seems deeply misguided to me: Daniel Brown has not moved in this case for the First Step Act to be applied retroactively, because (disappointingly) Congress has not provided for the Act to be applied retroactively. Rather, Brown has moved for a sentence reduction under § 3582(c)(1)(A) because Congress has provided for judges to be able to “reduce [his] term of imprisonment” if and whenever a judge finds “extraordinary and compelling reasons warrant such a reduction.” Judge Pratt suggests Brown has made such a showing and he even suggests that Brown has already served more time than is appropriate for his crimes. But, still, Judge Pratt refuses to use the legal tool available to him to reduce Brown’s sentence, and so Brown is now still slated to serve nearly another 30 years in prison(!) that neither Congress nor any judge views as in any way justified by any sound sentencing purposes.

Critically, though 18 U.S.C. § 3582(c)(1)(A) is often called a “compassionate release” provision, there is no requirement in the statute that a judge order a sentencing reduction in the form of a “time served” sentence. All the statute says is that a judge is authorized to “reduce the term of imprisonment ... after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction.” If Judge Pratt’s concern was that section 3553(a) factors did not justify reducing Brown’s sentence below 210 months, he still could have granted him relief by reducing his sentence from 510 to 210 months.

Because Judge Pratt used terms like “not yet” and “at this juncture” and “at this time,” I am hopeful that Judge Pratt could and would entertain a renewed § 3582(c)(1) from Brown in four years when he has served 210 months of imprisonment. Notably, there is no clear law right now about whether and when there are limits on how many times a defendant can bring a motion for sentence reduction pursuant to § 3582(c)(1)(A). But since I think the law clearly supports granting his motion now, I am disappointed Judge Pratt did not exercise his discretion in this case in a manner similar to how he did in Gall.

A few prior related posts on § 3582(c)(1)(A) after FIRST STEP Act:

• Compassionate release after FIRST STEP: Should many thousands of ill and elderly federal inmates now be seeking reduced imprisonment in court?

• Sad start to what should become happier compassionate release tales after passage
Tenth Circuit: ‘Relevant Background Law’ Trumps Unclear Record in Granting § 2255 Relief From Johnson Error

by Michael Berk

The U.S. Court of Appeals for the Tenth Circuit reversed the denial of a successive motion under 28 U.S.C. § 2255, remanding the case for resentencing where the “relevant background legal environment” demonstrated that his sentence was based on the Armed Career Criminal Act’s (“ACCA”) unconstitutional residual clause.

On September 9, 2008, Aaron Eugene Copeland pleaded guilty to possession of a firearm as a felon. Although 18 U.S.C. § 922(g) carries a statutory maximum of 10 years, the sentencing court found that three prior convictions — two “serious drug offenses” and a 1981 second degree burglary in California — qualified Copeland for the 15-year mandatory minimum sentence under the ACCA, 18 U.S.C. § 924(e). On December 5, 2008, Copeland was sentenced to 15 years’ imprisonment.

Originally, the ACCA sentence enhancement was triggered when sufficient prior convictions were classifiable as “serious drug offenses” or “violent felonies” under any of three provisions, known as the elements clause, the enumerated offense clause, and a catch-all residual clause. The U.S. Supreme Court in Johnson v. United States, 135 S. Ct. 2551 (2015), struck down the residual clause as unconstitutionally vague.

As Copeland had filed several unsuccessful collateral attacks prior to the decision in Johnson, he brought this successive motion with the permission of the Tenth Circuit under § 2255(h)(2), asking the district court to vacate his unconstitutional sentence. The court rejected Copeland’s motion on October 25, 2017, stating that there was “no possibility that [Copeland’s] burglary conviction was treated as a violent felony under the residual clause” and thus, because “Johnson has no application in this case,” it could not even entertain the motion under § 2255(h)(2). Copeland appealed, and the Tenth Circuit granted a certificate of appealability.

To prevail on his Johnson challenge, Copeland needed to show, by a preponderance of the evidence, that the sentencing court relied on the residual clause to enhance his sentence. United States v. Driscoll, 892 F.3d 1127 (10th Cir. 2018). In the Tenth Circuit, this question is evaluated by first considering statements in the record. Id. To the extent that the record is inconclusive, a court next considers whether the “relevant background legal environment at the time of sentencing” forecloses the likelihood that the sentencing court would have relied on either of the other “violent felony” clauses in the ACCA. Id.

Because the district court’s disposition was effectively a dismissal as a matter of law, the Tenth Circuit was able to engage in detailed de novo review. The record in Copeland’s case, although lacking a “clear pronunciation” of the sentencing court’s rationale, was suggestive of reliance on the enumerated clause. At the change-of-plea hearing, for example, the court mentioned potential comparison of Copeland’s prior to the statutory definition, and the PSR described Copeland’s prior conviction in terms of the elements of generic burglary, an offense listed in the ACCA’s enumerated clause.

But contrary to the statement of the district court (which did not purport to rely on its memory of the proceedings) that the record showed “no possibility” that the residual clause was used, the Tenth Circuit found the record inconclusive. As the lower court had thus erred in determining otherwise, the Court looked past the judge’s conclusion and turned to the relevant background law.

A “snapshot” of the case law in 2008 showed, in fact, that the sentencing court could only have relied on the residual clause in qualifying Copeland’s 1981 conviction under the ACCA, the Court determined. In United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005), the court held that a court could rely on a PSR’s description of an offense as a “violent felony” only when the PSRs determination was backed by charging documents as allowed under Shepard v. United States, 544 U.S. 13 (2005). In Copeland’s case, the PSR lacked such support, and so its description could not legitimately have served as the basis for a finding that his prior offense qualified under the enumerated clause.

The Court noted that, had it not looked to the background law, Copeland would not have carried his burden because the record appeared to suggest that the sentencing court thought the enumerated clause was appropriate. But since the law in 2008 only permitted a residual clause classification of Copeland’s California prior, the sentencing court had committed a Johnson error.

The Court determined that the error was not harmless because, even under current law, Copeland’s 1981 prior could not qualify under any clause of the ACCA. Copeland thus showed that Johnson indeed had some “application in this case” and therefore not only that his successive motion met the criteria in § 2255(h)(2) but that he should prevail on the merits. Accordingly, the Court reversed and remanded with instructions to grant the motion and resentenced Copeland consistent with its opinion. See: United States v. Copeland, 921 F.3d 1233 (10th Cir. 2019).

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Missouri Supreme Court Clarifies Defendant Is Entitled to Self-Defense Instruction When Substantial Evidence Supports Instruction Regardless of Whether Defendant Presented Evidence Contrary to Self-Defense

by Douglas Ankney

The Supreme Court of Missouri clarified that a defendant is entitled to a self-defense jury instruction whenever there is substantial evidence to support the submission of the instruction, and the fact that a defendant presents evidence contrary to the theory of self-defense is not an exception.

Andrew Barnett and Victim were both at the Little Bar ("the bar"). All night long, Victim urged Barnett to go outside and fight him. Victim eventually approached Barnett in a threatening manner in the bar, and the two men fought. The bartenders ordered the men to leave. Before Barnett left, his friend returned some knives to Barnett. Barnett exited the bar and stopped to urinate near a dumpster. Victim approached Barnett and shouted, "Now you’re going to die [expletive]."

Barnett saw a shiny metal object in Victim’s hand coming toward Barnett’s face. Barnett later testified he knocked the Victim’s hand away, shoved Victim to the ground, and left. A witness claimed he saw Victim “drop like a bag of rocks.” Victim was lying on the ground, bleeding from apparent stab wounds. A few hours after the incident, police officers asked Barnett if he stabbed Victim in self-defense, but Barnett adamantly denied stabbing Victim at all. At trial, Barnett professed a self-defense instruction.

The State objected, arguing Barnett was not entitled to the instruction because he had denied the stabbing. The circuit court sustained the State’s objection. A jury found Barnett guilty of first-degree assault and armed criminal action. Barnett appealed, arguing the circuit court erred by refusing to submit a self-defense instruction.

The Missouri Supreme Court observed, “In determining whether a defendant is entitled to an instruction, this Court has long held if there is substantial evidence to support the theory propounded in the requested instruction, the court is required to submit that instruction to the jury.”

State v. Bidstrup, 140 S.W. 904 (Mo. 1911). In making this determination, a court must view “the evidence in a light most favorable to the defendant[,] in order to determine whether the evidence was sufficient to support and authorize instructions on the mentioned matters.” State v. Cole, 377 S.W.2d 306 (Mo. 1964).

The rule that a court is required to submit an instruction when there is substantial evidence to support it does not change when the defendant’s testimony contradicts the requested instruction. Bidstrup. Otherwise, the court would be tasked with determining which version of the defendant’s statements was true.
to believe, and that would usurp the jury’s fact-finding role. State v. Jackson, 433 S.W.3d 390 (Mo. 2014).

