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Electronic Monitoring: An Alternative to Incarceration or a Troubling Extension of Punishment?

by David M. Reutter

IT IS OFTEN SAID THAT LIFE IMITATES ART. When it comes to electronic monitoring (“EM”), your friendly, neighborhood Spiderman was a major influence for the idea to use an electronic device to track the location of persons entangled within the criminal justice and immigration systems. The use of EM has gained traction as reformers push to end mass incarceration and the cash bail bond system. Critics, however, assert that EM is just another form of government control that has an insidious impact upon those subject to EM, their families, and society as a whole. They also warn leaving EM unchecked allows Big Brother another avenue to monitor society’s every move. While others support EM by citing its positive benefits, EM’s founders regret that it has been transformed from a tool to motivate behavioral change to a form of punishment itself.

EM is a prime example of how technology can be created for one purpose and is found to have applications in a realm its creators never intended. While studying in the 1960s at Harvard University under famed psychologists B.F. Skinner and Timothy Leary, twin brothers Robert and Kirk Schwitzgebel, who later changed their last name to Gable, came up with the idea to use EM as a form of positive reinforcement. Their research began by monitoring the movements of juvenile offenders, so they could reward them for being timely for appointments.

The idea came after Robert watched the 1961 movie *Westside Story*. “I would take dates to the movie because it had a romantic effect on them. (I wasn’t very creative about what to do with dates back then.) By the third time I saw the movie, I had a good understanding of

the plot,” Robert said. “During the movie, the hero’s girlfriend tries to get to him in time to warn him of the danger of a gang fight, but she is too late. I wondered how we could have helped him. I thought, if only we could have sent him a signal. If only we knew where he was, we could have saved his life. Then I had an idea. If he wore a transmitter, we would contact him and prevent his death.”

The following week, Robert met William Sprech Hurd, an electrical engineer, at a cocktail party. They created a cumbersome battery-operated device from war surplus missile-tracking equipment. Their device used radio frequency to communicate the test subject’s location. An office was established in a vacant Cambridge storefront. It drew volunteer at-risk youth, parolees, psychiatric patients, and student researchers to participate in various behaviorally oriented research projects between 1960 and 1975. Much like how Skinner rewarded animals for responding to sound cues, the Gable brothers sought to inspire responsible behavior in juvenile offenders by rewarding them with free haircuts, pizza, concert and movie tickets, limo rides, and other prizes.

“The purpose, though, was to give rewards to the offenders when they were where they were supposed to be, that is they were in drug treatment session, or went to school or a job,” explained Robert Gable. “And then we would signal them that they were eligible for a reward.”

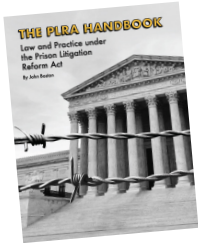
Their device usually covered about five square blocks. “A patent was granted on the system in 1969 (Schwitzgebel and Hurd, 1969),” reported the Civic Research Institute (“CRI”). “One study (Schwitzgebel, 1969)

summarized the results from sixteen participants who ranged from an offender with over 100 arrests and eight years of imprisonment to a young business person with no arrests. The results indicated that the participants either adjusted to the monitoring system within the first few days or rejected it as too intrusive and embarrassing.”

The rewards, however, were not significant enough for all of the 16 volunteers to endure the invasiveness of the initial study. All but two dropped out of the study, finding the bulky radio transmitters oppressive. “They felt like it was a prosthetic conscience, and who would want Mother all the time along

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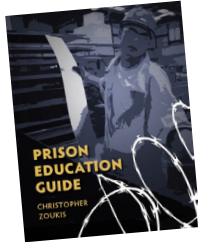
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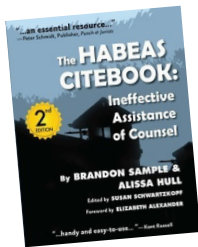
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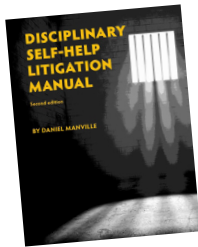
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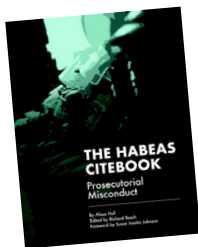
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Electronic Monitoring (cont.)

with you," Robert Gable said. *Psychology Today* declared the device a "belt from Big Brother."

Robert Gabel moved to UCLA and later to Claremont Graduate University in California and initiated smaller studies with young adult offenders. He partnered with Robert Bird, a graduate engineering student, to build a transceiver on a belt that was capable of two-way tactile signaling. It employed an FCC-licensed low-powered radio station that covered less than a mile. Later, their research included "telemetry physiological responses such as heart rate and galvanic skin responses of offenders in natural social settings (Schwitzgebel and Bird, 1970)," reported CRI.

"Our idea was, gosh, if you can train pigeons to play Ping-Pong," Robert Gamble said, "you ought to be able to get kids to show up for therapy on time."

"We wanted to apply operant conditioning to human social problems," Kirk Gabel added.

The idea of monitoring offenders remained idle for about a decade until Jack Love, a judge in Bernalillo County, New Mexico, resurrected it. Judge Love was seeking a technological solution in 1977 to an over-crowded prison system and prisoners attempting to escape. An idea started to form from reading in a newspaper about a device placed under the skin of cattle to track them and his recollection of a library equipped with a scanning device that would ring a bell if a visitor tried to leave with a book that had not been checked out. The idea for EM fully germinated after reading *The Amazing Spiderman*, a comic-book series by Stan Lee and John Romia that ran in newspapers throughout the 1970s. In one story line that ran in August and September 1977, the evil Kingpin attached a tracking device to Spiderman. It allowed the villain to track, via radar, Spiderman's location.

By 1982, Judge Love unsuccessfully floated his idea to computer companies. Then, he pitched his idea to Michael Goss, a Colorado engineer who was working as a sales representative for Honeywell Information Systems, to produce a tracking device for low-level defendants. Goss created the cigarette pack sized device he dubbed the Goss-link. It communicated with a receiver connected to a telephone in the age before cellphones. Every 60 seconds, it sent a signal to the receiver, which dialed a central computer if the device was outside the receiver's 150-

foot range. Judge Love was the first subject to test the Goss-link. "It put me on a very, very short leash," he said in a UPI interview about the ankle monitor he wore over a weekend in March 1983.

After the New Mexico Supreme Court reluctantly gave permission for a pilot EM program, Judge Love ordered the first man to be fitted with a Goss-link in April 1983. He ordered two more men to wear the EM in short order. All three men were on work release with a "home curfew" from 7 p.m. to 7 a.m. each day, reported a 2008 paper published in the *Journal of Offender Rehabilitation*. Love said the device was "ideal for people convicted of drunk driving, who are required to stay out of cars or bars at night."

The first defendant completed his 30-day monitoring sentence but was arrested two months later for shoplifting. A second defendant "was a veteran of the Vietnam War and had violated his probation by receiving stolen property. That man kept to his curfew while wearing the ankle bracelet but apparently showed up drunk on his fifth day, a violation of his probation," reported Gizmodo.com. "He was sent back to jail."

"During the actual hours of monitoring, the procedure was found to be effective, although behavioral problems occurred at other times when monitoring was not in use. One unexpected, but not necessarily undesirable, consequence was the stigma associated with wearing the device," reported CRI about the three-month pilot program. "Criminal associates of the first offender, a heroin user, did not want to be around him because they feared that the device was capable of transmitting conversations."

The pilot program ended after peer judges in Bernalillo County argued that Judge Love violated the state's Public Purchasing Act by signing a contract with Goss's company, National Incarceration Monitor and Control Services, Inc. ("NIMCOS"), for tracking units without consulting the other judges. The state Supreme Court agreed.

"In my opinion, it was a successful field test," Love was quoted as saying years later. "There were bugs and gremlins and glitches in the system and the equipment. However, it was like the Wright brothers getting off the ground."

"That didn't stop the judge's idea from spreading throughout the country," reported Gizmodo.com. "At least a dozen companies sprung up between 1983 and 1988 in the U.S. offering different versions of electronic

Electronic Monitoring (cont.)

monitoring for prisoners. About 20 states and counties in 14 states experimented with the technology in the 1980s, slowly pushing the concept into the mainstream, according to a report for Congress in 1988.”

An Electronic Goldmine

Boulder Industries (“BI”), which was subsequently purchased by private prison profiteer The GEO Group, was the leader in tagging cows with its “Electronic Dairy ID System.” It was looking to grow its business when Goss came knocking for investors. BI’s then-president, David Hunter, asked an assistant to conduct a market appraisal of Goss-link. The assistant’s report was gloomy: “Probation and parole departments thought that electronic monitoring was too new, too much work, threatened their jobs, and shouldn’t be done by a private company,” CRI reported. “When Hunter read this report, he thought to himself, ‘Wow! Here’s a real business opportunity.’ About three months later he loaned \$250,000 to NIMCOS.” BI then began an aggressive acquisition of smaller monitoring companies and personnel, including Goss.

EM gained traction as a growth industry when young inventor Thomas Moody, whose father owned the perfect combination of companies—a burglar alarm company and a radio station—to expand EM, convinced Monroe County, Florida, Circuit Court Judge Allison DeFoor to test an “In-House Arrest Program.” DeFoor became enamored with the technology.

DeFoor, in April 1984, “transferred the small pilot program to Edward A. Garrison, Administrative Judge of the Palm Beach County Court. Judge Garrison placed 12 probationers on electronic monitoring under the supervision of the County Sheriff’s Department and of Pride Integrated Services, Inc., a non-profit probation service agency,” CRI reported. “Moody’s newly established Controlled Activities Corporation (“CONTRAC”) provided monitoring equipment for the In-House Arrest program, and the central monitoring station was placed at Pride in West Palm Beach.”

According to a report by the Florida Bar’s Judicial Qualifications, “Judge DeFoor improperly utilized his office in order to develop and promote an electronic device in which DeFoor held a financial interest. The device, used to monitor probationers under house

arrest, had been developed by a corporation organized by Judge DeFoor. Moreover, Judge DeFoor signed as guarantor for a line of credit for the corporation, experimented with the device using individuals whom Judge DeFoor had convicted of minor criminal infractions, allowed his photograph to be utilized in promotional materials, replaced the Salvation Army as misdemeanor supervisor of the Upper Keys area and substituted a company which had marketed the device in another part of Florida, and at all times intended to participate in any profits which the device might generate.” The Florida Bar publicly reprimanded Judge DeFoor for his behavior and two other counts of unethical conduct. *Inquiry Concerning a Judge, DeFoor*, 94 So.2d 1121 (Fla. 1986).

The EM industry has experienced exponential growth since Moody’s breakthrough with an ethically-challenged judge. A serious study of its history and growth was chronicled by the *Journal of Offender Monitoring*, which was founded in October 1987 by Marc Renzema, now retired Professor of Criminal Justice at Kutztown University in Pennsylvania. That publication maintained until 2009 the most complete bibliography of monitoring-related publications that existed.

The technology behind EM continues to evolve. It has transformed from radio frequency to smartphones with GPS, image, and biometric recognition that are replacing ankle bracelets. As GPS and cell tower signals that provide precise locations proliferate, curfews are disappearing. Newer devices have a tamper-proof tether paired to a smartphone that can be attached to the wrist. Smartphones and wrist devices that detect blood-alcohol levels through one’s sweat are replacing breathalyzer kiosks.

EM is expanding into prisons. Missouri and Florida are two states that are installing the hardware to shackle EM on prisoners to determine their exact location inside the prison. In Missouri, EM wristbands also monitor a prisoner’s heartbeat and create three dimensional images showing with whom they have come into contact. Florida has a pilot EM program that is being installed at several higher security prisons.

EM is a growing industry with annual revenue of over a billion dollars. As of January 2022, the U.S. Immigration and Customs Enforcement agency had 182,607 individuals under EM supervision, with more than 60,000 people entering the program the previous year. The Biden Administration expanded the

program to include new levels of supervision, such as strict curfews. According to a report by the Pew Charitable Trusts, 125,000 criminal defendants were under EM supervision in 2015. That was an increase from 53,000 people in 2005. A September 2022 report by the American Civil Liberties Union (“ACLU”) found that “[f]rom 2005 to 2015, the number of active electronic monitors in use rose by 140 percent. More recently, in 2020 and 2021, the number of people on monitoring increased in the wake of the COVID-19 pandemic as authorities tried to mitigate the impact of the virus on incarcerated populations.” Bloomberg estimated that 25-30% more people worldwide were shackled with EM as a result of the pandemic.

Rather than reduce jail and prison populations, EM widens the net of persons subjected to supervision by the criminal justice system. “EM further expands the carceral system because it is not just used as an alternative to incarceration, it is also imposed in cases where individuals would otherwise have been released on less or no restrictions. Consequently, EM use presents a self-fulfilling prophecy: EM’s mere existence leads to its widespread use because law enforcement becomes dependent on the tool. People under correctional control are not a monolith. Some individuals understandably prefer EM to incarceration,” the ACLU said. “But governments should not ask people to choose between a physical and electronic cage or between a deprivation of their right to liberty and their right to privacy. Rather, governments should make all efforts to keep people in their communities with as few restrictions on their liberty as possible,” the ACLU contends.

In 2022, the Biden Administration budget aimed to increase the number of people enrolled in ICE’s Alternatives to Detention (“ATD”) program by 45,000 people. It was touted as a more humane alternative to detention. ATD’s Intensive Supervision Appearance Program, however, has not resulted in a decrease in ICE’s incarceration rate.

“Since the creation of the Immigration Supervision Appearance Program, which was supposedly designed to reduce the number of people detained, the number of people who have been detained by ICE has more than doubled,” Tosca Giustini, a clinical student at Cardozo School of Law, said.

On May 28, 2021, 89,115 people were monitored through ATD. People enrolled in ATD’s ISAP (Intensive Supervision Appearance Program) are subject to residential

visits, telephone calls, and curfews. About a third of all ISAP enrollees are forced to use EM devices.

When Illinois abandoned cash bail in 2023, many feared judges would turn to EM as an alternative. That is what happened when Cook County eliminated cash bail. One thing is certain, the more courts turn to EM, the more lucrative it becomes for private companies seeking to mine gold from poor defendants and migrant detainees ensnared in the criminal justice and immigration system. It is estimated by one prison research organization that by 2025, there will be 282,000 people under EM supervision in North America on any given day.

The Benefits of EM

EM ankle monitors are often called “digital shackles.” That phrase evokes the negative aspects of EM, which are examined below. Yet, there is evidence EM has many positive benefits.

Research indicates that EM can produce positive effects for certain offenders (such as sex offenders), at certain points in the criminal justice process (post-trial instead of prison), and perhaps in combination with other conditions attached (such as geographic

restrictions) and therapeutic components, according to a 2020 study in the *Journal of Criminal Justice* titled, “A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders.”

A 2012 study produced by the District of Columbia Crime Policy Institute titled “The Costs and Benefits of Electronic Monitoring for Washington D.C.” detailed a cost-benefit analysis. It found that, on average, EM reduced arrests of program participants by 24%, which generated “\$3,800 in societal benefits per participant.” It further concluded EM saved local agencies \$580 and federal agencies \$920 per participant.

According to an article on BI’s website, EM results in participants being released from jail or prison early, allowing them to commute to work or school, attend therapy and appointments related to EM supervision, and complete community service requirements of their probation. “Individuals can remain in their community, preserve employment, maintain residence, maintain the support of family members, and access the resources they need to improve their lives,” the article stated. A little over 25% of sentences are between five years to a decade, according to the Federal

Bureau of Prisons. When a prisoner is released before their sentence is completed, they may be allowed to serve the remainder of their sentence under EM.

BI said it conducted “four rigorous studies” and came to the following conclusions about EM:

- Reduces an individual’s risk of failure by 31%
- 86% of individuals placed on location monitoring at the time of sentencing remained free of any new arrest, during their term of supervision
- 97% of individuals placed on location monitoring at the time of sentencing remain free of any arrest for a violent offense, during their term of supervision
- Individuals on EM supervision were far less likely to have a Failure to Appear violation (8.17% versus 22.59%) than those who were not electronically monitored.

BI also cited a University of New Mexico study of the statewide pretrial GPS tracking system that found that between 2017 and 2020, 95% of people facing felony charges who were released before their trials did not go on to get arrested for a violent crime.

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Electronic Monitoring (cont.)

With ever evolving technology, it is true that some of the horror stories that revolve around antiquated technology involved bulky radio frequency ankle monitors. “EM is becoming more personal and portable,” BI said. “Agencies now have access to low-profile, wrist-worn devices and smartphone apps to connect clients more closely with supervising officers and the critical community resources individuals need to be successful.”

The ‘Systematic Harms’ of EM

EM is actively advocated by many criminal justice and immigration system reformers as an alternative to custody for non-violent pretrial offenders, immigration detainees, probationers, and parolees. Criticism, however, abounds from civil rights activists.

A September 22, 2022, report by the ACLU, titled “Rethinking Electronic Monitoring: A Harm Reduction Guide,” took an in-depth look into GPS ankle monitors, cellphones, and radio frequency technology as well as other devices that law enforcement agencies and private companies use to track the location of certain individuals and track

them while they are out of a physical detention facility.

The ACLU pointed to evidence that EM fails to fulfill its goals of providing “a more humane alternative to incarceration” because people who are monitored can return to their communities instead of being in a detention facility, thereby improving public safety, reducing the risk of flight, and stimulating rehabilitation.

EM is often justified by law enforcement as an effective way to protect public safety, ensure that individuals show up to their legal proceedings, and promote rehabilitation. However, the expanded use of EM disregards research and experience and illustrates that such monitoring devices fail at their intended purposes; cause massive harm to those being monitored; exacerbate inequities along lines of race, class, and disability; disrupt rehabilitation, all while resulting in an exorbitant price tag. Instead of serving as the substitute to incarceration, quite often, EM expands mass incarceration, as countless individuals are thrown back behind bars after committing minor technical violations.

In support of the technical violation claim, the ACLU cited two reports. An evaluation of EM in the *Federal Probation Journal* found no effect on rates of re-arrest for new offenses. However, the report did claim that individuals being electronically monitored were significantly more likely to have a technical violation. In addition, the Vera Institute’s 2020 study of pretrial EM concluded that the more time an individual is being electronically monitored, the higher the likelihood of them returning to incarceration as a result of violation of their EM. “Research on reentry programs have also found that more restrictive supervision does not necessarily lead to lower recidivism rates.”

