Jonathan Best had been out of prison for two years when he ended a rocky relationship with his girlfriend. Like many men and women on parole—a form of early release, in which the remainder of one’s sentence is served in the community—he suffered from depression and anxiety.

At the time, Best often had to choose between paying his monthly $80 parole fee and putting food on the table. He worried that if he got pulled over for speeding, a warning would go straight to his parole officer (PO). Like many who face the stress of reentry from prisons in the US, Best sometimes coped by using drugs or alcohol. He rarely felt free.

Best never found out exactly what happened on Aug 16, 2012, the day he was sent back to prison. Nor does he know what part his ex-girlfriend played in his return, though Best suspects that she called his PO and told him he was doing drugs.

Unofficial protocol was for Best’s PO to appear at his doorstep; supervision often means giving up one’s Fourth Amendment right to privacy in one’s home. But on that occasion, his PO surprised him and demanded Best come to the parole office.

When he arrived, Best was tested for drug use and put into a bar and shared a beer with a friend. As far as he knew, he was whisked off to prison for failing a drug test.

Patricia Garin, an experienced Mass parole attorney who represented Best at his revocation hearing, said that when a person on parole is violated for technical infractions, they are often charged with breaking multiple rules. Best, Garin said, was charged with cocaine use and failing to pay his $80 supervision fee.

Forced back into the system, Best became the kind of statistic that is well known to activists nationwide who are trying to expose the practice of parole revocation for technical violations. It’s a practice that, even before the coronavirus pandemic, devastated many who are struggling to right their lives after prison.

As of July 2020, nine out of the ten largest clusters of COVID-19 in the United States are in jails and prisons,” wrote award-winning researcher Allison Frankel in Revoked: How Probation and Parole Feed Mass Incarceration in the United States, a report by Human Rights Watch and the American Civil Liberties Union.

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When he arrived, Best was tested for drug use on the spot. As he recalled in a March phone interview with me, three POs interrogated him for more than 30 minutes, then told him that he had produced a dirty urine sample.

“They put me in a cage in the Brockton parole office,” Best said. “I didn’t get to call anyone, and they told me I was going back.”

Best’s case scenario
“Going back,” or violating parole, is extremely common in this country. In a 2019 report, the Council of State Governments (CSG) found that “45 percent of state prison admissions nationwide are due to violations of probation or parole.”

The data definitely shows: Parole does not help people stay out of prison. Rather, it feeds incarceration.

In Best’s case, he had not committed a new crime. Nor had he missed a curfew or a check-in meeting. He hadn’t walked into a bar and shared a beer with a friend. As far as he knew, he was whisked off to prison for failing a drug test.

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According to the nonprofit Marshall Project, which keeps an up-to-date count of COVID-19 cases behind bars on its website, there were 121,156 cases reported in state and federal prisons as of Sept 8. [Editor’s note: 161,349 cases as of Oct. 27.] As a comparison, while the US has carried out 839 executions of prisoners this millennium, more than 1,017 state and federal prisoners have died from the virus in just the past six months.

Even before the pandemic, the public was not clamoring to send people back to prison. A July 2019 poll by the Pew Charitable Trusts reported that roughly six in 10 respondents believed that “people on parole or probation who commit technical violations should serve either no prison time or no more than 45 days.”
The Human Rights Defense Center (HRDC), which publishes Prison Legal News and Criminal Legal News, cannot fund its operations through subscriptions and book sales alone. We rely on donations from supporters!

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)!

Where does your donation go? Here's some of what we've done in the past year:

- We won censorship lawsuits against three jails in California and jails in Virginia and North Carolina which now allow prisoners to receive books and magazines.
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- We won a resounding victory in the federal Ninth Circuit Court of Appeals over the practice of taking prisoners money and giving them fee laden debit cards.
- We published The Habeas Citebook: Prosecutorial Misconduct, by Alissa Hull and edited by Criminal Legal News Editor Richard Resch.

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**Gift Option 1**
In recognition of your support, we are providing the PLN hemp tote bag when making a donation of at least $75. Carry books and groceries stylishly and help end the war on drugs!

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**Gift Options 3**
As a thank you for your support, we are providing the entire PLN anthology of critically acclaimed books on mass imprisonment signed by editor Paul Wright! (The Celling of America, Prison Nation and Prison Profiteers) plus the PLN hemp tote bag to carry the books in when making a donation of $250 or more.
Revocation Nation (cont.)

Technical supervision revocations are not only unpopular—they are also incredibly costly for taxpayers. The Council of State Governments estimates that sending people back to prison for minor infractions costs states $2.8 billion a year.

Jake Wark, director of communications for the Executive Office of Public Safety and Security, asserted in an email comment that Massachusetts has always sent very few people back to prison for probation and parole violations long before the COVID-19 crisis.

While Wark’s assertion that the numbers are low may be true, he fails to acknowledge the proportion of technical violations to actual new arrests. His words don’t explain why people like Jonathan Best, similar to most of the people sent back to prison for minor parole infractions in Mass, are returned without committing a new crime.

A public records request to the Mass Parole Board confirmed that even during COVID 78% of people on parole who were returned to custody between March and June 2020 were sent back for technical violations, not for new crimes. Of those, 39% were eventually re-paroled, while 61% received revocations and lost their parole.

In the midst of a pandemic, sending people back to prison for minor violations could be a death sentence.

What can states like Massachusetts do instead?

I spoke with stakeholders in New York, Minnesota, and California—from incarcerated citizens to prison superintendents—who are rethinking responses to technical parole violations beyond partisan politics. In surveying those efforts, it is clear that activists face significant hurdles in changing the US parole system; at the same time, there is steady progress being made in the fight to revoke revocations.

Technical violations

Attorney Katy Naples-Mitchell said in a phone interview that “no one should have their liberty restrained based on the fact that they were trying to meet their parole conditions and life intervened.” The attorney and legal fellow at the Charles Hamilton Houston Institute of Race and Justice at Harvard Law School added, “In this country, we have the presumption of liberty.”

As the nonprofit Prison Policy Initiative reported about revocations in 2018, there is often an impulse to extract those on parole from the community “at the first sign that they are struggling.”

Gerdzer Edmee, an activist who is on parole in New York, understands this firsthand. Edmee was recovering from COVID when we spoke on the phone in March. He spoke about how the revocation process almost upended him several times.

Before he got sick, besides supporting justice initiatives at the Katal Center for Health, Equity, and Justice, Edmee worked construction. But it has been a struggle for him to follow all the supervision rules, which can include drug tests, a monthly supervision fee, warrantless searches, court costs, lie detector tests, counseling, AA and NA meetings, and court-ordered treatment. Edmee also had to obtain employment in a specified period of time and stay away from people deemed “disreputable.”

Common requirements also include regular meetings with parole officers and prohibitions from leaving the state. Revoked, the Human Rights Watch-ACLU report, notes, “Nationwide people under supervision must comply with an average of 10 to 20 conditions a day.”

“If they were to remove all parole violators from prison,” Edmee said, “they would have to close prisons.”

...
more likely to be on parole, but are also more likely to be sent back to prison for parole violations. Schiraldi and Bradner write that in the US parole system, "Black people are 4.15 times more likely to be under parole supervision than white people, and Latinx people are 15 percent more likely than white people to be under parole supervision." Moreover, Blacks are 50% more likely than whites to have their paroles revoked for technical violations.

Even for those who don’t end up back in jail, the cost of getting swept up for technical violations is high. "[A] weekend stay in jail can be enough to lose a job, educational opportunity, home, car, or custody of children," Schiraldi and Bradner point out.

Best spent three months behind bars only to discover that his parole would not be revoked. Meanwhile, he said, "I lost everything but my job." Best has struggled since he was released in 2012. This year, working two jobs and helping two family members who contracted COVID-19, has been especially difficult. In late August, he buried his aunt.

By any measure, COVID-19 has accelerated the potential toll of technical violations. In April, a group of 54 community supervision executives from across the country emphasized the need for states to "suspend or severely limit technical violations for the duration of the coronavirus crisis." They noted: "With 4.5 million people on probation and parole nationwide ... too many people are placed under supervision who pose little public safety risk and are supervised for excessive supervision periods beyond what is indicated by best practices."

**Less is more**

In a July 16 press release, a coalition of activist organizations blasted New York Gov. Andrew Cuomo for his failure to live up to his promise to decarcerate. The criticism stemmed from a prior acknowledgement that those incurring technical violations should not be locked up during a pandemic, which came with a promise to release 1,100 individuals. In practice, Cuomo released 791 prisoners, including 379 from New York City; two months later, admission trends data showed 300 new admits from NYC, in a sense erasing any impact.

There have also been relative successes in the Empire State. A coalition of activist groups—Katal, A Little Piece of Light, Unchained, and others—effectively educated Cuomo about the crisis of technical violations. New York sends more people back to prison for technical parole violations than any state besides Illinois. According to the Bureau of Justice Statistics, on Jan 1, 2018, 44,572 people there were serving state parole sentences. That year, there were also 5,783 revocations for technical violations in New York, which, according to Vincent Schiraldi of the Columbia School of Social Work, cost the state more than $600 million.

Schiraldi, who also co-directs the Justice Lab at Columbia and was former commissioner of New York City Department of Probation, has written hundreds of articles on the subject of supervision, but he gave credit to grassroots organizers. He said the heavy lifting in the coalition has come from impacted community members, both inside and outside prison. In one example, Emily Singletary and her incarcerated husband, Derek Singletary, founded the activist group Unchained in 2018. In an interview, they said the coalition pressured Cuomo through a variety of strategies, such as holding rallies and publishing newspaper op-eds.

The New York coalition also backed a statewide campaign to get a groundbreaking parole violations bill up and running in New York. Known as #LessIsMoreNY (i.e., less mass supervision means more safety and justice), the legislation was developed by coalition members on parole, along with currently incarcerated people and their family members, Katal, Unchained, the Justice Lab at Columbia, and the Legal Aid Society in NYC.

"I try to get people involved, to galvanize guys, the energy and anger we have, and bring it to the right people." Speaking from Elmira Correctional Facility in New York, Derek Singletary said in a phone interview that he wrote parts of the bill in his cell and is proud that he and his wife encouraged people from inside as well as outside prison to participate in the process. Unchained, Emily said, includes about 100 prisoners, and several hundred formerly incarcerated people and their families.

In terms of parole, the Less Is More legislation would restrict the use of incarceration for all technical violations, bolster due process with a hearing procedure that is both fair and speedy, and provide "earned time credits" to reduce the number of days people have to spend on supervision. More than 200 individuals and organizations have signed on to support the legislation; as of July 17, the list included: NYC Mayor Bill de Blasio; Karol Mason, former US assistant attorney general and president of John Jay College; Former Chief Justice of New York Jonathan Lippman; as well as police, district attorneys, legislators, sheriffs, commissioners of probation, parole and corrections; and the New York City Council.

Before New York’s 2020 legislative session ended, the coalition’s outreach was nonstop—articles, rallies, social media campaigns. Before pandemic restrictions set in, they brought impacted people to meet with legislators, all the while distributing fact sheets and disseminating information to the families of prisoners.

The Less Is More bill has yet to pass; it will come up in the next two-year session. In the meantime, those who are actively pushing for change describe the
progress so far—influential endorsements, media attention, attitude adjustment about technical violations—to be unprecedented for an issue rarely addressed in the public square.

The Minnesota Paradox

On July 29, Kelly Lyn Mitchell, executive director of the Robina Institute of Criminal Law and Criminal Justice, moderated a webinar on state racial disparities in the criminal legal system. In the presentation, she referred to a “paradox” named for the city where George Floyd was killed by police in May, setting off nationwide protests that continue in various cities today. Minnesota, Mitchell said, has “one of highest standards of living in this country,” yet is home to some of the “largest racial disparities in the country.”

Research shows that while white people make up 84% of Minnesota’s population, they comprise only 46% of the adult prison population. Black people are only 6% of the population, but make up 36% of the state’s prison population.

Minnesota has been widely criticized for racist policing and overcriminalization of people of color, particularly those who struggle with substance use and mental health issues. In 2019, the Council of State Governments found that it was one of 20 states with “more than half of [prison] admissions … due to supervision violations.”

According to the Incarcerated Workers Organizing Committee, Indigenous peoples and Blacks fared the worst; a fact sheet for IWOC’s campaign to end technical violations reported, “African Americans are twice and Native Americans three times as likely to be violated each month than whites.” In an interview, IWOC member David Boehnke said that systemic racism has historically impacted the state and characterized how it deals with prisoners and returns to prison.

In a phone conversation, Boehnke said that two and a half years ago, prisoners, formerly incarcerated people, and their families began a campaign called No New Crime, No New Time. As part of the effort, they initiated a series of conversations with the Department of Corrections with the stated goal of ending parole revocations.

Their campaign got the attention of Minnesota’s Democratic Gov. Tim Walz. In an October 2019 Time magazine article, Waltz (along with Missouri’s Republican Gov. Mike Parson) called out his state for sending people to prison for parole and probation technical violations. They called it “alarming” that on any given day in this country, “95,000 people are incarcerated as a result of technical violations.”

Though it is too early to quantify the efficacy of these initiatives in terms of how many people were released, it does seem that the Decarcerate Minnesota coalition, which encompasses the aforementioned prisoner rights advocates and others, has already had a tangible impact. Beyond making headlines by meeting with top officials and expressing their concerns and ideas, their work is reflected in the hiring of Curtis Shanklin, Minnesota’s new deputy commissioner of the Corrections Department’s community services division. A Black man with an advocacy background, Shanklin said in a phone interview and by email that upon getting the appointment, he immediately began working toward reducing revocations.

“We stopped thinking about supervision as accountability and enforcement and started thinking about it more so as supportive services,” Shanklin said. Along with retraining parole officers to act more like “coaches and mentors” than disciplinarians, he described how the department is working to keep people...
in the community. 

Among other innovative measures, Shanklin’s department instituted a quick screen, so those accused of parole violations are able to find out if their parole will be revoked in less than two weeks. They also added many graduated sanctions in lieu of incarceration.

“We restructure rather than revoke,” Shanklin said. Identifying one sign of success in an email, the deputy commissioner wrote: “Since the beginning of the COVID-19 outbreak in March, the downward trend in release violator admissions to prison has accelerated rapidly. The number of release violator admissions from April-June 2020 (163) is about one-fourth the number from the same period in 2019 (613) and one-fifth the number from the April-June period in 2017 (760).”

Boehnke applauds the changes but said more work needs to be done: “We still haven’t seen accountability for parole officers making bad decisions, i.e. sending people to prison for no reason. They have an incredible amount of power over people’s lives.”

Jeremiah Sims, who has been a parole officer in the greater Minneapolis-St. Paul area for 13 years, works under Shanklin. Along with a team of three others, he supervises primarily Native Americans who are considered high-risk to return to prison, and who make up 10% of Minnesota’s prison population. In a phone interview, Sims said his goal is to consider the “totality of circumstances to see if there are community alternatives.”

“If someone is drinking, we want to figure out why they are consuming alcohol, where they are living, their stress level, and we want to connect with the individual,” Sims said. “We rarely send them back to prison if they are not posing a community safety risk.”

California realignment

California Gov. Gavin Newsom has said publicly that a “core value” of his administration is to shrink the footprint of prisons. Newsom gained attention earlier this year when he called for shortening parole to a maximum of two years, down from five years for felons. In response to the coronavirus pandemic, the California Department of Corrections and Rehabilitation (CDCR) released 10,000 prisoners considered low-risk. CDCR also promised to let out 8,000 other prisoners by the end of August, many with less than six months left on their sentence. Medically vulnerable prisoners were to be evaluated on a case-by-case basis to determine if they could be released. This would bring the total to 18,000 prisoners released.

Still, advocates say that much more needs to be done to release people considering the vast size of the California system. As of Aug 19, there were 102,282 state prisoners in custody. According to the CDCR, as of Aug 27, there were 10,210 confirmed cases of COVID-19 among state prisoners.

David Muhammed, who heads the nonprofit National Institute for Criminal Justice Reform (NICJR), said in an interview that Newsom is not the first California governor entreated to reduce prison populations. In 2011, under then-Gov. Jerry Brown, California was forced by the US Supreme Court into “realignment” to reduce its dangerously overcrowded prison population. To comply, the state transferred 30,000 people convicted of nonviolent crimes from state prisons to county jails and changed many policies.

One policy shift that resulted from the realignment was that people with technical violations (except those who had originally been given life sentences) would no longer be sent to state prisons, but instead would serve their revocations, up to a maximum of 180 days, in county jails. As a result, Muhammed said, fewer people who have violated parole with technical violations have therefore been sent to prisons. CSG’s report notes that of the total prison population, only .05% were reincarcerated for technicals.

Critics, however, say the realignment merely shifted the problem of mass incarceration to jails—a problem that has also been compounded by the coronavirus pandemic.

On March 27, more than 70 California activist organizations and individuals wrote to Gov. Newsom, CDCR Secretary Ralph Díaz, and other public officials, stressing the urgency of changing a number of supervision practices in light of the pandemic. It is not clear if the CDCR changed practices because of their concerns, but as in many other states, parole office visits have since been held virtually, with some employment requirements lessened.

Modest COVID-related accommodations aside, activists are seeking permanent practices that could keep people out of jail for technical violations. Sandra Johnson, who has been off parole for three years, said in a conversation how devastating technical parole violations have been to her life.

“I was being in the wrong area, associating with the wrong people, they told me,” said Johnson, who was in and out of Chowchilla Prison for 15 years.”Just because they saw me in a certain area, they said I was in a gang.” At one point, Johnson recalled, she was told she couldn’t be around her sister, who also had a record.

The Columbia Justice Lab’s report on racial inequities in supervision notes: “An order to stay away from other people who have a felony conviction may seem reasonable at face value.” But the report’s authors argue that it is unfair to force people, particularly people of color who are overrepresented on parole, to avoid those who can provide support, housing, stability, or employment connections.

**Hope ahead**

Now free in California, Johnson has been going back into Chowchilla to teach prisoners how to avoid parole violations after release. As a program coordinator with Root and Rebound, alongside an attorney who is also her supervisor, she taught in-person classes throughout 2019 and correspondence classes in the months since the coronavirus outbreak.

“We create a blueprint for them,” Johnson said of the prisoners she helps. The attorney gives legal advice, and Johnson tells her story. She added, “They say, Sandra is a rock star because she has walked our journey. They need to see someone come back in who has made it.”

Root and Rebound is also working with other grassroots organizations—#Cut50, NICJR, others—to provide incentives for people to follow the rules. Together, the groups backed a bill that would reduce returns to prison and time on parole, and shift parole from punitive-based to goal-oriented. By promoting educational, vocational, and rehabilitative programs, the legislation aims to provide support; under a section titled “Incentive-Based Community Supervision,” the bill offers “fifteen days of credit per month for remaining free of any new arrests or parole violations.” As of this writing, the bill made it to the governor’s desk, where it has until the end of September to get signed into law. Activists are hopeful.

In Minnesota, some advocates contend that parole reform efforts are compromised on account of the lack of representative diversity among those tapped to advance change from the inside—a significant consideration for anyone involved in similar efforts anywhere. Sims acknowledges that his team, which supervises Native Americans on parole, is all
Parole, Shanklin said, “it’s important to ask, May. “For the approximately 7,200 people on with staff of color after Floyd’s murder in concerns, and noted that he opened up a dialogue at 10 am, and you roll in at 11, you could get if your PO tells you to come in the morning there when you get there,” Moccasin said. “But to have no clocks. “In other words, you get days.” He also spoke of how it’s commonplace said. “For example, our funerals take three edge of how the culture functions,” Moccasin Paul, “each one … a nation within itself.” “There needs to be more working knowl-
dge of how the culture functions,” Moccasin said. “For example, our funerals take three days.” He also spoke of how it’s commonplace to have no clocks. “In other words, you get there when you get there,” Moccasin said.”But if your PO tells you to come in the morning at 10 am, and you roll in at 11, you could get a technical and be going back to jail.” Shanklin agreed with Moccasin’s con-
cerns, and noted that he opened up a dialogue with staff of color after Floyd’s murder in May. “For the approximately 7,200 people on parole,” Shanklin said, “it’s important to ask, How can we be intentional around programming that is both gender and culturally specific?” Finding potential solutions elsewhere, the IWOC began working on new legislation, borrowing the “Less Is More” rallying cry from New York. Boehnke said the bill will be ready for the next legislative session, and “provides for a stepdown on probation and parole so people can get off supervision if they demon-
strate good behavior.” Regarding the big picture, Prison Policy Initiative gives states across the country fail-
ging grades for their inability to decarcerate in large numbers since the pandemic struck. Still, in response to ongoing grassroots campaigns and more immediate calls for decarceration amidst coronavirus concerns, several states are addressing the problem of technical parole violations—in March, the Colorado Department of Corrections temporarily suspended arrests for low level technical violations; Wisconsin did the same, while Ohio and Alabama, among others, ordered some releases of people detained for minor parole infractions.

“We have seen some significant changes partly because of our conversations and par-
tially due to COVID-19,” Boehnke said. The IWOC member emphasized the need for certain practices to be codified into law.

“We don’t want changes to be dependent on the good will of an organization.”

This week Jonathan Best will listen to AA meetings online, and he may be visited by his PO officer for a breathalyzer test. He will go to Boston for his job at a pizza place and to Upton where he works outside on oil tanks. He will be with his family.

Jean Trounstine is a writer, activist, and professor whose latest book is Boy With a Knife: A Story of Murder, Remorse, and a Prisoner’s Fight for Justice. She is on the steering committee of the Coalition for Effective Public Safety.

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sponses to social problems.

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Is someone skimming money or otherwise charging you and your loved ones high fees to deposit money into your account?

*Criminal Legal News* (PLN) is collecting information about the ways that family members of incarcerated people get cheated by the high cost of sending money to fund inmate accounts.

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- Fees charged to submit payment for parole supervision, etc.

This effort is part of the Human Rights Defense Center’s *Stop Prison Profiteering* campaign, aimed at exposing business practices that result in money being diverted away from the friends and family members of prisoners.

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Please direct all related correspondence to kmoses@humanrightsdefensecenter.org

Call (561) 360-2523, or send mail to PLN

Prison Legal News
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Lake Worth Beach, FL 33460

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Federal Habeas Corpus: Time Limits for Filing

by Dale Chappell

In my first column in this series on federal habeas corpus for state and federal prisoners, we’ll go over time limits for filing in federal court and how those time limits are calculated. The following information is adapted from my book WinningCites: Section 2255, A Handbook for Prisoners and Lawyers.

AEDPA and Affirmative Defenses

There is a one-year time limit to file a federal habeas corpus petition under 28 U.S.C. § 2254 (for state prisoners) or a motion under 28 U.S.C. § 2255 (for federal prisoners). Thanks to the Antiterrorism and Effective Death Penalty Act (“AEDPA”) signed into law on April 24, 1996, this time limit applies to prisoners filing for habeas relief in federal court. Don’t let the words “antiterrorism” and “death penalty” confuse you — Congress meant the harsh one-year restriction to apply to all prisoners. Today, courts have gotten away from the highly political aspect of the AEDPA speeding up the death penalty and stopping terrorism and now say that the AEDPA’s purpose is to promote “finality” of convictions and sentences.

The time limit, however, is not an absolute bar. Instead, it’s an “affirmative defense” that the government (a general term for the federal or state prosecutor) can ignore or purposely waive. As an affirmative defense, it’s the government’s job to address whether your habeas petition or motion was filed on time. You don’t have to argue up front that your motion is on-time. But in reality, if your filing is late, the government will surely raise such an easy defense. Even if it doesn’t, the court itself can raise it — if it gives you the chance to argue why your filing isn’t late. So, be ready. The only time the court cannot raise timeliness is if the government expressly waives it. Wood v. Milyard, 132 S. Ct. 1826 (2012); Day v. McDonough, 547 U.S. 198 (2006).

Calculating the One-Year Limit

The one-year AEDPA time limit applies to first-in-time motions and petitions filed in district court, as well as second or successive (“SOS”) applications filed in the court of appeals. Dodd v. United States, 545 U.S. 353 (2005). There are four events that start the AEDPA clock. These aren’t merely “tolling” provisions that put the clock on hold. Rather, these triggers restart the clock. You get a full year to file your motion or petition from the date of the event.”“Tolling” is the court pausing the AEDPA clock for certain reasons unrelated to the four events provided by law (see below).

One thing to know is that being late even by one day can be fatal to your habeas petition or motion. U.S. v. Marcella, 212 F.3d 1005 (7th Cir. 2000) (“foreclosing litigants from bringing their claim because they missed the filing deadline by one day may seem harsh, but courts have to draw the line somewhere”). Being pro se (without a lawyer) doesn’t excuse you from complying with the time limits.

Typically, the one-year clock expires on the anniversary date of the event triggering the starting of the clock. Say your judgment became “final” on September 25, 2020, your one-year window under the first provision (noted below) would expire on September 26, 2021. Under Federal Rule of Civil Procedure 6(a), you don’t count the first day of the event (the day judgment was entered), and since September 26, 2021, is a Sunday, your deadline bumps up to September 27, the next business day, under Rule 6.

If you’re filing pro se from prison, your petition or motion is considered “filed” and the clock stops when you hand your papers to prison staff for mailing. This is called the “prison mailbox rule,” recognized by the U.S. Supreme Court in Hill v. Lockhart, 487 U.S. 266 (1988).

The general consensus is that a court may not extend the time to file your habeas petition or motion. You have to file something to give the court authority to grant an extension, such as the application stating your claims (you can file a memorandum in support of the claims later without penalty). The reasoning is that because a habeas case is a new “independent civil suit,” the court doesn’t have a “case or controversy,” giving it jurisdiction to extend the time until something is filed to open the case. See Swickbrow v. United States, 565 Fed. Appx. 840 (11th Cir. 2014); but see United States v. Thomas, 713 F.3d 165 (3d Cir. 2013).

One Year from Judgment Becoming Final

The first trigger that starts the AEDPA clock is the date on which your judgment becomes final. [Federal prisoners: § 2255(f)(1); state prisoners: § 2244(d)(1)(A)] You get one year from that date. This is by far the most common deadline prisoners face in habeas cases. Nearly all ineffective assistance of counsel (“IAC”) claims, the most common habeas claims, would fall under this first trigger for the AEDPA clock.