The court is to determine if the evidence is sufficient to support the instruction, regardless of which party introduced the evidence. Bidstrup. Substantial evidence is ‘any theory of innocence ... however improbable that theory may seem, so long as the most favorable construction of the evidence supports it.’ State v. Minard, 245 S.W.2d 890 (Mo. 1952). If the evidence tends to establish the defendant’s theory, or supports differing conclusions, the defendant is entitled to an instruction on it. State v. Westfall, 75 S.W.3d 278 (Mo. 2002). Substantial evidence to support a self-defense instruction must show the elements of self-defense as defined by statute: A person may use physical force upon another if the person (1) was not the initial aggressor and (2) reasonably believes such force to be necessary to defend himself from what he believes to be the use of unlawful force by such other person. RSMo § 563.031.1. A person can only use deadly force when he reasonably believes such deadly force is necessary to protect himself against death, serious physical injury, or any forcible felony. § 563.031.2(1).

The Court determined Barnett was not the initial aggressor, and he reasonably believed the use of deadly force was necessary to protect himself from death, serious physical injury, or a forcible felony. Victim repeatedly challenged Barnett to step outside and fight. Victim approached Barnett in a threatening manner inside the bar and the men fought. While Barnett was outside urinating, Victim approached from behind shouting “now you’re going to die,” and Victim swung something metal and shiny toward Barnett’s face. Even though there was evidence negating self-defense, the trial court is to view only the evidence supporting the instruction or “in the light most favorable” to giving the instruction.

Accordingly, the Court vacated the judgment of the circuit court and remanded for further proceedings not inconsistent with the Court’s opinion. See: State v. Barnett, 577 S.W.3d 124 (Mo. 2019).

Writer’s note: In clarifying the rule that a defendant is entitled to an instruction whenever substantial evidence supports it, the Court stated that the `dicta’ stating the contrary in State v. Wright, 175 S.W.2d 866 (1943) is incorrect and further stated any holding to the contrary should not be followed. The Court expressly overruled State v. Baker, 277 S.W.2d 627 (Mo. 1955), and its progeny.

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**Minnesota Supreme Court Announces Heightened Pleading Standard for Birchfield/Johnson Claims Raised in Collateral Postconviction Proceedings**

*by Douglas Ankney*

The Supreme Court of Minnesota announced a heightened pleading standard when a petitioner asserts a Birchfield/Johnson claim for relief in a collateral postconviction motion.

On March 22, 2012, deputies from the Washington County Sheriff’s Department found Jason Fagin asleep in his car. A pat search of Fagin produced a bag containing what appeared to be methamphetamine. In the vehicle, the deputies found needles, syringes, and spoons. Fagin was “extremely impaired.” He was booked into the Washington County Jail whereupon he refused both a blood test and a urine test. Nothing in the record indicates the deputies sought a warrant for either test.

Fagin ultimately pleaded guilty to first-degree test-refusal under Minn. Stat. § 169A.20(2). In May 2017, Fagin filed a post-conviction petition alleging that his test-refusal conviction was unconstitutional. The district court denied the petition on the grounds that Fagin had failed to prove that an exception to the warrant requirement did not exist. He appealed, and the court of appeals reversed, holding that the district court erred by placing the burden of proof regarding the absence of an exception to the warrant requirement on Fagin instead of the State. The Minnesota Supreme Court granted the State’s petition for review.

The Court observed that in 2016 the Supreme Court of the United States held that state statutes cannot compel submission to blood tests unless a warrant was first obtained or a recognized exception to the warrant requirement existed. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). Consequently, refusal to give a blood sample by a person suspected of driving under the influence could only be criminalized if (1) police had a valid warrant, or (2) some recognized exception applied. Id.

The Minnesota Supreme Court later held that the State may not criminalize the refusal of either blood tests or urine tests absent a warrant or a recognized exception to the warrant requirement. Johnson v. State, 916 N.W.2d 674 (Minn. 2018). The Court also held Birchfield and Johnson applied retroactively. Id.

But the Court had never before decided upon whose shoulders the burden of proof rested in a collateral attack of a test-refusal conviction asserting that neither a warrant nor a recognized exception existed. Ordinarily, most litigation about exceptions to the warrant requirement occur in a pretrial suppression hearing where the State bears the burden of proving an exception. State v. Morales, 176 N.W.2d 104 (Minn. 1970). However, “[u]nless otherwise ordered by the court, the burden of proof of the facts alleged in the [postconviction] petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence.” Minn. Stat. § 590.04. And in Tschau v. State, 829 N.W.2d 400 (Minn.2013), the Court held, “A petitioner bears the burden to establish by a preponderance of the evidence that facts exist that warrant postconviction relief.”

The Court recognized that placing the burden of proof on the petitioner requires the petitioner to prove two negatives: that no warrant existed and that no recognized exception existed. While proving no warrant existed is rather easy by showing no warrant was in the record, proving no exception existed could be a daunting task if the State stood silent by not alleging any particular exception or by alleging an exception without any explanation. This would be contrary to the Court’s jurisprudence that “equity is an important component of postconviction relief.” Carlson v. State, 816 N.W.2d 590 (Minn. 2012). Therefore, the Court ruled that when a petitioner asserts a Birchfield/Johnson claim, he or she must affirmatively allege that no search warrant was issued and that no warrant exception was applicable.

The State, in its responsive pleading, shall admit or deny the allegations. If a warrant exists, the State shall affix a copy of it to the responsive pleading. If the State claims an exception, the State shall identify the exception and plead its grounds in sufficient detail to give the petitioner adequate notice of the State’s petition.

Accordingly, the Court remanded to the district court with instructions to allow the parties to comply with this new heightened pleading standard. See: Fagin v. State, 933 N.W.2d 774 (Minn. 2019).
California Supreme Court Holds Discovery Statute Requiring ‘Good Cause’ Not Applicable When Evidence Held by Court

by Dale Chappell

Must a habeas petitioner in California show “good cause” under the habeas discovery statute to obtain evidence held by the court, just like he must do if the State held the evidence? No, a unanimous Supreme Court of California held, ordering the habeas court to reconsider releasing the evidence.

When death-row prisoner William Satele’s habeas counsel filed an informal request for the prosecutor to turn over evidence held in Satele’s criminal case, he clarified at a hearing that it was “not really” a discovery motion because the court actually possessed the evidence he was seeking and not the prosecutor. “It’s just evidence of the court,” he said.

What counsel wanted to see was ballistics evidence from a gun found in a car Satele was driving hours after the shooting death of a couple during a gang-related and racially-motivated murder connected to the West Side Wilmas gang.

The habeas court denied counsel’s request. Under Penal Code § 1054.9, a habeas petitioner may be granted discovery of evidence “in the possession of the prosecution and law enforcement authorities” if he can show “good cause” to believe that access to physical evidence is reasonably necessary to the defendant’s efforts to obtain relief.” The statute vests the habeas court with jurisdiction to grant discovery to facilitate the prosecution of a habeas petition.

The court said that Satele failed to show “good cause” and denied counsel’s request.

On appeal to the Court of Appeal, the court summarily affirmed the habeas court’s ruling, and the California Supreme Court subsequently denied review. However, the Court did grant review on its own motion to answer whether the “good cause” requirement under § 1054.9 applies to evidence held by the court.

Addressing this issue of first impression, the Court noted that “discovery is generally understood to mean an exchange of information among the parties to an action.” The court and its clerk are not “parties” in a criminal action, the Court explained.

The “plain language” of § 1054.9 clearly says that “discovery motions” are for those “materials in the possession of the prosecution and law enforcement authorities,” the Court noted. Therefore, § 1054.9 applies only to evidence that is in the possession of the prosecution, not the court, the Supreme Court concluded.

So, if “good cause” does not apply to requests for discovery of evidence held by the court, then what standard does apply, the Court asked. Both the U.S. Supreme Court and the California Supreme Court have held that there is a “general right” under common law to inspect and copy public records held by the court. This right ensures “judicial integrity” of the proceedings. And the court may release evidence in proper cases for evaluation outside the court.

Applying this reasoning, the Court held that habeas counsel’s request for evidence from the court (and not the prosecutor) was governed by these rules and not § 1054.9.

Accordingly, the Court vacated the habeas court’s denial of Satele’s request for discovery and remanded to the court “to exercise its inherent authority to grant access under whatever conditions it deems necessary.” See: Satele v. Superior Court, 444 P.3d 700 (Cal. 2019).

Seventh Circuit Vacates Conviction and Remands for a Franks Hearing

by Douglas Ankey


Investigator Todd Maas is a police officer in Superior, Wisconsin. He prepared a warrant application and signed the supporting affidavit. Maas swore that a confidential informant told him that earlier the same day the informant had driven another party to a parking lot adjacent to the Baywalk Inn to buy heroin from a black male called “Big Mike,” the brother of “Toonchie.”

Maas swore that he and another officer surveilled the parking lot where they observed a black male leave the hotel and enter then exit at least five vehicles in the parking lot.

Maas also discovered that the occupant of Room 203 was the only guest who had paid in cash and was staying only one night—behavior typical of drug traffickers according to Maas’s training and experience.

This information convinced a state trial judge to issue a search warrant for Room 203. But Maas did not include in his affidavit any damaging information about his confidential informant, viz., the informant was being paid for his services; he had 15 prior convictions and had two pending criminal charges; had a history of opiate and cocaine abuse; and was hoping to receive a reduced sentence in exchange for his cooperation.

Clark was in Room 203 when police executed the warrant. Cellophane bags, a digital scale, and 82 grams of a heroin/fentanyl mixture were recovered.

Clark filed a motion to suppress with a request for an evidentiary hearing pursuant to Franks (“Franks hearing”) in federal district court, alleging that Maas deliberately or recklessly omitted the critical information that affected the credibility of the unidentified confidential informant.