Rather than providing the supervisee with a chance to succeed, “EM sets people up to fail.” Jail is often the consequences for taking out the trash, chasing after a dog, suffering a device malfunction, failing to charge the device, or not leaving a doctor’s office at a specified time. A report by the National Institute of Corrections found that “notification of upcoming court appearances (including phone calls, recorded phone messages, mail notification, text messaging, and email) was highly effective at reducing the risk of failure to appear,” the ACLU report said. According to a 2018 behavioral study, less invasive and regular sorts of interventions, such as text message reminders and transportation assistance,

provide significant benefits without the EM albatross dangling from one’s neck.

Another cause of technical violations is the myriad and numerous restrictive rules placed upon those under EM supervision, and their complexity create “greater barriers” for people with disabilities. In the study analyzed by the ACLU, the number of rules those under EM were forced to follow ranged from 4 to 41. In addition, in the study, the average number of rules was 14. However, the study pointed out that rules governing people being monitored are myriad. Then general court supervision imposes additional rules. The fewest number of rules was six, and the greatest was 58, with the average being 21.

While general release rules provide for flexibility, EM rules seem restrictive, although policies from 14 states suggest that the rules may be modified. The ACLU provided some examples of rules that “are ambiguous, overly broad or open to interpretation.”

- “He or she shall abandon evil associates and ways....”—Alabama Bureau of Pardons and Parole.
- “You shall so conduct yourself as not to present a danger to yourself or others.”—Department of Public Safety and Correctional Services, Maryland
- Conduct yourself “in the manner of a responsible citizen.”—Massachusetts Parole Board
- “I must maintain acceptable behavior and conduct which shall justify the opportunity granted to me by the ... Parole Board.”—New Mexico Corrections Department

The ACLU also provided examples of ambiguous or overly broad EM rules:

- Conduct yourself in “an orderly manner at all times.”—Cuyahoga County Probation Department, Ohio.
- “I will not behave in such a manner that is likely to result in damage to or malfunctioning of the equipment.”—Department of Corrections and Community Supervision, New York.
- “I will remain faithfully employed at a lawful occupation and support my legal dependents, if any, to the best of my ability.”—Mississippi Department of Corrections.

In addition to these types of amorphous rules, a technical violation may ensue for a violation of restrictive movement rules. According to *Electronic Prisons: The Operation*

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

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of *Ankle Monitoring in the Criminal Legal System*, monitored individuals are almost always required to remain on their property and can only leave their property with proper approval. But the process in order to obtain such approval is often unclear, and it typically takes days to implement. In many cities, going to church, to the store, and taking children to school or visiting a doctor all require pre-approval.

Mining Gold From Poor Defendants

A disturbing aspect of EM is the financial toll imposed upon poor defendants. The high costs of EM place many people in a position where they inevitably fail. EM can cost between \$1.50 and \$47 per day or between \$547.50 and \$17,155 a year. These fees threaten the financial security of a population that is already struggling to make ends meet. On average, EM fees are \$3,284.08 per year.

Daehaun White thought he was walking free on October 12, 2018. His \$1,500 bond for driving around in a stolen vehicle a friend allegedly loaned him was beyond what he or his family could afford. His public defender, Erika Wurst, convinced the judge to lower the

bond to \$500, and the non-profit Bail Project paid it for him. As he was being released, a guard handed White a letter from Wurst.

The letter informed him that St. Louis Judge Nicole Colbert-Bochway ordered him to wear an ankle monitor. That release stipulation required White to immediately report to the offices of Eastern Missouri Alternative Sentencing Services (“EMASS”) to be fitted with the EM. To get the monitor attached, White had to pay \$300, which included a \$50 installation fee and 25 days of service at \$10 per day. White could not afford to pay the fee, and police came and rearrested him three days later.

White’s mother subsequently borrowed the \$300 to gain his release and for installation of the EM. Once he was fitted with an ankle monitor, White was instructed to appear at EMASS with \$70 each week after the first 25 days. He was unable to obtain employment after his release. Some employers shied away after seeing the bulky monitor.

Placing a defendant on EM falls within the discretion of the presiding judge. Interviews of two different St. Louis judges exhibit how that discretion is applied disproportionately. Judge Rex Burlison stressed that while

each case is different, EM is usually imposed upon defendants who are deemed a flight risk, endanger public safety, or have an alleged victim. Judge Colbert-Bochway, according to public defenders, regularly made GPS a condition of release. Judge David Roither said, “I really don’t use it very often because people here are too poor to pay for it.”

The EMASS contract allows the court to assign indigent defendants to EM “at no cost.” None of the judges interviewed by ProPublica could recall waiving EM fees. Judge Burlison was against such a waiver.

“People get arrested because of life choices,” Burlison said. “Whether they’re good for the charge or not, they’re still arrested and have to deal with it, and part of dealing with it is the finances.” To release defendants without monitors simply because they can’t afford the fee, Burlison told ProPublica, would be to disregard the safety of their victims and the community. “We can’t just release everybody because they’re poor,” he continued.

Private companies such as EMASS typically have weekly check-in hours that conflict with the daytime work schedules of those under supervision, creating a hardship that can cost them their jobs. In 2011, the

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National Institute of Justice surveyed 5,000 people on EM and found that 22% said they had been fired or asked to leave a job because of the device.

Some critics argue that the public-safety claim is specious rhetoric that serves only to protect the judge. “The fundamental question is: What purpose is electronic monitoring serving,” said Blake Strode, the executive director of ArchCity Defenders, a nonprofit civil rights law firm in St. Louis. “If the only purpose it’s serving is to make judges feel better because they don’t want to be on the hook if something goes wrong, then that’s not a sensible approach. We should not simply be monitoring for monitoring’s sake.”

Three months after he was fitted with an electronic monitoring device, a judge approved White for its removal. When he showed up at EMASS’s office, he was told the contract he signed provided the device could not be removed until he paid the \$700 he owed. White stopped charging the device. When he appeared at EMASS’s office one Monday, a compliance officer removed the device and calculated what White owed. The total amount owed was \$755, plus 10% annual interest. EMASS expected White to pay \$850 over the next nine months, which was more than his initial \$500 bond. When Goss jumped into the EM business, he described it as a “goldmine.” In cases such as White’s, the poor who are subjected to EM comprise the mine that the gold is extracted from.

Undermining Rehabilitation

The restrictive movement rules that come with EM supervision are, as described earlier, rigid and difficult to have adjusted. Michael Tafolla was placed on EM as a condition of his supervised release after serving 20 years in an Illinois prison. He was initially approved for three days of four-hour movement. He soon obtained an internship at a university and a full-time job with a temp agency. When he called his parole officer to request an adjustment, he was told that he “had to pick between the internship or the job with the temp agency,” Tafolla said. “They said I was doing too much. I was having panic attacks because of this. I am trying to go to school. I am trying to work. I don’t understand the problem. You’re telling me I’m doing too much? I’m doing too much of what I’m supposed to do? You get out and you think you’re free and you’re

going to be able to enjoy life, but now doing the most basic, necessary things like working and school become the most complicated,” Tafolla observed.

When Shannan Davis was released from a Michigan jail to a treatment center, she was subjected to EM. At first, the ankle monitor was too loose, and then when it was adjusted, it was too tight and caused her pain. Pursuant to her EM rules, she was prohibited from leaving the recovery house. “I can’t go on group outings with the other girls staying here. I’m pretty much locked down in this house,” she said. “I’m not allowed to go to the store with the rest of the house. I’m not allowed to take a walk down the road for exercise. There are always staff members with the girls so we’re not unsupervised but, because of the way my bond is worded, I am not allowed to participate.”

Davis was unable to pay the weekly \$105 EM fee, so her mother paid the bill for her. In addition to the rigors of digital confinement, Davis said the device itself is troublesome. “Like the other day when I got back from the doctor, all three lights on the monitor were going off and it did that for two to three hours. I couldn’t get a hold of anybody. The thing just goes off all day,” she said. “It’s stressful because I think they’re going to come and pick me up and arrest me.”

Upon his release from jail while awaiting trial, Matthew Brown was placed on EM and confined to his Maricopa County, Arizona, home for three years. He said the movement restrictions caused him to lose touch with his family. “The more disconnected I get from people, the harder it is on me mentally; the worse I feel about myself. When you’re on electronic monitoring they say you are free, but you’re really jailed,” he said. Then, there were the costs. Several of his monitors were destroyed from water, subjecting him to the \$1,740 cost of each unit. “I’ve probably water damaged a dozen or more because of my job as a boat captain. It wasn’t me having fun, it was me doing my work. There is a daily charge too, but I do not know how much it is.”

“They can force a guilty plea out of someone because you owe so much money,” continued Brown. “If I did not have the financial means and support, I would have already pleaded guilty. I can only imagine how many people do that. People lose their jobs because of electronic monitoring and they can’t pay for their house, or family, or kids. It’s a domino effect.”

The effects of EM are magnified when forced upon juveniles. When 13-year-old

Christopher grabbed a girl’s butt in a middle school hallway, he thought he had done something foolish and inconsequential. The girl, 14, felt otherwise when she reported it to her mother, who called police. Christopher was charged with sexual battery. He spent more than a month in a juvenile hall and took a plea deal for 90 days of probation that included EM. His probationary term was regularly extended due to both serious offenses like stealing a bike and for technical violations such as being late for his 6:00 p.m. curfew. He ended up being supervised on EM until he turned 18.

Christopher said he had to wear loose fitting pants all the time to hide the ankle monitor and avoid teasing from peers. He was jailed several times for violations. “It disrupted my education, which I had to continue while I was locked up. I ended up graduating on time only because I stayed focused. But it just created this hatred in my heart for the police,” he said. “Curfew was definitely the hardest part. Getting home at 6 p.m. every night. 6 p.m. I was a teenager. I had energy! But I only had these two or three short hours after school to do anything, even activities like sports and extracurriculars. And then someone would say, ‘Chris, it’s 5:50!’ And I’d be so embarrassed and would have to sprint out of there and run home. At one point, I had a dishwashing job and would get off at night, and they’d hassle me even for that.”

In many jurisdictions, EM rules dictate family and social relationships. The following are a few examples of such rules:

- People on monitors are prohibited from “babysitting or being a primary caregiver for any person, children, or pets without approval.”—Alaska Department of Corrections.
- People on monitors must “understand that all residents (18 years old and older) of the household [they] live [in] must agree to the conditions listed on the Cohabitant Acknowledgement Form.”—San Diego County Sheriffs’ Department, California.
- “Participants and their family members will receive an orientation, from the Monitoring Service Unit Chief, the Case Manager [and/or] the Investigator ... and they must sign the Program Agreement acknowledging their understanding of the rules of the program, prior to release.”—Prince George’s County Department of Corrections, Maryland.

- “I will not allow persons of disreputable character to visit my residence during the period of home confinement.”—Kanawha County Sheriff’s Office, West Virginia.

In some jurisdictions, rules require family and friends to cooperate or share information with law enforcement:

- “Since a client may be harder to reach in the community,” people who live with a person on a monitor are required to share their contact information with the monitoring officer.—Dallas County Pretrial Services.
- People on electronic monitoring must provide their family members’ “[f]irst, middle, last and maiden name; address and phone number; if the family member has been on supervision or incarcerated; date of birth; highest education level; substance abuse history; [and] if the family has a criminal history.”—Virginia Department of Correction.

Physical and Other Harms of EM

When a woman identified by *Motherboard* as Ms. C. was released from ICE immigration detention, she was fitted with an ankle monitor that required charging every 4-5 hours. However, she told lawyers at the Kathryn O. Greenberg Immigration Justice Clinic that the device hurt her ankle. In fact, the device was so uncomfortable that it gave her “lacerations ... numbness ... [and] sores.”

A bulkier replacement model electrically shocked Ms. C. four times when the battery ran low or was not fully charged. A report by Freedom for Immigrants, the Immigrant Defense Project, and the Benjamin N. Cardozo School of Law reported similar incidents. “Participants also reported aches, pains and cramps, excessive heat, numbness, inflammation, scarring, cuts, and bleeding from the shackles. Sixty-five percent of participants said that the devices negatively impacted their physical health on a ‘constant’ basis.”

A report by *The Guardian* detailed the EM experience of Macarena. “Before I was sent to detention, I was paying taxes, we were working. I didn’t want to lose my daughter, my husband, my baby boy ... I lived in this country for almost 18 years,” she said. Faced with the choice of detention or EM, she chose the latter in 2020.

She said the bulky BI ankle monitor was heavy and made it difficult to walk. At times, the device would overheat and burn her skin.

“I put a big Band-Aid or a sock between the belt and my skin because it was so hot,” she recalled. “My skin turned red and started bleeding because it was tight and hot at the same time.” BI issued a statement disputing claims its device is defective or otherwise harms individuals wearing it.

The stigmatism of EM is one of the harms most often cited by those subjected to such supervision. Some reported being pointed at, mothers grabbing their children and leaving the area, employers refusing to hire them, and prejudice in housing opportunities. While these and other harms of EM may be disputed or accepted as an alternative to incarceration, the privacy concerns inherent in EM is not fully understood and is highly regulated. As EM grows as an alternative, the creep of EM into one’s life should be of concern to all citizens

Expanding the Panopticon

Former Google CEO Eric Schmidt warned that, “Almost nothing, short of a biological virus, can scale as quickly, efficiently or aggressively as these technology platforms and this makes the people who build, control and use them powerful too.”

The encroachment of EM upon one’s privacy rights calls to mind the panopticon, a circular or rotunda shaped prison with an inspection room in the center so that “a functionary standing or sitting on the central point, had it in his power to commence and conclude a survey of the whole establishment in the twinkling of an eye” that was designed by 18th century English social reformer and utilitarian philosopher Jeremy Bentham.

Paul-Michel Foucault, a French philosopher, historian of ideas, writer, political activist and literary critic, applied “the notion of the panopticon, with its twin focus on surveillance and self-regulation, as the preeminent form of social control in modern societies.” It has an interesting application to EM.

With the COVID-19 pandemic, “surveillance creep” moved into the private lives of citizenry throughout the world. According to *Technology Review*, governments around the world started aggressively mandating contact tracing apps. In China, for example, people were supposed to wear a digital wristband and download the StayHomeSafe app. The two work in unison to enforce quarantine requirements. In Bangladesh and India, travelers received hand stamps that marked them as meant to be in quarantine. And in America, some states issued quarantine orders as well as mask requirements.

In a 1979 paper, Foucault said the “panopticon allows disciplinary power to be enacted through hierarchical observation, examination, and normalizing judgement. In many settings, including in medicine and public health, the regime of power is all-pervasive: the few watch the many, undertaking surveillance using ‘methods of fixing, dividing, recording’ throughout society.”

“As a form of social control, this ubiquitous panoptic surveillance contributes to the feeling of being under continual surveillance, and so in response to this, individuals become their own agents of surveillance by complying with normative expectations and convention without having to be actually under surveillance,” was the summary of Foucault’s thesis in a report on link.springer.com titled *COVID-19 Extending Surveillance and the Panopticon* (the “Report”). “People willingly participate in this surveillance. In this manner panoptic surveillance is an apparatus of discipline which makes the exercise of power more efficient and effective—it is a subtle form of coercion, and thus the power is enacted invisibly and inapparently, permeating all aspects of social life. Self-surveillance and discipline in these ways have become the primary source of social control in modern society.”

Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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

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Electronic Monitoring (cont.)

“Foucault referred to the inconspicuous and invisible ‘guards at the gates, at the town hall and in every quarter’ that ‘ensure the prompt obedience of the people,’” the Report continued. “We have learnt to live with ‘guards’ in the form of the microregimes of power associated with everyday customs and ideologies and the deployment of reason, knowledge, sexuality, and many other social practices. Added to these we now have drones, wrist bands and ankle bracelets, smart phones, microchips, thermal sensors, and many other technologies to surveil our biometrics, our behaviours, and our movements,” stated the Report.

While COVID-19 and EM existed within a “state of exception,” it is the conditioning of society to accept the base of government that most concerns civil libertarians. Those subject to EM have little privacy and virtually no privacy rights under the U.S. Constitution. Their movements are highly monitored. The Report stated that by normalizing extended surveillance, certain risks are posed and questions raised. Such concerns should be the subject of ongoing, critical dialogue.

The National Juvenile Justice Network (“NJJN”) issued a similar warning. It noted that the Edward Snowden revelations on U.S. government surveillance “have enhanced public awareness of the scope of the surveillance state,” but still, much of the surveillance mechanisms and implementations linking data gathering to law enforcement and authority at large is obscure to society. Ultimately, those who protest the union between mass incarceration and the public-private surveillance must intimately understand how the technology works in order to create alternative solutions. What are the implications of the “expanding capacity of technology” that can regulate with surveillance? And what safeguards are there?

As researchers Danielle Keats Citron and Frank Pasquale said, “Big Data is increasingly mined to rank and rate individuals. Predictive algorithms assess whether we are good credit risks, desirable employees, reliable tenants, valuable customers—or deadbeats, shirkers, menaces, and ‘wastes of time.’ Crucial opportunities are on the line, including the ability to obtain loans, work, housing, and insurance.”

Research is being conducted to use EM information in troubling ways. For example, some police departments are using EM to

pinpoint the exact location of a suspect after a crime has occurred. Law enforcement even hopes that someday, EM will be able to predict when someone is about to commit a crime.

For example, May Yuan, a professor at the University of Oklahoma, is developing software that logs an individual’s movements. By analyzing the results, her team can find patterns in the offender’s habits and thereby detect suspicious behavior. By observing the movements of a convicted burglar, for example, the software would notify law enforcement that he is circling a certain location every day. “Ultimately, we are hoping that our tools will help the parole officer to stop any potential crime committed by those offenders again,” Yuan said.

Another overlooked and unregulated aspect of EM is how the massive location-tracking data compiled by private companies is handled. Rather “than considering privacy issues, EM providers often boast of how much data they collect and how long it is stored,” according to NJJN. Satellite Tracking of People, for example, claims to be the largest EM company in the country and assures its clients that it keeps data for at least seven years.

“Without oversight, accountability, transparency, or rights, predictive policing is

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just high-tech racial profiling—indiscriminate data collection that drives discriminatory policing practices,” said activist poet Malkia Cyril.

NJJN said a distinction must be made regarding whether EM is used instead of incarceration or a condition of parole “because it has an important effect on the question of its punitiveness.” While EM is often touted as an alternative to custody, one official said that is not how it works in practice. A former Michigan prison official said that EM is just another tool to extend incarceration.

According to an academic report by Sykes, “incarceration results in five pains: deprivation of autonomy, deprivation of goods and services, deprivation of liberty, deprivation of heterosexual relationships and deprivation of security.” A report titled “Punitiveness of electronic monitoring: Perception and experience of an alternative sanction” published

on sagepub.com identified pains specific to EM. It found EM pains are the deprivation of autonomy and deprivation of liberty, pains affecting relationships, deprivation of employment-favorable conditions, and physical and financial pains.