But when is a judgment “final”? In Gonzalez v. Thaler, 132 S. Ct. 641 (2012), the Supreme Court settled the question and held that a judgment is final when all options to appeal have expired or all appeals have been denied. This is true even if you waived your right to appeal in a plea agreement, because you can still file an appeal even if it gets dismissed under the waiver.

One Year from the Date an Impediment Is Removed

Under a rarer and less understood provision, you have one year to file from the date an unconstitutional “impediment” put in place by the government is removed. [Federal prisoners: § 2255(f)(2); state prisoners: § 2244(d)(1)(B)] There are two requirements to trigger this starting point. First, the impediment must be a true obstacle and not merely something making it more difficult to file your petition or motion. Second, the obstacle must be unconstitutional or unlawful under federal standards.

For example, say the government withholds favorable evidence from you in violation of Brady v. Maryland, 373 U.S. 83 (1963), which held that this is a violation of the U.S. Constitution’s Due Process Clause. Some courts have held that the date you discover that this evidence was withheld, the clock restarts under this second provision. United States v. Cottage, 307 F.3d 494 (6th Cir. 2002). Brady claims have also been recognized under the fourth provision noted below. Asserting both provisions may be a good idea.

One Year From a Retroactive Supreme Court Decision

The third provision allows the AEDPA clock to restart from the date of a retroactive Supreme Court decision. [Federal prisoners: § 2255(f)(3); state prisoners § 2244(d)(1)(C)] What’s interesting is that any court can make a Supreme Court decision retroactive for this provision, and it doesn’t have to be the Supreme Court itself — unlike the requirement for filing a SOS petition or motion, which does say that the Supreme Court must make its decision retroactive (which rarely ever happens).

It’s also different from the SOS realm be-
cause the high court’s ruling doesn’t have to be a constitutional decision. This means a Supreme Court decision interpreting a statute applies retroactively under this provision because statutory interpretation cases always apply retroactively, since the Court’s interpretation is what the statute has always meant. United States v. Peter, 310 F.3d 709 (11th Cir. 2002).

One Year From the Date of Newly Discovered Facts

The fourth provision restarting the one-year clock is “the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.” [Federal prisoners: § 2255(f)(4); state prisoners: § 2244(d)(1)(D)] The provision for state prisoners may seem similar, and courts regularly conflate the two provisions. But the slightly different language matters.

State prisoners must show discovery of the “factual predicate” for the claim. Federal prisoners only have to show discovery of “facts supporting the claim.” A “predicate” is the basis for a claim, meaning the claim didn’t exist before the discovery. But the claim could have existed for federal prisoners, yet the clock doesn’t start until the facts are discovered to support the claim. It may seem like a minor difference, but when Congress uses different language for similar statutes, the Supreme Court says this is important. Duncan v. Walker, 533 U.S. 167 (2001).

Both federal and state prisoners must show due diligence. This doesn’t mean “maximum feasible diligence” but only “reasonable diligence.” Holland v. Florida, 560 U.S. 631 (2010). In other words, you don’t have to exhaust every avenue to meet this standard.

The Supreme Court’s instructive case on this fourth provision is Johnson v. United States, 544 U.S. 295 (2005), where the Court recognized a vacated prior conviction as a new “fact” to restart the AEDPA clock.

Equitable tolling and Exceptions to AEDPA

When none of the provisions apply because your petition or motion is filed beyond these time limits, a court may allow “equitable tolling” of the one-year clock if (1) you’ve been pursuing your rights diligently and (2) some extraordinary circumstance stood in your way and prevented timely filing. Holland.

A good example of equitable tolling applied in a habeas case is Socha v. Boughton, 763 F.3d 674 (7th Cir. 2014). There, a public defender refused to turn over a prisoner’s case file so that he could file a habeas petition in federal court. The court rejected the government’s argument that the prisoner should have pieced together a petition even without the case file in order to meet the one-year deadline. The court said that this would result in courts rejecting numerous petitions for being inadequate. “Sometimes it takes longer to review the possibilities, discard the least promising, and write a concise pleading than it would to write a kitchen-sink petition,” the court said.

Also note that tolling applies under § 2244(d)(2) while your state postconviction case is pending before you file your federal petition. This is a different tolling, and you don’t have to show the Holland criteria; tolling is automatic as long as your case is pending in state court (including any appeals).

There are also exceptions to the AEDPA’s time limit. The Supreme Court addressed one such exception in McQuiggin v. Perkins, 133 S. Ct. 1924 (2013), holding that actual innocence is an “exception” to the AEDPA’s time limit. The Court reasoned that habeas corpus is designed to prevent a miscarriage

by Douglas Ankney

Bucking the trend among the majority of federal circuits, the U.S. Court of Appeals for the First Circuit announced that the residual clause of U.S. Sentencing Guidelines (“U.S.S.G.” or “Guidelines”) § 4B1.2(a)(2) – when applied prior to United States v. Booker, 543 U.S. 220 (2005) – is unconstitutionally vague pursuant to Johnson v. United States, 576 U.S. 591 (2015), and a challenge to a sentence imposed under the residual clause may be collaterally raised via 28 U.S.C. § 2255(f)(3).

In 1997, Anthony M. Shea was convicted in the U.S. District Court for the District of New Hampshire, inter alia, of armed attempted bank robbery under 18 U.S.C. § 2113(a) and (d) (“Count 1”) and of using a firearm during a crime of violence [the attempted armed bank robbery] under 18 U.S.C. § 924(c) (“Count 2”). But the district court also classified Shea as a “Career Offender” under U.S.S.G. § 4B1.2(2)’s residual clause based on Shea’s prior violent felony convictions for federal armed bank robbery and assault and battery on a police officer in Massachusetts.

Both U.S.S.G. § 4B1.2(a)(2) and the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B) (“ACCA”), defined “violent felony” as a felony offense that “(1) has as an element of the use, attempted use, or threatened use of physical force against the person of another [the “elements clause”], or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [the “enumerated crimes clause”], or otherwise involves conduct that presents a serious potential risk of physical injury to another [the “residual clause”].”

Application of U.S.S.G. § 4B1.2(a)(2) increased Shea’s Guidelines range from 132-162 months to 262-327 months in prison. Because there were no grounds for departure, the judge sentenced Shea to 327 months on Count 1 and a mandatory consecutive term of 20 years on Count 2 for an aggregate term of 567 months in prison. The judgment was affirmed on appeal in 1998.

Then, shortly after Johnson was decided in 2015, Shea filed a § 2255 petition, alleging his conviction under the residual clause of § 924(c) and his enhanced sentence under the residual clause of U.S.S.G. § 4B1.2(a)(2) were unlawful because those clauses are unconstitutionally vague based on the reasoning of Johnson. Shea argued that even though a § 2255 petition must normally be filed within one year of the date a conviction became final, § 2255(f)(3) restarts the one-year clock on “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.”

The district court denied the petition, reasoning that the new rule in Johnson applied neither to § 924(c) nor to the pre-Booker Sentencing Guidelines. Consequently, the restarting of the clock under § 2255(f)(3) was unavailable to Shea, and thus his petition was untimely. Shea then appealed to the First Circuit.

While the case was pending on appeal, SCOTUS held that § 924(c)’s residual clause is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319 (2019). The parties agreed that, as to this claim, the petition was timely filed and should be remanded to the district court to determine if the conviction under Count 2 could survive under § 924(c)’s elements clause.

Regarding Shea’s challenge to the residual clause of U.S.S.G. § 4B1.2(a)(2), the Court observed that in 2005 SCOTUS decided Booker wherein the justices reasoned that making application of the Guidelines mandatory ran afoul of Apprendi v. New Jersey, 530 U.S. 466 (2000). That is, the Guidelines required judges to make a determination of facts that resulted in mandatory imposition of increased minimum and maximum sentences, and this violates a defendant’s right to have a jury make those factual determinations per Apprendi. Booker explained that if the Guidelines were advisory only then they would not run afoul of Apprendi.

Then in 2015, SCOTUS held in Johnson that the residual clause of the ACCA is unconstitutionally vague. The following year, SCOTUS held in Welch v. United States, 136 S. Ct. 1257 (2016), that Johnson applies retroactively.
Because the residual clauses of U.S.S.G. § 4B1.2(a)(2) and of the ACCA are identical, all federal circuits except one have ruled that U.S.S.G. § 4B1.2(a)(2) is also constitutionally vague. United States v. Frates, 896 F.3d 93 (1st Cir. 2018). But SCOTUS then overruled those decisions, holding that the Guidelines are not subject to vagueness challenges because they are now advisory only. Beckles v. United States, 137 S. Ct. 886 (2017). Vagueness challenges may be made to statutes and rules that carry the force of law only when those statutes and rules define elements of crimes or fix sentences. Johnson. Because the Guidelines are now advisory only, they do not fix sentences. Beckles.

However, Beckles left unanswered the question of whether the Guidelines could be challenged based on the rule announced in Johnson where sentences were imposed pre-Booker. The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits all held that Johnson did not restart the one-year clock for challenges to pre-Booker sentences. (See opinion for cases cited.) Generally, these holdings were based on the premise that Johnson didn’t apply to the Guidelines and to grant relief challenging those pre-Booker Guidelines would require a district court to craft a new right not recognized in Johnson.

But the First Circuit rejected that premise. A case announces a new rule if it breaks new ground or imposes a new obligation on the government, i.e., if the result is not dictated by precedent. Chaidez v. United States, 568 U.S. 342 (2013). However, a case does not announce a new rule when it merely applies a governing principle from a prior decision to a different set of facts. Id.

In Johnson, SCOTUS addressed the residual language in the ACCA defining a violent felony as “any felony that presents a serious potential risk of physical injury to another” requiring “a court to picture the kind of conduct that the crime involves ‘in the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.” Such a framework left “grave uncertainty” on “how to estimate the risk posed by a crime and how much risk it takes for a crime to qualify as a violent felony.” Johnson. Because the residual language failed to clearly inform a defendant of the proscribed conduct and because it was open to arbitrary interpretation by judges, it is unconstitutionally vague. Id.

The First Circuit concluded that the principle behind the rule in Johnson applies to pre-Booker sentences when the Guidelines were mandatory and there were no grounds warranting a departure from those Guidelines. Because the mandatory Guidelines fixed the range of minimum and mandatory sentences, a judge could impose (and in Shea’s case increased the minimum and maximum range) the residual clause of U.S.S.G. § 4B1.2(a)(2) violates the rule announced in Johnson.

As such, Shea’s challenge was timely filed under § 2255(f)(3), the Court concluded. The Court instructed that the burden was on Shea to prove by a preponderance of the evidence that his enhanced sentence was imposed under the residual clause of the Guideline and not under the elements clause.

Accordingly, the Court vacated the judgment and remanded for further proceedings consistent with its opinion. See: Shea v. United States, 976 F.3d 63 (1st Cir. 2020).
Why Coroners Often Blame Police Killings on a Made-Up Medical Condition
An interview with Harvard health researcher Justin Feldman.
by Samantha Michaels, Mother Jones

A day after police officer Derek Chauvin pressed his knee against George Floyd’s neck in Minneapolis, killing him, a county medical examiner began an autopsy. His preliminary findings seemed to conflict with what people had seen in the viral video footage of the May encounter: Though the video showed Floyd repeatedly telling the officer he couldn’t breathe, the examiner wrote that there were no signs Floyd had suffocated. Floyd’s death, the examiner added, was likely due to a combination of his underlying medical conditions, being restrained, and “potential intoxicants” in his system.

It wasn’t the first time a medical examiner or coroner shied away from implicating the police following a high-profile killing. After officers in Colorado restrained 23-year-old Elijah McClain and injected him with ketamine last year, a medical examiner’s office said it couldn’t determine whether McClain died from an accident, natural causes, or a homicide. “The decedent was violently struggling with officers who were attempting to restrain him,” the coroner’s report stated. It added that medics believed McClain had “excited delirium,” a controversial diagnosis that is sometimes applied to people whom police believe are acting manic because of cocaine or other stimulants. (McClain had no history of stimulant drug use, and no such drugs were detected in his body when he was admitted to the hospital, the coroner report noted.) “It is unclear if the officer’s action contributed as well,” the report concluded.

In September, prosecutors in Tucson, Arizona, announced they would not charge police officers in the April death of a 27-year-old man they had restrained naked, handcuffed, and face down on the ground with a spit hood over his head, after a medical examiner’s office found cocaine in his system. The man, Carlos Ingram Lopez, said he couldn’t breathe and repeatedly begged for water, but the medical examiner’s office couldn’t determine whether the officers’ use of restraint had killed him.

In Floyd’s case in Minneapolis, the medical examiner ultimately published the full autopsy report and ruled the death a homicide in June, but only after Floyd’s family paid independent investigators to conduct a second autopsy that concluded asphyxia (suffocation) occurred. And even then, the examiner blamed heart failure, not suffocation, for his death, and noted that fentanyl intoxication and heart disease may have been contributing factors.

Why are coroners often reluctant to implicate police in killings? To find out, I turned to Justin Feldman, a researcher at Harvard’s FXB Center for Health & Human Rights who studies police violence and medical examiners. More often than you might expect, he explained, politicians and police pressure medical examiners to change people’s death certificates, though there’s no public evidence suggesting that happened in the cases of Floyd, McClain, or Lopez.

Coroners also make lots of mistakes—in more than half of cases Feldman studied, they didn’t classify police killings as police killings. And certain medical researchers, along with the company Axon, which produces Tasers, have collectively made it easier for investigators to blame deaths on drugs instead of police force.

Feldman shared with me some little-known truths about medical examiners and revealed simple solutions to fix these problems.

How common is it for a medical examiner to blame drugs after somebody is killed by police?
Specifically when someone dies in police custody but isn’t shot, it’s very common. It’s often attributed to either a drug overdose or this contested medical condition called excited delirium. Sometimes the argument is made that this person would have died anyway.

Can you tell me more about excited delirium?
Excited delirium is a term that a forensic pathologist named Charles Wetli came up with in 1985. The theory behind excited delirium is that someone who uses cocaine or other stimulants chronically over time develops some condition involving the brain that leads them to a state of mania, where they’re violent, they’re not responding to verbal cues, not responding to pain. And in many formulations of people who have described this condition, they say that it in itself is fatal—that the people who are experiencing delirium would have died anyway, even without police restraints or Tasers or chokeholds, or ketamine, which is increasingly being used to treat excited delirium. And they argue there’s some kind of knowable, physiological explanation, but they haven’t actually been able to describe it.

This is a condition that’s not accepted in the International Classification of Diseases, which is the international diagnostic list of all known conditions. It’s not accepted in the Diagnostic and Statistical Manual, which is the psychiatric diagnoses list in the US. But it is something that many medical examiners and coroners use to describe these deaths.

You’ve written that the company Taser, now called Axon, made it easier for medical examiners to blame deaths on excited delirium, and harder to suggest they were caused by a police officer’s use of force or restraint.

I wouldn’t pin it all on Taser/Axon. It starts really with this research by Wetli and his colleagues. Then in the early 1990s, there was a series of deaths in police custody in San Diego, and the San Diego Police Department convened a commission of medical researchers and law enforcement experts to review deaths in custody throughout the United States. They popularized the idea that restraint and positional asphyxia are not fatal as such, but either excited delirium kills them, or it makes them more vulnerable to the effects of restraint or positional asphyxia.

Then in the 1990s, Tasers got a lot more popular in law enforcement. Taser has essentially a product defense unit, because Taser gets sued, particularly when people die after being tased. So [the company’s] product defense strategy is to claim excited delirium was the actual cause of death, and it was just a coincidence that [the victim] was tased before death. They have funded research into excited delirium, and funded the same researchers that cast doubt on the existence of positional asphyxia. They pay expert witnesses to testify in cases involving Taser. In some jurisdictions, you can have a coroner’s cause-of-death determination changed if you challenge it in court, and [Taser’s] done that.

And this is still happening now? It wasn’t just in the ’90s?
Not only is it still happening—it’s being spread to other countries. There are people who have accepted considerable funding from
Axon who have gone on to countries like the UK, Australia, and Canada and argued that excited delirium is an explanation for deaths in police custody, and it’s sort of taken off in those places as well.

Note: Axon did not respond to a request for comment.

Are medical examiners not aware that legitimate medical organizations say excited delirium is not really a justification?

A lot of medical research in general, and especially forensic science, is often based on faulty assumptions, and there’s some serious limitations. It’s not that the World Health Organization or the American Psychiatric Association have come out and said, “Hey, this isn’t a thing, or this is something you should be really critical of.” And even if they did, there are very few forensic pathologists or medical examiners in the US, and they have a lot of autonomy and a lot of power. Because not a whole lot of people want to do that job. And there’s not a lot of people certified to do that job. And they kind of do what they want to do.

I would attribute some of their openness to accepting excited delirium to their close relationship with police and often not wanting to implicate police in deaths. I think some of it has to do with genuine uncertainties that arise when you conduct a negative autopsy, where there’s no clear physical signs for the cause of death. In the absence of body cam videos and cellphone videos, usually the only kind of evidence as to what happened was from police themselves. So it’s sort of a convenient explanation that arises in genuine settings of uncertainty, but also the relationship of power between police and medical examiners. And medical examiners are sometimes retaliated against or pressured by police or other government officials to change causes of deaths.

What exactly is their relationship with police?

There are two kinds of death investigators in the US: medical examiners and coroners. Medical examiners are physicians. They are appointed. Coroners in general don’t have much medical training. They’re not physicians, and they are usually elected at the county level.

So they work closely with police in their day-to-day job, which involves investigating things like homicide, suicide, and drug overdose, and they are reliant on a close working relationship with police. They don’t want to make the relationship uncomfortable.

There have been cases where there are egregious conflicts of interest, especially in California, where in some counties, the coroner is the sheriff. It’s the same person. There’s this built-in conflict of interest through the relationship. There’s a position statement by the National Association of Medical Examiners that says, when investigating a death in police custody, bring in someone from a different jurisdiction to investigate the death. But in practice that rarely happens.

You mentioned that sometimes medical examiners or coroners are pressured by politicians. Can you tell me more?

About a decade ago, the National Association of Medical Examiners, which is a professional association for forensic pathologists and medical examiners, surveyed their membership. And about 1 in 5 reported being pressured by a public official, which included politicians and also police, to change cause-of-death determinations or manner-of-death determinations. So, manner of death would be: Is it a suicide, homicide, etc.? And then a good proportion of those who reported experiencing pressure also said they were retaliated against if they refused to change the cause or manner of death.

They may be pressured by police to change something that’s accidental to “homicide,” so that it provides stronger evidence in a murder case. And there’s also a lot of politics around whether someone is classified as dying from suicide, because often families don’t want the cause of death, because it’s stigmatized, to be reported as suicide. So there’s a lot going on in terms of conflicts and controversy over how cause and manner of death are classified.

[In the case of George Floyd], I don’t know if there’s any evidence of direct political pressure on that medical examiner. I think that initial report really points to how the examination of the body itself doesn’t necessarily tell the story. And what the medical examiner in Hennepin County was doing was examining all the possible contributing factors except for the police. That was absent from the [preliminary] description, very notably.

Note: A spokesperson for the Hennepin County medical examiner’s office declined to comment to Mother Jones about Floyd’s case but stated that the office “is an independent entity and does not work for the County Attorney or any law enforcement agency.”

You’ve also reported that medical examiners often make mistakes when they’re classifying deaths. How often does that happen?

Yeah. There’s a diagnostic code for when someone is killed by police under the International Classification of Diseases, and it’s called “legal intervention.” When someone’s killed by police, their death certificate is supposed to say that they were killed by police. And then the proper code is applied to the death certificate. But my research has shown that in over 50 percent of cases, police killings are not classified as police killings in the mortality data: They’re instead usually classified as homicides, as if any civilian killed another civilian. So we don’t have good data on police killings.

And if you look specifically at deaths in police custody that don’t involve shootings, the vast majority are not even classified as homicides. Sometimes there’s a missing manner
Police Killings (cont.)

of death, “accidental” or “undetermined.” Sometimes it’s attributed to drugs or mental illness, or heart disease, or respiratory disease. It’s a big mix. You can’t actually code a death certificate as excited delirium, because it’s not recognized. So it’s very hard to figure out what’s going on when it’s a death like George Floyd’s, or like one of the other deaths we’ve been hearing about recently like Elijah McClain.

If someone dies in police custody, if there are no signs on the body that will tell you this person died of asphyxia, meaning they were suffocated to death because they were restrained, the only story you have to go by is the police officer’s.

What are some of the main reforms that should be made to address the problems we’ve discussed, like medical examiners’ lack of independence and their misclassification of deaths?

One is to do exactly what the National Association of Medical Examiners is calling for, which is to require that independent medical examiners, meaning they’re out of the jurisdiction, investigate deaths in police custody. Another one is to put a checkbox on the death certificate that would say “death in police custody” or “law enforcement custody,” that would indicate not that the officer caused the death, because determining causation is something that’s fraught with controversy, but just flagging it so that it can be identified in statistical analysis and further review.

And then finally, in many health departments throughout the United States, there are maternal mortality review committees. Every time a mother dies in relation to childbirth, a committee of experts gets together to determine exactly what happened, what were the causes—everything from social determinants of health to their particular treatment in the medical system—and make recommendations for what should happen better in the future to prevent situations like that.

I think there should be a death-in-custody review committee at health departments that would bring together various experts and community members and people in criminal justice accountability groups, to thoroughly examine the circumstances of deaths in police custody, so they could be documented well, and so that systems-level reforms could be identified.

Are there any jurisdictions that are undertaking these reforms?

No. There’s a lot of pushback. In 2015, the office of vital statistics at the Colorado Department of Public Health tried to put a checkbox on the death certificate that had “legal intervention” as a manner of death, with “legal intervention” being the official term for when someone dies at the hands of law enforcement. And the coroners didn’t like it, and they essentially got the vital statistics director to take the checkbox off after just a few months. I think there’s a reluctance by health departments to alienate death investigators or law enforcement.

Have we ever seen any big campaigns to boot elected coroners out of office after they misclassified a death in police custody?

This has really flown under the radar, and very few people know about it, even people who are very much plugged into police accountability work. Their role has been seen basically apolitical, even though that’s not true. And I think few people even know what the job entails.

During the Reconstruction era after the Civil War, when more than 1,000 Black politicians were able to take office, there were dozens of Black coroners, and that was seen as an important role to hold. And also in Alabama, the Lowndes County Freedom Organization, which was like a Black alternative to the local Democratic Party, which was like a Dixiecrat party, they ran a slate of candidates, and they ran a coroner who ended up losing, and they educated their constituents about what the coroner even does. So this is something that’s been to a small degree explored in previous political movements but has certainly not been a major part.

Cincinnati Police Department Agrees to Audit of Its DNA Database

by Douglas Ankney

The Innocence Project of New York, along with the Cincinnati, Ohio, law firm of Gerhardstein & Branch (collectively “Plaintiff’s Counsel”), negotiated a settlement on September 14, 2020, wherein the Cincinnati Police Department (“CPD”) agreed to an unprecedented audit of its DNA-based homicide cases.

The settlement emerged from a 2018 civil rights lawsuit filed by Plaintiff’s Counsel on behalf of Joshua Maxton.

Maxton spent over a year in jail until a jury acquitted him of murder. During trial, the defense learned for the first time that the Cincinnati police were informed seven months earlier that DNA evidence from the crime scene resulted in a “CODIS hit” for alternate suspect Dante Foggie. A CODIS hit is a match of DNA submitted to the FBI’s CODIS database, which is a compilation of more than 18 million DNA profiles taken from people convicted of crime across the U.S.

The terms of the settlement provide that the evidence obtained by the CPD was properly disclosed to persons, as is required by law.

Covering cases from June 2011 to June 2018, the audit seeks to determine whether a CODIS hit matched DNA to a person other than the accused/convicted person, and if so, was the evidence disclosed to the defense. Any undisclosed DNA matches will be provided to the convicted person or that person’s last-known counsel. The cases will be reviewed by Safer, a team of pro bono attorneys and students from the Ohio Innocence Project. The settlement also provides that Safer will confer with numerous stakeholders in Hamilton County, Ohio, to recommend improvements for timely disclosures of DNA/CODIS evidence.

Nina Morrison, senior litigation counsel for the Innocence Project, said: "This settlement is historic. It acknowledges that Josh Maxton sat in jail for more than seven months on a wrongful murder charge, even after police were notified of DNA evidence that supported his longtime claim of innocence. It also provides a novel and rigorous process to determine if other innocent people in Cincinnati were convicted of crimes they did not commit.”

Source: innocencproject.org
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Within weeks, the U.S. Courts of Appeals for the Fourth and Fifth Circuits opened the doors on two decades-old cases, allowing the possibility for habeas corpus relief based on withheld evidence by prosecutors and law enforcement that likely led to wrongful convictions.

The Fifth Circuit Case

The first case was an application to file a “second or successive” (“SOS”) habeas corpus petition in federal court by Robert Gene Will in the Fifth Circuit. On August 5, 2020, a divided panel of that court granted Will permission to file another petition under 28 U.S.C. § 2254 in the district court based on a slew of exculpatory evidence that the prosecution withheld from the defense.

Will was convicted and sentenced to death for the murder of a Harris County (Texas) sheriff’s deputy in 2000. Despite the fact that there were no witnesses or forensic evidence tying him to the crime, a jury still found him guilty. Fifteen years later, Will filed an application in the Fifth Circuit requesting permission to file another habeas corpus petition in federal court to challenge his conviction based on evidence suppressed by the prosecution.

The Fifth Circuit granted Will permission, finding that “there were disturbing uncertainties of Will’s culpability even before the introduction of the withheld evidence. Now, with the new evidence in hand, the uncertainties are even more disturbing.”

Under 28 U.S.C. § 2244(b)(3)(C), a state prisoner must file in the appropriate U.S. Court of Appeals an application for authorization to file a SOS habeas petition in the district court. If the application makes a prima facie showing of satisfying certain gatekeeping provisions of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), the court can grant authorization to allow the district court to hear the claims in the first instance. The Court of Appeals does not, however, examine the merits of the claims in considering whether to grant authorization.