The district court agreed that the police provided no information about the informant’s credibility but denied the motion on the grounds that the police had provided sufficient corroboration so that the warrant did not depend on the informant’s credibility. Clark was convicted, and he appealed.

He argued, inter alia, that the district court erred when it denied his motion to suppress without conducting a Franks hearing.

The Seventh Circuit observed the Fourth Amendment’s strong preference for search warrants requires probable cause determinations to be made by a “neutral and detached magistrate” as opposed to “officer[s] engaged in the often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10 (1948). The application for a warrant “must provide the magistrate with a substantial basis for determining the existence of probable cause.” Illinois v. Gates, 462 U.S. 213 (1983).

A search warrant is not valid if the police obtain it by deliberately or recklessly presenting false, material information or by omitting material information from the affidavit presented to
the issuing judge. Franks.

The purpose of a Franks hearing is to give the defendant an opportunity to prove by a preponderance of the evidence either falsity or recklessness and materiality. United States v. McMurtrey, 704 F.3d 502 (7th Cir. 2013). To obtain a Franks hearing, a defendant need not prove the Franks violation, but the defendant must make a substantial preliminary showing (1) that the warrant application contained a material falsity or omission that would alter the issuing judge's probable cause determination and (2) that the affiant included the material falsity or omitted information intentionally or with a reckless disregard for the truth. United States v. Glover, 755 F.3d 811 (7th Cir. 2014).

The Court determined in the instant case that the warrant application depended heavily on the credibility of the informant. The police had no controlled drug buys from Clark. They never saw money or drugs change hands. Even the informant did not claim to see drugs or money change hands.

The Court concluded the credibility of the informant was material to this case. The Government argued that Maas' own observations supplied probable cause, independent of the informant. But in this case, Maas' failure to include the adverse information about the informant called Maas' own credibility into question.

The Court stated, “This is where materiality and intent become intertwined. If the omissions were deliberate or reckless, it would not be unreasonable to take seriously the prospect that other portions of the same warrant application may have been deliberately or recklessly false.”

The Court compared it to judges instructing jurors that if they believed a witness has lied intentionally about a material matter, they may (but are not required to) discount the witness' testimony on other matters. United States v. Weinstein, 452 F.2d 704 (2d Cir. 1971).

The Court concluded that the district court erred when it denied the motion to suppress without affording Clark a Franks hearing.

Accordingly, the Court vacated the district court's judgment and remanded for a Franks hearing and appropriate action based on that hearing, to wit: either granting the motion to suppress, or if the motion is denied, reinstating the convictions and sentences. If the judgment is reinstated, then the denial of Clark's motion to suppress and the district court's sentence are affirmed. See: United States v. Clark, 935 F.3d 558 (7th Cir. 2019).\[1\]

**Fifth Circuit: Practices of Orleans Parish Judges in Collecting Fines and Fees Violates Due Process**

*by Douglas Ankney*

The U.S. Court of Appeals for the Fifth Circuit affirmed the decision of a district court that granted summary judgment to the plaintiffs in a § 1983 suit alleging that the practices of the judges (“Judges”) of the Orleans Parish Criminal District Court (“OPCDC”) violated the Due Process Clause of the Fourteenth Amendment.

Plaintiffs Alana Cain, Ashton Brown, Reynaud Variste, Reynajia Variste, Thaddeus Long, and Vanessa Maxwell (“Plaintiffs”) were all former criminal defendants in the OPCDC who had pleaded guilty to various offenses. The Plaintiffs were assessed fines and fees ranging from $148 to $901.50. They were subsequently arrested for failure to pay their assessed fines and fees, and they spent from six to fourteen days in jail.

The 12 defendant judges are the current judges of the 12 sections, designated A through J, of the OPCDC, who have exclusive control over the Judicial Expense Fund (“JEF”) as established by La. Rev. Stat. § 13:1381.4.

Approximately one-quarter of the monies deposited into the JEF comes from the Judges' collection of fines and fees.

Money from the JEF is spent by the Judges on, *inter alia*, salaries and employment benefits of court personnel (excluding the Judges), the cost of professional liability insurance, court room repairs, cleaning, and legal conferences and education. Each of the Judges is allocated $250,000 per year for personnel salaries and $1,000 for court costs from the JEF.

When the collection of the fines and fees is reduced, the OPCDC has difficulty meeting its operational needs, leading to a reduction of staff salaries and leaving some positions unfilled. During these times, the Judges increase their collection efforts.

Prior to the initiation of the lawsuit, the Judges delegated the authority to collect the fines and fees to a Collections Department that had the authority to arrest persons who were delinquent in their payments on their fines and fees. These persons were held in jail until someone made a payment on their behalf. After the suit was filed, the Judges withdrew the Collection Department's authority to issue warrants, recalled all active warrants in issue, and cancelled almost $1 million in court debts.

The district court granted summary judgment to the Plaintiffs on numerous claims, of which the Judges appealed only one: that the Judge's authority over both fines and fees revenue and ability-to-pay determinations violated the Due Process Clause.

The Fifth Circuit observed, it is axiomatic that a "fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133 (1955). The general rule is that officers acting in a judicial capacity are disqualified if they have an interest in the controversy being decided. *Tumey v. State of Ohio*, 273 U.S. 510 (1927). In *Tumey*, the mayor of an Ohio village presided over a “liquor court” that allowed the mayor to impose fines on defendants and imprison them until the fine was paid. Half of the money generated from the fines was placed into a fund over which the mayor had the authority to disburse. The Supreme Court explained, “Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." Id. And in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), the Supreme Court applied the principles of *Tumey* to a sitting justice of the Alabama Supreme Court, establishing the principles applies to judges in addition to the average man acting as a judge. Additionally, proof of actual influence upon the judge is unnecessary; all that is required is a situation that "would offer a possible temptation to the average ... judge." Id.

Based on those principles, the Fifth Circuit determined that the practices of the Judges “crossed the constitutional line” and upheld the district court's grant of summary judgment. The Judges of the OPCDC had exclusive authority over how the JEF was spent; the Judges had to account for the OPCDC’s budget; and the fines and fees made up a significant portion of the Judge's annual budget. Consequently, the “temptation” was too great, the Court ruled.

Accordingly, the Court affirmed the judgment of the district court. See: *Cain v. White*, 937 F.3d 446 (5th Cir. 2019).\[2\]
In April 2007, the Orange County (California) District Attorney (“OCDA”) began what has become the largest database of DNA profiles not created by legislative act. Shrouded in secrecy until now, UC Berkeley Law Professor Andrea Roth has pulled back the curtain to reveal a perverse creature.

The procedure for obtaining the DNA profiles, colloquially known as “Spit and Acquit,” begins with the OCDA charging between 60,000 to 80,000 people annually with misdemeanors. Indeed, superior court judges suspect that the OCDA files some of those charges simply to get the DNA with no intention of prosecuting the charges. Nearly all of the defendants are not in custody but are herded into a large public courtroom for arraignment. Without any defense counsel present, the OCDA calls a group of defendants into a hallway and explains that they can have their case dismissed or plead to a lesser charge if they submit a DNA sample. The defendants are told to put a cotton swab in their mouth to collect the sample and pay $110. Around 15,000 people per year accept the deal, and as a result, the OCDA has collected over $11 million since the program began. And the defendants are required to sign waivers permitting the OCDA to keep their profiles forever, foregoing any future legal action or right to expungement.

To date, the OCDA has collected over 176,000 profiles. But since the profiles are collected from people charged with petty crimes, such as walking an unleashed dog, the value of the database is questionable. The database has “matched” a profile to a crime scene just 766 times in more than a decade. And of those “leads,” only five resulted in convictions — convictions that could have been obtained using existing state and federal databases. By contrast, a similar database in Arkansas created by state statute to include DNA profiles of only convicted persons has 166,494 profiles with 5,262 matches.

Unlike the databases created by the federal government and state legislation, the OCDA’s database has almost no oversight. The federal government’s Combined DNA Index System (“CODIS”) holds DNA samples from offenders convicted of serious felonies across the U.S. The DNA profiles submitted from the prisoners and those from crime scenes submitted for comparison must be developed by a state certified laboratory. But the OCDA uses a device known as “Rapid Hit DNA Machines,” making the profiles ineligible for uploading into CODIS. As such, the OCDA’s database is managed by a private firm — Bode Cellmark Forensics (“Bode”) in Virginia. Since DNA is used to determine everything from hereditary diseases to relatives, the potential for abuse of the information is astounding. Partnering with Bode—and the concurrent profits earned — may explain why the OCDA has the unnecessary database.

Sources: ocweekly.com, thecrimereport.org, “Spit and Acquit: Prosecutors as Surveillance Entrepreneurs” by Andrea Roth (California Law Review)

Sixth Circuit Grants § 2254 Habeas Relief in Unusual Case of Attorney Failing to Initiate Plea Negotiations

by Douglas Ankney

The U.S. Court of Appeals for the Sixth Circuit reversed the decision of a district court that denied habeas relief. In an unusual ruling, the Sixth Circuit found that defense counsel was ineffective for failing to initiate plea negotiations.