In conclusion, the author of the punitiveness report said that if “EM is used instead of incarceration, then it represents an alternative, otherwise it turns into an additional punishment.... If EM is meant to provide an alternative to incarceration, then it also requires a framing that adapts to the life situations of the people wearing the bracelet and the people in the household; that is, it requires a certain degree of flexibility.”

The inventors in the original EM technology are dismayed at how it has transformed into a source of punishment. “What really changes behavior are motivational factors, such as fun and adventure and pride and

accomplishment, recognition, affection. Unfortunately, electronic technology has gone to punishment instead of the use of positive reinforcement,” lamented Robert Gable. The current technology “is like watching a child grow up retarded because of being misunderstood.”

Gable asked probation officers gathered around him why EM can’t be used for reinforcement rather than punishment. “If it got out that offenders were getting rewarded,” said one smiling officer, “that would cause a huge stir.”

Sources: *npr.org*, *gizmodo.com*, *civicsresearchinstitute.com*, *bi.com*, *wired.com*, *aclu.org*, *themarshallproject.org*, *vice.com*, *aclu.org*, *issuu.com*, *njjn.org*, *journals.sagepub.com*, *technologyreview.com*, *link.springer.com*, *kiro7.com*, *edmontonjournal.com*, *reviewjournal.com*, *propublica.com*, *the guardian.com*, *slttoday.com*

Cellebrite Asks Law Enforcement Clients to Keep Its Phone Hacking Tech Secret

by Jo Ellen Nott

CELLEBRITE—THE ISRAELI DIGITAL intelligence company that provides data extraction tools for law enforcement to collect, analyze, and manage digital data—is asking its customers to keep the technology a secret.

For years, Cellebrite has tried to keep the technology of its products secret and has urged law enforcement agencies purchasing its best-selling product, the UFED (Universal Forensics Extraction Device) to be hush-hush about using the device. A training video for Cellebrite takes it even one step further by advising the user of the hardware to stay quiet as well.

In a transcript that *TechCrunch* published of the training video used to teach companies about the UFED, a senior company employee emphasizes the need to keep the capabilities of the UFED secret for several reasons. The employee/instructor cautions that “it’s super important to keep all these capabilities as protected as possible” to enable Cellebrite to continue investing in research and development, to keep ahead of bad actors who try to steal the technology, to combat advances made by cellphone manufacturers to keep their product secure, and to limit unavoidable

courtroom disclosures that could comprise the effectiveness of its flagship product, Cellebrite Premium.

The instructor also talks about the components of the premium UFED system and the need to physically protect the device. He calls the bits and pieces of the device “highly sensitive assets” that should not be tampered with or disabled because getting a replacement takes a long time, and during that time, the agency will lose its capability to perform data extraction from cellphones.

The training video also warns against sharing any of the premium capabilities of the UFED in face-to-face conversations, over the phone, on online discussion groups, or via email. The video advises to not disclose too much in court reports or in-house manuals or technical documents. The training reminds users that written materials can be requested by outside auditors for ISO 17025 or Freedom of Information Act requests.

Cellebrite argues that keeping its technology secret is necessary to prevent criminals from learning how to exploit it. Cellebrite’s argument that secrecy is necessary to prevent bad actors from using the technology is countered by the company’s critics who argue that

this secrecy is harmful to the public interest. Legal experts are concerned that this secrecy could make it difficult for defendants to get a fair trial.

“Cellebrite’s secrecy is a problem because it makes it difficult for defendants to challenge the evidence against them,” asserted ACLU attorney Nathan Freed Wessler. “When defendants don’t know how the evidence was obtained, they can’t argue that it should be suppressed.”

Cellebrite spokesperson Victor Cooper said that it is “committed to supporting ethical law enforcement” and that the tools are made “with the utmost respect for the chain of custody and judicial process.”

Cellebrite’s secrecy is a complex issue with no easy answers. It is important to protect defendants’ rights and ensure that they have a fair trial. But it is also important to allow law enforcement agencies to use the tools they need to investigate crimes and protect public safety. Ultimately, it will be up to the nation’s courts to decide how to balance these competing interests.

Sources: *Appleinsider*, *TechCrunch*

California Court of Appeal: Traffic Stop Prolonged for Drug Dog Sniff Search Unrelated to 'Mission' of Stop Violates Fourth Amendment

by Anthony W. Accurso

THE COURT OF APPEAL OF CALIFORNIA, Fourth Appellate District, overturned the denial of a defendant's motion to suppress, holding that the officer impermissibly extended a traffic stop to conduct a drug dog sniff around the exterior of the defendant's vehicle.

Officer Anthony McGlade of the Anaheim Police Department received a tip about a black pickup truck that "had acted suspiciously" around the Tampico motel, where "drug trafficking was a problem." No further details were provided other than that vague statement.

McGlade was on duty with Titan, a narcotics detection dog. He located and followed the suspect vehicle until the driver allegedly executed an improper lane change, and he initiated a traffic stop, activating his body camera.

McGlade made contact with the driver, Joseph Gyorgy. He obtained Gyorgy's California driver's license but then proceeded to ask him "several questions, including whether Gyorgy was on probation or parole, whether he was a narcotics or sex registrant, whether he

had any needles or sharp objects in the truck, and whether he had any weapons or drugs in the truck." Importantly, according to the record, other than obtaining Gyorgy's driver's license, there is no indication that McGlade or any other officer on scene performed any activity related to the initial purported justification for the traffic stop, viz., the alleged "unsafe" lane change in violation of Veh. Code § 22107.

Upon learning that Gyorgy was a registered sex offender, McGlade initiated a line of questioning about his living situation, eventually eliciting that Gyorgy had been at hotels in Anaheim for the last two nights.

"About four or five minutes in[to]" the stop, McGlade ordered Gyorgy out of the vehicle for a pat search, then deferred the pat search until a second officer, John Pasqualucci, arrived. After the pat search revealed nothing incriminating, McGlade informed him Titan would perform an exterior sniff of his truck. Gyorgy objected to the search, but McGlade declared, "It really doesn't matter what you

think. I have the right to be able to do this." In preparation for Titan's sniff search, Gyorgy removed his small dog from the cabin of the truck.

Titan alerted on two areas around the vehicle, and in response, McGlade performed a search of the truck. He located methamphetamine and a glass pipe with residue, an unloaded firearm, an empty magazine, and six live rounds of ammo. Gyorgy was placed under arrested and charged with unlawful possession of drugs, paraphernalia, a firearm, and ammunition.

Gyorgy filed a motion prior to arraignment to suppress the evidence located during the stop, arguing that it was impermissibly prolonged in violation of his Fourth Amendment rights. After hearing testimony from McGlade about the stop, the magistrate judge denied the motion, stating: "In summary, we have a lawful traffic stop. We have a lawful detention. The detention was not prolonged." After his arraignment, Gyorgy once again moved to sup-

Prison Education Guide

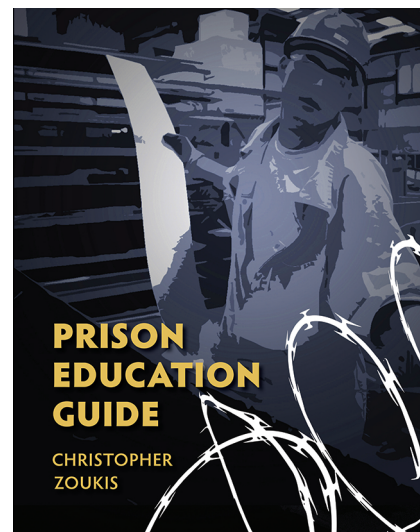
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press the evidence on the grounds that it was obtained during an unlawfully prolonged traffic stop. A different judge denied the motion.

Following a jury trial, Gyorgy was convicted on the misdemeanor possession of methamphetamine and paraphernalia charges, and the trial court declared a mistrial as to the unlawful possession of a firearm and unlawful possession of ammo charges because the jury was unable to reach a verdict. He was placed on informal probation with a suspended imposition of sentence, and he timely appealed.

The Court of Appeal noted a traffic stop “constitutes a seizure of persons within the meaning of the Fourth Amendment” but is constitutionally reasonable “where police have probable cause to believe that a traffic violation has occurred.” *Whren v. United States*, 517 U.S. 806 (1996). However, “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.” *Rodriguez v. United States*, 575 U.S. 348 (2015).

Under *Rodriguez*, the traffic stop may “last no longer than is necessary to effectuate the purpose” of the stop. The “mission” of the stop, aside from issuing a ticket, may include “ordinary inquiries incident to [the traffic] stop such as checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.” *Rodriguez*. A dog sniff may lawfully be performed during the time it takes to carry out these tasks, but “may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining any individual.” *Id.*

Referring to McGlade’s testimony at the suppression hearing, the Court concluded “McGlade detoured from the traffic stop’s mission almost immediately.” Though he obtained Gyorgy’s license, he didn’t use it to run a validity or warrant check, and proceeded to “inquire[] into matters unrelated to the suspected traffic violation.” Not only did the dog sniff prolong the stop, but so did the “safety precautions” McGlade took to facilitate it such as the removal of the small dog from the passenger compartment of the truck, the Court explained. In fact, other than obtaining Gyorgy’s driver’s license, McGlade and the other officers on scene failed to undertake any tasks related to the “mission” of the traffic stop, i.e., the alleged unsafe lane change. Thus, the Court held that the police prolonged the traffic stop in violation of the Fourth Amendment.

Accordingly, the Court vacated Gyorgy’s

convictions and remanded with instructions to grant his suppression motion. See: *People v. Gyorgy*, 93 Cal. App. 5th 659 (2023). 🐾

Editor’s note: It is notable that nine years after the U.S. Supreme Court decided *Rodriguez v. United States*, 575 U.S. 348 (2015), there still appears to be a troubling amount of confusion and ignorance regarding *Rodriguez*. Under *Rodriguez*, the current case is not difficult to resolve, yet two judges and the prosecution got it very wrong.

Rodriguez provides that a traffic stop must be “limited in scope and degree of intrusion by its purpose and may last no longer than reasonably necessary to effectuate the purpose of the stop.” See *Illinois v. Caballes*, 543 U.S. 405 (2005). The *Rodriguez* Court instructed that traffic stop related inquiries are permissible such as “checking the driver’s license and any outstanding warrants against the driver, as well as inspecting the vehicle’s registration and insurance,” because such inquiries are related to the “mission” of the stop—addressing the alleged traffic violation that justified the stop and associated traffic-safety concerns. See *Arizona v. Johnson*, 555 U.S. 323 (2009).

However, the Court made it abundantly clear that inquiries intended to detect “evidence of ordinary criminal wrongdoing” are not a part of the “mission” of a traffic stop and thus constitute the unlawful prolonging of the stop. The Court reiterated that a “dog sniff ... is a measure aimed” at uncovering ordinary criminal wrongdoing and “not an ordinary incident of a traffic stop.” See *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

The *Rodriguez* Court explained that whether the prolonging of the traffic stop to conduct inquiries unrelated to the mission of the stop occurs before or after the “completion of the traffic infraction investigation” is irrelevant. Prolonging the traffic stop to investigate matters unrelated to the traffic infraction violates the Fourth Amendment regardless of when the prolonging occurs during the traffic stop.

Despite the *Rodriguez* Court setting forth the governing legal principles clearly, fully, and unambiguously, Gyorgy’s motion to suppress was wrongfully denied by two separate judges and opposed each time by the prosecution. Nevertheless, the facts and correct result are simple and straightforward.

An officer received a vague tip about a black truck in connection with possible drug activity. We know that the tip itself did not establish a legal basis for an investigative seizure

because the officer did not immediately initiate a traffic stop upon locating the truck, but instead, he waited until the truck allegedly made an unsafe lane change to serve as the legal basis for initiating the traffic stop. Consequently, the “mission” of the stop was the claimed traffic infraction, not a drug investigation.

But, with the exception of obtaining Gyorgy’s driver’s license, nearly all of the officer’s activities during the stop were related to a drug investigation, not the purported traffic infraction, especially the drug detection dog’s sniff search of the truck’s exterior, which undoubtedly prolonged the traffic stop. *Rodriguez* dictates that this constitutes the unlawful prolonging of the traffic stop for a purpose unrelated to the traffic infraction. Additionally, *Rodriguez* instructs that it does not matter whether the prolonging occurs before or after the traffic infraction investigation concluded, so it is of no consequence that the exterior sniff search occurred prior to the conclusion of the traffic investigation.

Despite the straightforward resolution of the case, the lead police officer clearly does not understand *Rodriguez*, as evidenced by his declaring, “It really doesn’t matter what you think. I have the right to be able to do this [exterior sniff search].” When in fact, he clearly did not, and it is not even a close call. More unsettling is the fact that the two judges who denied the motion to suppress also do not appear to understand *Rodriguez*.

Similarly, the dissenting judge in the case believes that the “12-minute traffic stop” was not “unreasonably long” and “would hold this ... traffic stop (a seizure) was not unreasonably long under the Fourth Amendment.” But the judge completely misses the point. The *Rodriguez* Court expressly rejected the notion that there is a *de minimis* exception to the rule prohibiting the prolonging of a traffic stop to inquire into matters unrelated to the “mission” of the stop. It is not the length of the prolonging of the stop that makes it unlawful; it is the prolonging itself.

With so many parties in just this case alone misconstruing *Rodriguez*, there is little doubt that other motions to suppress are similarly being wrongfully denied in other cases across the country. The “*Rodriguez* moment” (the precise point when all the tasks tied to the purpose of the lawful traffic stop concludes) should definitely be a point of focus for possible relief in any traffic stop in which police investigated matters unrelated to the “mission” of the stop and subsequently discovered contraband.

Maine Supreme Court: Defense Counsel Ineffective for Opening Door to Otherwise Inadmissible Evidence of Bad Character

by Matt Clarke

THE SUPREME JUDICIAL COURT OF Maine reversed a defendant's domestic violence conviction after finding her attorney was ineffective for opening the door to prejudicial evidence about her parenting and failing to object to the prosecutor's improper introduction of evidence about having a child removed from her home.

Meghan M. Pratt wanted to cut her daughter's hair, but the daughter refused. Pratt picked up scissors and moved toward her daughter. A struggle ensued but ended without injuries. Then Pratt left to run an errand.

When Pratt returned, she told her daughter that she would have to be punished for disobeying her mother. The daughter said, "You aren't even a mother to us." Pratt smacked the daughter's face with her right hand, leaving a bruise that persisted for several days, and then held her daughter with both hands, not releasing her until she had calmed down.

Pratt was charged with domestic violence assault under 17-A M.R.S. § 207-A(1)(A).

During opening statements at her jury trial, the State introduced the parental discipline justification as a potential defense. Defense counsel responded in opening statements by introducing the issue of "family dynamics" and the principle that parents are legally justified in using reasonable and moderate forms of punishment against their children.

On the witness stand, the prosecutor asked the daughter where her siblings lived. Pratt objected based on relevance. The prosecutor argued it was relevant to the issue of family dynamics that Pratt raised in opening arguments. The trial court sustained the objection, "noting that the question could indicate to the jury that children may have been removed."

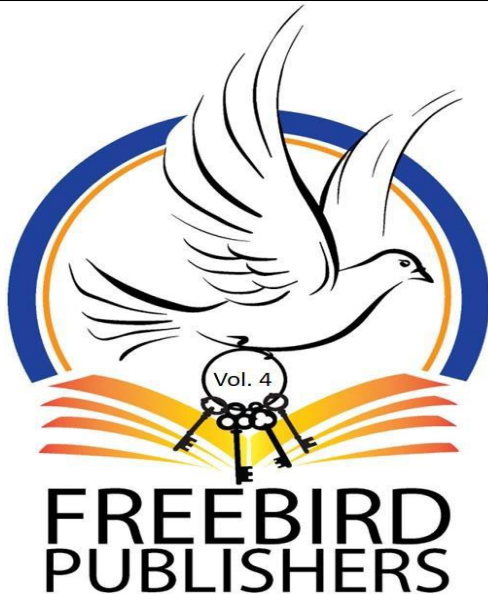
The daughter was then asked to explain the statement she had made to Pratt before she was struck. She testified that all Pratt "really did was stay in her room the majority of the time" and "didn't really treat us like we were her kids."

Pratt objected to the question's lack of specificity but was overruled, and the prosecutor continued to ask questions about Pratt's parenting practices, including the fact that she did not spend time with her children, cook for them, or wash her daughter's laundry.

Pratt objected to the relevance of the line of questioning. The prosecutor argued that it was relevant to the issue of family dynamics introduced by Pratt during opening statements. The trial court overruled the objection, stating "it would allow a little bit of latitude on it."

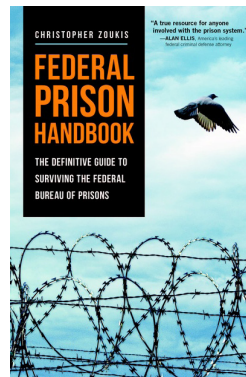
The prosecutor asked more questions relating to Pratt's parenting, "eliciting testimony about an alleged assault of another child [and] Pratt's failure to play with or eat with her children." Pratt did not object.

Pratt testified that she slapped her daughter to avoid being assaulted by her. She said she had not consciously intended to slap her daughter, explaining that she had "just reacted" when her daughter came at her because she had been "beat up a lot" in her neighborhood



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as a child. Pratt testified that she hit the victim in self-defense, not for discipline.

During cross-examination, despite the previously sustained defense objection to questions on the matter, the prosecutor questioned Pratt about removal of her children and again brought up the issue in closing arguments. Neither time did defense counsel object.

Pratt expressly waived the parental discipline justification defense after close of evidence. The jury instructions only addressed self-defense. The jury found Pratt guilty. She was sentenced to 60 days in jail, all of which was suspended, and one year of probation.

On appeal, Pratt argued that the trial court erred in admitting evidence of her parenting. The state Supreme Court could not find clear error but noted that, had Pratt not raised the parental discipline defense in opening statements, it would have been “inadmissible evidence of bad character.” The Court also determined that the prosecutor’s “line of questioning, in violation of the [trial] court’s ... ruling about one of Pratt’s children being taken out of the house was plain error.” However, that error was insufficiently prejudicial to justify vacating the conviction in light of the other evidence admitted at trial and the fact that Pratt had placed her parenting at issue.

Pratt filed a timely pro se petition for post-conviction relief (“PCR”). The PCR court appointed her an attorney who filed an amended brief, alleging defense counsel had been ineffective in opening the door to prejudicial evidence about Pratt’s parenting during opening arguments and failing to object to the prosecution’s error.