Will met one of the criteria by showing that the newly discovered evidence, “if proven and viewed in light of the evidence as a whole, [it] would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense.” § 2244(b)(2)(B)(ii). In other words, Will showed he was likely “actually innocent” of his conviction.

The Court listed in a chart 20 “key pieces of evidence” that cast reasonable doubt on Will’s conviction. But this wasn’t the first time a court has questioned his guilt. In 2012, the district court lamented the strict limitations placed on it by the AEDPA, requiring it to deny habeas relief based on the evidence it saw back then, urging the governor to undo Will’s death sentence.

Now, new documents and reports have come to light to show Will’s codefendant may have been the real killer, and Will has “demonstrated it is reasonably likely that, after hearing the new evidence alongside the old evidence, every reasonable juror would have some level of reasonable doubt,” the Court said.

What opened the door for Will was that the prosecution violated the requirements set forth by the U.S. Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963). There, the Supreme Court held that when the prosecution withholds evidence, purposefully or not, that may be “favorable” to a defendant, it violates the Due Process Clause of the U.S. Constitution. And it’s the prosecution’s responsibility to turn over the evidence — a defendant doesn’t have to “scavenge for hints of undisclosed Brady material,” the Court instructed.

Accordingly, the Fifth Circuit held that Will made a prima facie showing his Brady claim deserves further consideration and granted authorization to file another habeas petition in the district court. See: Will v. Davis, 970 F.3d 536 (5th Cir. 2020).

The Fourth Circuit Case

In the Fourth Circuit, the Court similarly granted authorization for Ronnie Long to file another habeas corpus petition in the district court, which was denied on the merits. On appeal from that denial, a divided en banc Fourth Circuit held on August 24, 2020, that the district court erred when it ruled the state postconviction court did not unreasonably apply U.S. Supreme Court case law to Long’s case.

Long was convicted in a North Carolina state court in 1976 for burglary and rape and was sentenced to life in prison. The strongest evidence against Long was the victim’s testimony identifying him as the man who raped her.

In 2005, Long began requesting evidence to be tested, including biological evidence for DNA testing. Long found that much of the evidence he received was never disclosed to his defense lawyers by the prosecution. Citing a Brady violation, Long filed a Motion for Appropriate Relief (“MAR”) in 2008 in state court, asking for a new trial.

While the MAR court found that the prosecution indeed violated Brady by withholding evidence from Long, it denied his MAR because he had “not shown by a preponderance of the evidence that the claimed evidence was withheld by the state, that it was exculpatory, or that the result likely would have been different with the claimed evidence.” His state appeals of that denial were all rejected.

Five years later, Long filed his authorized SOS § 2254 petition in the district court again raising his Brady claim. The district court ruled that the MAR court “reasonably applied the United States Supreme Court’s Brady jurisprudence in concluding that the evidence in question, considered cumulatively, did not qualify as material.”

On appeal, the Fourth Circuit held that the MAR court applied “an erroneously high burden” on Long to prove his Brady claim. Under Brady, a defendant must show only a “reasonable probability of a different result” for the withheld evidence to be “favorable.” Kyles v. Whitley, 514 U.S. 419 (1995). The MAR court’s harsher “preponderance of the evidence” standard was too much, the Court said, and the district court should have known this.

And the evidence suppressed by the State was significant. Not only did a detective “lie” on the stand, the Court noted, but a “legion” of test results did not implicate Long. “Considering both the exculpatory and impeachment effects of the suppressed evidence, together with the shortfalls in [the victim’s] identification of Long, the withheld evidence put the whole case in such a different light as to undermine confidence in the verdict,” the Court said.

Fourth and Fifth Circuits Reopen Decades-Old Cases for Habeas Relief Due to Brady Violations

by Dale Chappell
Accordingly, the Fourth Circuit vacated the district court’s denial and remanded with instructions to “act with dispatch” to determine if Long is “actually innocent” of his conviction after spending 44 years in prison. See Long v. Hooks, 972 F.3d 442 (4th Cir. 2020).

Why These Cases Are Important

These two cases illustrate the unfair burden placed on prisoners by the AEDPA who later discover, after all their appeals and postconviction remedies have been exhausted, that the prosecution withheld favorable evidence from them that could have proven their innocence – or at least led to a more favorable result. Both of the petitioners in these cases faced the nearly impossible to surmount bar under the AEDPA for SOS habeas corpus relief requiring “actual innocence.” Fortunately, they both met that burden. But many cannot.

But this burden has been criticized lately by many judges who say it’s not only unfair but likely unconstitutional. While nearly every Circuit has by now held that a Brady violation raised in a SOS petition or motion must clear the “actual innocence” bar under the AEDPA, the debate continues.

The courts so holding have reasoned that because a Brady violation existed at the time of the first petition or motion – even though it was unknown by the prisoner at the time – a subsequent challenge must be authorized under the SOS restrictions. This is the case despite the fact that the prosecution withheld the favorable evidence. This glaring problem was skillfully detailed by a panel of the Eleventh Circuit in Velez Scott v. United States 890 F.3d 1239 (11th Cir. 2018), where the Court said that, while it was bound by its precedent requiring authorization for Brady claims in SOS challenges, that precedent is “wrong.” Nearly the entire opinion was about why applying AEDPA’s restrictions to SOS challenges to Brady claims is unconstitutional.

Citing Velez Scott, three concurring judges in Long, discussed above, echoed the same concerns that making prisoners with Brady violation claims prove by clear and convincing evidence they are “actually innocent” violates the Constitution. “This case exemplifies how our current habeas precedent incentivizes and rewards bad faith on the part of police and prosecutors,” they charged in a separate 38-page opinion on why this rule should be changed.

“Our habeas precedent rewards state actors guilty of Brady violations for committing additional constitutional violations in order to subject the Brady claim to a higher standard of review. But keeping an innocent man in prison should not be considered a reward,” they continued.

This perverse incentive for prosecutors to withhold evidence knowing that a prisoner would face such an impossible burden under the AEDPA may not be one for the court to fix, one court suggested. In Brown v. Muniz, 889 F.3d 661 (9th Cir. 2018), the Court acknowledged the constitutional concerns with such a harsh rule but said that Congress chose to prioritize “finality” over a person’s innocence.

“That is a policy, not a legal objection” for Congress to answer, the Court explained in finding a Brady violation did not meet the strict actual innocence standard for relief in that case.

But can a court fix this problem? The U.S. Supreme Court has mentioned that a “fundamental miscarriage of justice” can excuse procedural bars to relief under the AEDPA. McQuigg v. Perkins, 569 U.S. 383 (2013). Finality should yield to avoid wrongly incarcerating someone, the Court has said more than once. With a 9 to 6 split in the Long decision, the Supreme Court may have the chance to address this problem (though it has refused to do so up to this point).
**Time to Curb Police Unions**  
*by Bill Barton*

The May 25, 2020, death of George Floyd under the left knee of Derek Chauvin in Minneapolis served as the proverbial “straw that broke the camel’s back” when it came to spurring widespread public outcry over the seemingly endless list of Black Americans killed by police across the country. In an era of cellphone cameras and police bodycams, the incontrovertible evidence of such over-the-top police violence is more and more obvious to anyone who is paying attention. Thousands of primarily non-violent protesters have come out all across the country, risking their health and lives in the midst of the novel coronavirus pandemic to show support for Floyd and the myriad past victims of police brutality. [See: A Nation on the Brink, CLN, July 2020]

Despite the chilling combination of detachment and brutality shown by Chauvin in the profoundly disturbing eight minutes and 46 seconds displayed in the video, not everyone is repelled or angry. Lt. Bob Kroll, president of the Minneapolis police union, certainly wasn’t marching with the protesters. In fact, he has called them part of a “terrorist movement.” He also stated that the four officers fired for their participation in Floyd’s death were “terminated without due process.” Floyd was certainly terminated without due process. The reason for Floyd’s arrest? He was suspected of buying a pack of cigarettes with a counterfeit $20 bill.

Kroll, who called the alleged lack of due process “despicable behavior,” also criticized the Obama administration for its “oppression of police” and hailed President Trump as someone who “put the handcuffs on the criminals instead of us.” Police union lawyers are reportedly representing the four cops who were fired. Kroll cited “lack of support at the top” on the part of elected officials who were “minimizing [sic] the size of our police force and diverting funds to community activist with anti-police agenda.” Kroll has held his position since 2015. Former Minneapolis police Chief Janeé Harteau said, “I believe Bob Kroll was elected out of fear.” Kroll’s message to officers was, “We are the only ones that support you. Your community doesn’t support you. Your police chief is trying to get you fired.”

When the city’s mayor banned so-called “warrior training” of officers that teaches methods of violent confrontation, Kroll cut a deal with a private company to provide that training, in flagrant opposition to the mayor’s ban. Harteau cited Kroll’s comments as “another example of why unions and arbitrators must be held accountable and support the discipline decisions of police leadership.” At the time of Floyd’s death, the city was in the midst of negotiating a new contract with the police union.

### ‘Misaligned With the Moment’

**MINNEAPOLIS CITY COUNCIL MEMBER**

Steve Fletcher at one point attempted to divert money from hiring officers and into the city violence protection office. In response, cops began delaying responses to 911 calls placed by Fletcher’s constituents. “It operates a little bit like a protection racket,” he remarked of the union, as The New York Times reports. “I struggle to know if they have gotten more extreme, or if the world has changed and they haven’t. Either way, they are profoundly misaligned with the moment.”

The Office of Violence Prevention, meanwhile, uses city-employed “violence interrupters” walking the streets six nights a week to check on residents and business owners.

In April, Kroll said he had been involved in three shootings, “and not one of them has bothered me.” He deplored the idea of training cops to de-escalate tense situations. “Certainly getting shot at and shooting people under my watch takes a different toll, but if you’re in this job and you’ve seen too much blood and gore and dead people, then you’ve signed up for the wrong job.” At the time of Floyd’s death, Kroll had 29 complaints against him pending; Chauvin had 18 complaints. Jonathan Smith, a Department of Justice attorney, said, “If you leave a bad officer on the street, that has a damaging effect on every other officer. No one on the street is going to say that’s a good officer and that’s a bad officer.” And regarding the complaints against Chauvin, he said, “Had those been addressed in an appropriate way, not only would Mr. Floyd be alive, we wouldn’t have the disruption in the community and you might have actually saved his career if you put him on the right path earlier on.

A 2017 Reuters report that examined police union contracts said that unions are instrumental in “using [their] political might to cement contracts that often provide a shield of protection to officers accused of misdeeds.”

Separately, a scholarly overview of 178 police union contracts negotiated in the U.S. highlighted how reform and accountability have been thwarted.

Bob Kroll certainly doesn’t stand alone. Other police union officials are on the same page. In 2017, Patrick J. Lynch, head of the patrol officers’ union in New York City, said Mayor Bill de Blasio had “blood on his hands” from the shooting of two uniformed officers by a man who mentioned the police high-profile killing of Eric Garner in 2014 by officer Daniel Pantaleo, utilizing a chokehold that was prohibited according to department policy. Pantaleo was not indicted by a grand jury and remained on duty until about five years later when an NYPD administrative judge ruled that the chokehold was, indeed, a violation, and Pantaleo was fired. Lynch berated the city for surrendering to “anti-police extremists” and said, “We are urging all New York City police officers to proceed with the utmost caution in this new reality, in which they may be deemed reckless just for doing their job,” a deadly violation of NYPD’s own policy apparently being viewed as part of the job.

### ‘A Blanket System of Covering Up’

Lynch’s support of cops “just doing their job” reaches back a number of years, pre-cellphone video ubiquity and police bodycams everywhere, to the infamous 1999 case of unarmed 23-year-old Amadou Diallo, who was fatally shot by four plainclothes NYPD officers in a hail of 41 bullets. Officers had mistaken her son’s wallet for a gun.

Retired NYPD commander Corey Pegues said, “The unions, at least in New York City, outright just protect, protect, protect the cops. It’s a blanket system of covering up police officers.”

Katherine Bies wrote in the *Stanford Law & Policy Review* that following “the rise of police unions in the 1970s’ those unions have successfully blocked their members from direct public accountability.”

“Police unions have established highly developed political machinery that exerts significant political and financial pressure on all three branches of government. The power of police unions over policymakers in the criminal justice context distorts the political process and generates political outcomes that undermine the democratic values of transparency and accountability.”

Labor historian Sam Mitrani, of the
College of DuPage in Illinois, said, “These are armed, trained people who are totally not accountable to the community they are policing.”

Until public outrage forced it to discontinue the practice, an Albuquerque union paid $500 to cops who had killed an individual in the line of duty. They called it “a supportive service to the officer during a traumatic time.” Critics dubbed it a bounty.

In Phoenix, union officials tried to obtain a deal that offered its members a service that scrubbed their social media profiles, following incidents where officers had posted allegedly racist memes, including one where an officer thanked vigilant George Zimmerman “for cleaning up our community one thug at a time” in reference to his shooting of 17-year-old Trayvon Martin.

More recently, the head of the NYPD Captains Endowment Association issued a statement in support of James Kobel, the deputy inspector hired to combat workplace harassment who is under police inquiry. Kobel is accused of posting racist and anti-Semitic comments to the Law Enforcement Rant message board using the name Clouseau. He has denied the allegation.

In St. Louis, circuit attorney Kimberly Gardner, the first Black woman to serve as lead prosecutor in that city, sued the police union for allegedly blocking her attempts to reform the police force. She was supported by a separate union of Black cops, who said the union, and the department itself, are “accepting of racism, discrimination, corruption.”

In Louisville, undercover cops operating under a no-knock warrant used a battering ram in the middle of the night to topple the door and fatally shoot an unarmed young Black woman, Breonna Taylor, in her own home. Mayor Greg Fischer warned those calling for the firing of the cops that the process would be slow, blaming the city’s collective bargaining agreement with the police union. Fischer lamented, “The system is not a best practice for our community.”

No Union Should Shield Misconduct

Big labor is primarily silent about police unions. When publicintegrity.org sought comments from the leaders of 10 major unions and labor groups, no one was willing to talk. However, on June 3, 2020, in response to Randi Weingarten, president of the American Federation of Teachers, it said, “I think we have to do something nationally about the demilitarization of policing.” She also noted that collective bargaining is a “false choice” and that no union contract should shield employee misconduct.

Labor historians trace the beginnings of the tensions between mainstream labor and police unions to the late 1800s, before the latter even existed. City officials often called in cops to break up strikes and then arrest leaders, as well as beleating workers with batons. Joshua Freeman, a labor historian at City University of New York, said, “Police were seen as tools for repressing unions.” A particularly infamous example is the Haymarket massacre of 1886, where Chicago cops killed a worker and injured seven others, who were on strike demanding an eight-hour work day.

In those days, workers in the private sector were the only ones who could organize and band together. The public-sector workers and government employees (such as teachers and sanitation workers) began to have the same opportunity in the 1920s. The American Federation of Labor – later the AFL-CIO – began letting police officers into its organization in 1919. By the 1950s and 1960s, police unions had become commonplace. Their current power seems to have been consolidated mainly in the 1970s. Freeman is not surprised that the labor movement in general declines to focus on police unions, noting that it wasn’t until the deaths of Michael Brown and Eric Garner in 2014 that they began to acknowledge racism in policing. “It’s a very delicate subject, it’s rarely discussed openly and out loud,” Freeman said.

Qualified Immunity

Providing the impetus to boot the police unions – or at the very least rein in their power considerably – may well hinge on the Supreme Court rethinking its doctrine of qualified immunity from 1982. Patrick Jaicomo and Anya Bidwell, attorneys with the Libertarian Institute for Justice, said, “When the Supreme Court conceived qualified immunity, it promised that the rule would not provide a license for lawless conduct for government officials. Plainly, it has,” and “whether the official’s actions are unconstitutional, intentional or malicious is irrelevant…”

An analysis from techdirt.com sums up the necessity of booting police unions in one sentence: “If the goal is to keep bad cops employed indefinitely, it’s been super-effective.” [See: A Mass Purge of Misconduct Records by Phoenix, Arizona Police, CLN June 2020]

Sources: reason.com, nytimes.com, nationalreview.com, publicintegrity.org, lowyinstitute.org, buzzfeednews.com, techdirt.com, thecity.nyc
Eighth Circuit Vacates Sentence After District Judge Interfered With Plea Negotiations and Made Disparaging Remarks About Federal Judiciary

by Douglas Ankney

The U.S. Court of Appeals for the Eighth Circuit vacated Seneca Harrison’s sentence because the judge for the U.S. District Court for the Western District of Missouri interfered with plea negotiations and made disparaging remarks about the federal judiciary.

The Government offered Harrison a deal where, in exchange for his guilty plea, both sides could argue for a sentence between the recommended Guidelines range of 70 to 87 months on a charge of felon in possession of a firearm. At the plea hearing, Harrison stated “we can, like, get this out of the way, like, right now today” because he did not even [want to] go to trial.

But upon hearing that a Guidelines-range sentence was all that the Government was offering, the district judge said “[t]hat’s probably worse than if he got convicted right? I mean, because if he gets convicted, he can argue for less, right?” The judge excused the prosecutor from the courtroom and then told Harrison that the federal system “sucks” and is “really harsh.”

The judge then offered advice that if Harrison were to plead guilty he would be sentenced by a less lenient judge, but if Harrison chose to go to trial that other judge would be out of the picture.

Harrison listened to the judge’s advice and proceeded with a bench trial. The judge convicted him. Because Harrison chose to go to trial, he did not get a deduction in Guidelines points for acceptance of responsibility. U.S.S.G. § 3E1.1 cmt. n.2. This subjected Harrison to a higher sentencing range.

United States v. Pirani, 406 F.3d 543 (8th Cir. 2005). That plain error occurred was easily shown because it was a bright-line rule established by the Federal Rules of Criminal Procedure, Rule 11(c)(1), that a district court cannot participate in plea negotiations or plea discussions. United States v. Washington, 109 F.3d 459 (8th Cir. 1997).

To demonstrate that the error affected his substantial rights, Harrison had to show a reasonable probability that, but for the district court’s error, the result of the proceeding would have been different. United States v. Dominguez Benitez, 542 U.S. 74 (2004). A reasonable probability is one that “is sufficient to undermine confidence in the outcome of the proceeding.” Id. The Court reasoned that Harrison’s remarks about not wanting a trial and settling the matter that day were sufficient to establish a reasonable probability that he would have pleaded guilty and been subjected to a term of imprisonment below the one he actually received after going to trial.

Consequently, Harrison’s substantial rights were affected, the Court concluded.

Having found plain error, the Court chose to exercise its discretion to correct the error, determining that commenting on the sentencing practices of another judge and stating the federal system “sucks” harmed the “public reputation of judicial proceedings.” Further, offering advice that actually exposed Harrison to a higher sentencing range raised serious questions about fairness.

The Court concluded that Harrison’s sentence should be vacated and the case remanded for resentencing before a different judge. United States v. Rogers, 448 F.3d 1033 (8th Cir. 2006). Accordingly, the Court vacated the sentence and remanded for resentencing before a different judge. See: United States v. Harrison, 974 F.3d 880 (8th Cir. 2020).

Massachusetts Supreme Court: Brady Requires Disclosure of Exculpatory Material Revealed During Immunized Testimony Before Grand Jury

by Douglas Ankney

The Supreme Judicial Court of Massachusetts affirmed an order of a trial judge requiring a district attorney to disclose to defense attorneys details of misconduct by two police officers that were disclosed during the immunized testimony of the officers before a grand jury.

In July 2019, Fall River police officer Michael Pessoa submitted an arrest report, claiming the arrestee was noncompliant and threatened to punch the officers whereupon Pessoa used force (an “arm bar take down”) to take the arrestee to the ground. Because the arrestee was noncompliant, Pessoa added a charge of resisting arrest. Two additional Fall River officers were present during the arrest, and they each submitted use-of-force reports corroborating Pessoa’s account and supporting the additional charge of resisting arrest.

Shortly thereafter, surveillance video revealed that the arrestee had been compliant when Pessoa approached and punched the man on the left side of his head, and then, Pessoa violently took him to the ground in a manner not using the arm bar takedown. An ensuing criminal investigation resulted in 15 indictments against Pessoa. During the course of the investigation, the district attorney obtained orders of immunity pursuant to G. L. C. 233, §§ 20C-20G for the two officers who were present during the arrest. In the officers’ testimony before a grand jury, they each admitted to filing the false use-of-force reports.

The district attorney then filed a motion in Superior Court requesting the authority to disclose the information revealed by the officers to defense attorneys in cases where the officers had either filed a report or would be called to testify. The Superior Court granted the motion. The officers appealed.

The Court observed “[u]nder the due process clause of the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights,

The Court rejected the officers’ four arguments against disclosure. First, the officers argued that since failure to disclose the information would not require a reversal of any defendant convicted at a trial where the officers testified, then the information isn’t Brady material. That is, under *United States v. Bagley*, 473 U.S.667 (1985), a prosecutor’s failure to disclose exculpatory information is not a breach of the prosecutor’s duty to disclose unless the evidence is “material,” i.e., had the evidence been disclosed, there is a reasonable probability that result of the proceeding would have been different.

The Court reasoned that the officers were equating a duty to disclose with the standard of review used to determine whether failure to disclose requires a new trial. The Court had declined to adopt the Bagley standard, choosing instead to adhere to the test in *United States v. Augurs*, 427 U.S. 97 (1976), which requires only a showing that the evidence “might have affected the outcome of the trial.” And in Massachusetts, the rules of criminal procedure require disclosure. A prosecutor’s duty to disclose is based upon whether the information is exculpatory. When deciding to disclose evidence, the prosecutor is not to weigh whether it is material, the Court explained.

The Court also rejected the officers’ argument that the since the information wasn’t admissible at any trial, it should not be disclosed. Generally, specific instances of misconduct for impeachment purposes are not admissible absent a conviction. *Commonwealth v. LaVelle*, 605 N.E.2d 852 (Mass. 2000). But there are narrow exceptions where the interest of justice prohibits strict application of the rule. *Id.* It is for a trial judge to decide whether evidence of misconduct in the absence of a conviction should be admitted. *Commonwealth v. Lopes*, 91 N.E.3d 1126 (Mass. 2018).

Next, the Court rejected the argument that the orders of immunity under G. L. c. 233, §§ 20C-20G prohibit disclosure. The immunity protected the officers only from prosecution in any criminal or civil action based upon their immunized testimony or based upon any evidence obtained as a result of their testimony. *Matter of a John Doe Grand Jury Investigation*, 539 N.E.2d 56 (Mass. 1989). Immunity does not protect from community scorn, embarrassment, or even being fired from one’s job when details of misconduct become known by the public.

Finally, the Court rejected the argument that disclosure violates the rule that grand jury proceedings are to be kept secret. Disclosure of the information is part of a prosecutor’s duty, and as such, it is part of the grand jury proceedings that are intended for disclosure. Mass. R. Crim. P. 5(d).

The Court concluded that the information was Brady material that the prosecutor had a duty to disclose to defense attorneys where the officers may be witnesses or where they had filed a report.

Accordingly, the order of the Superior Court was affirmed. See: *In the Matter of a Grand Jury Investigation*, 152 N.E.3d 65 (Mass. 2020).
Mississippi Supreme Court: Cannot Declare Mistrial on All Counts After Jury’s Acquittal on Some Counts

by Anthony Accurso

The Supreme Court of Mississippi held that a district court erred when it ordered a mistrial on all three counts of an indictment after the jury had returned an acquittal on two of the counts.

Johnathan Nickson was tried in mid-2018 on two counts of first-degree murder for killing Nedra Johnson and Bradley Adams and one count of being a felon in possession of a firearm.

During the trial, the court instructed the jury that it could find Nickson guilty or not guilty on each count of first-degree murder, but if the jury found him not guilty, it must then consider whether he was guilty of second-degree murder.

The jury was sent out for deliberations and sent a note back that it was deadlocked. The court recalled the foreperson and instructed the jury to “return the verdict on whatever counts you’ve decided on and then come back.” The jury returned and advised that it had unanimously agreed to acquit Nickson for first-degree murder on counts one and two, but it remained deadlocked as to second-degree murder.

The court impressed upon the jury the necessity of returning a verdict and ordered them back to deliberations. The jury again notified the court that it was “hopelessly deadlocked.”

The court then ordered a mistrial as to all three counts, over the objection of Nickson’s counsel. Nickson appealed to the Mississippi Supreme Court on the grounds that he should not face trial on the first or second-degree murder.

The court then ordered a mistrial as to all three counts of an indictment after the jury had returned an acquittal for first-degree murder for counts one and two, he could not again face those charges at retrial.

The State argued that this case was similar to Blueford v. Arkansas, 566 U.S. 599 (2012), which involved a deadlocked jury as to lesser-included offenses to capital murder that resulted in a mistrial. The Court found Blueford distinguishable because the jury in that case was not afforded the opportunity to acquit on each level of the murder charge, and moreover, the jury in Blueford never formally acquitted Blueford in writing. It merely orally reported that it had voted to do so verbally.

Nickson then argued that second-degree murder is a lesser offense but not a lesser-included offense. The Court pointed to its decisions in Montgomery v. State, 253 So. 3d 305 (Miss. 2018), and Potts v. State, 233 So. 3d 782 (Miss. 2017), to inform Nickson it had previously ruled otherwise.

Because it is a lesser-included offense, was properly included as a charged-offense and jury instruction, and the jury failed to return a written verdict for the second-degree murder, the Court determined that Nickson may again be tried for second-degree murder.

Accordingly, the Court partially reversed the order of the district court such that Nickson could be retried for second-degree murder on counts one and two and being a felon in possession of a firearm. He could not be tried again for first-degree murder. See: Nickson v. State, 293 So.3d 231 (Miss. 2020).

California Court of Appeal Reverses Murder Conviction Because Superior Court Erred by Allowing Deceased’s Out-of-Court Statements Into Evidence

by Douglas Ankney

Division One of the Fourth Appellate District of the California Court of Appeal reversed Rene Quintanilla, Jr.’s murder conviction because the Superior Court allowed as evidence the deceased’s out-of-court statements under the hearsay exception in Evidence Code § 1390.