In February 2010, Curtis Byrd and his girlfriend Charletta Atkinson planned to rob Richard Joiner at a bank ATM. Byrd suggested the plan and provided the gun. But at the last minute, Byrd, who had no criminal record, had a change of heart and told Atkinson, “I can’t do this. This is not for me. I’m not going to do it.” Atkinson exited their vehicle armed with the pistol. During the ensuing robbery, Joiner resisted. In a struggle for the weapon, the pistol discharged, and Joiner was shot in the head and died. Atkinson returned to the car, and Byrd drove away. Shortly thereafter, Byrd turned himself in to the police. Byrd and Atkinson were both charged with, inter alia, first-degree premeditated murder and first-degree felony murder. Byrd was charged on a theory of aiding and abetting, which under Michigan law subjected him to the same penalties as the principal - a mandatory sentence of life without parole. Mich. Comp Laws § 767.39. Atkinson negotiated a plea agreement whereby she would plead guilty to second-degree murder and testify against Byrd in exchange for a sentence of 30 to 50 years. But Byrd’s attorney, Marvin Barnett, adamantly refused to inquire about a plea agreement.

Barnett assured Byrd that he would “hit a home run” for Byrd by securing an acquittal on the affirmative defense theory of “abandonment.” Later, when Byrd asked about a plea deal, Barnett told Byrd he was “going home” instead of going to prison. Byrd was found guilty by a jury and was sentenced to prison for life without parole. After his convictions were affirmed on appeal and his postconviction motions were denied, Byrd filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in the federal district court for the Eastern District of Michigan.

At an evidentiary hearing, Wayne County Prosecutor David Braxton testified that his office had a demonstrated record of preferring plea deals over trials. He further testified that once a principal has pleaded guilty, prosecutors have more of an incentive to reach agreements with their aiders and abettors. Braxton testified it was rare for a Wayne County judge to reject a plea agreement. When asked why he did not reach an agreement with Byrd, Braxton replied that Barnett never indicated he was interested. Braxton testified that it is the policy of his office to wait until defense counsel requests an offer before entering into plea negotiations. Barnett testified that he did not seek an offer because he believed Byrd was not guilty under the theory of abandonment of the crime. Barnett was completely wrong on the law regarding abandonment.

The district court denied the habeas on the ground that Byrd failed to prove he would have accepted a plea offer had one been made. Byrd appealed.

The Sixth Circuit observed the usual standard of deficient performance and prejudice applied to this claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The defendant must show his attorney made professional errors that fell below an objective standard of reasonableness, and he must show that, absent...
The prosecutor’s testimony and track record for preferring plea deals and the rarity of judges’ rejection of those deals coupled with Byrd asking Barnett about a deal convinced the Court that Byrd met the required showing. The Court concluded that Barnett was ineffective for failing to initiate plea negotiations.

Accordingly, the Court reversed the district court’s decision and remanded to the district court with instructions to issue the writ if the State does not reopen proceedings consistent with the Court’s opinion within 180 days. See: Byrd v. Skipper, 940 F.3d 248 (6th Cir. 2019).

Ninth Circuit: Federal Sentencing Court Must Hear Defendant Before Determining If Acceptance of Responsibility Reduction Applies

by David Reutter

The U.S. Court of Appeals for the Ninth Circuit held that a “sentencing court erred by concluding that it could not first hear from the defendant before determining whether a reduction for acceptance of responsibility was warranted under the Sentencing Guidelines.” The Court concluded the misapprehension of law was plain error that requires resentencing.

Before the Court was the appeal of Jeffrey Green. His apartment in Anchorage, Alaska, was subject to a search warrant executed on June 3, 2016, by a group of police officers. They found a revolver in Green’s pocket and two pistols in a safe. Both pistols had been reported stolen.

As Green had a long history of felony convictions, he was charged with a single count of possession of a firearm as a felon in violation of 18 U.S.C. § 922(G)(1).

Green agreed to a plea agreement in which he admitted to possessing the revolver in his pocket but not to all conduct in the indictment. A pre-sentence report concluded Green was not entitled to a reduction of sentence for accepting responsibility under Sentencing Guidelines § 3E1.1(a) because he had not admitted possessing the two pistols found in the safe.

The district court held an evidentiary hearing to determine if Green possessed those firearms.

At another hearing, the district court concluded it could not hear from Green before it determined applicability of the reduction for acceptance mitigator. The court found the mitigator did not apply, which put Green at a Sentencing Guidelines range of 100 to 120 months as opposed to 77 to 96 months if the mitigator had been applied. Green was sentenced to 108 months in prison, and he appealed.

The Ninth Circuit framed the issue as follows: “Must a district court decide on a defendant’s eligibility for an acceptance-of-responsibility reduction in his Guidelines level before listening to the defendant’s allocution? Our answer is ‘No.’

Guidelines § 3E1.1(a) provides for reducing a defendant’s offense level by two points if the district court determines the defendant has “clearly demonstrate[d] acceptance of responsibility for his offense.” The goal is to “reward defendants who are genuinely contrite.” United States v. McKinney, 15 F.3d 849 (9th Cir. 1994).

The Guidelines suggest that a guilty plea supported by truthful admissions ... creates a presumption that the defendant will receive the acceptance-of-responsibility reduction,” the Court explained as per Guidelines Manual § 3E1.1 cmt. n3.

The Court observed that the district court failed to “cite any specific authority to support its premise that a sentencing court must reach its conclusion regarding acceptance of responsibility before hearing from the defendant.” The Court explained that neither “the Guidelines nor the pertinent case law prefers ignorance over appropriate information collection and considered judicial reflection before calculating the applicable Guidelines range.” In fact, if the sentencing court has made up its mind without hearing from the defendant, the “defendant can hardly demonstrate sincere contrition,” the Court noted.

Since Green conceded that he did not adequately challenge the district court’s allocution ruling in that court, so plain error review applies. Under that review, relief may be granted where (1) the district court’s error is contrary to the law at the time of the appeal, (2) affects defendant’s substantial rights, and (3) “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” United States v. Depue, 912 F.3d 1227 (9th Cir. 2019).

The Court concluded that all three factors were satisfied. The district court’s decision was “undoubtedly contrary to law” since “no authority supports” its conclusion. The Court also determined that the error affected his “substantial rights and seriously affected the fairness of the judicial proceedings.” Had the district court considered his allocution, there is a reasonable probability he would have received a lower sentence, the Court stated.

The clear error regarding the law, together with the reasonable probability Green would have received a lesser sentence, “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” Accordingly, the Court vacated Green’s sentence and remanded for resentencing. See: United States v. Green, 2019 U.S. App. LEXIS 30033 (9th Cir. 2019).
Indiana Supreme Court: Postconviction Petition Addressing Only Issues From New Trial, New Sentencing, or New Appeal From Federal Court via Habeas Proceedings Is Not a Second Petition Under State Law

by Douglas Ankney

The Supreme Court of Indiana held that a postconviction petition that raises only issues emerging from the new trial, new sentencing, or new appeal obtained from a federal court through habeas proceedings is not a second or successive petition as defined by Ind. P.C. R. 1(12), the Court explained. Therefore, Shaw does not need to obtain prior authorization before filing the petition.

Accordingly, the Court remanded for further proceedings consistent with its opinion. See: Shaw v. State, 130 N.E.3d 91 (Ind. 2019).

Maryland Court of Appeals Announces Circuit Court Retains Authority to Exercise Its Revisory Power for Up to Five Years After Granting Belated Postconviction Motion

by Douglas Ankney

In a case of apparent first impression, the Court of Appeals of Maryland announced that a circuit court has authority to revise a criminal defendant's sentence for up to five years after the date the circuit court granted postconviction relief, permitting a belated motion for modification of sentence.

In 2008, the circuit court imposed a prison term of 14 years and six months that had been suspended. While on probation, Schlick was convicted of another crime. In September 2008, the circuit court imposed a prison term of the 14 years and six months that had been suspended.

After sentencing, Schlick told his attorney to file a motion for a sentence reduction, but his attorney failed to do so.

In 2012, Schlick filed a postconviction motion claiming ineffective assistance of counsel due to his attorney’s failure to file the motion for sentence reduction. The attorney swore under oath that she had failed to file the motion after Schlick had requested her to do so.

On March 20, 2013, the circuit court granted the postconviction motion and gave Schlick 90 days in which to file a motion for a modification of sentence. Schlick timely filed the motion in May 2013.

But, for various reasons, no hearing on the motion was held until January 2017, when the court sua sponte raised the issue of whether the court still had revisory authority to modify Schlick’s sentence. The court ultimately dismissed the motion without addressing its merits. The court reasoned that by statute it had authority to modify Schlick’s sentence for up to five years after it was imposed. Since the probation was revoked and the prison sentence was imposed in September 2008, the circuit court determined it no longer had revisory authority after September 2013.

Schlick appealed.

The Court of Special Appeals vacated the circuit court’s decision and remanded, ruling that the circuit court retained fundamental jurisdiction over the motion, and it was within that court's discretion whether or not to consider the motion on its merits. The Maryland Court of Appeals granted the State’s Petition for Writ of Certiorari.

The Court of Appeals observed that, “Upon a motion filed within 90 days after imposition of a sentence ... in a circuit court ... the court has revisory power over a sentence except that it may not revise the sentence after expiration of five years from the date the sentence originally was imposed ....” Maryland Rule 4-345(e). When probation is revoked and a new sentence is imposed, then the new sentence has the effect of being an original sentence. McDonald v. State, 550 A.2d 696 (Md. 1988).