The PCR court held a hearing during which defense counsel testified, admitting that he had opened the door to admission of parenting evidence but justifying it by saying he was unsure whether her testimony would raise the issue. He also admitted being “absolutely” on notice before the trial that it was a self-defense case and said he did not object to the prosecution’s error because he had already had an objection on the issue sustained and thought additional objections unnecessary. The court denied the PCR.

Aided by attorney Rory A. McNamara of Drake Law in York, Pratt timely appealed and was granted a certificate of probable cause by the Maine Supreme Court.

The Court observed that the Sixth Amendment and article I, section 6 of the Maine Constitution provide that a criminal defendant is entitled to the effective assistance of counsel. It states that in reviewing a claim

of ineffective assistance of counsel, it applies the test set forth in the landmark U.S. Supreme Court case *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that the defendant establish that (1) defense counsel’s performance fell below an objective standard of reasonableness and (2) there’s a “reasonable probability that, but for counsel’s unprofessional errors,” the outcome of the proceedings would have been different.

The standard for measuring counsel’s performance is “reasonableness under prevailing professional norms ... [and] counsel’s representation of a defendant falls below the objective standard of reasonableness if it falls below what might be expected from an ordinary fallible attorney.” *Watson v. State*, 230 A.3d 6 (Me. 2020).

Applying that standard to defense counsel’s inclusion of the parental discipline justification in the opening statement, the Court concluded that doing so unnecessarily opened the door to evidence of Pratt’s parenting practice, which wasn’t reasonable under prevailing professional norms. The Court based its conclusion on the fact defense counsel knew Pratt would be testifying, which counsel expressly told the jury in the opening she would be doing, so there wasn’t a need

to raise the parental discipline issue in the opening because it could have been raised during Pratt’s later testimony. Additionally, the Court faulted defense counsel for not performing the due diligence required “to know to a fair degree of certainty how” Pratt would testify, and so, counsel should have known beforehand which defense to raise. Finally, if defense counsel wasn’t sure how Pratt would testify, counsel “was under no obligation to raise the parental discipline justification in his opening statement,” the Court stated. Thus, the Court concluded that defense counsel’s opening the door to

prejudicial evidence of Pratt’s parenting during opening statements “fell below the objective standard of reasonableness.”

Turning to *Strickland*’s second prong, the Court stated that but for defense counsel’s error, the jury would not have heard about Pratt’s parenting practices because that would have constituted inadmissible evidence of bad character. It concluded: “We believe the testimony about Pratt’s parenting practices—which did not make it any more or less probable that Pratt struck the victim or acted in self-defense and served only to establish and highlight Pratt’s bad character—reasonably could have impacted the jury’s verdict and thus is of significant prejudicial effect.” Thus, the Court held that the cumulative effect of defense counsel’s opening the door to Pratt’s parenting practices and his failure to object to the prosecutor’s error results in the reasonable probability that the outcome of the proceeding would have been different but for counsel’s errors.

Accordingly, the Court vacated the judgment of the PCR court and remanded for entry of judgment granting the petition for post-conviction review and vacating the conviction in the underlying criminal judgment. See: *Pratt v. State*, 303 A.3d 661 (Me. 2023). 📌

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Eighth Circuit Announces ‘Categorical Approach’ Applies to SORNA Tier Analysis

by Douglas Ankney

IN A CASE OF FIRST IMPRESSION, THE U.S. Court of Appeals for the Eighth Circuit announced that the categorical approach applies to the tier analysis of the Sex Offender Registration and Notification Act (“SORNA”), 18 U.S.C. § 2250(a).

Michael Ryan Coulson was convicted by court martial of “forcible pandering” in violation of Article 120c(b) of the Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. § 920c(b) (2012). He subsequently failed to register as a sex offender in Iowa and pleaded guilty to violating SORNA. At his sentencing for the SORNA violation, Coulson argued that the categorical approach applied. And because his forcible pandering conviction is defined as forcible “prostitution,” which is further defined as “compelling another person to engage in sexual abuse or sexual contact” (10 U.S.C. § 920c(d)(1)), he argued it is a Tier I offense.

The U.S. District Court for the Northern District of Iowa determined that the categorical approach applied but also found that “the possibility of a prostitution conviction arising from mere sexual contact over the clothing was so unlikely as to be speculative or hypothetical.” The District Court determined that Coulson’s UCMJ conviction is comparable to sexual abuse, 18 U.S.C. § 2242, which is a Tier III offense under SORNA. The District Court sentenced Coulson accordingly, and he timely appealed.

The issue before the Court was “how to conduct SORNA’s tier analysis.” The Court observed that a sentence for a SORNA conviction depends partly on the severity of the underlying sex offense as categorized by SORNA’s three tiers. Tiers II and III apply when the underlying offense is “comparable to or more severe than” a listed offense. 34 U.S.C. § 20911(2)-(4). Tier I is a “catchall”

when Tiers II and III do not apply and is the least severe category.

But the Eighth Circuit had never before determined which approach applies to SORNA’s tier analysis. The Court observed that the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have all held that the categorical approach applies, and no circuit has held to the contrary. (See Writer’s note below for full citations.) “In general, as applied in several different criminal- and immigration-law contexts, the categorical approach does not permit a court to consider a defendant’s actual underlying conduct,” the Court noted. See *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (directing courts to consider “not ... the facts of the particular prior case, but instead ... whether the ... statute defining the crime of conviction categorically fits within the generic federal definition”).

The Court explained: “This approach permits only an elements-to-elements comparison between a defendant’s prior offense and either: (1) a general or traditional common law definition of a referenced offense, e.g., ‘burglary’ as referenced in 18 U.S.C. § 924(e); or (2) the elements of an offense as defined with express reference to a particular statutory provision. SORNA’s tier provisions involve the latter in that 34 U.S.C. § 20911(4)(A)(i) expressly references the definitions of ‘aggravated sexual abuse’ and ‘sexual abuse’ from 18 U.S.C. §§ 2241 and 2242.”

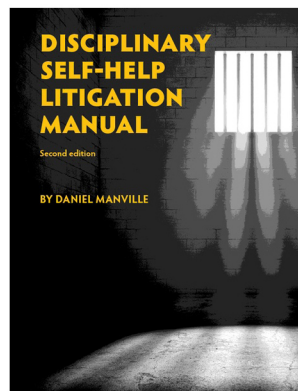
Agreeing with the circuits that have already ruled on this issue, “textual support points almost exclusively toward the categorical approach,” the Court determined. “Reference to a generic ‘offense,’ to a specific statute, or to a ‘conviction’” and the absence of references to “conduct or to specific acts that a defendant previously committed” strongly suggest Congress intended courts to apply the categorical approach and to not look at the defendant’s actual conduct, according to the Court. See *Nijhawan v. Holder*, 557 U.S. 29 (2009). Thus, the Court held that the categorical approach applies to SORNA’s tier analysis.

Turning to the present case, the District Court concluded that Coulson’s comparative offense was sexual abuse under 18 U.S.C. § 2241. Conviction under that statute requires a sexual act. But the statutory elements of

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Coulson's UCMJ conviction include sexual contact or sexual abuse. 10 U.S.C. § 920c(b). Sexual contact may be accomplished with touching over the clothes, but sexual abuse required a sexual act, i.e., penetration of the penis with the mouth, vulva, or anus or contact between the mouth and the penis, vulva, scrotum, or anus. § 920(g)(1) and (2).

Because it is possible to be convicted under § 920c(b) without committing a sexual act, the Court ruled that the District Court erred in determining Coulson's comparative offense was sexual abuse, i.e., his "offense of

conviction [wa]s unambiguously broader in scope than the SORNA comparators." It was of no significance that Coulson forced an adult woman to engage in sexual intercourse for money that was paid to Coulson. Under the categorical approach, courts do not look at the defendant's actual conduct, explained the Court.

Accordingly, the Court reversed Coulson's sentence and remanded for further proceedings consistent with its opinion. See: *United States v. Coulson*, 86 F.4th 1189 (8th Cir. 2023). 📖

Writer's note: The citations to the cases from the other circuits that have addressed this issue and have all adopted the categorical approach are as follows: *United States v. Walker*, 931 F.3d 576 (7th Cir. 2019); *United States v. Barcus*, 892 F.3d 228 (6th Cir. 2018); *United States v. Young*, 872 F.3d 742 (5th Cir. 2017); *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1 (1st Cir. 2015); *United States v. White*, 782 F.3d 1118 (10th Cir. 2015); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014).

Pharmacies Are Giving Your Prescription Data to Police Without a Warrant

by Anthony W. Accurso

FOLLOWING A CONGRESSIONAL INVESTIGATION, some lawmakers wrote a letter to the Department of Health and Human Services ("HHS") about how the eight largest pharmacy chains provide patient prescription information to police without requiring a warrant, and only one regularly notifies customers when it discloses this private data.

Conducting the investigation were Senator Ron Wyden (D-OR), along with representatives Pramila Jayapal (D-WA) and Sarah Jacobs (D-CA). They obtained briefings from the eight major pharmacy chains: CVS Health, Walgreens Boots Alliance, Cigna, Optum Rx, Walmart Stores Inc., The Kroger Co. Rite Aid Corp., and Amazon Pharmacy. Such a review became more urgent since nearly "one in three women ages 15 to 44 ... a [Washington] Post analysis found, live in states where abortion is fully or mostly banned."

"[W]e learned that each year law enforcement agencies secretly obtain the prescription records of thousands of Americans without a warrant. In many cases, pharmacies are handing over sensitive medical records without review by a legal professional," the lawmakers wrote in their letter to HHS.

While five of the companies require internal review by legal professionals prior to releasing data, three companies—CVS, Kroger, and Rite Aid—said that "their staff are instructed to process records requests in-store" because "their staff faced extreme pressure to provide an immediate response." These three companies have a combined 60,000 locations nationwide.

Amazon is the only company that notifies customers when this data is released, unless

it is required not to by a gag order accompanying the request. "Although pharmacies are legally permitted to tell their customers about government demands for their data, most don't," wrote the lawmakers. "As a result, many Americans' prescription records have few meaningful privacy protections, and those protections vary widely depending on which pharmacy they use."

Under the Health Insurance Portability and Accountability Act ("HIPAA"), it is HHS that "determine[s] the standard of legal process that will govern disclosure of medical records." In their letter to HHS, the lawmakers wrote that the agency should "strengthen the minimum bar set in the current regulations to require a warrant."

"We urge HHS to consider further strengthening its HIPAA regulations to more closely align them with Americans' reasonable expectation of privacy and constitutional principles," wrote the lawmakers. "Pharmacies can and should insist on a warrant, and invite law enforcement agencies that insist on demanding patient medical records with soleus subpoena to go to court to enforce that demand."

Some states—such as Louisiana, Montana, and Pennsylvania—offer additional protections for medical data disclosure, though federal law enforcement is not subject to their laws. However, as some women may choose to travel to obtain an abortion in a state where it is legal, state-by-state regulations will fail to provide adequate protections for Americans.

The Office of Civil Rights, under HHS, is considering "new protections banning the use

or sharing of protected health data to identify, investigate or prosecute providers and others involved in the provision of legal reproductive health care, including abortion," according to the HH website.

Tech companies have been dealing with records requests from law enforcement for years and have recently begun requiring warrants for data such as location tracking records. This change became more pressing as police began submitting thousands of requests per year. It's important for the pharmacies and HHS to address this issue before the volume of requests for prescription data similarly metastasizes. 📖

Sources: *the hill.com*, *therecord.media*, *bostonglobe.com*

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Law Review Article Examines Role of Defense Attorneys in Jurisdictions With Progressive Prosecutors

by Matt Clarke

THE RELATIVELY NEW MOVEMENT TO elect progressive prosecutors has been the subject of many academic articles. However, that literature has almost exclusively focused on the role of the prosecutor in a progressive prosecution environment. Little has been written about how practicing in a progressive prosecution environment affects the role of defense counsel. This deficit in academic studies is addressed in a *Cornell Law Review* article titled “Defense Lawyering in the Progressive Prosecution Era” by Professor Jenny Roberts, co-Director of the Criminal Justice Clinic at American University’s Washington School of Law.

What Is a Progressive Prosecutor?

The article notes that there is no single definition of what it means to be a prosecutor who was elected running on a progressive platform. However, the post-election reality can range from a progressive who prosecutes much the same as a conservative would to a prosecutor who is anti-carceral and seeks to limit or even eliminate lengthy prison sentences.

Considering the fact that progressive prosecutors have been elected in many highly-populated districts since the movement began, it is important to gain a more specific understanding of what is meant by “progressive prosecutor.” To that end, the article offered four ideal typologies, first proposed by Benjamin Levine in the *Minnesota Law Review*, while acknowledging that the actual situation is more complex.

“First is the ‘progressive who prosecutes,’ someone with generally progressive politics, but who does not ‘bring her politics to the job or to the administration of criminal justice.’ Next is the ‘proceduralist prosecutor,’ focused on getting their house in order by fighting corruption and misconduct, and striving to ensure defendants are given fair process. Third is the ‘prosecutorial progressive,’ who embraces their role and ‘the power of state violence’ but exercises that power to address ‘structural inequality and substantive justice.’ Finally, there is the ‘anti-carceral prosecutor who harbors no illusions about criminal law as a vehicle for positive change.’”

The article noted that “the term ‘pure anti-carceral prosecutor’ is oxymoronic, since

all prosecutors incarcerate and even the most progressive will likely be able (or willing) to scale their own offices back only to a limited extent.” Also, even the most progressive prosecutor will be unable to effect change in the other unjust aspects of the criminal justice system such as inhumane prisons, overbearing probation officers, and unjust collateral consequences.

The article concluded that the “very idea of a transformative prosecutor is difficult to conceive. Even the most progressive prosecutor is highly unlikely to disrupt their own power or support handing more power over to others. After all, the prosecutor ran on a platform that they would achieve the reform, not step back and allow others to transform.” But just such a transformation led by others is likely what is necessary because studies have shown that “prosecutors are the main cause of mass incarceration.” Yet, “overarchingly, the progressive prosecution movement is closely linked to reform of the existing criminal legal system, rather than any radical transformation.”

The Political Environment in a Progressive Prosecution Jurisdiction

The article noted that any progressive prosecutor will face pushback ranging from political opponents who reject the concept of criminal justice reform to line prosecutors who just want to keep doing things “the way they have always been done.” The pushback can complicate the relationship between defense counsel and the prosecution as prosecutors may not feel it is politically feasible to negotiate beyond the first-offered plea agreement lest they be further criticized for being “too soft on crime.”

Progressive prosecutors are often quick to claim the mantle of reformer. This can lead them to undermine other parts of the legal system that might also lead reform—especially defense attorneys. This happened during the tenure of Raebel Rollins. After running on a progressive platform, she was elected District Attorney in Suffolk County, Massachusetts.

“In Boston, Rollins was a prosecutor who could be characterized as anti-carceral at least in some low-level cases and perhaps ‘prosecutorial progressive’ on others. For ex-

ample, shortly after taking office, she ordered her line prosecutors to follow a default policy of declining to prosecute a list of fifteen misdemeanor offenses with supervisory permission to deviate from the policy only in exceptional circumstances.”

“Yet Rollins squarely positioned her office as the real voice for reform of the criminal legal system, at the same time lashing out at public defenders. Her unjust criticism of the defense bar to further her political standing led to a rift between defense attorneys and prosecutors instead of them working together to reform the criminal legal system.”

“This type of rhetoric is not uncommon from progressive prosecutors—although Rollins went further than most by suggesting that [public] defenders were villains and by going beyond claiming the role of reformer to also embrace a narrative of prosecutor-as-hero. In a similar vein, Brooks Holland and Steve Zeidman have described, ‘two prominent progressive prosecutors, Larry Krasner in Philadelphia, Pennsylvania, and Rachel Rollins in Suffolk County, Massachusetts—apparently believing that they, and only they, know what is best and ‘progressive’—publicly denounced their local community bail funds for having posted money bail for people accused of serious crimes.” Yet, true reform will not occur if all that is addressed is the politically-appealing low-hanging fruit of minor offenses.

Problems occur even when prosecutors embrace the defense bar as partners in reform. Studies have shown that clients of public defenders are already confused about the role of defense counsel, with many believing they work with prosecutors to send their clients to prison. Publicity touting the close ties between the defense bar and progressive prosecutors can only serve to exacerbate that misunderstanding, further burdening the attorney-client relationship.

Typologies of Defense Lawyers in Progressive Prosecution Jurisdictions

As it did with “progressive prosecutors,” the article offered four typologies of defense attorneys practicing in progressive prosecution jurisdictions. The first is the abolitionist defender, “working to replace extreme over-re-

liance on the criminal system to solve societal problems with less racist, more humane and effective approaches even as they represent individual clients within that system.”

Abolitionist defenders push for lasting, systemic change well beyond the hypothetical “pure anti-carceral prosecutor.” However, just as it is questionable whether any prosecutor can be “purely anti-carceral,” it is also questionable “whether any actor within the criminal legal system [including abolitionist defenders] can be a pure abolitionist, as they gain their living from their work [within the system] and are deeply intertwined with many of its most oppressive aspects.”

The second typology is the “reform defender” who believes “in the fundamental soundness (or the necessity) of the criminal legal system, at least for the most serious offenses. But they work for major reform on issues including decriminalization of low-level offenses, procedural fairness, and overly-punitive felony sentencing schemes.”

“Still further along the defense lawyer spectrum would be those defenders who are simply thankful to have a progressive prosecutor in place and do not seek to rock the boat. Indeed, the prosecutor may have come from the defender’s office, stepping from one role into the other. These new status quo defenders may fulfill their role in the adversary system in individual cases but are satisfied with allowing the prosecutor to lead any systemic reform efforts.”

“Finally, in a typology that is far from complete, there are non-progressive defenders. This group takes fewer progressive positions than the elected prosecutor. They might be former prosecutors now in private practice or perhaps defenders who do the work because they enjoy litigation and generally believe everyone has a right to counsel. But they view some of the prosecutor’s policies as an undeserved windfall for their clients.” As such, they might be immediately accepting of plea bargain offers instead of pushing for the best possible outcome for their clients and thus deliver substandard or even ineffective representation.

Taking Advantage of a Progressive Prosecutor’s Reformer Claims

Defenders who are faced with prosecutors claiming to be the only reformists can use this claim to their clients’ advantage. “Progressive prosecutors claiming the reform narrative does not always [or even often] reflect reality. Some who have adopted the progressive mantle still

pursue policies that are more punitive than expected, given national criminal system reform trends.” In such cases, defenders can point out to prosecutors the differences between the reform promises made by the prosecutor and the actual situation for the defender’s client with respect to reform issues such as racial inequity, fairness, selective prosecution, disparate treatment of the poor, or ending mass incarceration.