Quintanilla killed his live-in girlfriend (identified only as Charlene) by shooting her in the chest with a shotgun. He was charged with several felonies, including murder.

The People filed a motion in limine to admit out-of-court statements Charlene had made to friends and family members describing Quintanilla’s domestic violence toward her over the years of their relationship. The trial court ordered a foundational hearing to determine if the statements could be admitted as evidence under the hearsay exception in Evidence Code § 1390. Under § 1390, out-of-court statements made by a person unavailable to testify at trial may be admitted as evidence if the defendant “engaged ... in wrongdoing that was intended to, and did, procure the unavailability of ... the witness. At the hearing, the trial court heard testimony from:

- Charlene’s aunt who testified that Charlene said Quintanilla strangled her twice (once with his bare hands and once with a belt causing her to lose consciousness); Quintanilla tied Charlene to a chair, duct-taped her mouth, put a bag over her head, poured gasoline over her, and lit a lighter and that Quintanilla was stopped only because Charlene’s daughter went to get Quintanilla’s mother who intervened; and Charlene said she was scared of Quintanilla, but she didn’t go to the police because she loved him.
- Charlene’s friend Maria testified that Charlene came to live with her on three occasions due to Quintanilla abusing her. Charlene told Maria that Quintanilla beat her with his fists, blackened her eyes, broke her nose, and strangled her twice. Maria saw the black eyes and broken nose.
- Charlene’s friend Andrea testified that she saw bruises on Charlene’s face and arms, and Charlene said Quintanilla had beaten her.
Charlene’s out-of-court statements. 

* Detective Christian Vaughn, who testified as an expert on domestic violence, explained that, in general, abusers often dissuade victims from reporting the violence to police through control, separation/isolation, and intimidation but testified that he didn’t have any facts on which to conclude that Quintanilla killed Charlene to keep her from reporting the abuse to police.

The trial court concluded that from these numerous instances of abuse it was reasonable to infer that Quintanilla had abused and ultimately killed Charlene to prevent her from reporting the abuse and testifying as a witness. The court allowed the witnesses to testify at Quintanilla’s trial regarding what Charlene told them. Quintanilla was convicted of Quintanilla’s trial regarding what Charlene reported the abuse and testifying as a witness.

The court allowed the witnesses to testify at Quintanilla’s trial regarding what Charlene told them. Quintanilla was convicted of several counts, including first-degree murder, and he appealed. Among his many issues, he argued that the trial court erred in admitting Charlene’s out-of-court statements.

The Court of Appeal observed “[h]earsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated.” Evidence Code § 1200(a). Except as provided by law, hearsay evidence is inadmissible. Evidence Code § 1200(b). But if the defendant engages in an act of wrongdoing that is intended to cause the unavailability of the declarant as a witness, and the wrongdoing does cause the declarant’s unavailability, then the declarant’s out-of-court statements are admissible. Evidence Code § 1390(a). The defendant may have numerous reasons for engaging in the wrongdoing, but § 1390 applies as long as at least one of those reasons was to prevent the declarant from testifying. People v. Kerley, 23 Cal.App.5th 513 (2018). However, substantial evidence must support a trial court’s determination to admit the declarant’s out-of-court statements. People v. Brown, 73 P.3d 1137 (Cal. 2003).

In the present case, the Court observed there was substantial evidence that Quintanilla repeatedly abused Charlene. But there was little, if any, evidence — and certainly not substantial evidence — Quintanilla engaged in wrongdoing with the requisite intent to prevent her from testifying about the abuse, according to the Court. Nor was there substantial evidence that he killed Charlene to prevent her from testifying about the abuse. The Court noted that Charlene never reported the abuse “because she loved him;” Quintanilla was never charged with abusing Charlene; there was no active prosecution against Quintanilla for abusing Charlene; and Charlene wasn’t scheduled to appear as a witness against Quintanilla. Thus, the Court concluded it was error to admit the evidence under the hearsay exception in § 1390.

Because the jury convicted Quintanilla of first-degree murder (murder that is willful, deliberate and premeditated) rather than second-degree murder (murder that is rash and impulsive), there was a reasonable probability the jury relied on the strangulation and gasoline incidents to support their finding of guilt of first-degree murder because that was the only evidence of Quintanilla behaving with deliberation and premeditation, the Court said. Consequently, the Court ruled that the trial court’s error was not harmless.

Accordingly, the Court reversed the judgment and remanded for further proceedings consistent with its opinion. See: People v. Quintanilla, 2020 Cal. App. LEXIS 177 (2020).
New Report Shows More Than Half of Wrongful Convictions Involved Misconduct by Police and Prosecutors

by Dale Chappell

More than half of the cases where innocent people were wrongfully prosecuted and imprisoned over the last three decades involved misconduct by the police and/or prosecutors. This comes from a new report by the National Registry of Exonerations (“NRE”) released in September 2020, compiling data on every exoneration since 1989.

Out of 2,400 cases analyzed by the NRE, 54 percent were the result of misconduct by law enforcement and prosecutors, and the more severe the crime, the more likely misconduct played a role. Overall, cops and prosecutors evenly split the misconduct. But the discipline was largely on law enforcement, with prosecutors rarely, if ever, taking the blame.

The 218-page report details the most common types of misconduct, giving examples of cases and the fate of the officials responsible for the misconduct. It then notes any discipline handed out and concludes with suggestions on why misconduct occurs and what can be done to prevent it.

Background

The NRE manages an archive of all known exonerations in the U.S. since 1989. So far, that comes to 2,663 cases. The report, though, focuses on all the cases up to February 2019. It also limits misconduct to government officials who contributed to the false convictions of people later exonerated. Typically, this means concealed or false evidence and lying witnesses.

For purposes of the study, the term “exoneration” is defined as “a person who was convicted of a crime [and] is officially and completely cleared based on new evidence of innocence.”

“Misconduct” is defined as a violation of an “official duty in the investigation or prosecution of a criminal case, and that violation contributed to the conviction of a defendant who was later exonerated.”

The misconduct is broken down into five general categories: witness tampering, interrogations, fabricated evidence, concealed evidence, and misconduct at trial.

While not less important, the report does not focus on misconduct by defense lawyers and judges.

Defense lawyers work for the defendant, and their errors are usually “sins of omission” (such as failing to investigate) and usually remain unknown. And lawyers tend to steer away from claims against judges, possibly because other judges are reluctant to pursue complaints against other judges, the study suggests.

Frequency of Misconduct

Misconduct occurred about evenly between men and women, and Black and White defendants, with slightly higher numbers in cases involving Black men. This, of course, is an average across all crimes, and some offenses were much more uneven, like drug cases versus white-collar crimes.

By far, the most misconduct happened in murder cases, with about half of the 908 murder convictions by way of official misconduct. Interestingly, prosecutorial misconduct in white-collar crimes beat out all other crimes, with more than half of the cases infected by misconduct. Those white-collar cases were also entirely federal cases.

Disturbingly, the report said that almost 80 percent of death penalty cases that were exonerated involved official misconduct. In other words, 8 out of 10 people who were wrongfully convicted and sentenced to die were put on death row because of police and prosecutorial misconduct. The report attributes this high rate to the fact that death penalty cases get more attention and therefore more scrutiny, which uncovers the misconduct more often. That’s probably why the worse the crime is, the higher the misconduct rate, the report states.

Drug case exonerations happened mainly in two places: Houston and Chicago. Most of the Chicago cases involved a few corrupt cops, notably Police Sgt. Ronald Watts, who planted drugs on people to extort money from them. At least 77 wrongful drug convictions were linked directly to Watts. The Houston drug cases involved drugs that were found to be not drugs at all, once they were tested in a lab. Hundreds of defendants were exonerated in Houston after that was exposed.

While Blacks make up only 13 percent of this country, 52 percent of wrongful murder convictions and 63 percent of drug exonerations involved Blacks. They were twice as likely as Whites to be wrongfully convicted in drug cases, according to the report.

Types of Misconduct

In order of the way proceedings happen in criminal cases, the following are the five common categories of misconduct listed in the report:

- Witness Tampering: Defined as ‘delib-
erate and successful efforts to get witnesses to give false evidence or withhold true evidence.” Witness tampering accounted for 17 percent of the exonerations in the report. The highest rate was for murder and child sexual abuse cases, with about 80 percent of all exonerations involving witness tampering.

It’s primarily a form of police misconduct, the report says, since they’re the main investigators who interview witnesses. The three common types of witness tampering include (1) procuring false testimony, (2) tainting identifications, and (3) improper questioning of a child victim. Tainted identification was the most common, occurring twice as often as the others. It’s also the type of witness tampering most often used to convict Black defendants.

• **Interrogations:** Misconduct during police interrogations made up seven percent of all exonerations, with 57 percent of those being false confessions. Chicago police led the nation in illegal interrogations, with 69 percent of false confessions in Chicago the result of violence. Nearly all of those exonerations stemmed from a pattern of torture during the 1970s and 1980s, where mostly Black men were tortured by Chicago detectives under then-Police Commander Jon Burge. In 2009, a “torture commission” found dozens of false confessions coerced by Burge and his men. Burge was eventually fired and sentenced to four years in prison.

• **Fabricated Evidence:** Misconduct when police create evidence in a case in order to convict happened in about 10 percent of the exonerations. This included actual false evidence in three percent of cases, officers lying as witnesses in five percent, and “confessions” by defendant created by the police in two percent of those cases.

Concealing evidence favorable to the defendant was a common problem, as was planting evidence, mostly in drug crimes (see Houston, for example). The report notes that planted evidence is difficult to detect and is most often only revealed by other coinciding factors.

Fabricated confessions (not false confessions) are those created by the police, often in the form of admissions written by the police that were not made by the defendant. Once again, the report found most fabricated confessions happened in Chicago.

• **Concealing Evidence:** In *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that the prosecution must turn over all favorable evidence to the defense. Over the last 50-plus years, prosecutors have devised ways around *Brady*, and courts have chipped away at the rule as well.

The report unsurprisingly found that concealing evidence from the defense was the most common type of misconduct found by the NRE in all exonerations. It happened in 44 percent of the exonerations in the report. Why the high number with such a clear command by the Supreme Court? The report notes several factors.

The evidence considered “reportable” by *Brady* is unclear, the report states. The Court has defined it as evidence that, had it been disclosed to the defense, the result of the case would’ve been different. The report points out the problems with this definition.

“First, how can anyone know whether a jury would have decided a case differently if it had additional evidence?” And, more importantly, how can a prosecutor make that call? After all, it’s the prosecutor who determines whether evidence might be favorable to a defendant and must be turned over.

“Given their role, it’s not surprising that prosecutors were responsible for concealing evidence in 73 percent of exonerations,” the report notes.

• **Misconduct at Trial:** Over 95 percent of convictions in this country are by way of guilty pleas, rather than trials. Many reasons exist for that unreal fact, but even in the small number of trials conducted, 23 percent of all exonerations involved misconduct at trial.

Lying cops called by prosecutors at trial made up most of the misconduct. They committed perjury in 13 percent of exonerations. They lied about the investigation in 75 percent of trials, which made up most of the report’s details.

Misconduct by prosecutors also occurred when they would “suborn” perjury, i.e., allow a witness to lie on the stand. A prosecutor has a duty to correct any lies by its witnesses. Prosecutors failed to do this in eight percent of all exonerations or 186 of the 2,400 cases. The most common lie by a prosecutorial witness was that they didn’t get favorable treatment in exchange for their testimony.

Lies by prosecutors themselves often came during closing arguments, trying to convince the jury to convict the defendant.

**Federal Cases**

Federal cases made up only five percent of all exonerations, but 41 percent of federal exonerations were white-collar crimes. And the misconduct in those cases was all by the prosecutors. White-collar cases are “big-ticket prosecutions” for federal prosecutors, the report notes. Federal prosecutors often use white-collar cases as platforms to push their career and position themselves for federal life-long judgeships.

This is true even though more than half of white-collar defendants never see jail or prison, and then those who do usually get sentenced to less than three years on average. Perjury was the main misconduct by prosecutors in those cases. In exoneration cases, federal prosecutors lied in white-collar cases two times more often than state prosecutors lied in murder cases.

**Discipline**

Discipline, when it did happen, was imposed in just 17 percent of exonerations and often came in bunches, the report states. Prosecutors were “rarely” punished, but cops were punished four times more often than prosecutors. Still, that was in only one in five known cases of misconduct by the police. Forensics workers got most of the punishment in nearly half the exonerations.

The type of discipline usually came down to employment (fired or demoted), professional (loss of licenses), or criminal (criminal charges filed). Out of 2,400 cases, only three prosecutors were ever criminally charged because of their misconduct, and those were high-profile cases.

The report notes that a loss in a civil lawsuit does not count as “punishment” because it’s usually the taxpayers or insurance company that pays the damages, not the officials themselves.

Two disgraced prosecutors were mentioned in the report. Former Williamson County (Texas) D.A. Ken Anderson, who purposely concealed evidence in a murder case that caused a defendant to spend 24 years in prison, spent just four days in jail for criminal contempt. And Michael Nifong, the former Durham County D.A. in North Carolina who falsely accused the Duke University Lacrosse players of rape, spent just a single day in jail on criminal contempt charges.

**Conclusion**

Why do law enforcement officials commit misconduct that leads to convictions of innocent people? The report concludes that the causes are mostly systemic. Pervasive practices that allow and encourage bad behavior by cops and prosecutors together with an environment of poor leadership and training all support misconduct by officials. Change those elements, and you can change the instances of misconduct, the report concludes.

Sources: *reason.com, National Registry of Exonerations*
**Seventh Circuit: Prior Conviction Under Overbroad State Drug Statute May Be Used in Career Criminal Enhancement But Not For Prior Drug Crimes Enhancement**

by Matt Clarke

On July 20, 2020, the U.S. Court of Appeals for the Seventh Circuit held that a prior state drug conviction under a statute that defined the drug more broadly than the equivalent federal statute could be used to enhance a federal drug crime sentence as a career offender under U.S.S.G. §§ 4B1.1(a) and 4B1.2(b) but could not be used as a prior drug crime to enhance the sentence under 21 U.S.C. §§ 841(b)(1)(C) and 851. It vacated the sentence and remanded the case.

An Illinois police task force found Nathaniel Ruth in possession of cocaine and a gun. He was indicted for possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). The Government notified Ruth that it would be using a 2006 Illinois conviction for possession of a controlled substance (cocaine) with intent to distribute, in violation of 720 ILCS 570/40l(c)(2), to enhance his maximum sentence from 20 to 30 years under 21 U.S.C. § 841(b)(1)(C). Ruth did not object.

The probation office used the same 2006 state drug conviction, along with another prior conviction, to determine that Ruth was a career offender subject to enhancement under U.S.S.G. § 4B1.1. Ruth objected to the career offender classification on the grounds that the 2006 Illinois conviction was not a “controlled substance offense” under U.S.S.G. §§ 4B1.1(a) and 4B1.2(b) because 720 ILCS 570/40l(c)(2) is categorically broader than federal law and thus could not be a predicate felony controlled substance offense. He argued that the Illinois statute criminalized the possession of positional isomers of cocaine; whereas, the federal statute did not.

The trial court overruled Ruth’s objection, and Ruth pleaded guilty to both counts. The court determined a sentencing range of 188 to 235 months of imprisonment and sentenced him to 108 months. Ruth appealed, raising the issue of using the 2006 Illinois conviction in both enhancements.

The Seventh Circuit noted that it compares state drug statutes with similar federal drug statutes using the Taylor categorical approach to determine whether the state offense qualifies as a “felony drug offense” within the meaning of federal law enhancing sentences for prior felony drug offenses. United States v. Elder, 900 F.3d 491 (7th Cir. 2018) (citing Taylor v. United States, 495 U.S. 575 (1990)). To do this, the Court compares the elements of the state offense with the elements of federal statutes defining a similar offense. Elder. Its review of the § 851 enhancement was for plain error only since Ruth had not objected to that enhancement. The Court held that, because the state statute criminalizes possession of the positional as well as the geometric and optical isomers of cocaine while the federal statute criminalizes possession of only the optical and geometric isomers of cocaine, the state statute is broader than the federal statute. Therefore, the 2006 state conviction could not be used for prior offense enhancement. Further, it was plain error to do so in this case.

The same could not be said of the career offender enhancement as the federal Sentencing Guidelines contain no definition of “controlled substance,” the Court stated. Recognizing it was on the minority side of a circuit split, the Court reaffirmed that it had already determined that prior convictions for possession of a “controlled substance” used for career criminal enhancements are not restricted “to a particular state’s concept of what is meant by that term.” United States v. Hudson, 618 F.3d 700 (7th Cir. 2010). Therefore, it upheld the use of the 2006 Illinois conviction for career criminal enhancement but not for prior drug offense enhancement.

Accordingly, the Court vacated the sentence and remanded for resentencing. See: United States v. Ruth, 966 F.3d 642 (7th Cir. 2020).

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**Hawai‘i Supreme Court Announces Admissibility of Third-Party Culpability Evidence Is Same Relevancy Test That’s Applied for Other Evidence, Superseding Rabellizsa**

by Douglas Ankney

The Supreme Court of Hawai‘i announced that the standard for admission of third-party culpability evidence is the same as the relevancy test that is applied to other types of evidence, superseding State v. Rabellizsa, 903 P.2d 43 (Haw. 1995).

Yoko Kato was arrested on charges of second-degree murder. The complaining witness (identified as “CW”) was a Japanese national. She had received a text message from a woman calling herself Ai Akanishi, asking the CW to meet her for drinks. The message arrived via the LINE application using the CW’s personal LINE identification (“LINE ID”). Even though the CW did not know anyone named Akanishi and hadn’t given her LINE ID to anyone by that name, she agreed to the meeting.

The CW rode her bicycle to the designated location. A man speaking in broken Japanese (“spoken by a nonnative speaker”) directed her where to park her bicycle. While she was parking her bike, the man stabbed her several times. She fled to a nearby business, and the owners called police.

When describing her assailant, the CW told police her attacker could have been a woman because the voice was high for a male. She later told police the woman might have been Kato because Kato had the CW’s LINE ID. Kato’s iPad also revealed a communication with an email address connected to Akanishi.

At trial, the defense called David Miller. After Miller had testified that he and the CW had at one time been in a serious romantic relationship (he wanted to marry her), counsel asked if Miller was aware she had been dating other men while he was dating her. The State’s relevancy objection was sustained. Counsel then asked if Miller had seen the CW with other men, and the State’s relevancy objection
was again sustained. Defense counsel then explained at a bench conference that he was attempting to show that Kato did not have a motive to stab the CW, but Miller did.

The State argued, based on Rabellizsa, that there wasn’t sufficient nexus connecting Miller to the crime to allow evidence of his motive to be entered. Ultimately, the court ruled that because there was no evidence placing Miller, a Caucasian, near the scene of the crime, the defense had failed to meet the “sufficient nexus” standard of Rabellizsa, and the motive evidence would not be permitted. The defense reminded the court that the CW had told police her attacker was Caucasian. The court discredited that, choosing to credit instead the State’s witnesses who described the assailant as Asian.

Through other witnesses, Kato presented evidence that three eyewitnesses said it was a man who had stabbed the CW; that Japanese was Kato’s native language, which she spoke perfectly whereas Miller’s ability was rudimentary; that Miller carried a knife; and that Miller had access to Kato’s iPhone and her iPad. Kato was convicted of reckless endangering in the second degree, and she appealed. She argued, inter alia, that the trial court erred in precluding her from adducing evidence that Miller had motive to commit the crime charged. The Intermediate Court of Appeals (“ICA”) affirmed her conviction, and the Hawai’i Supreme Court granted further review.

The Court observed “[i]n Rabellizsa, this court considered as a matter of first impression the admissibility of evidence of a third person’s motive to commit the crime for which the defendant was charged.” In Rabellizsa, the Hawai’i Supreme Court relied on decisions from other jurisdictions to hold that motive alone was insufficient to establish relevance. Instead, there must be a “nexus between the proffered evidence and the charged crime.” Id. For example, the Rabellizsa decision relied on State v. Denny, 357 N.W.2d 12 (Wis. Ct. App. 1984) (formulating a “legitimate tendency” test requiring a defendant to show motive, opportunity, and “some evidence to directly connect a third person to the crime charged which is not remote in time, place, or circumstances” before the evidence is admissible). The Rabellizsa Court adopted Denny’s “legitimate tendency” test.

But in the intervening years since Rabellizsa, those decisions from other jurisdictions have been modified or reversed. In general, those jurisdictions now agree that the test for admissibility of third-party culpability evidence is one of relevance as defined by the rules of evidence. Gray v. Commonwealth, 480 S.W.3d 253 (Ky. 2016), Hawai‘i’s Rules of Evidence, Rule 401, defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The “legitimate tendency” test exceeds Rule 401’s threshold requirement that the third-party culpability evidence have “any tendency.” The lack of a direct connection between the third party and the crime charged does not mean third-party culpability evidence is not relevant, the Court explained.

In the instant case, Kato’s other evidence, when combined with evidence of Miller’s motive, would have supported a jury’s conclusion that Miller committed the crime and framed Kato.

Further, even under the “legitimate tendency” test, Kato showed a nexus between Miller and the crime. But the trial court had discredited her evidence, choosing instead to credit the State’s evidence. The trial court’s weighing of this evidence invaded the province of the jury and deprived Kato of a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319 (2006).

The Court concluded these errors were not harmless.

Accordingly, the Court vacated the decisions of the ICA and the trial court and remanded for further proceedings consistent with the Court’s opinion. See: State v. Kato, 465 P.3d 925 (Haw. 2020).

Fifth Circuit: Consecutive Sentence for FTA Must Be Part of ‘Total Punishment’, Not Merely a Stacked Sentence

by Dale Chappell

The U.S. Court of Appeals for the Fifth Circuit held that a mandatory consecutive sentence for a failure to appear (“FTA”) conviction must be calculated as part of the “total punishment,” not merely a stacked sentence, in order to adhere to the U.S. Sentencing Guidelines (“USSG”).

After Rene Izaguirre pleaded guilty to a federal marijuana charge in 2013, he abandoned before sentencing. Five years later, he was finally sentenced for that offense when he was arrested for another drug charge. But now he had a FTA conviction to add to that marijuana sentence.

At sentencing, the U.S. District Court for the Southern District of Texas relied on the Government’s explanation that the FTA sentence was the same Guidelines sentencing range (“GSR”) as the marijuana conviction and that the two sentences had to be consecutive. The court then imposed consecutive 108-month sentences for each offense. Izaguirre’s lawyer never objected and, in fact, agreed with this interpretation.

On appeal, Izaguirre argued that this was an error because the USSG requires the FTA sentence to run consecutive but only as part of the total GSR, not stacked at the end. The Fifth Circuit agreed, reiterating that a court commits “significant procedural error” when it improperly calculates the GSR. Gall v. United States, 552 U.S. 38 (2007).

The Court acknowledged that a sentencing court may separately calculate the GSR for an FTA offense “to obtain perspective,” but that “calculation would play no part in determining the applicable Guidelines range” for the overall sentence. The way it is intended to work, the Court said, is that the FTA and marijuana conviction should be “grouped” under the USSG to create a higher base offense level. Once the GSR is established for the grouped offenses, then the FTA sentence is severed and imposed consecutive to the main sentence but still within the GSR.

This “total punishment,” the Court said, aligns with Amendment 579 to the USSG in 1998, clarifying this procedure. That amendment also overturned the Fifth Circuit’s prior holding in United States v. Packer, 70 F.3d 357 (5th Cir. 1995), that a FTA sentence is a “separate and distinct” punishment. After Amendment 579, it’s clearly not, the Court said.

“It is clear from the record that [the district court’s] decision to impose two, consecutive sentences of 108 months of imprisonment stemmed directly from its misunderstanding of how the applicable advisory Guidelines range was to be determined,” the Court explained.

Accordingly, the Court vacated Izaguirre’s sentence and remanded for resentencing. See: United States v. Izaguirre, 973 F.3d 377 (5th Cir. 2020).
The Supreme Court of Colorado, proceeding from original jurisdiction on appeal from a district court, held that the district court erred in denying a preliminary hearing to a defendant charged with a class 4 felony DUI simply because he was free on personal recognizance pending conviction.

Donald Eugene Huckabay was arrested on May 25, 2019, and charged with misdemeanor DUI. The next day, he was released on personal recognizance. The People then amended his charge to a class 4 felony DUI because he had at least three prior convictions for DUI.

On December 30, 2019, Huckabay moved for a preliminary hearing under § 16-5-301(1)(a), C.R.S. (2019) and Crim. P. 7(h)(1) — which is a judicial determination of whether there is probable cause sufficient to subject the defendant to trial.

In People v. Tafoya, 434 P.3d 1193 (Colo. 2019), the Colorado Supreme Court established that a defendant who was charged with a class 4 felony DUI, and was in custody, was entitled to a preliminary hearing. This was important because the crime of felony DUI results from a recent statutory amendment.

The district court denied Huckabay's motion, relying on Tafoya because Huckabay was not in custody. Huckabay appealed directly to the Colorado Supreme Court under Colo. App. Rule 21, an exercise of original jurisdiction that is "an extraordinary remedy that is limited in both purpose and availability." Villas at Highland Park Homeowners Ass’n v. Villas at Highland Park, 394 P.3d 1144 (Colo. 2017).

The Court granted review because (1) it was an issue of first impression, (2) it was likely to recur across all judicial districts, and (3) waiting until after trial for standard appeal processes would make a preliminary hearing moot.

The Court began with the preliminary hearing statute, which states in part: "[o]nly those persons accused of a class 4, 5, or 6 felony by direct information or felony complaint which felony requires mandatory sentencing ... shall have the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information or felony complaint was committed by the defendant." § 16-5-301(1)(a); Crim. P. 7(h)(1).

Thus, a defendant must be accused of a class 4, 5, or 6 felony and must be subject to "mandatory sentencing," a phrase that was thus far undefined by the Legislature.

Under § 42-4-1301(1)(a), DUI is a class 4 felony "if the violation occurred after three or more prior convictions." Huckabay clearly met this requirement.