Under the Uniform Postconviction Procedure Act, a defendant may file one petition for postconviction relief for each trial or sentence. Md. Code, Crim. Proc., § 7-103(a). When a defendant receives ineffective assistance of counsel, he or she may be entitled to...
Not Guilty but Punished Anyway
by Douglas Ankney

Many people are aware that Pilate found Jesus “not guilty,” but Jesus was sentenced to death anyway. Fortunately, the American system of justice doesn’t permit such outcomes. Or does it?

According to reason.com, federal judges can — and often do — use what is called “acquitted conduct” when sentencing defendants. As an example, suppose you are charged with three murders and a robbery, but the jury acquits you of all charges except the robbery. The prosecutor will still argue to the court that, based on a preponderance of the evidence, the judge should consider your conduct in the murders when determining your sentence for the robbery. This provides a perverse incentive for prosecutors to charge more serious offenses they know they cannot prove. As in the example, the prosecutor charges you with three murders as leverage to get you to plead guilty to the maximum sentence for robbery in exchange for dropping the murder charges. But if you refuse the plea offer, then the prosecutor still wins because he will argue that the judge should consider the acquitted conduct and sentence you to the maximum term for the robbery.

Senators Dick Durbin (D-Ill.) and Chuck Grassley (R-Iowa) introduced a bill in September 2019, amending the federal criminal code “to preclude any court of the United States from considering, except for purposes of mitigating a sentence, acquitted conduct at sentencing.”

The bill defines acquitted conduct as “acts for which a person was criminally charged and adjudicated not guilty after trial in a Federal, State, Tribal, or Juvenile court, or acts underlying a criminal charge or juvenile information dismissed upon a motion for acquittal.”

The bill has received wide bipartisan support from diverse groups such as Americans for Prosperity, the American Conservative Union, Americans for Tax Reform, FreedomWorks, Prison Fellowship, the R Street Institute, Right on Crime, and Koch Industries.

While it’s easy to see why the bill has tremendous support, it’s not so easy to understand why the practice even exists. But the answer hides in plain sight. Prosecutors are cloaked with almost unlimited power in choosing who to prosecute and for what. And this is simply another arrow in their quiver. Hopefully, it will soon be a broken arrow.

Source: reason.com

New Law Makes It Harder for California’s Cops to Get Away with Killing People
by Douglas Ankney

Beginning January 1, 2020, cops in California will be allowed to use deadly force only when the officer reasonably believes ... that deadly force is necessary to defend against an imminent threat of death or serious bodily injury.”

The law was inspired by the 2018 shooting of Stephon Clark, an unarmed black father of two killed by police in his grandparents’ backyard when officers claimed they mistook his cellphone for a gun.

Under the new law, if investigators determine that an officer used lethal force when there was a reasonable alternative, the officer could face criminal charges, civil liability, and disciplinary action. Current law allows the country permits use of force if it is “objectively reasonable,” which civil rights advocates and families of people murdered by police criticize as being a standard that is too low.

Peter Bibring, director of police practices at the American Civil Liberties Union of Southern California, said, “We expect this legislation to save lives.”

But Melina Abdullah, leader of the Los Angeles chapter of Black Lives Matter, said, “Unfortunately, in efforts to get law enforcement to lift their opposition, the bill was so significantly amended that it is no longer the kind of meaningful legislation we can support.”

Law enforcement unions had vigorously opposed the bill, prompting amendments to remove requirements for police to de-escalate tensions when interacting with the public.

Source: theguardian.com
High Bail Amounts Lead to Sharp Increase in Franklin, PA, Jail Population

by Dale Chappell

In Franklin County, Pennsylvania, a rural area with about 154,000 residents, high bail amounts are forcing people who can’t afford to purchase their freedom to plead guilty just to get out of jail for what are typically small-time misdemeanors.

Take, for example, the case of Tiana Lescalleet, who was arrested in 2016 on misdemeanor charges for receiving stolen property (her mother’s jewelry) and possession of drugs. Though she had no criminal record, Franklin Magisterial Judge Glenn Manns set Lescalleet’s bail at $75,000 and, when she couldn’t pay, sent her to the county jail. Lescalleet then had two options: plead guilty to the low-level charges to get released or stay in jail and fight the charges. Thirty-one days later, she pleaded guilty and was released.

On any given day, about 500,000 people like Lescalleet sit in county jails because they can’t pay bail. Researchers have found that more than half the people required to pay bail were unable to do so. This means a loss of jobs, housing, and a higher likelihood of them committing a new crime after release. But it also means that they are often forced to plead guilty just so they can get released and try to salvage their lives.

Researchers also found that people who could afford to pay bail were almost 25 percent less likely to be found guilty or plead guilty. And those people were more likely to regain employment after posting bail.

High bail and detention in Franklin County cost its taxpayers around $13 million a year over the last 10 years. The average cost for the county to house a prisoner who can’t afford to pay bail is $71 a day. The jail has just over 300 beds, costing taxpayers around $21,000 a day to house its prisoners. That’s a big hit for a county where more than a quarter of its residents earn less than $35,000 a year.

“We’ve created a machinery that churns out low-level convictions based not on individual guilt or culpability, but on an individual’s ability to pay,” said Alexandra Natapoff, a law professor at the University of California, Irvine. She’s the author of *Punishment Without Proficiency: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal.*

Natapoff describes the high bail system as the “criminalization of poverty” and says it has created “a now infamous phenomena of people pleading guilty merely to get out of jail.”

Dave Keller, chairperson of the Franklin County Commissioners, acknowledged that the county’s bail amounts are higher than other counties but does not believe that it has anything to do with the rise in the jail’s population. Instead, he attributed longer jail sentences for that increase. He did say that the county is looking into software that would help evaluate the role bail plays in the jail’s population growth.

“The heart of reform, the heart of the change, would require the misdemeanor system to stop criminalizing poverty,” Natapoff said. Officials must “stop conditioning incarceration and punishment on an individual’s ability to pay.”

Source: theappeal.org

Michigan Supreme Court Reverses Criminal Sexual Conduct Convictions in Two Consolidated Cases Due to Improperly Admitted Expert Testimony

by Douglas Ankney

The Supreme Court of Michigan reversed convictions for criminal sexual conduct in two consolidated cases due to improperly admitted testimony of expert witnesses.

Joshua Thorpe was in a relationship with Chelsie. The couple had a daughter together. Chelsie also had a daughter from a previous relationship (identified as “BG”). After several years, Thorpe ended the relationship. Ten-year-old BG then accused Thorpe of twice rubbing her vagina over her underwear and of one incident of Thorpe forcing her to touch his bare penis.

Among the witnesses to testify at Thorpe’s trial was Thomas Cottrell. Cottrell had a master’s degree in social work and was vice president of counseling at the YWCA Counseling Center. He was qualified as an expert in the area of child sexual abuse and disclosure. Cottrell neither examined BG nor was provided specific information about the case. He testified for the prosecution as to the broad range of reactions by abused children and as to reasons why a child might delay disclosure.

During cross-examination, Cottrell answered affirmatively when asked if children can lie or manipulate. On redirect, the prosecutor asked what is “the percentage of children who actually do lie?” Defense counsel objected and asked for statistics to support Cottrell’s anticipated answer. The trial court overruled the objection on the grounds that defense had “opened the door” by bringing up the issue of children lying. Cottrell answered that based on his experience 2 percent to 4 percent of children lied when alleging sexual abuse. He further testified that children lied with a purpose, either (1) when an abused sibling is receiving therapy and the other child wants to be included or (2) when the child wants to call attention to domestic violence.

There was no physical evidence that BG was abused. Thorpe was convicted. His judgment was affirmed by the Court of Appeals, and the Supreme Court granted him further review.

Brandon Harbison was accused by his 9-year-old niece (identified as “TH”) of numerous instances of touching her vagina with his hand and mouth and of placing his penis in her mouth.

Dr. N. Debra Simms, an expert in child sexual abuse diagnostics, testified in the prosecution’s case-in-chief. Simms testified that she diagnosed TH with “probable pediatric sexual abuse.”

Simms explained that the term was “standard” among professionals in her field.

A diagnosis of probable pediatric sexual abuse meant there wasn’t any physical signs of sexual abuse, but that the diagnosis was based on the “clear, consistent, detailed or descriptive”
account of the abuse given by the victim. An account that wasn’t clear, descriptive, or consistent is relegated to “possible” as opposed to “probable” sexual abuse.

Simms further testified that she didn’t expect to find physical signs of abuse because TH’s accounts of the abuse detailed only touching and oral sex.

On cross-examination, Simms testified her diagnosis was based on what TH had told her.

Harbison was convicted. The Court of Appeals affirmed. The Supreme Court remanded, and the Court of Appeals affirmed again. The Supreme Court granted further review.

The Court observed that an examining physician cannot give an opinion on whether a complainant has been sexually assaulted if the “conclusion [is] nothing more than the doctor’s opinion that the victim told the truth” or solely based on what the victim ... told the physician.” People v. Smith, 387 N.W.2d 814 (Mich. 1986). And in People v. Peterson, 537 N.W.2d 857 (Mich. 1995), the Court reversed because, “First, the experts ... improperly vouched for the veracity of the child victim” by testify[ing] that children lie about sexual abuse at a rate of about two percent.”