In a district where a progressive prosecutor was elected by a narrow margin, it may be difficult to gain concessions. Prosecutors are, after all, political creatures who cannot afford to alienate too many voters. Thus, the defender may be required to set achievable rather than optimal goals.

The opposite is true when a progressive prosecutor is elected by a wide margin and institutes actual reform measures. The defender may see the prosecutor’s offer of a plea bargain as reasonable but still must advocate for an even better position for the client.

Defenders’ Role as Change Agents

It is legitimate to question whether defenders can claim the role of change agent. They “are very much a part of the criminal legal system that some of them seek to abolish, other seek to transform (perhaps on the road to abolition), and still others simply wish to reform, either significantly or only at the edges. Defenders can be effective supporters of community activists and others who seek change but must be attentive to their own fundamental role (and, some may say, complicity) within a deeply racist, overly-punitive system.”

“These foundational critiques illustrate how problematic it would be for defenders to claim that they—not the progressive prosecutor—are the true change agents. However, defenders might choose to address prosecutorial claims to the reform mantle, any response must embrace the baseline position that no lawyer (and really no one person or group) should claim to be the hero within the system.”

Progressive Prosecutors Complicating the Attorney-Client Relationship

As previously noted, the article expounded on how studies have shown that many defendants are confused about the role of prosecutors, judges, and defenders. “On the individual representation level, any type of defense attorney in any progressive prosecution jurisdiction—but particularly one where the prosecutor claims ownership of the reform narrative—may face exacerbated tensions in

what can already be difficult attorney-client relationship issues. Many studies have revealed such tensions between defense lawyers and the clients they serve. Interviewees expressed views that their defense lawyer was working for the judge and the DA and not defending me or had a strategy to get me to cop-out and seemed to be working with the DA.”

Another study’s interviews with people facing criminal charges in Boston “revealed that, when they attempted to advocate for themselves, their own lawyers silenced and coerced them.” Yet another study “documented how indigent defense lawyers, while expressing concern about their clients’ racially disparate treatment, ultimately engaged in racialized courtroom practices themselves.”

“While many defenders have good relationships with their clients, the belief of some facing criminal charges that their lawyers are working hand-in-hand with the prosecution is not uncommon. Now, layer on top of that prosecutors who are touting themselves as the change agents for reform. Even if those prosecutors are not simultaneously attacking defenders, their reformer claims can lead to more obstacles for defenders working to build trust with their clients, the vast majority of whom rely on government-funded lawyers that they do not hire and cannot chose.”

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Increasing Advocacy in Progressive Prosecution Jurisdictions

The article pointed out that, given their progressive policies “some progressive prosecutors might prefer (or even expect) defenders to dial back their zealotry. But the new environment actually poses opportunities for defenders to push the mass criminalization and carceral needle back even further. The fact that a progressive prosecutor has slightly changed the balance in a system that stands out globally for its over-punitive approach should be seen as the preliminary move, not the end goal.”

Underutilized Charging Decision Advocacy

The article noted that one step of the prosecution process often overlooked by defenders is the charging process. Although few defenders are involved with a client’s case prior to the initial charging decision, those that are can lobby for lesser charges as being in line with a progressive prosecutor’s decarceration policies. Even after initial charging, in progressive prosecution districts where the

prosecutor has openly published a charging memorandum—such as New York County, Los Angeles, Chicago, Philadelphia, and Houston—defenders must utilize the published list of crimes that will not be prosecuted for their clients’ benefit. Some line prosecutors continue to prosecute crimes on the “will not” list such as possession of small amounts of marijuana. That is where a defender’s knowledge of the list can result in reduced or even dismissed charges. This makes defenders effectively the enforcers of the prosecutor’s declination policies.

Sadly, prosecutors publishing charging policies is the exception, not the rule. When prosecutors are less forthcoming, it is important for defenders to know what progressive campaign promises were made by the prosecutor and seek to enforce those when they benefit the client. A defender can also advocate for declination of misdemeanor prosecutions on the basis of studies showing it reduces overall recidivism rates resulting in reduced workloads for prosecutors.

Conclusion

The progressive prosecution environment can be complex and challenging to a defender.

However, it is still the defender’s duty to maximize advocacy for the client. This includes moving beyond the low-hanging fruit of misdemeanors and minor felonies into the murkier waters of serious and violent offenses.

The defender must “adapt to the changing environment. This new environment offers opportunities but also poses challenges. For example, any defense office previously overwhelmed with clients charged with low-level misdemeanor cases will have the opportunity to reassign resources if the new prosecutor has a declination policy encompassing many of those misdemeanors. At the same time, defenders must find ways to earn their clients’ trust and support community reform efforts when the prosecutor touts himself as the real reformer, or even transformer, of the criminal legal system.”

Source: Roberts, Jenny, *Defense Lawyering in the Progressive Prosecution Era* (September 17, 2023). *Cornell Law Review*, Vol. 109, No. 5, 2024, *American University*, WCL Research Paper No. 2023-16, Available at <http://dx.doi.org/10.2139/ssrn.4574381>

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What Happens When Prosecutors Offer Opposing Versions of the Truth?

by Ken Armstrong, ProPublica

An unusual recent court decision offered harsh criticism of a behavior that has left dozens of men condemned to death since the 1970s, spotlighting cases where prosecutors offered claims that contradicted what they said elsewhere.

This story was originally published by ProPublica.

WHEN BALTIMORE POLICE ARRESTED Keyon Paylor in 2014, one of two things was true.

Either Paylor hid a gun that the police found, or the police planted the gun and framed Paylor.

The two things cannot both be true. Even so, the U.S. Department of Justice presented the first version as true while convicting Paylor of being a felon in possession of a firearm, then presented the second version as true while prosecuting a corrupt police detective who had arrested Paylor.

If you find this confounding, you're not alone. When Paylor later challenged his conviction, the use of conflicting theories by the U.S. Department of Justice did not sit well with a judge on the 4th U.S. Circuit Court of Appeals.

"Which is the truth?" the judge, Stephanie Thacker, asked an assistant U.S. attorney during oral argument in 2021.

"Does the government not share at least my concern that the government has talked out of both sides of its mouth on this case?" she asked the prosecutor.

The case of Keyon Paylor—in which the 4th Circuit appeals court issued a strikingly blunt opinion two months ago—is but another in a string of cases in which prosecutors offer one version of the truth while trying one person, then offer a very different version while trying another person.

I wrote about contradictory prosecutions in 2017, and this ruling and others suggest the practice has not abated.

In *U.S. v. Driggers*, a case involving guns stolen from a train in Chicago, the defendant, Nathan Driggers, was convicted of being a felon in possession of a firearm. When prosecuting a co-defendant named Warren Gates, the federal government contended Gates bought guns from the train robbery from two other men. But in trying Driggers, the government contended Gates bought them from Driggers.

Confused? You are, again, not alone. The government denied using conflicting theories, but the 7th U.S. Circuit Court of Appeals wasn't persuaded. In a 2019 opinion, it wrote, "The government has not explained to us (or to anyone else) how these two conflicting factual representations can coexist, and we are at a loss to reconcile them." Still, the court upheld Driggers' conviction.

In the cases I found previously, prosecutors presented shifting theories on which defendant stabbed someone, or chopped someone's skull, or held someone's head underwater. Most cases involved a gun: Prosecutors would say one defendant fired a fatal shot, then, in a separate trial, before a different trier of fact, say a different defendant fired it.

In 2009, in Lynn, Massachusetts, a state prosecutor argued that Bonrad Sok fired the single shot that killed a man outside a restaurant; six months later, in a separate trial, the same prosecutor said the shooter was actually Kevin Keo. Both men were convicted.

Sometimes, prosecutors offered not two versions of the truth, but three. In Stuart, Florida, a convenience store clerk was shot and killed in 1982. In a first trial, the prosecution argued John Earl Bush was the shooter; at a second trial, it argued Alphonso Cave was the shooter; at a third trial, it argued J.B. Parker was the shooter. All three men were convicted and sentenced to death. Bush was executed in 1996. Cave died last year while still on death row. Parker's sentence last year was reduced to life, for reasons unrelated to the prosecution's contradictory positions.

At least 29 men have been sentenced to death in the U.S. since the 1970s in cases where prosecutors were accused of presenting competing versions of the truth, from what I found searching legal cases. When prosecutors change their version of who did what, it can lead to more serious charges or harsher sentences for more people. But as one federal judge wrote in a capital case, "Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth."

The U.S. Supreme Court has never ruled

squarely on whether conflicting prosecution theories violate due process. Lower courts are divided. In a handful of cases, a court has overturned a conviction or a death sentence, finding the prosecution's contradictory stances to be fundamentally unfair. But more often than not, courts have allowed the tactic, even as many have described it as unseemly or worse.

Jurors seem more taken aback by the conduct than many judges. For the 2017 article, I called a juror in a Missouri case in which the jury had convicted the defendant of being the second of two robbers in a fatal robbery. When I told her that the same prosecutor had argued, just two weeks before, in a separate trial, that the second robber was someone else, she gasped. "I think our justice system should actually be justice," she said. Later, as we kept talking, she was so shaken that she began to cry.

The Prosecution's First Version of the Truth

In January 2014, four Baltimore police officers arrested Paylor. One of the officers was Detective Daniel Hersl.

Hersl wrote up an incident report and probable cause statement, saying this is what happened:

The four officers were in an unmarked police car. They saw Paylor walking. When Paylor noticed the officers, he fled down the street. The officers followed in their car and saw Paylor arrive at his front porch, where he removed what appeared to be a black handgun from his waistband and put it under a chair cushion. Police lifted the cushion and found a loaded handgun.

Paylor, 22 at the time, had prior convictions on gun and drug charges, according to court records. After this arrest, he was indicted by a federal grand jury on a charge of illegal possession of a firearm by a felon.

Paylor's version of what happened differs from Hersl's. According to a brief filed by Paylor's current lawyers, Paylor was simply walking home. When the police detained him in his home's downstairs, one officer went

upstairs and stole thousands of dollars from a bedroom dresser. Police planted the gun on his porch and framed him, Paylor said. After his arrest, he called relatives from a jail phone; in recorded conversations, he denied the gun was his, claimed the police stole his money and said, "Hersl plays a dirty game."

At that point, Hersl had dozens of misconduct complaints and had been sued multiple times, according to court records. He was so notorious that in 2014, Young Moose, a Baltimore rapper, called Hersl out by name in his song "Fuck The Police." (In a first-person account, D. Watkins, a University of Baltimore professor, would later call Hersl "arguably the most hated cop in Baltimore.")

Paylor's attorney, hoping to use Hersl's history to discredit him, asked for every internal affairs department file in which Hersl had been accused of misconduct. Prosecutors turned over 30 files to the judge, who, in turn, allowed Paylor's attorney to see only four of them and part of another, according to court records. Paylor's attorney believed that provided too little ammunition to impeach Hersl and suggested Paylor plead guilty.)

The federal gun charge carried a maximum sentence of 10 years. Paylor was also accused of violating probation on a state charge, for which he was looking at another 15 years.

The government offered Paylor a deal: plead guilty and get five years on the federal charge and time served on the state charge.

Paylor took the deal—and at a hearing in 2015, the Justice Department presented its first version of the truth in this case.

Peter J. Martinez, an assistant U.S. attorney, appeared on behalf of the government. Asked by the judge for a summary of the facts, Martinez adopted Hersl's version of events. He said if this case had gone to trial, the government would have proved, beyond

a reasonable doubt, that the gun was Paylor's and that he had tried to hide it from the police.

The Prosecution's Second Version of the Truth

In 2015, the same year Paylor pleaded guilty, the FBI was investigating possible corruption within the Baltimore Police Department. The investigators eventually focused on a special unit called the Gun Trace Task Force. Task force officers, the federal investigation would show, were robbing people, many of them drug dealers who were unlikely to complain—and unlikely to be believed, if they did.

Officers were stealing money and planting evidence, the very sorts of behavior alleged by Paylor. "They were, simply put, both cops and robbers at the same time," a federal prosecutor would say in court.

Hersl joined that task force in 2016 and became a key suspect.

In March 2017, the FBI arrested Hersl and six other task force officers on federal racketeering charges. (Another task force member would later be arrested, bringing the total to eight.)

The investigation continued after the initial arrests. Investigators listened to recorded phone calls made from jail by people arrested by Hersl and other task force members—and came across the calls made by Paylor.

The federal prosecutors handling this case were Leo Wise and Derek Hines.

Wise wrote a book about the case, "Who Speaks for You? The Inside Story of the Prosecutor Who Took Down Baltimore's Most Crooked Cops." "This is a story of belief and disbelief, of how I came to believe that the Task Force's victims were telling the truth and the police officers were lying," he wrote.

In the book, Wise wrote of how the recorded jail calls helped corroborate accounts that might otherwise be dismissed: "The jail calls were like time capsules; they told us what had happened and when it happened. If we ever got to trial, they could also help us convince a jury that the victims weren't lying."

In June 2017, Hines and FBI agents met with Paylor, according to court records. Paylor reiterated what he'd said in

those calls, that he was innocent. Hines then put Paylor before a grand jury, where the Justice Department presented its second version of the truth in this case.

Paylor, under oath, testified that police framed him, planting the gun.

The Justice Department didn't charge Hersl in connection with the Paylor case, but it did file a motion asking that Paylor's sentence be reduced, saying Paylor had "provided substantial assistance to the government." Paylor turned down the offer, telling his lawyer that "the risk of retaliation by the police was too high" if he went through with the motion, according to court records.

"There Cannot be Two Sides to the Truth"

Hersl was convicted of racketeering offenses in February 2018 and sentenced to 18 years. Seven other members of the Gun Trace Task Force were also convicted. In the fallout, charges were dropped or convictions vacated in more than 800 cases the officers had handled, because their word could not be trusted.

The extent of the police misconduct was so great that the Baltimore city comptroller created a settlement tracker "to memorialize the devastating impact of the Gun Trace Task Force on our City." To date, the city has settled 41 lawsuits for nearly \$23 million, according to the tracker. Hersl was involved in 10 of those settled cases, the tracker says. Justin Fenton, a reporter now with the Baltimore Banner, wrote a book about the scandal, "We Own This City," which was the basis for an HBO miniseries with the same name. Fenton has also written about the Paylor case.

In March 2018—one month after Hersl was convicted—Paylor filed a motion asking that his own conviction be vacated. The Justice Department opposed Paylor's request, and in 2019, a U.S. District Court judge denied the motion.

The case then went to the 4th U.S. Circuit Court of Appeals, where one of the issues was whether the federal government could contradict itself: Should the government be allowed to defend Paylor's conviction after having presented him, to a grand jury, as a victim of a corrupt police officer?

At the 2021 oral argument, conducted by video conference because of the pandemic, Paylor's lawyer was Debra Loevy, executive director of the Exoneration Project, a free legal clinic whose staff represents people they believe were wrongfully convicted. Loevy told the court that the government vouched for

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Paylor while going after the police, “and then they threw him under the bus.”

The lawyer representing the federal government was Martinez, the same prosecutor who had helped secure Paylor’s conviction.

“Let me ask you this,” Judge Thacker, who had previously been a federal prosecutor herself, said to Martinez. “In the government’s view, was Mr. Paylor’s testimony at his plea hearing the truth, or was his testimony at the grand jury, that the government put on, the truth?”

“Very much the former, your Honor,” Martinez said.

“So the government put on testimony in the grand jury that was not truthful?” Thacker said.

Martinez wouldn’t give a yes or no. He said prosecutors put Paylor before the grand jury immediately after investigators interviewed him.

The judge pressed. “They can’t both be true,” she said of the two accounts.

“His sworn admission of guilt is the truth. His grand jury testimony is false,” Martinez said.

“All right, all right, so then the government did suborn perjury in the grand jury?” the judge said.

Again, Martinez avoided a yes or no. Instead, he said that while prosecutors can’t knowingly present perjured testimony, the grand jury “is an investigative tool,” and prosecutors often put witnesses in the grand jury while still vetting their reliability.

But Paylor had pleaded guilty, the judge said. And the government knew that. “So the government had to think that what he was saying in the grand jury was true, and what he said at the plea hearing was not true,” Thacker said.

“I’m not going to speak to the mental state of the prosecutor who put Paylor in the grand jury,” Martinez said.

The judge asked Martinez, “The government didn’t feel an obligation to get to the truth before it put somebody in the grand jury, under oath, to say something completely opposed to what he had pled guilty to?”

In the back-and-forth, Martinez said that after Paylor’s grand jury testimony, the government further investigated Paylor’s claim of being framed and concluded it was false. And ultimately, Martinez said, Paylor’s claim wasn’t used in any charge against Hersl or mentioned in Hersl’s trial or sentencing. (Loevy, Paylor’s attorney, disputed that the government’s subsequent investigation undermined Paylor’s claim of innocence.)

Thacker had few kind words for the government, saying it “hasn’t been the best judge of who’s telling the truth in this case.”

Loevy, in a recent interview, said, “I don’t recall ever having an argument like that—where the court was that vocally angry at one side’s position.”

Two months ago, the three-judge panel issued a unanimous opinion, written by Thacker.

The court didn’t vacate Paylor’s conviction, but for Paylor’s lawyers, it did the next best thing. The court’s ruling returned the case to a lower court for a hearing at which Paylor’s attorneys will have the chance to present evidence of the breadth of Hersl’s misconduct, particularly any instances that preceded Paylor’s guilty plea. The ruling authorized Paylor’s attorneys to conduct discovery, meaning they can now have access to records they were previously denied; plus, they can depose Hersl, asking him questions under oath.

“This case presents the extraordinary circumstance in which the Government has taken antithetical stances supporting two completely different versions of the truth relative to Appellant’s offense of conviction,” Thacker wrote. “But, there cannot be two sides to the truth. The truth is the truth.”

The judge wrote: “The Government’s two-faced positions and contrary statements before the court are clearly at odds with the notion of justice.”

“Thanks!”

I wanted to ask the various prosecutors in this matter about the 4th Circuit’s opinion lambasting the government.

I emailed Martinez, who left the Department of Justice and now works for a large law firm. He emailed back, saying: “As I understand the relevant DOJ regulations, I am prohibited from speaking with you, absent authorization, regarding the work I did in the United States Attorney’s Office.”

The Justice Department separately sent me an email, saying, “We are not commenting on this case, nor are we authorizing Mr. Martinez to comment.” Can I speak with Derek Hines and Leo Wise? I wrote back. “Department guidelines generally prohibit commenting on pending cases, therefore Wise and Hines are not authorized to sit for an interview. Thanks!” the Justice Department responded.