However, the People argued that because he could serve his time in a county jail under a work release program and not in the Department of Corrections ("DOC") he was not subject to a "mandatory sentence."

The Court noted that § 42-4-1307(6.5) (a) (the punishment statute for DUIs) states in part "[a] person who commits a felony DUI, DUI per se, or DWAI offense shall be sentenced in accordance with the provisions of § 18-1.3-401 and this subsection (6.5)." Section 18-1.3-401 allows for a presumptive range (absent "extraordinary mitigating or aggravating factors") of two to six years in DOC custody followed by three years of parole. Subsection (6.5) allows for 90 or 180 days in county jail or between 120 days and two years in county jail through participation in a work- or education release program. § 42-4-1307(6.5)(b)(I),(II). Also, the latter statute refers to either sentence as a "mandatory period of imprisonment."

Thus, because the punishment statute says a district court "shall" impose one of the three sentences, each involving some form of custody, regardless if it was in the DOC or in county jail, the Court found that Huckabay was subject to "mandatory sentencing." Further, the Court noted that if the Legislature intended "mandatory sentencing" to mean only DOC custody sentences it could have stated so explicitly in the statute. Therefore, the Court held that the district court erred in denying Huckabay a preliminary hearing.

Accordingly, the Court remanded the case back to the district court with instructions to grant him his hearing. See: People v. Huckabay, 463 P.3d 293 (Colo. 2020).

Second Circuit: Nondescript Photo of Unidentified Black Male Insufficient Grounds to Conduct Investigatory Stop

by Anthony Accurso

The U.S. Court of Appeals for the Second Circuit reversed a lower court order denying defendant's evidence suppression motion on the grounds that a photo, which provided very little identifying information, was insufficient grounds to stop and investigate.

On September 2, 2017, Jaquan Walker and Javone Hopkins were walking through the Central Business District of Troy, New York, around 6:50 p.m. when Sergeant Peter Montanino noticed them.

Recalling an email he received the day before of a photo of a suspect and the phrase "trying to ID suspect #2 in this photo," Montanino compared Walker and Hopkins and found they were "medium to dark skin toned black males. They were thin build. Both were wearing glasses at the time. One had little longer length, longer than shoulder length hair. The other one had what appeared to be short hair... Both had facial hair. Both appeared to have goatees."

Montanino called his subordinates, officers Owen Conway and Martin Furciniti, and asked them to stop and ID the pedestrians. The pair pulled up in front of Walker and Hopkins while Montanino pulled up behind them. The officers ordered them to stop and produce identification, which was used to run a file check for warrants.

Walker had an outstanding warrant and was arrested. Furciniti conducted a pat search incident to the arrest and discovered marijuana and 50 grams of crack cocaine. Walker also offered to provide information about other drug activity in the area. Walker was later charged with possession with intent...
to distribute under 21 U.S.C. § 841(a)(1).

Walker filed a motion to suppress the drugs and his statements after the arrest on the grounds that the search was unconstitutional. His motion was denied, and he entered a conditional guilty plea, which allowed him to challenge the denial on appeal.

Citing Terry v. Ohio, 392 U.S. 1 (1968), the Second Circuit said, “Though officers may approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest,” such a stop must be based upon “reasonable suspicion that the person to be detained is committing or has committed a criminal offense.” Dancy v. McGinley, 843 F.3d 93 (2d Cir. 2016).

The Court concluded that the officers lacked reasonable suspicion to stop Walker for two reasons. First, the email Montanino relied on merely contained a request to ID a “suspect.” It contained no information about any particular crime that had been committed. Though, during the suppression hearing, Montanino revealed the suspect was wanted for a recent shooting, that information was not known when Walker was stopped.

Further, Montanino’s description of Walker and Hopkins as matching the photo was not sufficiently particularized. In examining his testimony, the Court, quoting Dancy, observed that the “description fit too many people to constitute sufficient articulable facts on which to justify a stop.” Again quoting Dancy, the Court noted it previously said “that the description of a suspect as thin, black, and male was too vague ... to justify a stop of anyone meeting it.”

The Government then argued for an exception to the Fourth Amendment known as the “ attenuation doctrine.” “Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” Utah v. Strieff, 136 S. Ct. 2056 (2016). Even if the stop was unconstitutional, the Government argued, the intervening circumstance of discovering an outstanding warrant could justify the later search in which drugs were found.

The Court disagreed. The temporal proximity of the stop and the search — a mere 10 minutes — weighed for suppression, while the intervening circumstance — the discovery of the outstanding warrant — weighed against.

The third factor in the attenuation analysis set forth in Strieff, “the purpose and flagrancy of the official misconduct,” weighed heavily toward suppression in this case, according to the Court.

The reasons cited for stopping Walker fell “woefully short” of what the Fourth Amendment requires, the Court admonished. Since the unknown suspect photo was not known by Montanino to be linked to any crime, his “explanation for stopping Walker was so obviously deficient that it constitutes deliberate, reckless, or grossly negligent conduct,” the Court concluded, quoting Harring v. United States, 555 U.S. 135 (2009). The Court explained: “specificity in articulating the basis for a stop is necessary in part because according the police unfettered discretion to stop and frisk could lead to harassment of minority groups and severely exacerbate police-community tensions.” Dancy.

Thus, the Court held that the stop of Walker was unconstitutional, the facts of the case do not support the application of the attenuation exception.

Accordingly, the Court vacated Walker’s conviction and reversed the district court’s denial of the suppression motion. See United States v. Walker, 965 F.3d 180 (2d Cir. 2020).

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Sixth Circuit Vacates First Step Act Resentencing Denial Where Court Failed to Consider Post-Sentencing Conduct

by Anthony Accursio

In a decision filed on August 26, 2020, the U.S. Court of Appeals for the Sixth Circuit vacated the U.S. District Court for the Western District of Kentucky’s order denying a prisoner’s motion for sentence reduction under the First Step Act because the court failed to consider his post-sentencing good-conduct argument.

Shawn Williams pleaded guilty in 2005 to possession with intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a). The Government filed an enhancement under § 851 because of his prior felony drug conviction, raising his mandatory minimum to 20 years.

Based on a total offense level of 34 and a criminal history category of VI, his Guidelines range was 262 to 327 months. He was sentenced to 262 months’ imprisonment to be followed by 10 years of supervision.

In 2018, the passage of the First Step Act modified his effective statutory mandatory minimum sentence to 10 years, so Williams asked to be resentenced. In his motion, he argued, among other things, that his conduct while in prison warranted a reduction. Williams highlighted that he passed every drug test he had taken, held the same prison job for eight years, and helped 13 other prisoners obtain their GED.

The district court denied his motion while noting that the Guidelines, which account for most § 3553(a) factors such as the need “to protect the public from future crimes of the defendant, to provide just punishment, and to provide deterrence,” had not altered since his original sentencing, and it therefore affirmed his 262-month sentence.

Williams appealed on the ground that his resentencing judge failed to account for or even consider his post-sentencing rehabilitative conduct.

The Court of Appeals noted that the First Step Act does not entitle a movant to a “plenary resentencing.” United States v. Boulding, 960 F.3d 774 (6th Cir. 2020). Resentencing decisions under the First Step Act are reviewed for “substantive and procedural reasonableness.” Id. Upon any resentencing decision, the district court must “adequately explain the chosen sentence to allow for meaningful appellate review.” Gall v. United States, 552, U.S. 38 (2007). While the court need not respond to every sentencing argument, the record as a whole must indicate the court’s reasoning. Rita v. United States, 551 U.S. 338 (2007).

The Court determined that neither the current resentencing review nor Williams’ initial sentencing in 2005 accounted for his post-sentencing conduct, and thus the Court had no “indication of the district court’s reasoning as to that motion.” Accordingly, the Court vacated the district court’s order and remanded the case to the district court for further consideration of Williams’ good-conduct argument consistent with its opinion. See United States v. Williams, 972 F.3d 815 (6th Cir. 2020).
Montana Supreme Court: Renter’s Privacy Not Diminished By Landlord’s Probationary Status

by Anthony Accurso

The Supreme Court of the State of Montana held that a defendant’s rights to be free from unreasonable searches and seizures and invasions of privacy were violated when his landlord’s probation officer searched his rented space.

Stephen Thomas was caring for his sick wife when they rented the outbuilding on Parischere (Paris) Hughes’ property in 2016. Thomas paid $400 per month to rent and live in the space with all of his belongings. Because the outbuilding did not have “running water, plumbing, a bathroom, or kitchen facilities,” Thomas used these facilities in Paris’ home. When he was not there, he kept a lock on the door to his space.

Prior to moving in, Thomas was made aware that Paris was on probation. Her probation officer, Gen Stasiak, was made aware of and approved the rental agreement.

Paris missed two drug/alcohol screenings, one each on December 16 and 19, and Stasiak suspected she had relapsed. Stasiak invoked a condition of her probation that states in relevant part that, “all places in the defendant’s residence where the defendant has access are subject to [warrantless] search, even those private rooms of other persons with whom the defendant resides, unless those rooms are locked and the defendant does not have access to those rooms.”

When law enforcement arrived, Thomas came out to meet them, leaving his space unsecured. He was told to sit on the couch in the main home while the search was performed. Stasiak, finding the outbuilding Thomas was renting unsecured, searched it and found a “sort of family relic,” a very old bottle of “Ipecac and opium powder,” as well as some marijuana and paraphernalia. Thomas asserted that he never authorized the search of his space.

Thomas was charged and convicted for criminal possession of a dangerous drug on the basis of the opium bottle. His motion to suppress the evidence failed, and he was subsequently convicted. He appealed, arguing that his right to privacy was violated during the search.

The Montana Supreme Court recognizes that both the Fourth Amendment to the U.S. Constitution and Article II Section 11 of the state constitution protect citizens against unreasonable searches and seizures. Article II, Section 10 goes further, stating the “right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” This means the “range of searches which may be conducted pursuant to Montana’s Constitution is narrower” than those that are lawful under the U.S. Constitution. State v. Goetz, 191 P.3d 489 (Mont. 2008).

There are exceptions to these rights, but the “State [must] prove that one of the exceptions provided under our search and seizure jurisprudence applies.” State v. Therriault, 14 P.3d 444 (Mont. 2000).

In denying the suppression motion, the district court determined Paris and Thomas were roommates largely because Thomas regularly accessed Paris’ living space. The Supreme Court ruled this an error because “undisputed evidence established an arms-length rental arrangement” that provided Thomas “exclusive control over the outbuilding as his primary residence.” Further, Stasiak knew about the rental agreement and that Paris had no access to the outbuilding as part of the agreement. So while the terms of her probation reduced Paris’ right to privacy in her person and residence, they “did not govern Thomas,” according to the Court.

Also, Thomas kept the outbuilding locked, which further prevented Paris from accessing it. It was only because he was responding to law enforcement that he left it unsecured.

The district court used this fact and applied State v. Finley, 260 P.3d 175 (Mont. 2011) (search of a safe in Finley and his wife’s bedroom was justified where she was on probation and safe was open and unlocked) in denying Thomas’s motion. The Supreme Court ruled Finley distinguishable because Paris and Thomas were not married and sharing a living space, unlike the couple in Finley.

Thus, the Court ruled that Thomas had a right to be free from warrantless searches of his living space regardless of Paris’ probationary status.

Accordingly, the Court reversed the district court’s suppression ruling and ordered the criminal complaint dismissed with prejudice. See State v. Thomas, 471 P.3d 733 (Mont. 2020).

Federal Judges Beginning to Reject Geofence Warrants

by Anthony Accurso

Geofence warrants have become a common way for law enforcement to link a crime to a suspect using data gathered from smartphones. However, this process is legally dubious, and two federal judges from the district court in Chicago recently rejected issuing such warrants.

Such warrants are sometimes also called “reverse warrants” because they are like a normal warrant but in reverse. Normally, law enforcement officers (“LEOs”) have a suspect or specific details about a suspect, and they have some evidence that person committed a crime. They present this to a magistrate judge who then authorizes them to look for more conclusive evidence in very specific places.

In contrast, geofence warrants work backward from where a crime is committed, and LEOs then obtain an obscene amount of information on thousands of people in the hope they can sort potential suspects from that data. They then investigate those leads and apply for a normal warrant when they have amassed enough details to narrow it down to the person(s) they believe committed the crime.

Magistrate Judge David M. Weisman was called upon to authorize such a warrant after some pharmaceuticals were stolen. The government applied to obtain data gathered by Google (from the Android OS and Google apps installed on 97% of smartphones) on all the users in the area during the thefts. But the “area covered over seven acres (nearly the area of Wrigley Field) in a densely populated city,” near restaurants, a large residential complex,
“various commercial establishments,” and medical offices.

And the request was non-specific, requesting “evidence or instrumentalities of” the listed offense. This vagueness requires Google to turn over everything it has on users in that area at those times.

In rejecting the warrant, Weisman said the search was overbroad, in that it swept far too many non-suspects up in the search. There could be potentially thousands or tens of thousands of people whose data would be leaked despite their complete non-involvement in criminal activity.

He also said the items to be seized (the data from Google) were not “particularly described.” Essentially, the government could get whatever data it wanted without any limit on the types of data or how long it would keep it.

When they left empty-handed, the LEOS rewrote the warrant application to be somewhat more specific and then tried to pass it by a different judge. Judge Gabriel Fuentes similarly excoriated the government’s attempt to “shop around” for a better outcome.

Fuentes relied on two U.S. Supreme Court cases for guidance in denying the warrant. The first is Carpenter v. United States, 138 S. Ct. 2206 (2018), where the Court said the “reasonable expectation of privacy” covers cell-site location information for any period over seven days. This means the government cannot get weeks or months of information about where you’ve been (at least from cellphone companies) as this exposes a lot of everyday, non-criminal, private behavior. Fuentes said this warrant, if granted even in its amended form, would expose location information on hundreds or thousands of people who have a right to keep their movements private.

The judge also cited Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338 (1979), where LEOS obtained a warrant to search a bartender and a bar, and they used that warrant to justify searching every person in the bar when they executed the warrant. The Supreme Court said this kind of search is exactly what the Fourth Amendment is meant to prevent. Techdirt.com described the geofence warrant as “allow[ing] the government to grab everyone in the area, seize their devices, and take a look at their location history.”

Fuentes said, in his decision denying the warrant, the government was trying to “sort through the location information ... of multiple people to identify the suspect by process of elimination” and that this “discretion is too great to comply with the particularity requirement” of the Fourth Amendment.

While the judges should be lauded for taking a stand to protect the rights of law-abiding citizens, what does it say about the hundreds or thousands of such warrants that are approved each year. We don’t know exactly how many are requested each year or how many of those are approved.

According to the Electronic Frontier Foundation, a group fighting for citizen rights in the technology sphere, Google has reported there was a 1,500% increase in geofence requests from 2017 to 2018, and a 500% increase from 2018 to 2019.

While Google might be the preferred source for this data, we don’t know how many other companies also have been ordered to process such requests. We also don’t know exactly why there has been such a dramatic rise in requests for this data. Is this legally dubious practice now the first option in an investigation where the suspect’s identity isn’t immediately apparent?

That these two judges have defied the government this time is a good sign, and hopefully, the beginning of a trend that concludes with the Supreme Court issuing a blanket rejection of these fishing expeditions in favor of protecting the privacy of citizens.

Sources: techdirt.com, eff.org

Fifth Circuit: Safety Valve Isn’t Up to the Government

by Dale Chappell

The U.S. Court of Appeals for the Fifth Circuit held on August 21, 2020, that it’s not up to the Government to determine whether a defendant qualifies for a reduced sentence under the safety valve provisions of 18 U.S.C. § 3553(f). Instead, the Court reminded, it is up to the district court to make that decision based on evidence and not mere speculation by the Government.

Yuniel Lima-Rivero pleaded guilty to conspiracy to possess methamphetamine with intent to distribute under 18 U.S.C. § 856 and was sentenced to 15 years in federal prison without parole.

At sentencing, the U.S. District Court for the Northern District of Texas rejected Lima-Rivero’s request for application of the safety valve allowing a lower sentence. The Government argued that he failed to qualify for the safety valve because he did not truthfully provide all information known about the offense. Indeed, at sentencing, a DEA agent testified that Lima-Rivero was “less than forthcoming regarding many things.”

The district judge said, “I think it’s up to the government to determine if the defendant has complied with the safety valve provisions. I don’t know how you get around that,” the judge said and denied Lima-Rivero’s request for the safety valve.

On appeal, the Fifth Circuit reiterated its rule that a district court “is not bound by the government’s determination of whether a defendant failed to provide truthful information” for the safety valve. Under 18 U.S.C. § 3553(f)(5), one of the five criteria required for a reduced sentence under the safety valve is that a defendant must provide “all information and evidence [he has] concerning the offense or offenses that were part of the same course of conduct or common scheme or plan.”

The fact that the DEA agent testified Lima-Rivero was “less than forthcoming” wasn’t enough to cure the district court’s “repeated misstatements of the law,” the Court said. First, it noted that it is the district court’s responsibility to determine the facts for analysis under § 3553(f)(5), not the Government’s. The DEA agent’s testimony was not the determining factor.

Second, the DEA agent’s testimony was “mere speculation,” the Court said. “Such testimony must be supported with specific factual findings or easily recognizable support in the record,” the Court instructed. Had the agent offered evidence to back his statements, like Lima-Rivero’s refusal to answer question, for example, this would not have been speculative, the Court explained.

The agent “provided no specifics” regarding Lima-Rivero’s untruthfulness, “and no facts supporting his untruthfulness are obvious in the record,” the Court concluded. The district court therefore erred in relying on the Government’s ‘unsupported testimony’ to deny the safety valve.

Accordingly, the Court vacated Lima-Rivero’s sentence and remanded for resentencing. See: United States v. Lima-Rivero, 971 F.3d 518 (5th Cir. 2020).
Maine Supreme Court: SORNA Ruled Ex Post Facto Punishment for Defendant

by Anthony Accurso

In a decision issued August 13, 2020, the Maine Supreme Judicial Court held that the Sex Offender Registration and Notification Act of 1999 (“SORNA of 1999”) was unconstitutionally applied to a defendant in violation of the Maine and U.S. Constitutions’ ex post facto provisions.

Craig A. Porter moved his camper to a friend's property in Dresden, Maine, in May 2018 and did not notify the local sheriff’s office of the change. Proctor had prior sex offenses and was thus indicted in November 2018 for failing to register in violation of 34-A M.R.S. § 11222 (1-B) (2020). Proctor was convicted and sentenced to 90 days' imprisonment. The execution of the sentence was stayed pending resolution of his appeal as to whether SORNA of 1999 was unconstitutional as applied to him.

In October 1990, Proctor was convicted of four counts of unlawful sexual contact in violation of 17-A M.R.S.A. § 255 (Supp. 1990). He was sentenced to five years of imprisonment, with all but one year suspended and four years of probation. However, he was not then required to register as a sex offender because Maine did not pass its first registration law until 1991 (“SORNA of 1991”).

In November 1992, Proctor was convicted of gross sexual assault in violation of 17-A M.R.S.A. § 253 (Supp. 1992). He was sentenced to 10 years of imprisonment, with five years suspended and four years of probation.

SORNA of 1991 required imposition of a duty to register but allowed a court to waive the requirement where it found “good cause” to do so. Proctor was not required to register as part of his criminal sentence.

SORNA of 1999 was enacted and created a tiered system where “sex offenders” were required to register for 10 years, and “sexually violent predators” were required to register for life. A 2001 amendment to the law “made the law apply retroactively to all persons sentenced for sex offenses or sexually violent offenses on or after June 30, 1992, and before Sept. 18, 1999.” State v. Letalien, 985 A.2d 4 (Me. 2009). This amendment applied to Proctor’s November 1992 conviction, requiring him to register for life.

A 2005 amendment was passed, which retroactively applied “to all sex offenders sentenced on or after Jan. 1, 1982.” Doe v. Williams, 61 A.3d 718 (Me. 2013). This applied to Proctor’s 1990 convictions.

Both the U.S. Constitution (article I, § 10, cl. 1) and the Maine Constitution (art. I, § 11) prohibit ex post facto laws. A statute “violate[s] the prohibition against ex post facto laws if it: (1) punishes as criminal an act that was not criminal when it was done, (2) makes more burdensome the punishment for a crime after it has been committed, or (3) deprives a defendant of a defense that was available according to law at the time the act was committed.” Letalien.

As a result of a 2003 amendment, registration was no longer tied to criminal sentencing. “In light of this and other provisions, SORNA of 1999 was ruled as “civil and regulatory in nature,” not criminal. Doe v. Anderson, 108 A.3d 378 (Me. 2015). Because it was deemed civil, it could be applied retroactively but with certain caveats.

In Williams, the Maine Supreme Court allowed for retrospective application of SORNA to crimes committed before SORA of 1991

“because their sentences were not subject to any sex offender registration statutes, and, therefore, the retroactive application of SORNA of 1999 did not modify their sentences.” However, in Letalien and Anderson, SORNA of 1999 was ruled unconstitutional as applied to those defendants because it increased the length of registration or imposed registration where none was required as part of a sentence previously imposed, which “modified and enhanced a portion of [the defendant’s] criminal sentence.” Letalien.

In comparison, the Court found the effect of applying SORNA of 1999 to Proctor’s 1992 conviction appears to be a retroactive enhancement of the sentence imposed and is thus unconstitutional.

However, the limited record was vague as to whether Proctor would have still been required to register in 2018 as a result of his 1990 convictions.

Accordingly, the Court vacated Proctor’s conviction and remanded for a hearing regarding that registration obligation, a new trial, or both. See: State v. Proctor, 237 A.3d 896 (Me. 2020).enasent.

Seventh Circuit: Incompetent Advice to Reject Plea Offer Requires Evidentiary Hearing

by David M. Reutter

The U.S. Court of Appeals for the Seventh Circuit held a district court erred in failing to grant an evidentiary hearing on a claim that counsel rendered ineffective assistance by advising him to reject a favorable plea agreement without having reviewed the case file.

David L. Day, Jr., was charged in September 2013 with conspiracy to commit wire fraud and making false statements in loan and credit applications. In 2012, Day participated in a fraudulent scheme disguised as a “credit repair service.” Day sold misappropriated Social Security numbers to his “customers” with instructions on how to use their new “credit profile number” to apply for new retail loans.

Originally represented by federal defender Monica Foster, the Government in June 2014 offered a plea deal that provided for Day to plead to the conspiracy count and dismissal of the other count. It also agreed to an offense level and criminal history category that put Day into a Guidelines range of 51 to 63 months in prison. Foster believed the Government may agree to a downward departure to 40 months due to Day’s substantial assistance. She advised Day to accept the offer because he had no viable defense, and he was ready to accept the initial offer if the counteroffer was rejected.

Meanwhile, Day’s father recommended he get a second opinion from private attorney John Schwartz, who had no prior experience in federal criminal cases. Schwartz brought in John Christ, who had experience in federal criminal law. They told Day he was not guilty of a crime because he “could not be convicted for conduct that mothers were openly engag-
ing in.” Day retained the pair for $30,000 to take the case to trial. Following their advice, he rejected the plea offer.

The Government renewed its plea offer to Day’s new attorneys. They were “dismissive” of it, assuring Day he had a strong defense. As a result, he rejected the offer as the parties prepared for a January 26, 2015, trial date. His counsel arrived late for the final pretrial hearing on January 12 and displayed a significant lack of preparation for trial. Day formally rejected the plea offer at the hearing.

Afterward, his attorneys met with him and advised that based on the Government’s evidence he would lose at trial. Day was shocked and instructed his attorneys to get him “the best deal they could negotiate.” They said his best move was to plead guilty without a plea agreement and throw himself to the mercy of the court.

Four days later, Day pleaded guilty to the conspiracy charge, and the Government agreed to dismiss the other count. A pre-sentence report placed Day in a Guidelines range of 135-168 months. The Government agreed to downward departure for Day’s substantial assistance, putting him in an 87- to 108-month range. The Indiana federal district court sentenced Day to 92 months in prison. At some point after sentencing, Foster informed Day his attorneys never picked up the case file.

Acting pro se, Day filed a 28 U.S.C. § 2255 motion to vacate his sentence. He alleged Schwartz and Christ were ineffective for rejecting the plea offer despite never reviewing the case file or the Government’s discovery. The district court denied the motion without a hearing.

On appeal, the Government conceded that Schwartz and Christ performed deficiently when they advised Day to reject the renewed plea offer, but it argued a hearing was not necessary because Day could not show prejudice. The Seventh Circuit disagreed.

In denying a hearing, the district court ruled Day could not show prejudice because the plea agreement would not bind the court to a particular sentence. The Seventh Circuit said the proper standard is whether there is a reasonable probability that the court “would have accepted its terms” and the resulting sentence “would have been less severe” than the one that was actually imposed. 


“The district court’s prejudice analysis also overlooks the practical realities of plea negotiations,” wrote the Court. “Few court observers would contend that the government’s views as reflected in its plea stipulation and Guidelines recommendations have no influence on a judge’s real-world sentencing decisions,” the Court stated.

The Court concluded an evidentiary hearing was required. It noted that even if Day shows he would have accepted the plea offer but for the incompetent advice of his attorneys, he must still show a reasonable probability that he would have received a sentence lower than 92 months. If that is proven, then the district court must craft an appropriate remedy.

Accordingly, the Court vacated the district court’s order, and the matter remanded for an evidentiary hearing. See: Day v. United States, 962 F.3d 987 (7th Cir. 2020).

New Hampshire Supreme Court Announces Adoption of Lafler When Reviewing IAC Claims in Plea Bargain Cases

by Douglas Ankney

The Supreme Court of New Hampshire announced that it has adopted the approach of Lafler v. Cooper, 566 U.S. 156 (2016), in reviewing claims of ineffective assistance of counsel where the defendant rejected a plea offer and chose to go to trial based upon advice of counsel.

Keith Fitzgerald was indicted on five counts of theft by unlawful taking (Class A felonies) for using his power of attorney to transfer money from his father’s accounts into accounts in his name. Each count carries a penalty of 7.5 to 15 years. The State notified Fitzgerald in a plea offer that the sentence enhancements of RSA 651:6, III (2016) could be applied because his father was over 65 years old. Unable to reach an agreement at the first settlement conference, the parties filed a motion stating they continue “to engage[] in productive settlement discussions [and] are in agreement that the defendant have some time to consider the State’s current offer.”