The Supreme Court determined that Thorpe had shown it was more probable than not that a different outcome would have resulted if Cottrell had not testified that children lie about sexual abuse only 2 percent to 4 percent of the time and that they do so in circumstances not present in Thorpe’s case. Without any physical signs of abuse, the trial was basically a swearing match between Thorpe and BG. Cottrell’s testimony vouched for the credibility of BG. The Court further opined that Thorpe did not “open the door” by merely asking whether children lie or manipulate.

Turning to Harbison’s error, even though it was not properly preserved, the Court determined he established a “plain error that affected his substantial rights.” Dr. Simms’s testimony that TH suffered from “probable pediatric sexual abuse” was contrary to the unanimous holding in Smith. Since the Smith decision was a published decision that had never been questioned, the error should have been obvious to the trial court. The Supreme Court concluded that Simms’s testimony “is far more pernicious than a mere evidentiary error” because it struck at the heart of several principles of underlying rules of evidence. Not only did Simms’s testimony have the effect of vouching for TH’s credibility, but it also invaded the province of the jury to determine the sole issue in the case.

Accordingly, the Court reversed the judgment of the Court of Appeals in both cases and remanded both cases to the Allegan Circuit Court for new trials. See: People v. Thorpe, 2019 Mich. LEXIS 1258 (2019).

Payoffs for Police Misconduct Claims Rise While Number of Claims Appear to Fall

by Douglas Ankney

Municipalities and insurers are spending more in costs and payouts from law enforcement misconduct claims, but it appears that the total number of claims is dropping.

The rise in costs may be attributed to the heightened public focus on holding police accountable. “In the last five years, public opinion about police conduct in this country has started exploding,” said Michael Otworth, vice president at Genesis Management and Insurance Services Corporation.

“Historically, we're looking at the highest payouts for law enforcement that we've seen in a long time.”

Controversial cases dealing with excessive force, including Michael Brown Jr.'s death in Ferguson, Missouri, in 2014, have led to a loss of public confidence in law enforcement. And Washington, D.C.-area attorney Benjamin Eggert said, “The best explanation of why we're seeing flat claims with bigger payouts is that the police are doing the same things in 2019 that they were doing five years ago or ten years ago.”

Meanwhile, according to Eggert, the Supreme Court is expanding the protections of the qualified immunity defense to shield police from liability for their misconduct. Qualified immunity is a judicially created doctrine that prohibits an officer from being sued unless the officer violated a “clearly established constitutional right.” This means that if there isn’t a case precedent clearly establishing the right at issue, then the officer is immune from civil liability.

Eggert said that of the 11 Supreme Court opinions addressing the defense, there have been “ten in favor of qualified immunity and only one where it was questioned as going too far.”

Source: businessinsurance.com

Man Freed Who Sat in Prison Nearly 30 Years While Prosecutors Withheld Evidence of Innocence

by Dale Chappell

A man who sat in prison for almost 30 years because prosecutors and police withheld evidence that someone else committed the crime was set free July 16, 2019, after a Philadelphia judge said he was “likely innocent.”

In 1993, Chester Hollman III was convicted and sent to prison for life without parole for the murder of an exchange student in 1991. Hollman was arrested when the vehicle he was driving matched the getaway car involved in the crime.

However, police and prosecutors always had evidence that someone else might have committed the crime. They even had the name of the driver of the getaway car. But they never told Hollman’s lawyers.

The evidence was finally disclosed when Assistant District Attorney Patricia Cummings, head of the DA’s conviction integrity unit, turned over the evidence to Hollman. It was “pretty clear,” she said, that Hollman’s case probably wouldn’t have gone to trial, had he known about the evidence held by the state.

“I don’t think it’s really hit me yet,” Hollman said about his release. “Knowing that you’re in prison for something that you didn’t do and trying to convince people that you’re not lying ... it’s an uphill battle.”

Alan Tauber, Hollman’s lawyer, said Hollman had the best years of his life stolen from him. “We are only sorry that his mother did not live to see Chester declared an innocent man,” he said.

Source: cnn.com
New York City Cops Can Always Tell by Just the Smell
by Ed Lyon

As far as marijuana is concerned, the New York City Police Department (“NYPD”) has little need for a canine corps. The city’s two-legged, blue-clad human-type cops seem to have the best olfactory sense in the world for detecting “the odor of marijuana.” At least, that is what they testify to in court again and again.

As penalties for possessing or lighting up small amounts of pot decrease, it’s time for New York’s finest to reconsider, “I smelled an odor of marijuana” as a pretext to justify warrantless searches of people and vehicles. Sure enough, in some cases prohibited weapons and other contraband are found as a result of the unconstitutional searches. However, the veracity of the stated “underlying” reason for these searches is rapidly wearing thin.

Batya Ungar-Sargon served as a grand juror in the city’s grand jury in the Brooklyn borough in 2018. She remembers hearing city cops citing the marijuana odor mantra as their justification for stopping or searching a person. Ungar-Sargon stated the testifying cops “said it very formulaically,” as if by rote memory.

Bronx Judge April Newbauer finally had more than her fill of this practice. In late July 2019, she issued an opinion condemning it. In the case at bar, plainclothes NYPD cop David Nunez testified before Newbauer that he “noticed a strong odor of marijuana” as he neared a stopped vehicle. The marijuana the cops “found” was impressively arranged neatly in a row on the car’s center console as photographed for evidence. The car driver testified that the cops took those bags of marijuana from the passenger’s pockets.

After identifying several false statements in Nunez’s testimony, Newbauer concluded the photo was staged and that Nunez’s testimony was not believable.

In her written opinion regarding this case, she admonished: “The time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop. So ubiquitous is police testimony about odors from cars become that it should be subject to a heightened level of scrutiny if it is to supply the grounds for a search.”

Newbauer is not the first judge to address this practice. A Rochester, New York-based federal judge ruled that the practice violates the Constitution, but the NYPD and most of its city judges pay the ruling little, if any, heed.

Five other judges have gone public with their reservations about this dubious testimony by NYPD cops. Their doubts are often fueled by conflicting testimony by other cops and witnesses and especially by the testifying cops when their own testimony conflicts.

Even the Blue Line has fractured because of overuse of the phrase. NYPD Bronx borough officer Pedro Serrano publicly stated: “Certain cops will say there is an odor of marijuana, and when I get to the scene, I immediately don’t smell anything. I can’t tell what you smelled, but it’s obvious to me there is no smell of marijuana.”

NYPD spokesperson Al Baker officially responded to Judge Newbauer’s opinion and stated: “We categorically reject the judge’s baseless assertion in this case and refute her sweeping assertion that police officers routinely fabricate that the odor of marijuana is present in every vehicle they stop.”

Source: nytimes.com

Free Speech Is Sometimes Expensive
by Ed Lyon

Jon Goldsmith of Montgomery County, Iowa, attended a summer festival last year in adjoining Adams County. He witnessed police misconduct there so outrageous he felt he had to make the public aware of it. Unfortunately for him, the police did not agree with his colorful expressions on Facebook and criminally charged him. What exactly did Goldsmith see that sparked his righteous indignation?

Adams County sheriff’s deputy Cory Dorsey stopped a car at the festival, supposedly because of a brake light problem. He escalated the encounter to the point of calling for a drug interdiction dog to search the car. No drugs were found. Later, Goldsmith witnessed Dorsey “body slam” a person Goldsmith happened to know. He observed no reason for Dorsey to assault the citizen.

The Adams County Sheriff Department (“ACSD”) has a Facebook account. In that department’s case, it would be more appropriate to call it a Shamebook account as it displays photos of everyone it arrests. It was here that Goldsmith would subsequently see the mugshot of his acquaintance that Dorsey had body-slammed for apparently no reason. This prompted his Facebook rant.

Therein Goldsmith called Dorsey “a fucking pile of shit,” “a stupid sum bitch,” and further promised Dorsey “when you get shit canned [as a result of the behavior Goldsmith witnessed] I’ll hire you to walk my dog and pick up his shit.” The post did plainly link the rant to Dorsey’s pretextual motor vehicle stop and later uncalled-for use of force.

Dorsey’s supervisor, Sergeant Paul Hogan, saw Goldsmith’s rant shortly after it was posted. Rather than initiate an investigation into a citizen’s de facto report of multiple instances of police misconduct, Hogan swore out a criminal complaint against Goldsmith for harassment, claiming that his Facebook rant was “threatening.”

After his arrest, Goldsmith began suffering anxiety and abnormally high blood pressure. He also had to hire an attorney. The attorney recognized the egregious First Amendment violations and sought help from the American Civil Liberties Union (“ACLU”), which obliged.

Trial attorney Jonathan Mailander succeeded in having the criminal charge dismissed, citing an Iowa Supreme Court precedent in a similar case where that defendant’s Facebook comments about a cop made Goldsmith’s look, by comparison, like comments from Miss Manners.

The ACLU followed up with a lawsuit in federal court on First Amendment grounds. This suit culminated in not only a $10,000 settlement in Goldsmith’s favor but also in some extremely interesting permanent injunctions against the ACSD.