Wise and Hines are both now working on the DOJ team prosecuting Hunter Biden, the president’s son, on gun and tax charges.

Hersl asked last fall to be released early from prison on grounds of compassion. An emergency motion said Hersl has been diagnosed with metastatic prostate cancer; a doctor, in September, wrote that Hersl’s life expectancy is less than 18 months. The DOJ opposed the motion—noting, among other things, that Hersl has shown no remorse, continuing to maintain his innocence—and a judge denied Hersl’s request.

Hersl was represented at his trial by William Purpura. Purpura, in an interview with ProPublica, said he once asked Hersl if he ever planted a gun on anyone. Hersl laughed, according to Purpura, and said no, that in Baltimore there’s no need to put a gun on someone.

In 2021, while this appeal was pending, Paylor pleaded guilty to a state robbery charge and was returned to prison. He got back out in December.

Paylor was released from prison last month, after serving time in a robbery case. Before that, he had already served his sentence on the gun charge involving Hersl. I asked Gayle Horn, another of Paylor’s lawyers, why they keep fighting that 2015 conviction, and she said, “We’d like to see justice be done.”

Paylor, asked the same question, said: “Because from day one, I’ve been telling people I was innocent.”

“Now I’m just trying to clear my name.”

Update, Feb. 29, 2024: On Feb. 28, two days after ProPublica published this story, the U.S. Department of Justice filed a document in U.S. District Court reversing its previous position and conceding that Keyon Paylor’s conviction should be vacated “in the interest of justice.” The DOJ defended its earlier use of opposing theories as “based on the government’s reasonable belief in the evidence” but stated that “public confidence cannot sustain irreconcilable versions of one event.”

Gayle Horn, one of Paylor’s attorneys, told ProPublica, “We are grateful to the U.S. Attorney for taking a fresh look at this case and recognizing that Mr. Paylor’s conviction should be vacated.” Referring to the “irreconcilable versions” cited by the DOJ, Horn said, “And I would just add that Mr. Paylor’s version is the truthful one.”

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New York Court of Appeals Declines to Adopt Per Se Rule That Handcuffed Person Is Always ‘In Custody’ for Miranda Purposes, but Holds the Handcuffed Defendant Was ‘In Custody’ and Suppress Incriminating Statements

by Douglas Ankney

THE COURT OF APPEALS OF NEW YORK declined to adopt a per se rule that a handcuffed person is “in custody” for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, the Court held that the handcuffed and un-*Mirandized* defendant was in custody for purposes of *Miranda*, so incriminating statements that he made must be suppressed.

Acting on a tip from South Carolina police that Ramon Cabrera was transporting firearms into New York without a New York State Carry Permit (“NYS Permit”), Detective Kevin Muirhead and Lieutenant Peter Carretta of the New York City Police Department and Special Agent Adam Schultz of the Bureau of Alcohol, Tobacco, Firearms and Explosives staked out the home of Cabrera’s mother. When Cabrera arrived at about 10:00 p.m., the officers pulled in behind his vehicle.

As Cabrera exited his vehicle, the officers approached him and identified themselves as police officers. In response to Muirhead’s questions, Cabrera identified himself and explained that the home belonged to his mother. Cabrera was handcuffed at that point. When asked for identification, Cabrera directed the officers to his wallet in his car’s console. When removing Cabrera’s driver’s license, the officers observed a Florida Concealed Carry Permit and asked whether any firearms were in his vehicle. Cabrera told them there were three handguns and a rifle in the trunk and gave them permission to open the trunk. Upon opening the trunk, Muirhead observed a rifle. He asked Cabrera if he had an NYS Permit, and Cabrera answered “no.” Cabrera was placed under arrest and police ultimately recovered a rifle, three handguns, and several boxes of ammunition from the trunk of his vehicle.

Cabrera subsequently moved to suppress the statements he had made while handcuffed and the evidence removed from the vehicle. He argued that he “had been placed in custody when confronted by three officers who immediately handcuff[ed] him, and that the officers failed to read him his *Miranda* rights prior to questioning him.”

The trial court denied the motion, explaining that handcuffing “ensured the officers’ safety and did not transform the encounter into a full-blown arrest requiring probable cause.” Cabrera pleaded guilty to one count of criminal possession of a weapon in the second degree and timely appealed. The appellate division affirmed his judgment, reasoning that “the handcuffing did not elevate what was otherwise an investigatory detention to custody for *Miranda* purposes, and thus the officers did not first have to provide *Miranda* warnings before questioning Cabrera about the guns.”

On appeal to the New York Court of Appeals, Cabrera argued, inter alia, that he was “in custody for *Miranda* purposes when he was handcuffed,” and he urged the Court to adopt a “per se rule” that a “handcuffed person is in custody for *Miranda* purposes.”

The Court observed “*Miranda* warnings must be administered when an interrogation occurs ‘after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’” *Miranda*. To determine whether a person has been taken into custody, the Court considers “whether a reasonable person innocent of any wrongdoing would have believed he or she was not free to leave,” *People v. Paulman*, 833 N.E.2d 239 (N.Y. 2005), “and whether there has been a ‘forcible seizure which curtails a person’s freedom of action to the degree associated with a formal arrest.’” *People v. Morales*, 484 N.E.2d 124 (N.Y. 1985), citing *Berkemer v. McCarty*, 468 U.S. 420 (1984).

Turning to the facts of the present case, the Court explained “a reasonable innocent person in Cabrera’s position would not have felt free to leave when three law enforcement officers approached him at night, on a residential street, and handcuffed him before questioning him about firearms in his vehicle. The level to which the police restricted Cabrera’s movement was of a degree associated with a formal arrest. Nor does the record suggest that the defendant had any reason to believe that he would be handcuffed for only a limited duration. We therefore conclude that

there is no record support for the conclusion of the courts below that Cabrera was not in custody for *Miranda* purposes.” Thus, the Court held that Cabrera was in custody, and because no *Miranda* warnings were given, his statements while handcuffed regarding guns in his car and his lack of an NYS Permit should have been suppressed.

Notably, in reaching its conclusion, the Court declined “to adopt a per se rule that the use of handcuffs places an individual in custody for *Miranda* purposes in all instances.” While it is true that instances would be rare where the use of handcuffs would not lead to a finding of “in custody,” custodial status analysis “is inherently fact specific” in light of the totality of the circumstances, the Court stated. In only one specific circumstance has the Court previously adopted a rule that a person is in custody as a matter of law—when the person is interrogated “at gun point.” *People v. Shivers*, 233 N.E.2d 836 (N.Y. 1967). The Court cited several decisions from federal and state courts supporting its conclusion that the use of handcuffs is accorded significant weight—but is not dispositive—in determining custody status for purposes of *Miranda*.

Accordingly, the Court reversed the appellate division and remitted the case to the trial court for a new trial. See: *People v. Cabrera*, 2023 N.Y. LEXIS 1891 (2023).

Editor’s note: Anyone interested in the issue of excusing the failure to preserve an issue on appeal on the basis of an intervening U.S. Supreme Court decision (effectively, a “futility” exception to the preservation requirement) is encouraged to read the Court’s full opinion. It provides an in-depth examination of the governing New York case law and methodically applies it to the current set of facts.

The Court devoted much of its opinion on the preservation issue. For the first time on appeal, the defendant argued that in light of the U.S. Supreme Court’s decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (rejecting the use of all “means-end” tests when interpreting a Second Amendment challenge to a statute

and instructing that the government must “affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms” if it wants to place restrictions on firearm ownership), the New York statute that

criminalizes the unlicensed public carry of a loaded firearm—Penal Law § 265.03(3)—is unconstitutional. The defendant did not raise this Second Amendment argument before the trial court, so the Court declined to reach the merits of his unreserved constitutional claim

because he failed to satisfy the “high bar” for excusing preservation. See *People v. Baumann & Sons Buses, Inc.*, 846 N.E.2d 457 (N.Y. 2006); see also *People v. Patterson*, 347 N.E.2d 898 (N.Y. 1976); *People v. Baker*, 244 N.E.2d 232 (N.Y. 1968). 📖

Research Shows It Makes Sense to Hire Individuals with Criminal Records

by Jo Ellen Knott

RAND, A NONPROFIT RESEARCH ORGANIZATION, published a research brief on January 9, 2024, that proves hiring individuals with criminal records is not risky and has benefits for the employer, the individual seeking employment post-incarceration, and society.

The brief titled “Resetting the Record: The Facts on Hiring People with Criminal Histories” provides established facts on the realities of hiring people with criminal histories and offers valuable insights to hiring managers, policymakers, and the world at large. Drawing from at least eight sources of published research, the brief addresses concerns about hiring formerly justice-involved persons and suggests that not hiring them leads to missed opportunities on both sides.

The brief busts the myth that there are not many people with criminal records looking for work. The fact is nearly half the men aged 35 in the labor pool do have a criminal record (46 percent). That percentage varies only slightly by race and ethnicity. “Among 33-year-old women, the percentage of those looking for work in 2018 who had a conviction for a nontraffic offense was between 22 percent and 52 percent for White women,” according to the brief’s author. With a tight labor market, disqualifying half of the candidate pool is not good business. Research also indicates that a significant portion of these individuals become successful employees once given the opportunity.

Another misconception is the idea that once a person has a conviction he or she will reoffend while employed. It is a harmful misconception that is simply not true. The risk of reoffending decreases over time, with approximately 75 percent of individuals with a first conviction avoiding subsequent convictions within 10 years. This suggests that blanket judgments based solely on past convictions may not accurately reflect an individual’s potential for rehabilitation and success in the workforce.

When an employer assesses the risk of reoffending, there are much more reliable indicators to consider other than the type of crime committed. Factors such as time elapsed since the last conviction, the individual’s age, and the number of prior convictions are more predictive. Therefore, employers should adopt a refined and more balanced approach to evaluating candidates with criminal histories, considering multiple factors rather than focusing solely on the nature of past offenses.

Some factors to consider are job performance, training achievements, and testimonials. Those indicators provide a good understanding of an individual’s potential for success in a new job. Employers who prioritize these indicators may find that individuals with criminal records can be valuable assets to their business.

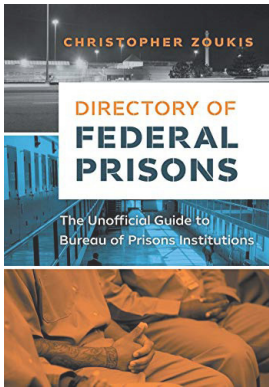
Society benefits when businesses hire former justice-involved individuals because those individuals have lower rates of reoffending,

thus reducing the amount of taxpayer dollars directed towards maintaining jails and prisons. An excellent way to encourage businesses to hire people with criminal records is to offer wage subsidies and insurance.

The research brief suggests that employers can tap into a diverse talent pool while contributing to positive social outcomes by overcoming common misconceptions about the formerly incarcerated and adopting evidence-based hiring practices. Through informed decision-making and support from policymakers, hiring managers can help create a more inclusive workforce where individuals with criminal records are given the opportunity to create and sustain a new way of life.

Job seekers who have been justice-involved in the past are encouraged to share the Rand Research brief with prospective employers. 📖

Source: *Rand*



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BY CHRISTOPHER ZOUKIS

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Fifth Circuit: Admission of DHS Investigation Form G-166F at Trial Where Preparer of Form Did Not Testify Violates Confrontation Clause and Rule Against Hearsay

by Douglas Ankney

THE U.S. COURT OF APPEALS FOR THE Fifth Circuit held that the admission of Department of Homeland Security (“DHS”) Investigation Form G-166F (“G-166F”) at Nicole Elizabeth Foreman’s trial where the preparer of the G-166F did not testify violated the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and violated Federal Rules of Evidence (“FRE”) 801, 802, 803, and 805.

A Culberson County Sheriff’s Deputy initiated a traffic stop of a white Pontiac SUV. The driver of the SUV was Ira Cannon. Foreman was a passenger in the front seat. Nine men who appeared to be of Latin American descent were squeezed into the back. The deputy contacted Customs and Border Patrol (“CBP”). An agent from CBP interviewed the nine men and reported on the G-166F that they were all Mexican nationals. CBP also determined that Cannon was the leader of a human-smuggling operation and that Foreman was his assistant.

CBP turned the case over to DHS, which ultimately charged Foreman with Count 1: transportation of illegal aliens for financial gain (in violation of 8 U.S.C.

§ 1324(a)(1)(A)(ii)) and Count 2: conspiracy to transport aliens (in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I)).

Over Foreman’s objections, the trial court found the G-166F admissible under the “business records” exception to hearsay. FRE 803. The CPB agent who prepared the G-166F did not testify, but his supervisor, Ramon Saenz, did so. Saenz testified that the G-166F was a document generated by his agents “in all alien-smuggling cases and that it included the citizenship of all people involved in a case.” He further testified that, while he did not personally interview the men in the back of the SUV, he knew they had all been previously deported to Mexico. A copy of the G-166F was presented to the jury.

The jury convicted Foreman of both counts, and she timely appealed, arguing that admission of the G-166F violated the Federal Rules of Evidence and the Sixth Amendment.

The Fifth Circuit observed the “Federal Rules of Evidence generally forbid the admission of hearsay, i.e., an out-of-court statement offered to prove the truth of the matter asserted.” FRE 801(a), (c) and FRE 802. A “business exception” exists to the rule against hearsay. FRE 803(6). In the present case, the Government argued, and the U.S. District Court for the Western District of Texas agreed, that the CBP used the G-166F “in its ordinary course of business and thus it falls into the business record exception to the hearsay rule.” Consequently, the District Court admitted the G-166F into evidence.

But the Court determined that the G-166F presented a double hearsay problem. See FRE 805 (“Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.”). First, the G-166(F) was neither an affidavit nor was it sworn to. Second, it contained both the out-of-court statements of the CBP agent and the out-of-court statements of the nine men found in the SUV. The Court explained: “the G-166F is precisely the sort of criminal investigation report the Federal Rules of Evidence prohibit.”

The Advisory Committee’s statement on the business records exception states: “If ...

the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not.” FRE 803(6) Advisory Committee’s note to 1972 proposed rule.

The Court explained that the G-166F is not “essentially ministerial” like other forms that have been admitted by courts as exceptions to the rule against hearsay. See *United States v. Noria*, 945 F.3d 847 (5th Cir. 2019) (“[T]he Court distinguishes between law enforcement reports prepared in a routine, non-adversarial setting, and those resulting from the arguably more subjective endeavor of investigating a crime and evaluating the results of that investigation. The former are admissible, while the latter are not.”). Thus, the Court concluded that the District Court abused its discretion in admitting the G-166F under the business record exception.

Turning to the Confrontation Clause of the Sixth Amendment, the Court observed criminal defendants have a constitutional right to confront the witnesses against them. “A district court must accordingly ensure that a defendant can challenge her accusers ‘in the crucible of cross-examination.’” *Crawford v. Washington*, 541 U.S. 36 (2004). “[T]he government bears the burden of defeating a properly raised Confrontation Clause objection by establishing that its evidence is non-testimonial.” *United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir. 2013). “A defendant deprived of the right to confront witnesses against [her] is entitled to a new trial unless the government proves beyond a reasonable doubt that the error was harmless; that is, that there was no reasonable possibility that the evidence complained of might have contributed to the conviction.” *Id.*

In determining whether an evidentiary ruling violated the Sixth Amendment, the Court asks three questions: “First, did the evidence introduce a testimonial statement by a non-testifying witness? Second, was any



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such statement offered to prove the truth of the matter asserted? Third, was the non-testifying witness available to testify, or was the defendant deprived of an opportunity to cross examine him?" *United States v. Hamann*, 33 F.4th 759 (5th Cir. 2022). If the answer to those three questions is "yes," a Confrontation Clause violation is established and vacatur of the conviction is required unless the government proves the error was harmless, according to the Court. *Id.*

Turning to the present, the Government conceded the second and third questions, so the focus was on the first question. As to that question, "a statement is testimonial if its primary purpose is to establish or prove past events relevant to later criminal prosecution." *Hamann*. And "the Supreme Court has said that statements that investigating officers gather during their investigation are testimonial and require the right to confrontation." *Davis v. Washington*, 547 U.S. 813 (2006). Apply those principle to this case, the Court

stated that the very name of the G-16F—"DHS Investigation Form"—demonstrated it was for investigative purposes to establish "past events relevant to later criminal prosecution." Therefore, the Court concluded that it was testimonial in nature, and Foreman established a Confrontation Clause violation.

The Court then stated that "if the unconstitutional evidence speaks to a contested element of the offense, we are more likely to find that the defendant suffered harm from the error." *Hamann*. The Government used the G-166F to establish the first of the three elements of 8 U.S.C. § 1324(a)(1)(A)(ii), i.e., "an alien was in the country illegally." The Government argued that Saenz's testimony that he knew the nine men had previously been deported to Mexico established that element. But the Court stated we "do not ask whether the evidence remaining after excision of the tainted evidence was sufficient to convict the defendant." *Hamann*. "Instead, the government must show that there is no

reasonable possibility that the information in the G-116F contributed to the jury's verdict." *Duron-Caldera*. The Court concluded the Government failed to establish that the error was harmless beyond a reasonable doubt as to Foreman's conviction on Count 1.

As to Count 2, the Court observed that conviction for the conspiracy did not require the Government to prove that "an alien was in the country illegally." Conspiracy requires only that "(1) two or more people directly or indirectly agreed to transport an alien within the United States; (2) the defendant knew of the agreement; and (3) the defendant joined the agreement willfully." 8 U.S.C. § 1324(a)(1)(A)(v)(I). Consequently, the tainted evidence had no bearing on the Count 2 conviction.

Accordingly, the Court vacated the Count 1 conviction, affirmed the Count 2 conviction, and remanded for resentencing. See: *United States v. Foreman*, 84 F.4th 615 (5th Cir. 2023). 📖

AI Disrupts Established Forensic Fingerprint Analysis— Not Every Fingerprint Is Unique

by Jo Ellen Knott

ON JANUARY 10, 2024, *FORENSIC MAG* delivered astonishing news: Research out of Columbia University and the University at Buffalo radically challenged the long-held belief that fingerprints from different fingers of the same person are always unique and unmatchable.

The research team, led by Columbia Engineering undergraduate senior Gabe Guo, developed an AI-based system that has shown a remarkable ability to correlate fingerprints from different fingers to the same individual with high accuracy. The team used a public U.S. government database of approximately 60,000 fingerprints to train their artificial intelligence system.