Ultimately, the State made its final offer of two years’ incarceration in a county facility, followed by two years of home confinement in exchange for a guilty plea to all five counts.

Defense counsel advised Fitzgerald that he was not opposed to Fitzgerald taking his case to trial and that counsel was “feeling good” about the jury finding reasonable doubt as to whether Fitzgerald did not have authorization to transfer the money. Fitzgerald declined the plea offer. A jury found him guilty of all five counts and found that the State had proved the father’s age for application of the sentencing enhancements. The trial court sentenced Fitzgerald to a term of 9.5 years to 25 years in state prison.

Fitzgerald subsequently filed a motion for new trial based on ineffective assistance of counsel, arguing, inter alia, that his attorney had incorrectly explained the “Elder Abuse (over 65 years old) charge.” At a hearing on the motion, defense counsel testified that he did not “recall specifically talking to [Fitzgerald] about the distinction between Class A felonies and the extended term.” Counsel further testified that he told Fitzgerald if he were convicted it would be unlikely that he would receive a sentence of more than three years. Counsel testified that he arrived at the three-year figure by checking the press for similar cases but that he did not research actual court cases. Had he done so, he would have discovered a similar case tried by the same judge wherein the defendant received a sentence similar to that received by Fitzgerald. Counsel also testified that Fitzgerald chose to go to trial based on the advice received from counsel.

The trial court denied the motion, reasoning that Fitzgerald failed to establish he was prejudiced because he did not prove that the trial court would have accepted the deal. Fitzgerald appealed.

The New Hampshire Supreme Court observed that to prove counsel was ineffective a defendant must demonstrate that counsel’s performance fell below an objective standard of reasonableness, and there was a reasonable probability that the deficient performance prejudiced the outcome of the case. Strickland v. Washington, 466 U.S. 668 (1984).

A defendant has a right to effective assistance of counsel during plea bargaining. Lafler. An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings, and laws involved and to offer an informed opinion as to what plea should be entered. State v. Hall, 8 A.3d 12 (N.H. 2010).

Because Fitzgerald’s counsel failed to communicate to him the severity of the
enhancements and his possible sentence exposure at trial and failed to reasonably research the law, counsel’s performance fell below an objective standard of reasonableness, the Court concluded.

Turning to the prejudice prong, the Court explained that because the analysis of ineffective assistance claims is the same under both the state and federal constitutions, the Court would adopt the approach developed in Lafler. A defendant must show: (1) the offer would’ve been presented to the court – he would have accepted the offer and the prosecution would not have withdrawn it due to intervening circumstances, (2) the court would’ve accepted the terms, and (3) the conviction or sentence, or both, under the offer would’ve been less severe than under the judgment actually imposed. Lafler.

The record demonstrated a reasonable probability Fitzgerald would’ve accepted the offer if not for counsel’s bad advice, the Court determined. The State offered no evidence that it would have rescinded the offer. Even though the trial judge had imposed a similar sentence in a similar case, the court is not to consider the idiosyncrasies of a particular judge when deciding the claim. Strickland. The record was absent of any evidence to suggest that the trial court would have rejected the offer as it is the usual course for trial courts to accept plea agreements. Woods v. State, 48 N.E.3d 374 (Ind. Ct. App. 2015). And the terms of the offer were less severe than the sentence actually imposed. Therefore, the Court concluded that Fitzgerald satisfied all three prongs of Lafler and was prejudiced by counsel’s error.

Lafler instructs that when the defendant was convicted of more severe charges than those in the offer the appropriate remedy is to vacate the judgment and allow the defendant to accept the offer. But if the defendant was convicted of the same charges as he would have been if he had accepted the plea bargain, then the sole advantage the defendant would’ve received under the plea was a lesser sentence. The remedy in such a case is to remand to the trial court to determine a sentence that’s fair to both parties, i.e., either the sentence offered in the plea bargain or the sentence imposed at trial – or something in between.

Accordingly, the Court remanded the case to the trial court to determine the sentence. See: State v. Fitzgerald, 2020 N.H. LEXIS 154 (2020).
Third Circuit Announces Resentencing Under First Step Act Requires Use of § 3553(a) Factors

by Dale Chappell

The U.S. Court of Appeals for the Third Circuit held on September 15, 2020, that when a district court determines that a person is eligible for sentencing relief under the First Step Act, the court must consider all the applicable sentencing factors under 18 U.S.C. § 3553(a), even if the new Guidelines range is the same as the old range.

After the U.S. District Court for the Middle District of Pennsylvania found that Jamel Easter qualified for sentencing relief under the First Step Act, it recalculated his Guidelines sentencing range (“GSR”), found that it didn’t change after applying the new law, and refused to go any lower. Easter was convicted of a crack cocaine offense in 2008, under 21 U.S.C. § 841(a), (b)(1)(B), and a consecutive sentence under 18 U.S.C. 924(c) for possessing a firearm in furtherance of that drug offense.

Originally sentenced to a total of 19 years (14 for the drugs and five for the firearm), Easter got a reduction in 2015 when Amendment 782 reduced his crack cocaine offense level by two points. His sentence was reduced to just over 16 years total with the reduction. When the First Step Act made the Fair Sentencing Act of 2010 (“FSA”) retroactive to those with over 16 years total with the reduction, when applying the new Guidelines, the Court said. The factors also influence each other. “Sentencing always turns on the balancing of a variety of factors; therefore, a change in any one factor may alter the relative weight the court assigns the others,” the Court noted.

Third, § 404 does not say the factors don’t apply, and Congress had the background that federal sentencing courts would refer to § 3553(a) when it wrote the First Step Act, the Court reasoned. Even the Government conceded in other cases the factors apply, the Court noted.

Fourth, the Court agreed with the Sixth Circuit in United States v. Boulding, 960 F.3d 774 (6th Cir. 2020), that § 404 requires an accurate calculation of not only the GSR but also the “thorough renewed consideration of the § 3553(a) factors.”

The Court also cited the Supreme Court’s decision in Pepper v. United States, 562 U.S. 476 (2011), that post-sentencing rehabilitation “may be highly relevant to several of [those] factors.”

Thus, the Third Circuit held that a district court “must” consider the § 3553(a) factors when contemplating whether to impose a reduced sentence under the First Step Act.

Accordingly, the Court remanded for the district court to resentence Easter under the newly announced rule. See: United States v. Easter, 975 F.3d 318 (3d Cir. 2020).

Roget’s Thesaurus
Can’t think of the right word? Let Roget’s help you! Over 11,000 words listed alphabetically. See page 53 for more information.
The Supreme Court of Kansas reversed Michael Alan Keyes’ murder conviction because the district court refused to give his requested self-defense instruction.

Keyes was tried for the murder of Jimmy Martin. State’s witness Carlo Malone testified that Keyes ordered him to stand outside the backdoor of Martin’s mobile home while Keyes entered the trailer armed with a pistol. He testified that he poked his head inside the door, but it was too dark to see anything. He heard an exchange of words between Keyes and Martin, culminating with Martin telling Keyes “do what you got to do.” Martin testified that he heard a gunshot and that he later helped Keyes bury Martin’s body.

Keyes testified that he neither ordered Malone to stand outside the backdoor nor was Malone even present. Keyes testified that Tina Martin – the owner of the property – had instructed him (Keyes) to evict Martin. Because Keyes knew that Martin was known to be armed with a knife, Keyes armed himself with the pistol. He confronted Martin inside the mobile home and told him he had to move. Martin threatened to kill Keyes, grabbed a knife, and began slashing it toward Keyes. Keyes shot Martin twice in the chest and twice in the head, killing him.

The coroner confirmed that Martin had been shot twice in the head and twice in the chest. Additionally, other witnesses testified that Martin was dangerous and had threatened to kill them with a knife.

At the close of the evidence, Keyes requested jury instructions on self-defense and involuntary manslaughter. Over objections from the defense, the district court denied the request. The jury convicted Keyes of first-degree premeditated murder, and he appealed, arguing, inter alia, that the district court erred when it refused his requested jury instructions.

The Kansas Supreme Court observed that jury instruction issues are analyzed utilizing a three-step process: (1) whether there is a lack of appellate jurisdiction, e.g., the appellant failed to preserve the issue for appeal; (2) consider the merits of the issue to determine if there was error; and (3) assess whether the error was harmless. State v. McLinn, 409 P.3d 1 (Kan. 2018). The first step was satisfied when Keyes objected to the district court’s refusal to give the instructions.

To determine if there was error, the court had to consider whether the instructions were legally and factually appropriate. McLinn. In so doing, the court examines the entire record in the light most favorable to Keyes. State v. Barlett, 418 P.3d 1253 (Kan. 2018).

The Court determined a self-defense instruction was legally appropriate because criminal defendants are generally entitled to an instruction on the law applicable to their theory of defense. Kansas law justifies the use of deadly force if a person reasonably believes it is necessary to prevent imminent death or great bodily harm. State v. Qualls, 439 P.3d 301 (Kan. 2019). The Court also determined the self-defense instruction was factually appropriate because Keyes’ testimony was evidence that he reasonably believed deadly force was necessary to prevent imminent death or great bodily harm. Id.

The State argued that Keyes wasn’t entitled to the instruction because he had entered the mobile home armed, thereby provoking Martin and negating the claim of self-defense pursuant to K.S.A. § 21-5226.

The Court concluded it was error to refuse the requested jury instructions. Because the question of self-defense could only be resolved by a jury making a credibility determination between Keyes and Malone, the Court concluded there was a reasonable probability the error affected the outcome of the trial and was, therefore, reversible error. State v. Barrett, 442 P.3d 492 (Kan. 2019).

Accordingly, the Court reversed and remanded with directions. See: State v. Keyes, 472 P.3d 78 (Kan. 2020).

Ninth Circuit: California Conviction Under § 261.5(c) Not Predicate Offense For § 2252(b)(1) Enhancement

The U.S. Court of Appeals for the Ninth Circuit held that a defendant’s conviction under California Penal Code § 261.5(c) is not a predicate offense triggering a higher mandatory sentencing range under 18 U.S.C. § 2252(b)(1) because the state statute of conviction is not a categorical match to the general federal definition of sexual abuse of a minor.

Chad Carl Jaycox pleaded guilty in 2018 to receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2). Upon issuance of the PSR, the court decided that his prior conviction for “unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator” under § 261.5(c) qualified him for an enhanced sentencing range of 15 to 40 years, up from 5 to 20 without a qualifying prior.

Jaycox objected to the enhancement, but the district court upheld the enhancement, citing United States v. Sullivan, 797 F.3d 623 (9th Cir. 2015) (holding that a conviction under Section 261.5(d) triggered the enhancement). Though his Guidelines range was 262 to 327 months, the court sentenced him to 240. He timely filed a direct appeal.

The Ninth Circuit had to determine whether § 261.5(c) is sufficiently different from § 261.5(d) to result in a ruling opposite its determination in Sullivan.

This analysis is known as the “categorical approach” and was set forth in Taylor v. United States, 495 U.S. 575 (1990). This approach involves “identifying whether the generic federal definition of the crime and assessing whether
COVID-19 Has Profound Effect on Breadth and Scope of Law Enforcement Agencies

by Michael Fortino, Ph.D.

With a global pandemic affecting nearly every aspect of traditional government operations, Syracuse University, in late spring of 2020, set out to evaluate the impact COVID-19 has had on the manpower and operations of our most active law enforcement agencies.

Much of this change seemed to follow the Trump administration’s March 15, 2020, decision to adopt a new “work from home” initiative for most federal agencies. Criminal referrals in the first half of March 2020 averaged about 4,500 per week, prior to the onset of the novel coronavirus and the “work from home” mandate. Shortly thereafter, communities experienced a reduction in both crimes and arrests, according to the data. By the end of March 2020, agency arrest referrals on U.S. Attorneys’ desks dropped to 1,800 per week, a dramatic decrease by more than half.

Following a Freedom of Information Act (“FOIA”) request for Department of Justice (“DOJ”) records, Syracuse University utilized the “Transactional Records Access Clearinghouse” (“TRAC”) to obtain agency production numbers, which produced surprising results. The numbers led law enforcement analysts to grow concerned that the virus may have resulted in a paradigm shift in both the quantity of criminal referrals as well as the urgency to arrest suspected perpetrators.

The study evaluated criminal referral reporting for the five top law enforcement agencies, which make up 81% of all case referrals to federal prosecutors. Those five agencies, in descending order of referrals made, are: Customs and Border Patrol (“CBP”), Federal Bureau of Investigation (“FBI”), Alcohol Tobacco Firearms and Explosives (“AFT”), Drug Enforcement Administration (“DEA”), and Immigration and Customs Enforcement (“ICE”).

When comparing the average referral numbers in the first six months of fiscal year 2019 to that same period for fiscal year 2020, which includes the initial onset of COVID-related lockdowns, the number of referrals per agency dropped dramatically, with the most pronounced drop reflected in CBP referrals.

In the first six months of fiscal year 2019, which would include October 2018 through March, 2019, and prior to the pandemic scare, total arrests and criminal referrals exceeded 95,000 overall. The TRAC report confirmed by Syracuse University provided a summary of this total number of referrals and broke reporting down by each of the top agencies: ICE – 7,564, DEA – 7,796, ATF – 7,883, FBI – 13,039, and CBP with a whopping 40,769.

To evaluate and better understand what may have been the predominant contributor to this sharp decline in referrals, analysts considered a series of COVID-related changes that include: revised arrest protocols, a reduction in the number of active agents on the street, and an obvious decrease in criminal enterprise during a lockdown. A closer examination of the data, however, suggests that there may be additional factors at play.

As a result of the complexities associated with FBI investigations, criminal referrals from this agency naturally lag behind other agency referrals by several months. Under the “work from home” guidelines, one would expect that an FBI reduction in criminal case referrals would simply be delayed further, but not necessarily decline, yet decline is exactly what transpired. Analysts believe that the “work from home” protocols may also have reduced the number of agent/informant interactions on the street, thus resulting in fewer investigations being initiated during the early stages of the pandemic.
COVID & Law Enforcement (cont.)

The DOJ, however, refuses to report on exactly which criminal enterprises or activities have remained consistent and which have declined dramatically, suggesting an intrinsic "risk vs. return" consideration for agent exposure. The DOJ, in this instance, may have an opportunity to determine from the data that certain crimes are not worth agent risk under a COVID-19 epidemic and possibly not a priority at all.

Other crimes simply cannot wait regardless of COVID risk, but the DOJ is keeping that information "close to the vest." This insight, analysts believe, could lead to major criminal investigation policies and protocols that shift agency manpower to higher-priority crimes and away from those considered innocuous.

Consider immigration enforcement, which both CBP and ICE are tasked with and which account for the lion’s share of all immigration-related arrests. By isolating arrest records for immigration offenses (as opposed to immigrants engaged in non-immigration criminal acts), analysts theorize that there existed an obvious sharp decline in border crossings as a result of fewer immigrants consolidating at the border out of fear of COVID-19 exposure. However, after closer analysis, the numbers may have declined not simply because there existed fewer immigrants attempting illegal entry, but simultaneously, fewer agents were positioned on the border. And of those on active duty, fewer yet may have been willing to intervene in a "hands-on" arrest.

If this is, in fact, true, it may account for a decline in the number of arrests being reported by the CBP, but it would not account for a decline in the data reported by ICE, which focuses predominantly on interior-immigration issues. ICE, it seems, implemented protocols to enact fewer arrests and, in cases involving illegal migrant workers and undocumented food processors, petitioned the Trump administration and called for a nationwide halt to all arrests as food supply chains began to falter and break down.

The pandemic seemed to ravage agricultural harvesting and meat and poultry processing but not because of fear of COVID-19. It seems that migrant workers and undocumented food processors were willing to sacrifice themselves and risk exposure during the outbreak rather than forego this life-sustaining income. As such, many became ill and could no longer work. Interestingly, undocumented workers seemed to show less fear of the coronavirus than fear of federal agencies set out to arrest them. Even the Trump administration had to acquiesce by placing a temporary moratorium on arrests and convictions of undocumented seasonal and food processing workers, suggesting that the economy ‘needed’ these valuable workers’ during a time of crisis.

In the wake of COVID-19, this “risk vs. return” reality for investigations and arrests may change the face of criminal justice forever. The data suggest that certain crimes and certain criminals are simply not worth agency risk during a pandemic and possibly not so even after the pandemic subsides.

Source: https://trac.syr.edu/tracreports/crim/608/

Sixth Circuit Vacates Sentence Where Upward Variance Based on Criminal History Had Little Bearing on Instant Offense

by Douglas Ankney

The U.S. Court of Appeals for the Sixth Circuit vacated the U.S. District Court for the Western District of Michigan’s sentence where the sentence imposed was an upward variance from the Guidelines range based on the defendant’s criminal history, but that history had little bearing on the instant offense.

In 2003, 21-year-old Manndrell Lee was sentenced to 12 months in prison after pleading guilty to second degree Criminal Sexual Conduct (“CSC”). He completed his sentence. Then from 2004 to 2018, Lee consistently violated the conditions of his parole — usually by failing to comply with sex offender registration laws and the terms of his location monitoring. He was punished with incarceration for each of those violations.

In 2018, Lee pleaded guilty to possession of a stolen firearm in violation of 18 U.S.C. § 922(j). His advisory Guidelines range, based on his criminal history score of 11, was 30 to 37 months’ imprisonment. But the district court decided an upward variance was necessary because of: (1) Lee’s “long and serious criminal history,” (2) his parole violations and disciplinary violations while in custody, and (3) his 2003 CSC offense. The district court imposed a sentence of 60 months in prison.

Lee appealed, arguing the upward variance of 23 months was substantively unreasonable.

The Sixth Circuit observed that a sentence is substantively unreasonable if it is greater than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a)(2), Holguin-Hernandez v. United States, 140 S. Ct. 762 (2020). Those goals include the need for a sentence (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2)(A-D).

When determining a sentence, district courts must begin with the Guidelines because the Sentencing Commission calculates its Guidelines ranges in an effort to carry out § 3553(a) objectives. Rita v. United States, 551 U.S. 338 (2007). If a district court reasons that a defendant’s Guidelines range fails to satisfy § 3553’s factors, it must provide a sufficiently compelling reason for any variance. Gall v. United States, 552 U.S. 38 (2007). The greater the variance, the more compelling the reason must be.

In the instant case, Lee’s criminal history score of 11 factored in his initial CSC offense and his parole violations, i.e., those were already considered when calculating his range at 30 to 37 months. But Sixth Circuit jurisprudence permits a district court to vary upward from a Guidelines range based on a defendant’s criminal history even though that history was included in the initial calculation of the Guidelines range. United States v. Trejo, 729 F. App’x 396 (6th Cir. 2018). However, the Court explained, “Importantly, in each of the cases in which we have upheld a district court’s decision to vary upward based on a defendant’s criminal history – a history which is already captured by the advisory guidelines range – we have emphasized the relationship between the instant offense and the defendant’s prior offenses.... Where ... no uniquely problematic criminal history demonstrates a specific need for deterrence beyond that already captured by the guidelines, then some...
meaningful relationship between the offense of conviction and the defendant's alleged likelihood of reoffending is needed.”

The Court then cited numerous precedents supporting its discussion, e.g., United States v. Johnson, 934 F.3d 498 (6th Cir. 2019) (14-month upward variance upheld because instant offense was fifth firearm conviction); United States v. Lanning, 633 F.3d 469 (6th Cir. 2011) (18-month upward variance upheld where instant offense was a theft conviction and defendant had numerous prior theft convictions); United States v. Dunnican, 961 F.3d 859 (6th Cir. 2020) (upward variance for firearm conviction where defendant had two previous violent convictions committed with firearms).

In the instant case, this was Lee’s first and only conviction involving a firearm. Further, the district court indicated that it imposed the variance out of concern that Lee might at some point in the future violate his parole again and be reincarcerated based on his history of parole violations. While an understandable concern, the Court concluded it was not sufficiently compelling to support an upward variance of 23 months (almost doubling the Guidelines range) because his risk of recidivism was already captured in his Guidelines range.

Accordingly, the Court vacated Lee’s sentence and remanded for resentencing. See: United States v. Lee, 974 F.3d 670 (6th Cir. 2020).

Washington Supreme Court Announces Prohibition Against Blanket Shackling Policies at Pretrial Proceedings

by Anthony Accurso

The Supreme Court of Washington issued a ruling that both clarified the standards governing the use of shackles during all court appearances and criticized the adoption of blanket policies for shackling without an individualized inquiry.

John W. Jackson, Sr. was accused of “assault in the second degree, domestic violence” after allegedly strangling his wife during an argument in early 2017. During Jackson’s pretrial hearings, he was required to be shackled and in a jail uniform. During the trial, he was allowed to wear street clothes but was required to wear a leg “brace” that prevented him from walking normally or potentially escaping.

Jackson’s attorney objected to this treatment and filed a motion requesting the court conduct an individualized hearing on the need to restrain Jackson during appearances. On August 4, 2017, the Clallam County Superior Court issued an opinion on Jackson’s motion, as well as similar motions by other defendants then pending, which adopted the policies of the Clallam County Sheriff’s Office on the restraint and shackling of in-custody defendants until a viable alternative, such as videoconferencing, was available.

During his trial, Jackson raised concerns that the jury could see his leg brace under his clothing, and it would be difficult for him to stand while preparing to testify. He was ultimately excused from standing when the jury entered and when he took his oath. He was ultimately convicted at trial and filed an appeal entering and when he took his oath. He was

On August 4, 2017, the Clallam County Superior Court issued an opinion on Jackson’s motion, as well as similar motions by other defendants then pending, which adopted the policies of the Clallam County Sheriff’s Office on the restraint and shackling of in-custody defendants until a viable alternative, such as videoconferencing, was available.

The Washington Supreme Court noted the long history of a defendant’s right to appear in court without shackles or bonds, having its roots in English common law. Further, article I, section 22 of the Washington Constitution states this right includes “the use of not only his mental but physical faculties unfettered, and unless some compelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is in plain violation of the constitutional guaranty.”

In the past, the Washington Supreme Court discussed the importance of preserving this right and for individualized assessment of the need for shackling, explaining “restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying on one’s own behalf, and right to consult with counsel during trial.” State v. Hertzog, 635 P.2d 694 (Wash. 1981).

A court retains discretion in determining when shackles are necessary, but a “broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be ‘potentially dangerous’ is a failure to exercise discretion.” Id.

The Court announced the extension of “the trial protections against blanket shackling policies to pretrial proceedings as well. . . . We now determine that the constitutional right to a fair trial is also implicated by shackling and restraints at nonjury pretrial hearings."

The Court stated that its position is based on “[w]hat we now know regarding the unknown risks of prejudice from implicit bias” and the culture in some county courts “in which incarcerated defendants are virtually guaranteed to have their constitutional rights violated” by blanket shackling policies.

The Court of Appeals agreed that Jackson’s rights had been violated by the shackling, but it also concluded that he could not demonstrate the violation wasn’t harmless and thus affirmed his conviction.

The Washington Supreme Court reversed this finding. While the high court had adopted a harmless error analysis regarding shackling during jury trials that placed the burden on defendants in State v. Hutchinson, 959 P.2d 1061 (Wash. 1998), it later shifted the burden to the State to prove “that the shackling did not influence the jury’s verdict.” State v. Damon, 25 P.3d 418 (Wash. 2001).

In the present case, the Court expressly disavowed Hutchinson’s “substantial or injurious effect” test and announced: “We hold that the State bears the burden to prove beyond a reasonable doubt that the constitutional violation was harmless as set forth in’ State v. Clark, 24 P.3d 1006 (Wash. 2001).”

After reviewing what occurred at trial, the Court concluded “the State cannot prove harmlessness beyond a reasonable doubt . . . .”

Accordingly, the Court reversed the Court of Appeals on the issue of harmlessness and remanded for a new trial “with instructions that at all stages of the proceedings, the court shall make an individualized inquiry into whether shackles or restraints are necessary, and for further proceedings consistent with this opinion.” See State v. Jackson, 467 P.3d 97 (Wash. 2020).

Writing to Win

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The en banc Supreme Court of Colorado held that the successful completion of a deferred judgment for a sex offense, which resulted in the dismissal of that charge, does not count as a conviction for purposes of the bar to petitioning a court to discontinue requiring sex offender registration for a person who “is convicted” of more than one sex offense set forth in § 16-22-113(3)(c), C.R.S. (2019), of the Colorado Sex Offender Registration Act.

As part of a plea agreement, Brian Keith McCulley pleaded guilty to one count each of second-degree sexual assault in violation of 18-3-403(1)(a), C.R.S. (2000), a fourth-degree felony, and third-degree sexual assault in violation of 18-3-404(1)(c), C.R.S. (2000), a class 1 misdemeanor.

He was sentenced to a four-year deferred judgment for the felony and received a 60-day jail sentence plus two years of probation for the misdemeanor. The probation required him to comply with the terms of the deferred judgment, and one of those terms was that he register as a sex offender.

McCulley successfully completed the terms of the felony deferred judgment, and the court ordered his guilty plea withdrawn and dismissed the felony charge.

Thus, the only remaining conviction was the misdemeanor. He continued to register as a sex offender based on that conviction. Twelve years later, he petitioned the court under § 16-22-113 to discontinue the registration requirement. The court denied the petition, ruling that the successfully completed deferred judgment counts as a conviction thereby disqualifying him from relief.

A unanimous panel of the court of appeals affirmed the district court.

Denver attorney Jonathan D. Reppucci of the Reppucci Law Firm represented McCulley on appeal to the Colorado Supreme Court. The Court conducted a de novo review. It noted that § 18-1.3-102(2), C.R.S., requires a court to withdraw a guilty plea and dismiss a case with prejudice upon successful completion of a deferred judgment. Prior to the withdrawal of the guilty plea, the court had accepted the plea, and that caused it to “act as a conviction.”


Once the guilty plea is withdrawn and the charge dismissed with prejudice, there is no longer a conviction. Hafelfinger v. Dist. Court, 674 P.2d 375 (Colo. 1984).