Because of other instances of the ACSD criminally charging citizens for negatively criticizing their officers, the court first issued a permanent injunction barring this practice.

Other injunctions require the ACSD to provide all deputies ACLU-approved training regarding social media policy and another ACLU-approved training regimen on free speech rights. Finally, the ACSD must pay all of the ACLU’s legal fees and expenses.

Sources: aclu-ia.org, reason.com
Archie Williams seemed doomed to die in prison. Sentenced to life without parole for a 1982 stabbing and rape, he managed to survive in Louisiana’s Angola as months bled into years, and years pooled into decades. Where others may have lost hope, Williams clung to one forlorn fact: He is an innocent man.

The circumstances of Williams’ case highlight how flawed the American system of justice can be. The victim was a Baton Rouge woman, who was sexually assaulted and then stabbed in her home when a neighbor tried to intervene. Almost a month later, police asked the victim if she could identify her attacker in a photo array that included Williams. She did not pick him but said the perpetrator looked like him. The police produced a second array that also had Williams’ picture, and she repeated that it was not him but someone who looked similar. Additionally, both the victim and her neighbor described the assailant as between 5 feet, 9 inches and 5 feet, 11 inches. Williams stands 5 feet, 4 inches.

Investigators interested in finding the guilty party rather than merely scoring a conviction might have considered other suspects, but the victim was subjected to a third photo array featuring Williams. This time, she chose him. After these repetitive exposures, she also picked Williams out of a lineup, though the neighbor selected someone else.

Louisiana law did not allow an eyewitness expert at Williams’ trial to explain several factors that led the victim to misidentify him. Almost no other evidence implicated Williams. None of the fingerprints found at the crime scene matched his own, and three people testified he was asleep at home that night. DNA testing was not in use yet, and a serology test only showed Williams was part of a significant portion of the male population who would have been the source of the semen in the rape kit.

Williams contacted the Innocence Project in 1995. The group began advocating for DNA testing in his case the following year, but the rape kit was not analyzed and admissible under Louisiana statutes until 2009. The DNA it detected belonged to the victim’s husband. Thus, the actual attacker’s identity remained unknown. That same year, the state ran prints from the crime scene through the FBI’s identification system but came up empty. Williams’ requests for additional searches bore fruit in 2014 when the Next Generation Fingerprint Identification updated the old technology. It turned up a match with Stephen Forbes, a man charged with one rape who had confessed to four others.

Even though those crimes occurred in the same area and timespan as the assault Williams was accused of, the police never questioned Forbes about it. He later died in prison.

Louisiana lawmakers no longer allow police to use many of the practices that helped falsely convict Williams, but experts on eyewitness identification still cannot testify for defendants at their trials. Only Nebraska has a similar ban.

Sources: theinnocenceproject.org

The Two-Edged Sword of DNA Exonerates Another Prisoner

by Ed Lyon

In 1996, 20-year-old Idaho Falls, Idaho, citizen Christopher Tapp was convicted of raping and murdering 18-year-old Angie Dodge. Tapp did not finish high school, so he was no match for educated cops who relentlessly interrogated him nine times over three-and-a-half weeks for a total of 25 hours.

The inconvenient facts that his DNA did not match any found at the crime scene, there was no physical evidence linking him to the crime, and there were no eyewitnesses were easily explained by prosecutors: There were multiple assailants.

Still, for two decades, the only man convicted was Tapp.

In an ironic twist, Dodge’s mother refused to be assured by Tapp’s conviction. The more Carol Dodge examined Tapp’s so-called confession and the case’s hard facts, the more convinced she became that her daughter’s killer was still out there. She turned to the flip side of DNA’s cutting edge to come up with the proof.

The July 2019 CLN (p.40) reported that police caught the California Golden State Killer (“GSK”) suspect through a novel use of DNA investigation. By simply buying a membership in FamilyTreeDNA, law enforcement had only to submit DNA collected from prior GSK crime scenes to build a family tree using the service’s unique Y-DNA database to find relatives of the GSK until they were able to zero in on him.

Dodge correctly reasoned the same process could be used to find the identity of her daughter’s murderer, even if it meant exonerating the man she once believed had killed her daughter.

A huge obstacle facing genetic genealogist CeCe Moore of the Virginia-based Parabon NanoLabs was the degradation of the DNA evidence recovered from the crime scene. With 39 percent of the commonly needed genetic markers gone, Moore had her work cut out for her.

After analyzing what was available, she began genealogical comparisons through GEDmatch, a service through which DNA profiles from companies like AncestryDNA, 23andMe, and FamilyTreeDNA can be used to locate lost relations.

Moore’s efforts paid off with the identification of Brian Leigh Dripps, Sr. as being the donor of hair and semen found at the crime scene.

Dripps lived across the street from Dodge and had been questioned by police after the murder. Faced with the DNA evidence against him, Dripps confessed.

The Idaho Falls police chief stated that department policies were adopted in the 1990s to prevent such interrogations like the ones conducted on Tapp. “We intentionally do our interviews to make sure that there’s information that only the person that was at the crime scene could give, which probably didn’t occur in those original interviews” that Tapp underwent, stated the chief.

In 2007, the Idaho Innocence Project had joined Dodge’s efforts. Tapp’s case also was championed by The Marshall Project and reported on by CBS’ 48 Hours television show in 2018. He was freed from prison in 2017.

Source: themarshallproject.org

National Fingerprint Database Frees Man After 36 Years

by Jayson Hawkins

In 2007, the Idaho Innocence Project had joined Dodge’s efforts. Tapp’s case also was championed by The Marshall Project and reported on by CBS’ 48 Hours television show in 2018. He was freed from prison in 2017.

Source: themarshallproject.org
**California**: A district attorney investigation is looking at why police in San Bernardino fatally shot Richard Sanchez, a resident who obeyed police orders during an encounter with law enforcement: He dropped his gun and put his hands up, washingtonpost.com reports October 26, 2019, one year after the incident. Sanchez was fired upon as he exited the house of a relative. The 27-year-old man had been drunk when a relative called 911 to report Sanchez was speaking irrationally. “Three seconds and two commands later, the officer opened fire. Body-camera footage … captures the five shots that killed Sanchez and a woman’s screams as he fell onto the lawn,” the news site report. The officer, who was not named, is no longer on the police force.

**California**: There is renewed scrutiny on the Banditos gang, which has police officers who are part of a deputy clique, vox.com reports, “who allegedly engage in violent and potentially criminal behavior while protecting their members and clashing with other law enforcement officers.” A 63-page lawsuit filed against Los Angeles County by eight L.A. county deputies in October 2019 alleges that deputy members of the Banditos routinely harass them, latimes.com reports. “In one September 2018 incident, two deputies were knocked unconscious at a department party, the lawsuit says. A few months later, it alleges, the Banditos secretly removed ammunition from another deputy’s shotgun.” Members wear tattoos of a skeleton with a sombrero, bandoleer and pistol.

**Colorado**: Police office Troy Morgan’s recent dismissal from the Springfield Police Department is part of a snowball of turmoil in the department. Although Morgan was let go in September 2019, months earlier, in March 2018, the town terminated then-police Chief Dennis Bradburn after allegations of misconduct against another officer ended in a settlement of $50,000, The Colorado Sun reports. Morgan, meanwhile, was fired after six months in Springfield. He “was hired at the department despite being terminated from his previous law enforcement job for a host of alleged transgressions,” the Sun reports. “The Colorado Sun confirmed Morgan’s termination through an open records request.”

**Florida**: Orlando school resource officer Dennis Turner was fired after he arrested two 6-year-olds for minor infractions at a charter school. One pupil threw a tantrum, usatoday.com reports. Another kicked a school employee after her wrists were grabbed in an attempt to calm her. The child’s grandmother, Meralyn Kirkland, attributed the girl’s behavior to a sleep disorder, speaking to WKMG-TV. The boy was released back to the school, while the girl was handcuffed and moved to juvenile detention on a battery charge. State Attorney Aramis Ayala, however, said her office would not prosecute the kids. “I refuse to knowingly play any role in the school-to-prison pipeline,” Ayala said. In fact, “department policy requires officers to obtain approval from a watch commander before arresting minors younger than 12, Chief Orlando Rolon said in a statement,” usatoday.com reports. The policy, however, was not heeded. Christian Minor, Florida Juvenile Justice Association director, noted: “The long overarching implications of placing a child in handcuffs in front of their peers can have devastating effects on a child’s development. This is a very sad situation that could have been dealt with differently.”

Florida: West Palm Beach Police Officer Travis Limauro—who has faced several misconduct accusations—must complete pretrial intervention requirements to avoid a criminal conviction following a May 2019 hit-and-run collision, pbpost.com reports in October 2019. The requirements include a letter of apology, 20 hours’ community service and a defensive driving class. The officer heading east through a busy intersection where he had the red light and where another driver, Susan Garone-Noble, had the green light. Garone-Noble was not injured but was shocked when Limauro drove off, she told the newspaper, and “thought he should be punished a little bit harder.” In a
Florida: A Doral lawman is under investigation for a forceful arrest at a traffic stop. As reported in the Miami Herald, Doral offices Travis Cooper drew his gun on Craig Nembhard and slammed him onto the pavement in a verbal dispute. Officers were ticketing motorists for illegal turns into a gas station. Nembhard's attorney, David Kubiliun, said his client was given a traffic citation but what followed was excessive force. "Thank God for the body cameras. He wasn't even going one mile per hour when the officer pulled his gun out," Kubiliun said. In fact, the "video was damning enough that state prosecutors decided not to move forward with charges against the motorists. ..." In the footage, "an officer is heard saying someone's about to get stomped on." When Nembhard objected to leaving his car, the officer reportedly yanked him from the vehicle and threw him to the ground, breaking his leg. Then Nembhard was handcuffed. Because of his broken leg, Nembhard cannot work, said the attorney. "He's walking with a walker. This was a traffic stop, a simple traffic stop."