Guo and his colleagues, with no background in forensic analysis, fed the fingerprint data into a neural network. At times, they fed pairs from the same person, other times prints from two different people. They trained "twin deep neural networks to predict whether two fingerprint samples (not necessarily from the same finger) were from the same person." The neural network learned to correlate a person's unique fingerprints with a high degree of accuracy. According to the researchers, it does

this by analyzing the curvature of the swirls at the center of the fingerprint rather than the minutiae, or endpoints in fingerprint ridges.

From the paper published in *Science Advances* Guo writes: "our main discovery is that fingerprints from different fingers of the same person share strong similarities; these results hold across all combinations of fingers, even from different hands of the same person. These similarities can mostly be explained by fingerprint ridge orientation."

Guo and his team have identified different fingerprints belonging to the same person—or intra-person prints—with a success rate of up to 77 percent for a single pair of prints. The accuracy rate improved with multiple pairs. They suggest that the intra-person fingerprint similarities are important because it can help investigators find leads when the fingerprints lifted at the crime scene are from different fingers than the fingerprints already on file.

Guo hopes that the additional information his research provides to forensic analysis can "help prioritize leads when many possibilities exist, help exonerate innocent suspects, or even help create leads for cold cases."

As important as Guo's research is, the journey to publish it was difficult. The paper was rejected by a forensic journal and even *Science Advances*, which eventually published it. The peer reviewers were deeply skeptical of Guo's findings because of the widely accepted belief in fingerprint uniqueness. The researchers, determined to dispel the skepticism, refined their AI model with additional data.

The paper, titled "Unveiling intra-person fingerprint similarity via deep contrastive learning," was finally published after Professor Hod Lipson of the Makerspace Facility at Columbia emphasized that its findings can potentially reopen cold cases and ensure justice for innocent individuals.

The study's implications extend beyond forensic science and highlight the transformative power of artificial intelligence in challenging established principles. Lipson believes in the potential for AI-led scientific discovery by non-experts, predicting an era of innovation and disruption in traditional fields. 📖

Sources: *Forensic Mag*, *Science Advances*

Does the Fourth Amendment Protect Cellphones at the Border?

by Douglas Ankney

“THE RIGHT OF THE PEOPLE TO BE SECURE in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Those hallowed words enshrined in the Fourth Amendment to the U.S. Constitution were, and are, intended to protect citizens from abusive, harassing, and over-intrusive policing. The Fourth Amendment does not protect citizens from all searches, but it protects against unreasonable searches. *Carroll v. United States*, 267 U.S. 132 (1925). And all searches conducted without a warrant are presumptively unreasonable—unless the government can justify the warrantless search under one of the carefully crafted exceptions to the warrant requirement. *Riley v. California*, 573 U.S. 373 (2014).

But in the context of forensic searches of cellphones, i.e., searches of the contents of cellphones, at America's borders, are those hallowed words and intended protections merely impotent splatters of ink on parchment? Cellphones are unique in many respects. With nearly every person in the U.S. owning and carrying one, the Supreme Court of the United States (“SCOTUS”) has likened the ubiquitous nature of cellphones to a bodily appendage. *Riley*. And in the context of searches, seizures, and the Fourth Amendment, SCOTUS has explained that cellphones are unique in their potential evidentiary value both quantitatively and qualitatively.

Quantitatively, the data on a person's cellphone may be the equivalent of 100,000 pages of text or more. *Id.* And qualitatively, the data includes text messages, phone books, picture messages, photographs, internet browsing histories, medical histories, contact lists, records of social engagements, registries of social clubs and other organizations, records of religious and sexual preferences, political affiliations, leases, utility bills, financial information—the list is seemingly endless. *Id.*

Because of the unique nature of cellphones, SCOTUS declined to apply the “search-incident-to-arrest” exception (“SITA Exception”) to the warrant requirement when law enforcement searches the contents of a cellphone after a suspect is arrested. Regard-

ing the SITA Exception, SCOTUS explained that “[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated.

In addition, “it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.... There is ample justification, therefore, for a search of the arrestee's person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Riley* (quoting *Chimel v. California*, 395 U.S. 752 (1969)). And in *United States v. Robinson*, 414 U.S. 218 (1973), SCOTUS explained that the SITA Exception applies simply because of the arrest.

In *Robinson*, the arresting officer searched an arrestee after arresting him on a charge of driving with a revoked license. The officer removed a crumpled cigarette package from the arrestee, opened the package, and discovered heroin. SCOTUS rejected the argument that the opening of the package was not a protective sweep for weapons and, therefore, not covered by the SITA Exception. SCOTUS held that “a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification.” *Robinson*. And because, on the surface, the removal of a cellphone from an arrestee and searching it appears no different than removing a cigarette package and searching it, the government argued in *Riley* that the SITA Exception applies to cellphones.

But SCOTUS rejected that “mechanical application.” SCOTUS explained that in determining whether a particular type of search is to be exempted from the warrant requirement, the Court weighs the degree of the intrusiveness of the search upon an individual's privacy against the degree to which the search is needed for promotion of legitimate governmental interests. *Riley* (citing *Wyoming v. Houghton*, 526 U.S. 295 (1999)).

The government's interest in the SITA Exception is to ensure the safety of the of-

ficers by them performing a protective sweep for weapons and for materials that might effectuate an escape and to retrieve any destructible evidence. Searching the contents of a cellphone seized from an arrestee and in the possession of police does little to advance those governmental interests. Conversely, due to the type and amount of data on a cellphone, an arrestee's privacy interests in the contents of the cellphone cannot be overstated. For these reasons, SCOTUS declined to apply the SITA Exception to cellphones. *Riley*. The contents of cellphones may still be searched but only when a warrant is obtained or when some other recognized exception to the warrant requirement exists. *Id.*

However, in addition to SCOTUS' holding that cellphones are unique in the context of the Fourth Amendment's protections, SCOTUS has also held that searches at America's borders or “points of entry” are unique with regard to the Fourth Amendment. “The Congress which proposed the Bill of Rights, including the Fourth Amendment, to the state legislatures on September 25, 1789, 1 Stat. 97, had, some two months prior to that proposal, enacted the first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29. Section 24 of this statute granted customs officials ‘full power and authority’ to enter and search ‘any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed....’

This acknowledgment of plenary customs power was differentiated from the more limited power to enter and search ‘any particular dwelling-house, store, building, or other place ...’ where a warrant upon ‘cause to suspect’ was required.” *United States v. Ramsey*, 431 U.S. 606 (1977).

SCOTUS explained that the “historical importance of the enactment of this customs statute by the same Congress that proposed the Fourth Amendment is, we think, manifest.... “The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate

the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43 contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind unreasonable, and they are not embraced within the prohibition of the amendment.” *Ramsey* (quoting *Boyd v. United States*, 116 U.S. 616 (1886)).

The *Ramsey* Court further observed that in *Carroll*, SCOTUS explained: “It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country ... have a right to free passage without interruption or search unless there is known to a competent official authorized

to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.”


“Border searches [or their equivalent such as searches at international airports or other points of entry into the U.S.], then, from before the adoption of the Fourth Amendment, have been considered to be ‘reasonable’ by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depend on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself.” *Ramsey*.

SCOTUS further explained “the ‘border search’ exception is not based on the doctrine of ‘exigent circumstances’... It is a longstanding, historically recognized exception to the Fourth Amendment’s general principle that a warrant be obtained, and in this respect is like the similar ‘search incident to lawful arrest’ exception treated in *United States v. Robinson*, 414 U.S. 218 (1973).” *Ramsey*. In *United States v. Montoya de Hernandez*, 473

U.S. 531 (1985), the defendant was suspected of smuggling drugs in her alimentary canal and was detained at an international airport for several hours until she had a bowel movement whereupon numerous balloons filled with cocaine were recovered.

SCOTUS has differentiated between “routine searches of persons and effects of entrants” that “are not subject to any requirement of reasonable suspicion, probable cause, or warrant” and non-routine searches that require “reasonable suspicion” defined as border officials having a “particularized and objective basis for suspecting the particular person” is smuggling contraband. *Montoya de Hernandez*.

However, SCOTUS seemed later to limit the required “reasonable suspicion” to non-routine searches of the person, explaining that “the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply does not carry over to vehicles. Complex balancing tests to determine what is a routine search of a vehicle, as opposed to a more ‘intrusive’ search of a person, have no place in border searches of



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vehicles.” *United States v. Flores-Montano*, 541 U.S. 149 (2004).

From these decisions, it is evident there are competing considerations behind a determination of the state of the law with regard to searches of the contents of cellphones at America’s points of entry. There is the government’s interest in protecting the nation from the entry of dangerous persons, plans and information to assist criminal activity, and contraband versus the individual’s monumental privacy interests in the cellphone’s contents. Since SCOTUS likened the border search exception to the SITA Exception that is inapplicable to cellphones, does the border search exception apply to cellphones? Is the search of a cellphone routine or so intrusive as to become non-routine? Without any clear guidance from SCOTUS, the rulings from the U.S. Courts of Appeals and U.S. District Courts on searches of cellphones at the border are a jumbled and confusing mix.

In *United States v. Touset*, 890 F.3d 1227 (11th Cir. 2018), Judge Jill Pryor concluded that neither reasonable suspicion nor a warrant is necessary to permit law enforcement to conduct a forensic search of a cellphone at the border. Similarly, Judge Sandra Lynch wrote in *Alasaad v. Mayorkas*, 988 F.3d 8 (1st Cir. 2021), that *Riley* does not “by its own terms apply to border searches, which are entirely separate from the search incident to arrest searches discussed in *Riley*.” In *Alasaad*, Judge Lynch rejected the plaintiffs’ civil suit challenging Customs and Border Patrol (“CBP”) Directive 3340-049A and Immigration and Customs Enforcement (“ICE”) Directive 7-6.1.

Both directives permit border agents to search electronic devices without a warrant but reasonable suspicion is required for more advanced searches—such as downloading a device’s data to a hard drive. Judge Lynch broke the scope of searches into three categories: (1) searches for “contraband”; (2) searches for “evidence of contraband”; (3) and searches for “evidence of activity in violation of the laws enforced or administered by CBP or ICE.” Judge Lynch posited that the border exception is necessary to prevent “anything harmful” from entering the country and advised that “Congress is better situated than the judiciary to identify the harms that threaten us at the border.”

Likewise, in *United States v. Haitao Xiang*, 67 F.4th 895 (8th Cir. 2023), the Court upheld the warrantless forensic search of the defendant’s cellphone as he was about to exit the

U.S. and return to China. While the *Haitao Xiang* Court expressed a favorable view of the *Touset* decision, the Court also concluded that, in the case before it, the CBP had reasonable suspicion to search the defendant’s cellphone based on tips from the FBI that the defendant had violated the Economic Espionage Act of 1996. But in *United States v. Cano*, 973 F.3d 966 (9th Cir. 2019), the Court ruled that warrantless searches of cellphones at the border are limited to searches for “digital contraband” only. The *Cano* Court observed that this “detection-of-contraband justification would rarely seem to apply to an electronic search of a cell phone outside the context of child pornography.” The Court determined that an officer’s scrolling through defendant Miguel Cano’s text messages was a “manual search” permitted by the border exception, but the officer’s action of recording phone numbers from the cellphone “went too far” as “[t]hose actions have no connection whatsoever to digital contraband.”

However, in *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018), Judge Pamela Harris held that manual searches of cellphones at the border are permitted under the border exception without any warrant and without any degree of reasonable suspicion. But particularized, reasonable suspicion is required for a forensic search. Even though the defendant’s cellphone was searched at a location and a time removed from the airport where the seizure of the cellphone had occurred, Judge Harris

explained that the “justification behind the border search exception is broad enough to accommodate not only direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally, through searches initiated at the border.”

Finally, in *United States v. Smith*, 2023 U.S. Dist. LEXIS 82455 (S.D.N.Y. 2023), Judge Jed Rakoff ruled that the above-referenced courts had “understated the *Riley* holding and overstated the border exception.” Judge Rakoff ruled that searches of cellphones at the border require officials to first secure a warrant. Underpinning Judge Rakoff’s ruling is his assertion that the government’s purpose in the border exception, viz., preventing “a person or thing outside the country from unlawfully coming into it,” is not advanced by forensic searches of cellphones because the data viewed on the cellphone is not actually located on the cellphone but is stored in the “cloud”—a server that is already in the U.S.

Until SCOTUS weighs in on the issue, it appears that whether or not the Fourth Amendment protects an individual’s privacy interests in his or her cellphone at the border and points of entry is determined not by the U.S. Constitution but by the which court has jurisdiction over the point of entry or exit the individual happens to utilize. 🗞

Additional source: lawfaremedia.org

New York Governor Signs Law Sealing Millions of Criminal Records From Public View

by Douglas Ankney

IN LATE 2023, NEW YORK GOVERNOR Kathy Hochul signed the Clean Slate Act into law, permitting millions of criminal convictions to be sealed. “With the signing of this law, it adds to our momentum to get people back to work, give them those opportunities,” said Hochul.

Under the Clean Slate Act’s provisions, criminal convictions in the state of New York will automatically be sealed from public view once the convicted person completes a waiting period after incarceration (set at three years for misdemeanors; eight years for felonies). Sealing of the records means they are hidden from potential employers and housing providers.

However, sex offenses and Class A felonies are excluded from the Clean Slate Act. Furthermore, some state, local, and federal agencies will be permitted to view the sealed records in limited circumstances. And “[s]chools, police agencies, and facilities dealing with vulnerable groups will also have access to sealed convictions for employment purposes.” The Clean Slate Act becomes effective in November 2024 with the New York State Office of Court Administration having up to three years to seal all eligible records. 🗞

Source: brooklyneagle.com

Massachusetts Supreme Judicial Court Announces Constructive Denial of Right to Counsel Where Defense Counsel Sleeps for Significant Portion or During Important Aspect of Trial

by David M. Reutter

IN A CASE OF FIRST IMPRESSION, THE MASSACHUSETTS Supreme Judicial Court held that “a defendant constructively is deprived of his or her constitutional right to counsel under art. 12 [of the Massachusetts Declaration of Rights] where trial counsel sleeps for a significant portion of during an important aspect of trial.” The Court, therefore, vacated the judgment of conviction and ordered a new trial.

Nysani Watt was convicted of first-degree murder for the 2013 shootings that killed 16-year-old Jaivon Blank and wounded 14-year-old Kimoni Elliott. Watt informed his first appellate attorney “that his trial counsel slept during portions of the trial,” but the “first appellate counsel dismissed the issue as unmeritorious and did not investigate it further.” The conviction was affirmed on appeal.

A motion for new trial was denied in 2020. Approximately two months later, Watt “filed another motion for new trial, contending that he was deprived of his right to counsel because his attorney was sleeping during critical parts of the trial. In support of this motion, the defendant submitted his own affidavit as well as affidavits from his second appellate counsel, his codefendant, his codefendant’s two trial attorneys, the two trial prosecutors, and his mother. Each affidavit described the affiant’s recollection as to whether trial counsel was observed sleeping during the trial and, if so, when and for how long.” The motion judge denied the motion. Watt timely appealed.

The Court applied the gatekeeper analysis under G.L.c. 278, § 33E, which is “the mechanism by which this court exercises plenary review of all convictions of murder in the first degree, provides this court with ‘extraordinary powers’ to ‘consider the whole case, both the law and the evidence, to determine whether there has been any miscarriage of justice.’” *Dickerson v. Attorney Gen.*, 488 N.E.2d 757 (Mass. 1986). “This unique form of review requires our consideration of issues raised by the defendant, as well as issues not raised, ‘but discovered as a result of our own independent review of the entire record.’” *Id.*

Because no one at the trial raised the fact that counsel was sleeping during trial, the error was not apparent from the record. “As a result of first appellate counsel’s ineffective

assistance, this court was not able to consider the claim under its plenary review, despite the efforts of the defendant,” the Court stated. “In these unique circumstances, we conclude that the defendant has presented a ‘new’ question under § 33E, because this claim was not available to the defendant in prior proceedings.”

Having found the gatekeeper criteria was met, the Court turned to the merits of the appeal. The Court noted that a defendant may be deprived of counsel even when counsel is physically present under certain circumstances. See *United States v. Cronin*, 466 U.S. 648 (1984) (constitutional error where, without a showing of prejudice, counsel was present but was “prevented from assisting the accused during a critical stage of the proceeding”). The issue of whether “an attorney’s slumber during trial results in deprivation of counsel requiring reversal” was a matter of first impression for the Court. It noted that in such cases the “United States Courts of Appeals for the Fourth, Fifth, Sixth, and Ninth Circuits focus on whether counsel slept for a substantial portion of the trial.... Meanwhile, the United States Court of Appeals for the Second Circuit focuses on whether counsel was unconscious ‘at critical times,’ a consideration that the Fifth Circuit has also discussed.” *United States v. Ragin*, 820 F.3d 609 (4th Cir. 2016); *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001); *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996); *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984).

The Court concluded that under art. 12 of the state Constitution, “a deprivation of counsel occurs when counsel sleeps for a significant portion of trial or sleeps through an important aspect of trial.” The Court stated that the significant portion of the trial standard provides a defendant “might prevail regardless of the demonstrated importance of the particular times at which counsel slept, if the duration and frequency of counsel’s sleeping was significant in and of itself. Although less frequent or shorter periods of unconsciousness at trial may support a claim of structural error, mere momentary lapses in attention or consciousness are insufficient.” *Tippins*.

Under the important aspect of trial standard, even “if a defendant cannot demonstrate

that counsel slept for a significant portion of the entire trial, prejudice may be presumed where a defendant demonstrates that counsel slept through an important aspect of trial,” the Court stated.

The Court announced that the “standard we adopt today for determining whether a constructive deprivation of counsel has occurred at trial affirms that which already may be intuitive—that there is a distinction between those portions of trial where unremarkable, ancillary evidence is being presented versus when direct evidence of guilt or innocence is being presented, and that the line between the two must be assessed on a case-by-case basis.”

Applying the newly adopted standard, the Court ruled that the affidavits submitted “provide a sufficient factual basis” to support the determination that trial counsel was asleep for a significant portion of the trial, including an important aspect of trial. *Commonwealth v. Sylvain*, 46 N.E.3d 551 (Mass. 2016).

The Court explained that “submitted affidavits [came] from both sides of the aisle, all of which corroborate the defendant’s claim that trial counsel was sleeping throughout trial.” Thus, the Court concluded that Watt was deprived of his right to counsel under art. 12 and determined that a miscarriage of justice occurred because “the deprivation of counsel at trial is the type of structural error that inherently raises serious concerns whether the trial itself was ‘an unreliable vehicle for determining guilt or innocence.’” *Neder v. United States*, 527 U.S. 1, (1999).