Although the misdemeanor conviction was sufficient to require McCulley to register as a sex offender, § 16-22-113(1)(b), C.R.S., provides that a person such as McCulley, who is required to register because of a conviction for class 1 misdemeanor third-degree sexual assault under § 18-3-404, C.R.S., as it existed prior to July 1, 2000, may petition the court for and order discontinuing of the duty to register 10 years after final release from the court’s jurisdiction if not subsequently convicted of a sex offense. But § 16-22-113(3), C.R.S., prohibits the deregistration of, among other persons, “any person who is convicted as an adult” of more than one sex offense.

Another statute, § 16-22-113(1)(d), C.R.S., expressly provides that a person who is required to register “due to being placed on a deferred judgment and sentence” can petition for removal from the registry.

The court of appeals in People v. Perry, 252 P.3d 45 (Colo. App. 2010), focused on the context of “is convicted” in § 16-22-113(3) and determined that it does not encompass a successfully completed deferred judgment. It noted that to construe it otherwise would cause § 16-22-113(3) to conflict with and disallow what § 16-108(l)(d), C.R.S., allows – specifically for a person who received a deferred judgment for sexual assault on a child to petition the court to discontinue the registration duty – as well as conflict with numerous court opinions holding that a successfully completed deferred judgment no longer constitutes “a conviction.” Further, the General Assembly deliberately chose the present tense, rather than referring to persons “previously convicted.”

The Supreme Court found the Perry Court’s analysis constructive and persuasive, adopting it as its own and holding “that a ‘conviction’ for the purposes of section 16-22-113(3)(c) does not include a successfully completed deferred judgment.” Thus, it held McCulley was eligible to petition the district court to discontinue his duty to register.

Accordingly, the Court reversed the judgment of the court of appeals and remanded for further proceedings consistent with its opinion. See: McCulley v. People, 463 P.3d 254 (Colo. 2020).

Second Circuit Announces Compassionate Release Motion by Prisoner Not Constrained by Outdated Guideline § 1B1.13, Application Note 1(D)

The U.S. Court of Appeals for the Second Circuit held on September 25, 2020, that the outdated compassionate release guideline under U.S. Sentencing Guidelines Manual § 1B1.13, Application Note 1(D) (“Application Note 1(D)”), doesn’t control when a compassionate release motion is filed by a federal prisoner, rather than the warden.

When Jeremy Zullo was sentenced a decade ago, the sentencing judge said, “it’s difficult for me to sentence somebody like you to 10 years in prison frankly.” The judge recognized that such a long sentence didn’t fit Zullo’s drug and firearm conviction with his clean criminal history but was obligated to impose at least 10 years, giving him 10 and a half years. The Government then appealed that sentence, and on remand, the judge was ordered to hand Zullo a five-year mandatory sentence in addition to the mandatory 10-year sentence for a total of 15 years in prison without parole.

After the First Step Act passed in 2018, opening the door for prisoners to file for compassionate release when the federal Bureau of Prisons (“BOP”) refuses to do so, Zullo filed a motion under 18 U.S.C. § 3582, giving the sentencing judge a chance to reduce his seemingly unfair sentence.
He cited his good conduct and his rehabilitation as key factors, along with the judge’s reluctance to impose the sentence earlier.

The U.S. District Court for the District of Vermont, however, rejected Zullo’s motion. It concluded that “his primary complaint that his sentence is too long in the first place cannot qualify as an extraordinary and compelling circumstance.” The court quoted Application Note 1(D), the sentencing Guideline that provides guidance for compassionate release motions under § 3582. “That Guideline defines ‘extraordinary and compelling circumstances,’ which were mostly medical-based reasons.

On appeal, the Court stated that the question before it was “whether the First Step Act empowered district courts evaluating motions for compassionate release to consider any extraordinary and compelling reason for release that a defendant might raise, or whether courts remain bound by [USSG § 1B1.13, Application Note 1(D)], which makes the Bureau of Prisons the sole arbiter of whether most reasons qualify as extraordinary and compelling.” The Court held that “Application Note 1(D) does not apply to compassionate release motions brought directly to the court by a defendant under the First Step Act.”

Prior to the First Step Act, a compassionate release motion could only be filed by the BOP under § 3582, and the limited criteria under § 1B1.13, Application Note 1(D) controlled. But Congress, after reports showed the BOP rarely filed compassionate release motions, expanded compassionate release to allow motions by prisoners.

The Court then set out to reconcile § 1B1.13 with the new § 3582 statute. Preferring to save the Guideline if possible, the Court removed § 1B1.13 as controlling when a prisoner files the motion. Instead, § 1B1.13 only applies when the BOP files a compassionate release motion, the Court instructed.

The Court explained: “motions by the BOP still remain under the First Step Act, [but] they are no longer exclusive … we read the Guideline as surviving, but now apply only to those motions that the BOP has made.” It added: “the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D), nor anything else in the now-outdated version of Guideline § 1B1.13, limits the district court’s discretion.”

In fact, the Court recognized that Congress took the BOP out of the equation when a prisoner files a compassionate release motion. “When the BOP fails to act, Congress made the courts the decision maker as to compassionate release,” the Court stated. “Motions not made by the BOP Director [fall] outside of section 1B1.13’s scope.”

The Court also recognized that compassionate release doesn’t mean “release.” “It bears remembering that compassionate release is a misnomer,” the Court said. The compassionate release statute “in fact speaks of sentence reductions.” The district court has options to reduce or terminate a sentence and impose probation or supervised release. The court has “broad” discretion in a remedy, the Court reiterated.

Accordingly, the Court reversed the district court’s decision and remanded for further proceedings consistent with its opinion. See: United States v. Brooker, 976 F.3d 228 (2d Cir. 2020).

$12 Million Settlement Against Louisville, Kentucky

by Ed Lyon

A settlement with family was reached in the death of Breonna Taylor of Kentucky, an unarmed Black woman who was killed when undercover Louisville Metro police “blindly” fired 10 rounds into her apartment on March 13, 2020, the result of a botched raid that began as Taylor and her boyfriend Kenneth Walker were sleeping. [See August 2020 CLN, p.48.]

The family’s lawsuit, resolved in mid-September 2020, cites battery, wrongful death, excessive force, and gross negligence. Taylor received no medical attention for more than 20 minutes after she was wounded, dispatch logs reveal, The Courier Journal reports.

Taylor was an emergency medical technician who battled for victims of the novel coronavirus before she became the victim of a no-knock warrant by overzealous cops.

The Taylor case got more exposure after the May 2020 killing of George Floyd. The video of Minneapolis, Minnesota, Officer Derek Chauvin, kneeling on Floyd’s neck for nearly nine minutes brought awareness to the everyday perils Black citizens face from police. Her death set off protests across the world along with Floyd’s.

Representing Taylor’s family were Lonita Baker and Benjamin Crump, who brought a civil rights deprivation and wrongful death suit against Louisville and the Metro police (“LMPD”). A settlement between the parties was reached six months and two days after Taylor’s death.

The $12 million settlement was negotiated by Baker, Crump, Mike O’Connell, and Sam Aguiar. The closest settlement amount to that was $8.5 million awarded to a Louisville man in a 2012 wrongful conviction suit, compensating him for spending nine years in prison for a crime he did not commit.

The really meaningful parts of the Taylor settlement were the dozen-plus police reforms the parties agreed on. The city banned no-knock warrants and must ensure that they will not return. Body cameras must be worn by police during all future raids. The LMPD must develop a system to cull problem cops from the department. Police leadership must approve all future search warrants. Emergency medical personnel must be present at all future raids. Monetary credit toward housing will be paid to officers who agree to live in areas of the city they normally patrol. All officers will perform two hours of community service weekly with pay.

Investigations against the officers involved in Taylor’s death continue, but as of October 26, only one of the officers involved has been charged.

Former Detective Brett Hankison, who was fired for “wantonly and blindly” firing his weapon outside Taylor’s apartment and through a patio door, pleaded not guilty to three counts of first-degree wanton endangerment for endangering the lives of people in a neighboring apartment, the only charges that were filed by a grand jury reviewing the 26-year-old woman’s death.”Neither Hankison nor the two other officers involved in the fatal police shooting were charged directly with Taylor’s death,” reports cbsnews.com, but the other two officers were placed on administrative leave.

On October 2, recordings of the grand jury investigation were released. The investigation uncovered “more than 250 videos and more than 4,000 pages of documents,” cbsnews.com reports.

Sources: ABC Nightly News, cbsnews.com, theguardian.com, vice.com, courier-journal.com
The New York Police Department ("NYPD") has consistently hindered police misconduct allegation investigations, withholding documentation and body-camera footage, as well as advising its police not to cooperate with interviews. That's according to an August 2020 article in ProPublica, a nonprofit news organization investigating abuses of power. With the assistance of THE CITY, WNYC/Gothamist and The Marshall Project, it investigated the NYPD and its historical lack of cooperation with the Civilian Complaint Review Board ("CCRB"), leading to a lack of discipline for misconduct and a large number of cases resolved as "inconclusive." The CCRB in New York was created in the 1950s in response to a coalition of advocacy groups in the city that wanted accountability in "police misconduct in their relations with Puerto Ricans and Negros specifically." Relations between the two have been strained since the beginning.

Sometime in the 1990s, New York's first Black mayor, David Dinkins, made the review board independent from the NYPD and gave it subpoena powers. These powers allowed the CCRB to "compel the attendance of witnesses and require the production of such records and other material as are necessary for the investigation of complaints."

Activists say the problem is in the enforcement of the CCRB's duties. Without the cooperation of the mayor, its powers are blunted. The NYPD circumvents requirements by withholding documentation or camera footage based on privacy rights.

Body cameras were mandated by federal Judge Shira Scheindlin in an attempt to record interactions between police and citizens. So withholding footage undermines the intent of the ruling. "This just seems like contempt," said Scheindlin when told of the NYPD's circumvention. "I understand privacy concerns. But they're refusing to meet their obligation," she told ProPublica.

In 2018, a CCRB staffer listed all the apparent withheld documents by the NYPD after comparing notes with others: warrants, arrest records, station house documents, officer injury reports, and more. The NYPD also redacts names on many of the records, hindering the CCRB's ability to locate and interview potential witnesses. Lastly, the police union advises police under investigation not to cooperate with interviews. They now claim social distancing prevents them from attending interviews.

The CCRB and the NYPD share the same Law Department, are represented by the same lawyers, and are both under the control of the mayor. "If the mayor isn't going to back it, it's a completely meaningless entity," said former CCRB member Richard Emery. Even filing suit against the NYPD would be fraught with politics. "The CCRB would need to get permission from the Law Department before they could even serve a subpoena on the police department," stated a staffer who wished to remain anonymous. "It would be a huge deal."

After a conclusive finding of guilt at a CCRB review, a police officer would still have to be found guilty in an internal trial by the courts, and then the police commissioner would have to make a final ruling before he or she could be disciplined.

The NYPD has a $6 billion budget, 36,000 officers, a direct line to Mayor Bill de Blasio, and groups of lobbyists to push its agenda. Even with the largest CCRB in the country, an independent inspector general devoted to police matters, and a federally mandated ruling requiring the use of body cameras, the NYPD has still been able to affect investigations by controlling access to information. Statistics show that when body camera footage is used, substantiated allegations against police more than double. Without footage, the CCRB was only able to substantiate 73 cases out of the 3,000 allegations filed in 2018.

When asked by ProPublica to comment, the NYPD said, "The NYPD makes every effort to provide both the IG and CCRB relevant information they need to perform their work. In certain instances, such as sealed records or information that may identify a sex crime victim, state law requires that certain redactions are applied or records protected. The NYPD works with both agencies to exhaust available alternatives when such legal constraints are present." Source: ProPublica

Shielding Police Identities: A Law That Cuts Both Ways

by Michael Fortino, Ph.D.

Marsy's Law, also known as the "crime victim bill of rights" designed to protect victims from their attackers when the latter are no longer incarcerated, is used by Florida police as a shield to hide an officer's identity from public access after a violent encounter with a suspect.

Responding to a call about a fatal stabbing, police chased down a man on the south side of Tallahassee. Natasha "Tony" McDade, a Black transgender man, pulled out a gun when cornered by police and was subsequently shot dead by the pursuing officer on May 27, 2020. The Tallahassee Police Department, citing Marsy's Law, refused to release the identity of the officer involved in the incident, claiming him "the victim of a crime... his identity should therefore be protected" as reported by motherjones.com.

Immediately after the shooting, according to the Florida Police Benevolent Association ("PBA"), the officer "was threatened by a person at the scene, and there has been ongoing animosity expressed against him on social media since he was forced to defend his own life." The PBA also cited the current toxic anti-police sentiment being expressed nationally and globally as a result of various White-cop/Black-suspect incidents that have stirred public protests in recent months.

Members of the LGBTQ community decry the strategy of shielding an officer's identity from the public's knowledge, as a misapplication of Marsy's Law. They claim that an officer attempting to avoid public scrutiny and accountability using Marsy's Law as a shield is "contradictory to the public's First Amendment right to gather information about what public officials do on public property."

On July 24, Second Judicial Circuit Court Judge Charles Dodson ordered the release of the names of two cops involved in McDade's death, saying, "The court finds that the explicit language of Marsy's Law was not intended to apply to law enforcement officers when acting in their official capacity."

The citizenry, he noted, "has a vital right..."
street crimes of the 1970s or the war on drugs of the 1980s are now used to impose “harsher than necessary” sentences on offenders. A piece of legislation can become a double-edged sword, and that is exactly what is happening with Marsy’s Law. Public entities such as police may now take advantage of this form of protective legislation to distance themselves from personal accountability to the public.

Many critics, including the ACLU, contend that Marsy’s Law compromises due process and that victim’s rights should take a back seat to federal constitutional protections. 

Source: motherjones.com

Exodus of a Baker’s Dozen

By Ed Lyon

Since the Memorial Day killing of George Floyd while in police custody, protests against police brutality and systemic racism have grown. And, as various protests and incidents of excessive force by police make headlines, police chiefs are beating a hasty exodus from troubled departments.

• In California, Los Angeles Schools’ Police Chief Todd Chamberlain resigned after defunding of his department by 33 percent resulted in 40 vacancies remaining unfilled and a force reduction of 65 officers.
• In Georgia, Atlanta Police Chief Erika Shields resigned after Rayshard Brooks was fatally shot by now-fired police Officer Garrett Rolfe. Although Mayor Keisha Lance Bottoms accepted the resignation, she stated Shields would continue to serve within the department in a position “yet to be determined,” turning the resignation into a demotion.
• In Kentucky, Louisville Mayor Greg Fischer fired Chief Steve Conrad after cops and National Guard soldiers shot restaurateur David McAtee to death. Conrad was fired because cops were not wearing their body cams, not because McAtee died.
• Prince George’s County, Maryland, Police Chief Hank Stawinski resigned after complaints by 13 minority officers were aired by the American Civil Liberties Union. They had allegedly been discriminated against and racially slurred by White cops.
• Las Cruces, New Mexico, Police Chief Patrick Gallagher took early retirement after eight fatal incidents during his tenure. The last two involved a chokehold death and firing 38 rounds of ‘less-than-lethal’ munitions against one suspect.
• Rochester, New York, Police Chief La’Ron Singletary retired after bodycam videos of cops killing mentally ill citizen Daniel Prude surfaced. His assistant chief and senior commander also retired. The next two senior commanders self-demoted, leaving the department leaderless.
• In Oregon, Portland Police Bureau Chief of Police Jami Resch resigned in the midst of long-lived and still ongoing protests against police brutality. She served as chief only six months.
• Nashville, Tennessee, Metro Police Chief Steve Anderson’s scheduled autumn 2020 retirement was stymied by the mayor’s announcement of his firing. No specific allegations or explanations were publicly made.
• Dallas, Texas, Chief Renée Hall resigned in the aftermath of a kettling operation on a bridge that resulted in hundreds of arrests but no actual charges and drunkenness as well as White policewoman Amber Guyger mistakenly entering a Black citizen’s apartment, fatally shooting him.
• Richmond, Virginia, police Chief William Smith resigned after a police SUV drove into a crowd of protesters, striking several of them, and a prior use by cops of tear gas on protesters before an announced curfew.
• Seattle, Washington, Chief Carmen Best retired after wages for her and her command staff were reduced. The department was defunded by $4 million and downsized by up to 100 cops. The department has been beset by more than 150 days of protests.
• Milwaukee, Wisconsin, police Chief Alfonso Morales was demoted over his department’s use of tear gas on peaceful protesters; investigations and disciplinary proceedings; and accusations of lying to city commissioners, with hiring and promotion updates.

The police chiefs’ exodus remained a baker’s dozen when Tucson, Arizona, Chief Chris Magnus’ attempt to resign was rejected and not accepted by the city manager. 

Source: usatoday.com
Proliferation of Police Drones Feeds Big Brother’s Need for Big Data

by Anthony Accurso

A recent article by Nick Motttern on Truthout.org highlights the growing trend of big data collection made possible by tech in policing, specifically the proliferation of drones with cameras.

Julie Weiner was at a Black Lives Matter protest in Yonkers, New York, in early June 2020 when she noticed a drone in the sky, seemingly monitoring the protest. After some digging, she learned the drone was operated by the Yonkers police.

Weiner is concerned that using drones, possibly in connection with other tech, such as facial recognition and predictive policing, “may be a violation of our rights to freely assemble, and to be free from unwarranted searches and seizures.”

Weiner is right to be concerned. While Yonkers Police Commissioner John Mueller has not put in place any formal policy for managing what is captured by drones or with whom that data is shared, Mueller is also considering purchasing police body cameras and had been favoring those made by Axon Enterprise, Inc. (formerly known as TASER International).

Axon, which is purported to control 80 percent of the police bodycam market, sells other law enforcement services as well. Axon is in partnership with DJI – the manufacturer of the drones used in Yonkers – to provide data capture and warehousing through its back-end database, Evidence.com. Drones, body cameras, and cameras attached to Taser can all be automatically uploaded to Evidence.com under a service contract with Axon with a “$199 do-it-all package.” To be clear, that’s $199 per officer, per month. The cost to Yonkers, with its roughly 600 officers, is about $120,000 per month.

This may be convenient for police, but it’s costly to citizens, in Yonkers and elsewhere, in terms of money and privacy. First-generation big data policing was limited by the data from each agency being “silod” and difficult to share with other agencies. But Axon’s Evidence.com is hosted on Microsoft’s immense cloud storage system, Azure, and receives data under contract with police in New York City, Atlanta, Brazil, and Singapore.

Eighteen states have laws requiring police agencies to obtain a warrant before using drone surveillance as of 2019, but there is no such limit on federal agencies. U.S. Customs and Border Patrol was recently found to have been operating a “reaper” drone outfitted with high-tech camera equipment to surveil peaceful protests. It’s not clear what, if anything, is stopping local police from accessing federal drone footage or vice versa on Evidence.com and then using that footage to unlawfully profile, track, or harass lawful protesters.

The U.N. High Commissioner for Human Rights, Michelle Bachelet, issued just such a warning recently: “New technologies can be used to mobilize and organize peaceful protests, form network and coalitions ... thus driving social change. But, as we have seen, they can be – and are being – used to restrict and infringe on protesters’ rights, to surveil and track them, and invade their privacy.”

Source: truthout.org, ohchr.org

PBA Cards and the Problem with Police Discretion

by Jayson Hawkins

Police officers have recently been under fire for excessive or even deadly force being used in routine arrests and traffic stops, but some critics have begun to draw attention to a different police behavior that involves how and when officers let people go free.

This criticism covers a broad range of behavior, but some of the most vocal protests concern PBA cards. These cards get their name from the Police Benevolent Association, which is the largest police union in New York City and a major issuer of cards. The cards carry the union logo, along with the name and phone number of the officer it was issued to.

PBA members get up to 20 cards each year, and they may give them to any friend or family member.

These civilians can then present the card when stopped by police for minor infractions, thus earning the cards their nickname: “get out of jail free cards.” The idea is that when an officer sees that the person he has stopped has some personal connection with a fellow officer, then he will be inclined to be lenient.

There is no data on how effective the cards are, but reporters at VICE.com spoke with multiple men who described how they had used the PBA cards issued to them by friends to get out of routine traffic violations. These men, not surprisingly, wished to remain anonymous.

There is no way to track how many cards have been issued or who has them, but some critics charge that the cards magnify already existing biases in policing. David Correia, co-author of Police: A Field Guide, emphasizes that the people who are given cards typically reflect the demographics of the police who issue them – White, male, and middle class. These are not the people, according to Correia, who need assistance when dealing with police in routine encounters.

There are no guarantees with PBA cards, but according to John Driscoll, a professor at the John Jay College of Criminal Justice, officers are subject to unofficial pressure to let card holders off with a warning. More than professional courtesy, this peer pressure is in some ways emblematic of police solidarity.

PBA cards are only part of what critics see as the larger problem of police discretion. The way police handle a traffic stop, for example, can hinge on things that have nothing to do with the violation at hand, like whether the person has a PBA card or what race they are. There are many well-documented cases of police brutality against people of color that began as the type of routine traffic stop PBA cards are meant to smooth over. Minneapolis police killed Philando Castile after they pulled him over for a busted tail light in 2016, and Blacks in Colorado and Louisiana have filed lawsuits against police alleging discriminatory and violent treatment during routine traffic stops.

The idea of discretion is inherent in how police go about their jobs. Criminologist George Kelling, an advocate of broad police discretion, argues that police must be able to identify disorder and criminal potential without being hindered by firm limits on how they respond to these potential threats.

Critics counter that by asserting the unfettered discretion police usually enjoy is actually the problem rather than the solution. It is this discretion, or at least the idea of it,
For-Profit Lexipol Takes Over Writing Departmental Policy for Public Safety

by Kevin Bliss

Lexipol, a privately owned company that drafts policies for over 8,100 police departments, fire, EMS, correctional services, and other public safety agencies nationwide is being criticized by reform activists as doing the bare minimum required by law to keep from being sued. They argue that the company is only concerned about its bottom line and hinders transparency at a time when reform measures are trying to hold police to a higher standard.

Started in 2003 by two retired police officers who later become lawyers, Lexipol charges the city, county, or state a fee to evaluate current departmental policies and rewrite them to comply with changing laws. The company brochure boasts: “a cost-effective solution that provides comprehensive policies and policy updates, Daily Training Bulletins to help officers apply policies, and reporting features to track policy acknowledgment.”

One of the ultimate goals of Lexipol is to limit liability for those public safety services they serve. Their material is advertised as what is necessary for “legally defensive content,” protecting agencies from lawsuits.

A senior staff attorney at the ACLU, Carl Takei, said, “The entire policy philosophy of Lexipol is based on the idea that if the policies just describe the legal standard and don’t give operational guidance to officers, don’t direct them how to behave in particular situations, they believe that that will minimize individual officer liability. All of their policy really tries very hard to avoid having bright-line rules or directing officers to do or not do any particular thing in a particular circumstance.”

At a time when the community is calling for more accountability and transparency, Lexipol is writing policy that changes permissible shooting incidents to when the threat is “imminent” and not just “immediate,” when the choice to shoot relies on “reasonability” and not “justifiability.”

Saranac Lake, New York, Mayor Clyde Rabideau said, “Yeah we want to limit our liability exposure. We want to conform to all the existing laws and procedures, and we don’t want to be sued…. For someone to complain about that is totally ridiculous.”

Governor Andrew Cuomo of New York signed an executive order June 12, 2020, requiring community members, stakeholders, local elected officials and police to come together and create policy that would be acceptable to the furtherance of law enforcement and the needs of the community they serve. This privatization of policy by Lexipol ignores community input, defeating the intent of this bill.

Sources: theintercept.com, motherjones.com

Thirty-Fourth Conviction Based on Bite Mark Forensics Overturned

by Kevin Bliss

Eddie Lee Howard, Jr. was the thirty-fourth prisoner whose case has been overturned because of the debunked pseudo-science of bite mark forensics. After 30 years in prison, the district attorney now has the choice whether to retry Howard or drop the charges.

Howard, a Black man, was arrested in 1992 in Columbus, Mississippi, for the murder of an elderly White woman. Dr. Steven Hayne performed the autopsies where he testified the second was required because there “was some question that there could be injuries inflicted by teeth.” After the second autopsy, he referred the case to Dr. Michael West, who used his patented method of exposing the body to ultraviolet light while wearing special glasses where he found bite marks he testified matched Howard’s teeth on the victim’s neck, arm, and breast. Howard was convicted and sentenced to death.

Represented by the Mississippi Innocence Project, Howard was granted in 2010 the right to have DNA analysis conducted on the evidence. Results excluded Howard from every piece of evidence tested. More importantly, DNA analysis found no saliva or male DNA on the victim’s nightgown where the underlying bite marks were said to have been found.

“The DNA testing also undermines Dr. West’s testimony that the victim was bitten,” Innocence Project attorney Dana Delger said she expects a favorable outcome.

Source: innocenceproject.org
**Guilt by Google**

by Jayson Hawkins

An extraordinary wealth of information is easily available if one only utters the magic word — “Google.” The problem arises with the realization that though the Google-genie provides information, there is no guarantee that the information is accurate or fair.

Questions about truth and privacy inevitably accompany any consideration of the new digitally connected world, and there are few areas where these questions produce more troubling answers than in the realm of online criminal records.

In the not-so-distant past, the maintenance of criminal records was the responsibility of the police agencies and courts that produced those records, but in the internet age, government sites represent only a fraction of the available criminal records online. Companies that specialize in brokering data pay government agencies and courts for bulk sets of arrest reports and other records, and the data are collated with other public records before being sold to background check services, consumer research companies, and sometimes even police agencies. There are apps that post updates about sex offenders in the neighborhood, and websites that put up recent arrestee mugshots charge a fortune to have the photos removed.

The primary causes of this shift can be found in government’s lack of resources and the growing public obsession with information awareness. The problem is that private companies that capitalize on these causes do not operate like the government or share the motives of the public.

Private firms operate for profit, which means they seek to monetize the data they collect and generate traffic on their websites. These motivations lead to a variety of difficulties. Without the accountability expected of government, inaccuracies become common, and data sets proliferate across the web with no regard for privacy or truth. Publicly shaming arrestees before they are convicted, or sometimes before they are even formally charged, creates opportunities for extortion.