Florida: Palm Beach County Sheriff's Deputy Jerald Samuel Alderman, who got drunk and allegedly threatened three car occupants with a gun, faces three counts of aggravated assault with a firearm, plus a charge of using a firearm while intoxicated, pbpost.com reports. In addition, he cannot "buy nor own guns for the next year" under a risk-protection order. The road patrol deputy was arrested in October 2019 and placed on paid administrative leave. In a viral Facebook video, the news site reports, "Alderman is seen showing a badge and pulling out a gun as he tells the three people inside, 'If I see you downtown again tonight, guess what's gonna happen?' When the driver asked what would happen, Alderman yells at them and bangs a gun on the car three times. The people in the car told West Palm Beach police they were riding around downtown near the nightclubs ... listening to music. They pulled into a parking lot ... and the man approached their car and showed them a star-shaped badge."

Georgia: A jury convicted Robert "Chip" Olsen, a former DeKalb County police officer, of aggravated assault in October 2019 after he gunned down an unarmed, naked man, abcnews.go.com. "Superior Court Judge LaTisha Dear Jackson set bond for Olsen at $80,000, ordered him to wear an ankle monitor and imposed a dusk-to-dawn curfew in effect until his sentencing Nov. 1," abcnews.go.com reports. He was then sentenced to 12 years in prison. In March 2015, Olsen killed 26-year-old Anthony Hill outside of his Atlanta area apartment building. The veteran, who had been diagnosed with bipolar disorder and post-traumatic stress disorder, was reportedly acting erratically. According to abcnews.go.com, "Olsen was convicted of two counts of violating his oath of office and one count of making a false statement. The assault charge carries a maximum sentence of 20 years; each of the other three counts carries a sentence of up to five years."

Illinois: Chicago police Superintendent Eddie Johnson is being investigated after being found slumped over the wheel near his home, which police discovered responding to a 911 call in October 2019, chicagotribune.com reports. Police said he did not seem impaired so he was permitted to drive home, though he got off without a sobriety test. And while Johnson called for a bureau of internal affairs probe, the issue will formally go to the city inspector general since the Chicago Police Department runs under a federal consent decree requiring reforms aimed at account-ability, police supervision and transparency. That office will determine whether Johnson violated any laws or police department policy.

New York: A Bronx jury in October 2019 awarded heroin addict Raoul Lopez $11 million after finding him "more credible" than the cops in a 2006 car-dragging case that left him partially paralyzed, nydailynews.com reports. Lopez, now 40, was stopped by Sgt. Phillippe Blanchard and his partner Zinios Konstantinides after he reportedly ran a stop sign. Then he was ordered at gunpoint to hand over a bag of drugs. The bag dropped and, when Lopez fumbled for it, a bullet from Blanchard's gun struck him. The officer, on the other hand, said he was leaning inside the vehicle to grab the ignition keys when Lopez drove off, so 'he had no choice but to open fire,' nydailynews.com reports. Lopez's lawyer Brett Klein said his client was unarmed and 'needlessly' shot. "He was at first a quadriplegic, and through hard work he has made great progress. But the loss of the function of his right arm and other permanent effects of this shooting will be with him for the rest of his life. We are grateful that a Bronx jury has held the City accountable for this wrongful shooting."

Pennsylvania: Philadelphia Police Inspector Carl Holmes mentored female police academy officers and then sexually assaulted three of them, abcnews.go.com reports. Holmes surrendered to police. "Holmes has at least twice before been accused of sexual assault by female officers," abcnews.go.com reports. "Besides the woman involved in the 2017 settlement, another female officer has said publicly that Holmes sexually assaulted her in 2008. He has previously denied those allegations."

Texas: San Antonio officials offered a $205,000 settlement in October 2019 to a woman who endured a "grossly invasive" search by cops, nytimes.com reports. Natalie Simms, now 40, says her constitutional rights were violated during a vaginal cavity search along a street in 2016. At the time, she was sitting on a curb and speaking on her phone, awaiting her boyfriend. Her vehicle was parked across the street. Then the cops showed up. Believing she might have illegal drugs, they asked to search her car. After she agreed, they asked a woman officer to also search her without a warrant. Even though she didn't have any contraband, they said she couldn't leave until she was fully searched by detective Mara Wilson, according to court records filed last year in the Western District of Texas. The officer insisted she pull down her shorts and ordered her to “spread” her legs. "Do you have anything down here before I reach down here?" Wilson asked. Much to woman's horror, Wilson removed her tampon. "Why would you do that," she asked the officer. No drugs were found. The New York
News In Brief (cont.)

Times notes that “(i)n Texas, it is illegal to strip-search a person or their property without their consent or a warrant, and searches of body cavities must be conducted out of public view.”

Tennessee: Memphis cop Ralph Confer was arrested after he allegedly assaulted a medical technician over a hot dog at a medical center employee cookout, according to an affidavit report, says commercialappeal.com. The woman was buzzed into a police holding area to pick up a wheelchair for a patient. She saw a barbecue taking place and asked for a hot dog. After Confer told her no, she returned later on and another employee told her to help herself. That’s when Confer slapped the bun off the woman’s hand. “Confer asked the woman to leave out of the back door but she said that she couldn’t,” commercialappeal.com reports. The woman said Confer picked her up by her arms causing her to hit her head against cabinets in the break room. She was then thrown to the ground and the officer placed his knee on her back and handcuffed her, according to the affidavit. She was placed in a female holding cell. The woman was never advised by Confer that she was under arrest and did not explain any charges to her, according to the affidavit. She sustained injuries to the top of her head, bruises to biceps and shin, and soreness to hip and lower back, according to an affidavit.

Tennessee: Desmond Logan, who preyed on women with a history of arrests while employed as a Chattanooga Police Department (“CPD”) officer, reached a plea agreement over proceedings for rape, according to a report by heraldextra.com. Logan, 33, who was arrested in September 2019, pleaded guilty in Federal Court to raping three women with a Taser. In June 2018, he handcuffed and raped a woman, then raped her in an empty cell. The woman was never advised by Confer of her rights, according to the affidavit report, says commercialappeal.com. The bill calls for “data points” to be compiled by county prosecutors, and it’s projected that a full-time staff position could help individual counties with that. “Maybe everything is fine” with prosecutorial decision-making, “but we don’t know what we don’t know,” said Kim Cordova, director of the Utah Commission on Criminal and Juvenile Justice. The state has seen the fastest rise in prison population after Idaho, “The average daily prison population population stood at 6,787 in September, up 169 from the same month in 2018,” heraldextra.com reports.

Texas: Fort Worth Police have egg on their faces over the death of Atatiana Jefferson, an innocent woman who was fatally shot by an officer who responded to a neighbor concerned about Jefferson’s front door being ajar. Jefferson, a 28-year-old black woman, was at her home playing video games with her 8-year-old nephew when police officers responded to an open structure call made by a neighbor who noticed a front door open … which he said was an unusual sight.” However, “[b]ody camera footage released by the police shows Dean, a white man, outside the home, looking into Jefferson’s bedroom window with a flashlight and shouting, ‘Put your hands up! Show me your hands!’ before firing a single bullet that killed Jefferson.” An apology to the woman’s family followed. “This incident has eroded the trust that we have built with our community and we must now work even harder to ensure that trust is restored,” said interim police chief Ed Kraus. There’s “absolutely no excuse” for the incident and Dean will be held accountable, he added. He asked the “community to not allow the incident to reflect poorly on the entire police department.”

Utah: Fired detective Jeff Payne, who describes himself as a “fall guy” for the city of Salt Lake and the police department, is fighting back with a lawsuit filed against the parties in October 2019, KSL.com reports. He claims his termination in October 2017 was wrongful because he was just heeding his commanding officer’s orders and department policy. The incident traces to July 26, 2017. That’s when “he was sent to the University of Utah Hospital to collect blood from a man who was injured in a crash that left another man dead. When the charge nurse, [Alex] Wubbels, refused to tell Payne where the unconscious patient was or let him draw blood — citing policy agreed upon by the police department and hospital that required him to have a warrant or meet certain criteria — Payne arrested Wubbels for interfering with an investigation. Body camera footage showing the detective dragging the screaming nurse out of the emergency room and handcuffing her against a wall spread quickly online, drawing widespread public criticism.” The former cop, who says the video is misleading and that the city slandered and defamed him, is seeking more than $300,000 in damages.
Hepatitis and Liver Disease: What You Need to Know, by Melissa Palmer, MD, 471 pages. $19.99. Describes symptoms & treatments of Hepatitis B & C and other liver diseases. Discusses medications to avoid, diets to follow and exercises to perform, plus includes a bibliography. 1031

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Christopher Zoukis
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