Because these records hopscotch freely across the web, inaccuracies are nearly impossible to fix. Even if the original error is corrected, data companies are under no obligation to update files with the new information. Pursuing legal challenges requires lawyers and money, two things that people who have had interactions with police are less likely to have. The end result is that a casual search can produce a cascade of misleading or even blatantly false information — essentially a phenomena called “guilt-by-Google.”

These problems are encountered by numerous Americans in a variety of situations. A Minneapolis man with a single conviction from the early 1980s discovered that a background check labeled him with multiple convictions, including one for robbery in 1901 and even open warrants. He soon learned that even if he fixed the state police records that were the source of the data, there was no way he could compel the companies whose data had been used to deny him an apartment and several jobs to fix their records.

Consider a Florida woman who was arrested but never charged after a disturbance at a night club. Her mugshot was posted on a website that demanded hundreds of dollars to take it down, and the record of the arrest still comes up in Google search results.

The collection, privatization, and sale of data are human processes that do not need to be at the mercy of the technological innovation or the surveillance power inherent in the web. Europe has enacted regulations to restrict the public release of personal data, including arrest records, and all that prevents the U.S. from doing the same is political will.

Source: slate.com

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**Would the Real Officer Friendly Please Stand Up?**

by Casey J. Bastian

In 1966, the official Officer Friendly program was first instituted by the Chicago Police Department. Shortly after inception, the program became sponsored by the Sears-Roebuck Foundation. This educational program was designed for elementary schools, focusing on kids ages 5-8. The Department of Education notes that by 1979, the Officer Friendly program was in 233 communities. That number expanded to 350 at the height of the program’s popularity in the late 1980s, prospectively influencing upward of 1.5 million youths. The cost to the foundation had risen to $400,000 per year.

On the surface, the program’s purpose seems entirely benevolent, viz., providing safety education while positioning the police officer as a trustworthy and kind savior of the community. Plausibly accepted as who could possibly object to safety education for our children?

In reality, the Officer Friendly program is viewed very differently depending on whom you ask. So who is the real Officer Friendly? Sadly, the response seems to depend on race. Is Officer Friendly the idealized vision in the 1958 Norman Rockwell depiction, The Runaway, where a cop is seen comforting a small White child, coaxing him to return home? Or is it the 1965 photograph of 5-year-old Aylene Quin’s son? A real image of a small Black child having an American flag ripped from his hands by an officer.

Many hear the term “Office Friendly” and it harkens back to images of effective community policing and public service. Images of an officer helping reunite children and parents, finding lost pets, and giving a friendly pat to the head of a child or a wave from a passing patrol car.

They remember Officer Friendly visits with affection, highlighting the way policing used to be conducted.

Not all memories are so sunny. For those who have experienced brutality at the hands of the police or who harbor reasonable sus-
The schism between these two views is not new. The 1960s were a very turbulent time with respect to people’s views toward law enforcement, much like today. The police were called names and viewed as enemies of the people. There was a need to renew the humanity of the officers. Police needed to counter views propagated by the kids’ families where their elders did not have fond memories of the police protecting them. From this need is where the Officer Friendly program originated. A type of socialization where children were made into young adults who respected the police.

In 1979, the Department of Education published a bulletin that explicitly emphasized the program’s goal: “The public image of law enforcement officers – especially as perceived by children – suffers from negative attitudes expressed by parents, siblings, and friends as well as the influence of television police shows.” The New York Times conducted an interview of police officer Felicia Perry in 1986. Perry believed that the Officer Friendlies on her force were trying to humanize police to rebut what television was perceived by children – suffers from negative humanity of the officers. Police needed to the people. There was a need to renew the humanity of the officers. Police needed to counter views propagated by the kids’ families where their elders did not have fond memories of the police protecting them. From this need is where the Officer Friendly program originated. A type of socialization where children were made into young adults who respected the police.

The officers are supposed to evoke a feeling of safety. The kids would do well to remember Rule 10 of the “Officer Friendly rules”: “Be my friend, always.” Teaching the concept of “All police officers are friendly, if we are friendly.” What happens when the officer decides you’re not friendly? Tamara Myers, studying police youth work, notes, “There’s this feeling of protection and benevolence, until. I’ll protect you as long as you’re on the right side.”

The program sold a Utopian dream of community authority where we are all kept safe. Not hand-cuffed, roughed up, or suspended from school. This “copaganda” presents a simplistic and rosy picture, but it leaves us wondering: Would the real Officer Friendly please stand up?

Source: Slate.com

Technology and Police Reform

by Anthony Accurso

Technology innovation seems to impact every aspect of our lives in the modern era, but what roles should technology play in policing? As the national conversation has turned to police reform, technology’s roles are being questioned anew.

Three technology trends are behind many of our most recent innovations: cheap data storage and databases, artificial intelligence, and near ubiquitous video and audio recording devices. This is equally true in tech recently adopted for use by law policing agencies. Cheap, high-definition cameras are mounted on Tasers, vehicle dashboards, drones, buildings, and officers’ bodies. That video is stored, seemingly indefinitely, in cloud databases. The video is combed through by AI algorithms to create new data points used by other AIs to make, or aid in making, decisions in a policing context.

But, like so many other areas of our lives affected by innovation, we never stopped to ask what purposes these tools serve, and whether those purposes are at odds with our other, closely held values like privacy or free speech.

Nine years ago, Santa Cruz, California, was one of the first police departments to adopt software that implemented “predictive policing.” The thought was that they could feed enough data about past crimes into a database, and an AI would tell them the most efficient way to allocate officers to prevent crime.

But this past June, Santa Cruz became the first city to ban predictive policing. It turned out that “predictive policing” magnified aggressive policing in minority communities and didn’t contribute to public safety. This was likely due in part to the fact that the information fed into the database reflected our nation’s history of racially motivated policing and oppressive laws, which targeted minorities.

Facial recognition AI algorithms have followed a similar trajectory. Being able to identify a person captured on video committing a crime sounds like a good idea. But what about citizens who are merely peacefully protesting? What

Source: Abajournal.com
North Carolina Supreme Court Announces

Harbison Applies When Defense Counsel Implies Defendant’s Guilt Without Prior Consent

by Douglas Ankney

The Supreme Court of North Carolina extended State v. Harbison, 337 S.E.2d 504 (N.C. 1985) (holding per se violation of defendant’s constitutional right to effective counsel when counsel concedes guilt to jury without defendant’s prior consent), to include cases where defense counsel impliedly — rather than expressly — admits the defendant is guilty of a charged offense.

Anton Thurman McAllister repeatedly slapped his live-in girlfriend, Stephanie Leonard, outside a gas station. McAllister then forced Leonard back to their apartment. An attendant at the gas station reported the altercation.

Once inside the apartment, McAllister continued to hit Leonard and twice attempted to suffocate her. McAllister then forced Leonard into the bathtub where he washed the blood from Leonard’s body. Afterward, they went to bed and had sexual intercourse.

The following evening, officers located McAllister. He agreed to accompany the officers to the police station for a non-custodial interview. The interview was videotaped, during which McAllister stated he: (1) pushed Leonard to the ground outside the gas station, (2) backhanded her in the face, (3) smacked her in the lip, (4) grabbed her in the mouth, (5) bit her hand, and (6) “smacked [her] ass up.”

McAllister proceeded to jury trial on an indictment that charged (1) assault on a female, (2) assault by strangulation, (3) second-degree sexual offense, and (4) second-degree rape. The videotaped statement was played to the jury, and during closing argument, defense counsel stated: “You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did.” Defense counsel further told the jury that McAllister was “being honest” with the officers about the altercation. Defense counsel then added, “Jury … you may dislike Mr. McAllister for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did.”

At the end of defense counsel’s closing argument, he said: “I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can’t. Please find him not guilty.”

The jury acquitted McAllister of all charges except the assault on a female. McAllister proceeded via a petition for writ of certiorari to the Court of Appeals to argue that his attorney improperly conceded his guilt to the charge of assault on a female; consequently, he was denied effective assistance of counsel pursuant to Harbison. A divided Court of Appeals affirmed, and McAllister appealed to the North Carolina Supreme Court.

The Court observed “[i]n Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that the right to counsel is the right to the effective assistance of counsel.” While the North Carolina Supreme Court adheres to the test enunciated in Strickland to determine if counsel was effective, there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” United States v. Cronic, 466 U.S. 648 (1984). When counsel admits a defendant’s guilt without obtaining the defendant’s permission to do so, “the harm is so likely and so apparent that the issue of prejudice need not be addressed.” Harbison.

In Harbison, the defendant was charged with the murder of his ex-girlfriend’s boyfriend and assault based on shooting the ex-girlfriend. The defendant pleaded not guilty and proceeded to trial under the theory that he had acted in self-defense. But during closing arguments, defense counsel said, “I don’t feel [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first[-]degree [murder].”

The North Carolina Supreme Court’s holding in Harbison was based primarily on the principle that a defendant has an absolute right to plead not guilty. The Harbison Court reasoned: “When counsel admits his client’s guilt without first obtaining the client’s consent, … [t]he practical effect is the same as if counsel had entered a plea of guilty without the client’s consent,” denying the client his right to have his guilt determined by a jury. Therefore, any time a defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent, it is per se ineffective assistance of counsel. Harbison.

In the instant case, counsel did not expressly tell the jury that McAllister was guilty nor did counsel explicitly request the jury to find McAllister guilty of any offense. But counsel’s remarks that McAllister was “being honest” in the videotape wherein he admitted to the elements of assault on a female coupled with counsel’s request of the jury to find McAllister not guilty of rape, of sexual offense, and of assault by strangulation (but consciously omitting a request for a not guilty verdict on the assault on a female) implied to the jury that counsel was admitting guilt as to the offense of assault on a female. And if counsel did so without McAllister’s consent, it was per se ineffective assistance of counsel based on the rationale of Harbison.

The Court announced “that a Harbison violation is not limited to” cases in which defense counsel expressly concedes guilt without defendant’s prior consent; instead, “Harbison should … be applied more broadly so as to also encompass situations in which defense counsel impliedly conceded his client’s guilt without prior authorization.”

Because the Court of Appeals ruled that Harbison requires counsel to expressly admit guilt, the Court reversed the judgment. But the Court could not determine whether or not counsel had McAllister’s consent to imply guilt to the assault charge as a trial strategy to obtain acquittal on the more serious charges. Accordingly, the Court remanded to the trial court to determine whether McAllister consented. See: State v. McAllister, 847 S.E.2d 711 (N.C. 2020).
Prison Education Guide
Christopher Zoukis
ISBN: 978-0-9819385-3-0 • Paperback, 269 pages
Prison Education Guide is the most comprehensive guide to correspondence programs for prisoners available today. This exceptional book provides the reader with step by step instructions to find the right educational program, enroll in courses, and complete classes to meet their academic goals. This book is an invaluable reentry tool for prisoners who seek to further their education while incarcerated and to help them prepare for life and work following their release.

The Habeas Citebook: Ineffective Assistance of Counsel, Second Edition
Brandon Sample & Alissa Hull
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Government Enforcers Are Still Cops

by Jayson Hawkins

The police-involved killing of George Floyd in late May 2020 has proven to be a rallying cry against systemic racism across America. The sight of a man begging to breathe while a cop knelt on his neck for nearly nine minutes has become the defining image of abuse by law enforcement, and thousands have taken to the streets nationwide to protest. Advocates were outraged, and those who had been on the fence about the need for reforms began to find the notion that “cops are just doing their jobs” hard to swallow. The air was ripe for change.

The debate over what form that change should take has raged since.

As early as June, calls to either “defund” or “abolish” police started to gain traction. New York City, for one, responded by reallocating a billion dollars from the police force budget to agencies like mental health and emergency services, which was intended to shift responsibility for part of the police caseload into more appropriate venues. It is too early to determine the effectiveness of this move, but the political right responded immediately by forecasting chaos and anarchy

while those on the left criticized that the measures did not go far enough.

Therein lies two opposing visions of America: a conservative one where the country’s cop problem will paradoxically be solved by piling more cops on top of it and a liberal one that proposes simply banning the problem. The Trump administration’s threat to send a “surge” of federal law enforcement into cities like Chicago and Portland drew parallels to failed military tactics used in Iraq and Vietnam, and employing them on American soil would almost surely enflame already volatile situations.

A suggestion from the left to replace all cops with enforcement from particular government agencies, however, is unlikely to produce better results.

An editorial in Reason.com (July 13, 2020) pointed out that government enforcers, regardless of which badge or title they bear, are merely cops by another name. Replacing general policing with specialized employees charged with hunting contraband or collecting taxes will effectively change nothing.

“Every new law requires enforcement; every act of enforcement includes the possibility of violence,” warned professor Stephen L. Carter of Yale Law School following the killing of Eric Garner by New York City police in 2014, which was captured on bystander video. Garner was placed in a fatal chokehold, and his chest compressed after cops confronted him on a sidewalk about selling loose, untaxed cigarettes.

When unarmed civilians are being killed in the streets, it is obvious that America has a police problem, yet replacing cops with other agencies empowered to operate in the same manner is a solution that serves no one and solves nothing.

Source: reason.com

News in Brief

Canada: A trial was underway in October 2020 for Calgary Constable Alex Dunn, who is accused of assault causing bodily harm during a 2017 arrest. “Dalia Kafi, who is Black and was 26 years old at the time, had been arrested on the accusation she breached a court-ordered curfew,” cbc.ca reports. She was out past curfew while at a friend’s home braiding hair. A pal offered to drive her home but police stopped the driver for an illegal turn. Kafi was arrested for breaching curfew and obstruction of justice. While having her arrest photo taken, Dunn tried to remove her hair scarf. One of the handcuffs, Dunn testified, had slid up toward Kafi’s elbow and she grabbed his hand. Video of Dunn throwing the handcuffed suspect face-first to the ground was released to the media, cbc.ca reports. Staff Sgt. Gordon Macdonald called it a “judo-style throw,” and he advised Dunn “that it was the worst use of force that I had seen.”

Florida: Detective James Suarez has resigned from the Palm Beach County Sheriff’s Office after an investigation concluded he took checks from a charity gutted by a fellow deputy who’s now in prison,” sheriff’s office documents reveal, palmbeachpost.com reports. Suarez served on the board of Children of Wounded Warriors without PBSO permission, “according to palmbeachpost.com. He allegedly solicited donations during an investigation, tipped off the disgraced ex-deputy, Robert Simeone, about a subpoena and contacted him hundreds of times after his arrest.” Simeone, it was earlier alleged, “steered about two-thirds of the donations [to the charity] to his personal or business accounts.”

Kentucky: Two dupont Manual High School student journalists in Louisville broke the story of a Kentucky State Police warrior-style training material. The article of October 30, 2020, on the Manual RedEye news site, shows that cadets in training were encouraged in a 33-page slideshow to use violence and were given quotes by Adolf Hitler and Confederate commander Robert E. Lee. According to manualredeye.com: “One slide, titled ‘Violence of Action,’ in addition to imploring officers to be ‘ruthless killer[s], instructs troopers to have ‘a mindset void of emotion’ and to ‘meet violence with greater violence.’” The slideshow drew “harsh condemnation from politicians, Jewish groups and Kentucky residents, but not from the Kentucky State Police department itself, which said only that the training materials were old.” Kentucky Governor Andy Beshear issued this statement: “This is absolutely unacceptable. It is further unacceptable that I just learned about this through social media. We will collect all the facts and take immediate corrective action.”

Idaho: In the era of Black Lives Matter and calls to defund the police, the Boise interim police chief asked cops to not display the thin blue line police flag in public. Interim Chief Ron Winegar launched a new policy, according a June 25 email from Winegar to Boise Police Department staff obtained by the Idaho Press via a public records request. Winegar “said he would be banning the flag, stickers, face masks or anything else with the symbol on it from being displayed in public places. It would still be allowed to be displayed in BPD headquarters at City Hall West, which is closed to the public,” Idaho Press reports. “The request stems from a request by a Boise Public Schools administrator for a school resource officer to remove the flag.
from his office at a school. “The policy change was initiated at the same time as a ban on the use of the lateral vascular neck restraint, or ‘sleeper hold.’”

**Illinois:** Expunging criminal records is a focal point in states that have legalized recreational marijuana. Cook County, Illinois, for example, has been expunging 300 cannabis convictions each week, dailynewswestern.com reports. In Michigan, those with low-level pot convictions will have their records expunged because of recently signed legislation, jurist.org reports. It is part of the Michigan Clean Slate initiative, which “will make criminal record expungement automatic for all people who are eligible,” the nonprofit Safe & Just Michigan reports.

**Louisiana:** Jeff Perilloux made headlines as the St. John the Baptist Parish judge convicted of fondling his daughters’ then-teenage friends in 2017. In October 2020, he was sentenced to 14 years in prison. According to nola.com, he also was reprimanded by ad hoc Judge Dennis Waldron, who discussed Perilloux’s “grooming” of the girls as he hosted sleepovers and chaperoned them on beach trips and cruises. The girls were 14, 15, and 17 at the time. “Over a weeklong trial last month, the four accusers testified to Perilloux touching them inappropriately in various situations, whether applying sunscreen or vapor rub over their chests and bodies or, according to one victim, holding his hand over her breast during a back massage,” nola.com reports. Said Louisiana Attorney General Jeff Landry (R) after the sentencing: “Sex offenses against children are the most serious of crimes which cause permanent psychological harm. This trauma has been exacerbated by Mr. Perilloux’s continued refusal to admit and/or take responsibility for what he did to these young women, who were children when these crimes were committed. But I hope the sentence issued today will bring some comfort to the survivors and their families.”

**Louisiana:** Fair Wayne Bryant, who became a symbol for the heavy-handed “habitual offender” law, was paroled October 18, 2020, after being given a life sentence for taking a pair of hedge clippers in 1997, npr.org reports. He had served 23 years behind bars for four felonies, including armed robbery of a cab driver, forging a check for $150, and stealing from a homeowner. The hedge clipper theft focused attention on the unfairness of “three strikes” laws. “Despite multiple appeals, including Bryant’s failed bid this year to have the Louisiana Supreme Court review his sentence, Bryant remained behind bars” until October 18. Only Chief Justice Bernette Johnson, who dissented, readily made a connection between Bryant’s long sentence and the “Pig Laws” enacted after Reconstruction. “These laws, enacted by all-white Southern legislatures, imposed extremely harsh penal sentences on Black people for crimes of poverty such as petty theft,” noted Sister Helen Prejean. “It is imperative,” said Alanah Odoms, ACLU of Louisiana executive director, “that the Legislature repeal the habitual offender law that allows for these unfair sentences, and for district attorneys across the state to immediately stop seeking extreme penalties for minor offenses.” A GoFundMe page is accepting donations to help ensure Bryant’s successful transition into society.

**Maine:** About 70 demonstrators turned out for a Black Lives Matter rally October 22, 2020, by the Portland police station, pressherald.com reports. The rally was part of “a national protest movement – the National Day of Protest to Stop Police Brutality, Repression and the Criminalization of a Generation – that began 24 years ago.” “There was a chant in memory of Breonna Taylor, a Black woman who was fatally shot in her Louisville, Kentucky, home during a raid by police officers.

**Minnesota:** Seventeen-year-old Darnella Frazier, who captured 10 minutes of video of George Floyd “trying to fight for his life” while pinned under a Minneapolis police officer’s knee, will be honored with the PEN/Benenson Courage Award at a virtual gala in December, startribune.com reports. “With nothing more than a cell phone and sheer guts, Darnella changed the course of history in this country, sparking a bold movement against systemic anti-Black racism and violence at the hands of police,” PEN America CEO Suzanne Nossel said in a statement, the Associated Press reports. “Darnella Frazier took an enormous amount of flak in the wake of releasing the video. People were accusing her of being in it for the money, or for being famous, or were asking why she didn’t intervene. And it was just left this way. We wanted to go back and recognize and elevate this singular act.” Frazier will share the honor with Marie Yovanovitch, who was ousted as U.S. ambassador to Ukraine by the Trump administration.

**Maine:** Two Rockland officers who allegedly beat to death porcupines while on duty in early June were fired September 2, 2020, and face felony animal cruelty charges, according to the Bangor Daily News. “The Maine Warden Service on Friday charged Addison Cox, 27, and Mike Rolerson, 30, with aggravated cruelty to animals — a Class C felony — and night hunting, a misdemeanor. Cox was additionally charged with unlawful use or possession of implements or aids. Rolerson also faces a charge of illuminating wild animals or birds.” The district attorney expressed concern that the officers’ credibility could affect nearly 100 criminal cases, in the event the officers were the only witnesses in the cases. The charges follow a Lincoln County Sheriff’s Office investigation. Meanwhile, Officer Kenneth Smith is accused of posting a video of a porcupine killing in a Snapchat group linked to night-shift cops. Smith had been on administrative leave in October. In 2017, Cox had been described by fellow officers as the department’s “resident raccoon whisperer” after helping a Rockland resident remove a young critter from a yard, according to WGMEM.

**Maryland:** A video of Anne Arundel police forcibly removing and arresting a Black Brooklyn Park man from a vehicle after stopping his girlfriend for allegedly speeding has had 22.5 million views on TikTok, capitolgazette.com reports October 24, 2020. “In several videos, officers ask Antoine Lee Wedington, 23, of Brooklyn Park, to get out of the car, saying they have warrants for his arrest. Wedington, the passenger, does not leave the car, and officers eventually remove him; throughout the videos, he asks the officers to let him leave the vehicle. When pressed against an SUV, he shouts at his partner [Heather Janney] to continue filming. Wedington was charged with resisting arrest.” Wedington kisses Janney as he is pulled from the vehicle and an infant carrier can through a back window. Wedington has two warrants: “a circuit court bench warrant for failure to appear in court on Oct. 5 and a retake warrant for violating conditions of parole and probation. Both warrants require officers to take the subject of the summons directly to a detention center, said police spokesman Lt. AJ Gardiner.”

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**Massachusetts:** A Boston Globe investigation revealed that the “Massachusetts State Police has allowed dozens of officers to remain on active duty after internal investigations found they had broken the law.” In-house “investigators had found 29 sustained charges for assault and battery; 19 alcohol and drug violations, including four OUILs; 17 charges for harassment, including..."
three for sexual harassment; [and] another 17 for improperly using the state’s criminal background check system against active troopers.” In turn, the “Massachusetts attorney general’s spokesperson told the Globe that the State Police had shared none of those details with the office.”

**Michigan:** Barry County residents in October 2020 were calling for the resignation of Barry County Sheriff Dar Leaf after he took the stage in May with William “Bill” Null and other members of the Michigan Liberty Militia during an American Patriot Rally-Sheriffs speak out event against statewide stay-at-home orders, mlive.com reports. Leaf compared Governor Gretchen Whitmer’s orders to being held unlawfully under house arrest. Now a right wing militia group is under arrest as part of an alleged terrorism plot to kidnap Whitmer from her vacation cottage. Leaf after he took the stage in May with other members of the group. Leaf compared Governor Gretchen Whitmer’s orders to being held unlawfully under house arrest.

**North Carolina:** A racially diverse get-out-the-vote rally of adults and children were sprayed with a “pepper-based vapor” by Alamance County Sheriff’s Office and Graham police officers October 31, 2020. At least eight people were arrested. According to npr.org: “Participants and organizers say they had proper permits for Saturday’s [“I Am Change”] event, which marched from Wayman’s Chapel AME Church to a rally at the city’s Court Square. Following the rally, organizers had then planned to lead about 200 marchers to a nearby polling place.” Following a moment of silence in memory of George Floyd led by the Rev. Greg Drumwright, marchers were ordered to stay on the sidewalk, and cops say they didn’t have permission to block traffic. “We are fed up with this kind of treatment in Alamance County and in Graham City,” Drumwright said in a Facebook live video. “Both of those law entities ... colluded to suppress peaceful organizers, who were here not only to vote today, but to call an end to system oppression and racial disparates,” Drumwright was among those arrested.

**Pennsylvania:** Two West Philadelphia police officers who fired at Walter Wallace, a 27-year-old Black man brandishing a knife, were taken off street duty. The fatal shooting took place October 26, 2020, npr.org reports. Wallace was on his home porch but ran away. His mother tried to shield him. She tried to tell police he was her son. “I’m yelling, ‘Put down the gun, put down the gun,’ and everyone is saying, ‘Don’t shoot him, he’s gonna put it down, we know him,’” said bystander Maurice Holloway, 35. The man’s father, Walter Wallace Sr., said his son had mental health issues and asked why police did not use a Taser. Philadelphia Mayor Jim Kenney said he watched bystander video, which shows parts of the altercation. He called it a “tragic incident and it presents difficult questions that must be answered.” Police Commissioner Danielle Outlaw said questions about “what led to shooting” will be part of a full investigation. Skirmishes between police and demonstrator's also injured a cop, who was in the hospital in stable condition, inquirer.com reported October 27. “About 29 other officers suffered mostly minor injuries from being struck by rocks, bricks, and other projectiles, police said in a preliminary report.” Police arrested about 20 linked to looting at retail stores.

**South Korea:** A wrongful conviction and torture case with apologies is rare. On November 2, 2020, prisoner Lee Chun-jae told a South Korean court that he killed 14 women and girls three decades ago and apologized to a man wrongfully imprisoned for one of his crimes. The man, Yoon, spent "20 years in prison for the 1988 rape and murder of a 13-year-old girl," cnn.com reports. “That murder is one of 10 killings that took place between 1986 and 1991, which are known as the Hwaseong murders after the area in which they took place.” A breakthrough came in 2019 when improvements in DNA evidence identified Lee as a suspect in at least three of the murders. Yoon, meanwhile, said police used torture on him to extract a confession in 1989; four others who were investigated in the 1990s took their lives. The conviction was the subject of a 2003 film, Memories of Murder. Whether Yoon’s conviction is overturned will be decided in a retrial. Police chief Bae Yong-ju apologized: “I bow my head down and offer apologies to the victims of Lee Chun-jae’s crimes, the surviving families and everyone who suffered damage due to the police investigation, including Mr Yoon,” scmp.com reported.
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By Alissa Hull
Edited by Richard Resch

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