Accordingly, the Court reversed the order denying the defendant’s motion for a new trial, vacated the convictions, set aside the verdicts, and remanded for a new trial. See: *Commonwealth v. Watt*, 224 N.E.3d 377 (Mass. 2024). 📌

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Colorado Supreme Court: Reduction of Charged Offense Appropriate Sanction for Pattern of Discovery Violations by District Attorney's Office Spanning Multiple Cases and Years

by David M. Reutter

THE SUPREME COURT OF COLORADO held a trial court did not abuse its discretion in reducing a defendant's charged offense to a lesser degree as a deterrent sanction. While such a sanction is disfavored, the Court found it appropriate given the Eleventh Judicial District Attorney's Office's two-year long pattern and practice of neglect of discovery obligations that other sanctions failed to cure.

The Court's ruling came in an appeal by the People. Joseph James Tippet was charged with first-degree murder after he shot his father on January 6, 2023. At his first appearance on January 18, Tippet asked the magistrate to order the prosecution to comply with Rule 16 of the Colorado Rules of Criminal Procedure, which requires it to make certain material and information in its possession or control available "as soon as practicable" but not later than 21 days after a defendant's first appearance. Tippet also sought an order requiring

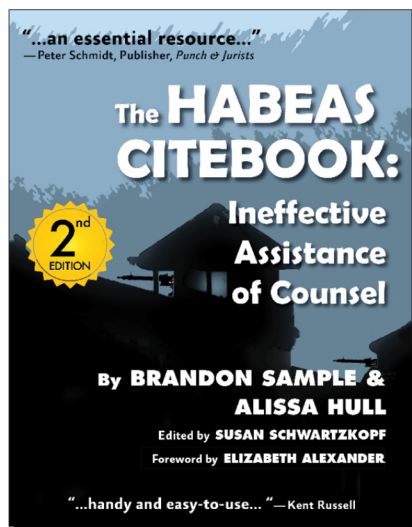
the memorialization and disclosure of all law enforcement conversations with potential victims and witnesses. The magistrate granted the motion.

Forty-seven days later, on March 6, "Tippet filed a motion to dismiss the first-degree murder charge as a sanction for the prosecution's violation of the magistrate's orders. Tippet argued that the prosecution had only produced 148 pages of discovery and some body-worn camera footage by the discovery deadline. He acknowledged that the prosecution produced twenty-eight additional pages of discovery after the deadline, but in his view, this production only proved that the prosecution continued to fall down on its Rule 16 obligations," the Court recounted. "All the late-discovered materials, Tippet asserted, including his interrogation and the autopsy report, were created before the discovery deadline." The next day, Tippet filed another

motion to dismiss the first-degree murder charge, this time identifying additional discovery violations by the failure to produce police documents and video from his workplace.

The magistrate held hearings on March 8 and 22. The prosecution was informed it had to do its job and produce the discovery. Finally, on March 28, "the prosecution produced 1,134 additional pages of discovery and filed a document certifying that they had disclosed all discovery in their possession and in the possession of the investigating law enforcement agencies." Tippet filed a supplement to his sanctions motions, which the magistrate set for hearing before the district court.

At that hearing, defense counsel asserted that the prosecution remained in violation of various of its discovery obligations. The prosecution provided various reasons for its noncompliance, as it had done throughout the discovery process, that the district court



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stated could be categorized as three primary problems: “One, the District Attorney has changed the assigned prosecutor several times. Two, by failing to verify discovery was properly downloaded and disclosed, the District Attorney’s staff either acted negligently or lack adequate training with respect to the District Attorney’s obligation to disclose evidence timely to the defense. Third, the District Attorney has failed to communicate adequately with investigating law enforcement agencies to secure evidence promptly.”

However, the district court stated, “None of these problems is new. The District Attorney has cited its problems with mistakes made by staff that have since left the District Attorney’s employ in numerous cases since 2021.” It considered 20 of the 30 cases Tippet identified as indicative of the District Attorney’s “pattern and practice of neglect” of its discovery obligations. That is, in addition to the numerous and prolonged delays as well as outright noncompliance with its discovery obligations in the current case, defense counsel also cited to about 30 other cases in which the prosecution was alleged to have engaged in a similar pattern of noncompliance with respect to its discovery obligations.

Based on those “circumstances, the court determined that the least severe sanction it could impose to deter continuing Rule 16 violations, while also preserving the truth-seeking function of discovery, was to reduce

the charge against Tippet from first degree murder to second degree murder. The court additionally directed the People to file an amended complaint consistent with the court’s order.” The People then filed a petition to invoke the Colorado Supreme Court’s original jurisdiction under C.A.R. 21. The Supreme Court issued a rule to show cause.

The Court began its analysis by noting that Rule 16(I)(a)(1) provides that the “prosecuting attorney shall make available to the defense ... material and information which is within the[ir] possession or control ... concerning the pending case...” This rule requires that such information be produced “as soon as practicable but not later than 21 days after the defendant’s first appearance at the time of or following the filing of charges.

“[T]his duty does not depend on the defendant having to first request the information.” See *People v. Dist. Ct.*, 790 P.2d 332 (Colo. 1990). To address a Rule 16 violation, the trial court must strike a balance between imposing the “least severe sanction that will ensure that there is full compliance with the court’s discovery orders.”

When considering sanctions under the rule, courts must consider “(1) the reason for and degree of culpability associated with the violation; (2) the extent of resulting prejudice to the other party; (3) any events after the violation that mitigate such prejudice; (4) reasonable and less drastic alternatives to

exclusion; and (5) any other relevant facts.” *People v. Cobb*, 962 P.2d 944 (Colo. 1998).

In finding the district court did not abuse its discretion in crafting the sanction, the Court noted that the “People do not dispute that they committed multiple discovery violations in this case.” Additionally, the other 20 cases considered by the district court demonstrated a pattern of discovery violations that dated to July 2021 and included “explicit warnings from various judges that a pattern of neglect was emerging or had emerged; a lack of understanding by prosecutors regarding their Rule 16 obligations; an apparent lack of oversight by the District Attorney in the face of significant continuing discovery problems; and a pattern by the District Attorney’s Office of dismissing cases when faced with discovery sanctions,” the Court stated.

The Court rejected the argument that although the People were on notice of the many discovery violations, Tippet was not prejudiced due to his confession. “The prosecution is not entitled to disregard its discovery obligations because it believes it has a strong case,” the Court admonished and ruled that the district court had the authority to reduce “Tippet’s murder charge as a deterrent sanction.”

Accordingly, the Court discharged the rule to show cause. See: *People v. Tippet*, 539 P.3d 547 (Colo. 2023). 📖

California Attorney General Issues Memo Prohibiting Out-of-State Sharing of ALPR Data

by Anthony W. Accurso

ROB BONTA, THE ATTORNEY GENERAL for the state of California, issued a memo to law enforcement agencies in the state, which interprets SB 34 and forbids them from sharing with out-of-state agencies data collected from automated license plate readers (“ALPRs”).

ALPRs are controversial. They record license plate numbers as a vehicle passes a camera, mounted on a traffic light, highway sign, or a patrol vehicle. The license plate number is paired with a timestamp and a location, which can be used to infer that the vehicle’s owner was in a particular place at that time. This implicates privacy concerns, especially when a woman from a state with abortion restrictions travels to California. But California agencies have been collecting this data and sharing it with hundreds of out-of-state agencies, including U.S. Customs and Border Patrol

(“CBP”) and U.S. Immigration and Customs Enforcement (“ICE”).

The California state Legislature passed SB 34 in 2015, requiring basic safeguards for the use of ALPRs, which includes a prohibition on California agencies from sharing data with non-California agencies.

Since then, the ACLU of California, MuckRock News, and the Center for Human Rights and Privacy have used public records requests to demonstrate that many California agencies have either ignored or defied these policies, putting Californians and visitors at risk. In 2019, the Electronic Frontier Foundation (“EFF”) successfully lobbied the Legislature to order the California State Auditor to investigate the matter. The resulting report was damning, finding that agencies were flagrantly violating the law.

The EFF and ACLU followed up on the report by suing the Marin County Sheriff’s Office in 2021 over the agency’s sharing of data to CBP and ICE. The case was ultimately settled in favor of the plaintiffs. The Attorney General’s memo has arrived at a time when some agencies have finally begun to come around. It cites SB 34 as the basis for the guidance.

In the meantime, the EFF has sent letters to over 70 agencies, citing the favorable lawsuit and the memo. “Dozens have complied,” according to the EFF, and only time will tell what it will take to get the remaining agencies—who are tasked with upholding the law—to follow it themselves.

Source: *Electronic Frontier Foundation*

Utah Supreme Court Announces Communication of Cellphone Passcode Protected by Fifth Amendment and Rules Advising Jury of Defendant's Refusal to Disclose Passcode Violates Privilege Against Compelled Self-Incrimination

by Anthony W. Accurso

IN A CASE OF FIRST IMPRESSION, THE Supreme Court of Utah held that production of a cellphone passcode is “testimonial” for purposes of the Fifth Amendment and that the State violated the defendant’s privilege against self-incrimination rights when it mentioned his refusal to disclose the passcode at trial.

Alfonso Valdez and “Jane” had dated and lived together but were separated. According to allegations by Jane, after a conversation by text message, the two met in a parking lot, ostensibly for Valdez to give Jane mail that had arrived since she moved out. However, once she approached his SUV, he produced a gun, forced her to enter the vehicle, and proceeded to verbally and physically assault her. She eventually escaped but did so without her cellphone and purse.

Police arrested Valdez, confiscated his cellphone, and obtained a warrant to search it. Valdez refused to make any statement during questioning, and he refused to provide the swipe pattern for his phone. The detective attempted to compel production of the code by saying they had obtained the warrant and that if Valdez refused, they would open it anyway with the assistance of a lab, but this process would destroy the phone. Valdez instructed the officer to go ahead and “destroy the phone.”

At trial on charges of kidnapping and assault, the State raised the issue of the contents of the cellphone, which the officer said were inaccessible because Valdez refused to provide the passcode (swipe pattern). Defense counsel objected but was overruled. The defense presented the testimony of Valdez’s ex-wife, who said she had seen the text exchange on Jane’s phone, that it was sexual in nature, and that it showed the meeting between Jane and Valdez was entirely consensual.

The State again raised the issue of the cellphone’s contents, reiterating that Valdez refused to unlock the cellphone and stated that if the conversation were exculpatory, he would have provided the passcode.

The jury convicted Valdez, but the conviction was reversed on appeal, with the

Court of Appeals finding in favor of Valdez’s Fifth Amendment violation claim. The Court of Appeals concluded that the State had “compelled” Valdez to provide the passcode because it “implied at trial that Valdez had an obligation to provide the swipe code to the investigating officers, and that he had no right to refuse.” According to the Court of Appeals, it was also “incriminating” because, “it has long been settled that the Fifth Amendment’s self-incrimination protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.” *Hübel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

The State timely appealed to the state’s Supreme Court, which stated that “the question before us is whether the State’s references at trial to Valdez’s refusal to provide his passcode constituted impermissible commentary on his decision to remain silent.” On appeal, the State conceded that the communication at issue (providing the passcode) is both “compelled” and “incriminating,” but the State argued that it is not “testimonial” and thus not subject to Fifth Amendment protections. See *Hübel*.

The State’s argument was that providing a passcode does not constitute a “testimonial” communication for purposes of the Fifth Amendment. It contended that a passcode “lacks semantic content and is entirely functional,” and thus, “turning it over is akin to handing over a physical key—a non-testimonial act.” Quoting David W. Opperbeck, “The Skeleton in the Hard Drive: Encryption and the Fifth Amendment, 70 *FLA. L. Rev.* 883 (2018). Consequently, the “foregone conclusion” exception to the Fifth Amendment applies to this situation because the only meaningful information that revealing the passcode conveys is that the person knows the passcode and/or is the owner of the phone, but that is a fact already known to police when they compel the individual to provide the passcode, according to the State.

The Court advised that whether compelled production of the passcode to an electronic device when law enforcement has a valid warrant to search it is “testimonial” in nature was an issue of first impression in the Court. It observed that the “U.S. Supreme Court has not yet addressed this specific question, so we analyze existing Fifth Amendment precedent to determine how it should extend to this new factual context.”

The Court rejected the State’s argument regarding the foregone conclusion exception. It explained that exception applies in cases where an “act of production” has “testimonial value because it implicitly communicates information.” But that is not the situation presented in this case because providing the passcode would have constituted “a verbal communication that would have explicitly communicated information from Valdez’s mind, so we find the exception inapplicable.”

The Court stated that the self-incrimination clause of the Fifth Amendment applies to communications that are “testimonial, incriminating, and compelled.” *Hübel*. In determining whether communication is testimonial, the “touchstone” used by courts “is whether the government compels the individual to use the contents of his own mind to explicitly or implicitly communicate some statement of fact.” *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335 (11th Cir. 2012). In that situation, a person is “compelled to be a ‘witness’ against himself.” *Doe v. United States*, 487 U.S. 201 (1988).

The Court referenced “Compelled Decryption and the Privilege Against Self-Incrimination,” by Orin S. Kerr, 97 *Tex. L. Rev.* 767 (2019). Kerr explains that “[w]hen the government uses the threat of legal punishment to compel an individual to divulge a [passcode], the government is seeking to compel testimony. The person is being forced to go into his memory and divulge his recollection of the [passcode].”

The Court stated that the application of the Fifth Amendment in the current factual context typically takes one of “two different factual scenarios that vary based on *how* law

enforcement sought to decrypt the contents of the seized device.” That is, “there are two common ways law enforcement might go about accessing the contents of a suspect’s locked cell phone that entail the suspect’s cooperation. First, an officer could ask or seek to compel the suspect to provide the passcode verbally or in writing. Or second, an officer could ask or seek to compel the suspect to turn over an unlocked phone—whether through biometric means (for example, fingerprint or facial identification) or through entering the passcode themselves without providing the passcode to police.”

The Court explained that determining which scenario a case contains “dictates the analytical framework” courts must use to decide whether a statement or act is “testimonial.” If it is the first scenario (from above) in which “a suspect’s oral or written communication that explicitly conveys information from the suspect’s mind ... we are in familiar Fifth Amendment territory,” according to the Court. On the other hand, if it is the second sce-

nario in which “a compelled act of producing evidence—such as handing over an unlocked phone,” courts must then decide “whether the act implicitly conveys information and therefore has testimonial value for Fifth Amendment purpose,” the Court explained. To further clarify, the Court stated that verbally providing a passcode and handing over an unlocked phone are functionally equivalent, but for Fifth Amendment purposes, “they are not the same.”

The Court then announced: “We hold that verbally providing a cell phone passcode to law enforcement is testimonial for Fifth Amendment purposes.

Turning to the present case, the Court determined that the facts presented in the record indicate that the police asked Valdez to tell them his passcode, which conforms to the first scenario. The Court explained that “[d]irectly providing a passcode to law enforcement is not an ‘act.’ It is a statement.... The statement explicitly communicates information from the suspect’s own mind.” Thus,

the Court ruled that “Valdez’s statement of his passcode to the detective would have been testimonial under the Fifth Amendment,” and so, the prosecution’s reference to his refusal to provide his passcode violated his Fifth Amendment privilege against compelled self-incrimination. See *Griffin v. California*, 380 U.S. 609 (1965) (holding that the Fifth Amendment forbids either comment by the prosecution or instructions by the court that an accused’s decision to not testify at trial is evidence of guilt).

Accordingly, the Court affirmed the Court of Appeals and remanded to the trial court for further proceedings. See: *State v. Valdez*, 2023 Utah LEXIS 138 (2023). 📖

Editor’s note: Anyone interested in the issue of law enforcement compelling a suspect to provide the passcode for a cellphone or directly unlock it for them is strongly encouraged to read the Court’s full opinion, in which the Court examines this issue in far greater detail than possible in this brief case summary.

Tracking Your Cellphone Might Be Easier Than You Think

by Michael Dean Thompson

THE UNIVERSITY OF TORONTO’S CITIZEN Lab investigated weaknesses in the manner with which cellphones and their locations are passed from tower to tower. What they found was that it was remarkably easy for a state agency, telephone company, and others to track cellphones using the archaic technologies that enable cellphones to be truly mobile.

As a cellphone travels between cell towers, sometimes at high rates of speed, cell towers must pass messages back and forth that identify the subscriber. It allows the cell tower awaiting the mobile user to make certain connections that are available in anticipation of the customer’s needs. However, each cell tower may have a different owner or operator. For that reason, a common exchange has been created that gives the towers the ability to share information and verify subscriber information irrespective that the phone and tower originate from different networks.

The IP Exchange (“IPX”) is a network that assists cellphone companies to share data about their customers. The IPX, however, is vulnerable to bad actors who wish to track cellphone users anywhere in the world. Anyone hooked into the IPX can monitor a cellphone’s movements with ease. And getting

access is not terribly difficult. As it turns out, telecom companies can put access to IPX on the market, “creating further opportunities for a surveillance actor to use an IPX connection while concealing its identity through a number of leases and subleases,” Citizen Lab reported. That is not hard to imagine when you consider how many cellphone providers there are in the U.S. alone. Of the 195 countries that use the IPX, there are over 750 networks. That number is even more impressive (or alarming) when you consider how many countries like Vietnam have just one state-owned cellular network.

Gary Miller, one of the coauthors of the report, is a mobile security researcher who by October 2023 had already tracked 11 million geolocation attacks that year from Chad and the Democratic Republic of Congo alone. Researchers also found trackers using Vietnam’s GTel Mobile to follow African cellular customers. In addition, Citizen Lab found what they believed to be a “state-sponsored activity intended to identify the mobile patterns of Saudi Arabia users who were traveling in the United States.” That effort apparently queried the Saudi locations every 11 minutes. Citizen Lab points out how truly global the problem

has become as they have found India, Iceland, Sweden, Italy, and more engaged in surveilling cellphones through the IPX.

There are no real legal and regulatory challenges for members of the IPX with regard to cellphone tracking, according to Citizen Lab. The relative lawlessness and terrible security standards have resulted in this manner of tracking easy and efficient. The worst part is not that China or Russia may find you of interest and have no problem finding you. The problem is that there is nothing stopping our own government from doing so. Furthermore, your cellphone only needs to be on and off of airplane mode for this manner of tracking to work. As if there aren’t already enough ways to track and surveil us without our knowledge or consent, here’s yet another. 📖

Source: theintercept.com

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Vermont Supreme Court Announces Prejudice Determination for IAC Claim Based on Rejected Plea Offer Limited to Evidence Available at Time Plea Considered—Not Any Subsequent Evidence

by David M. Reutter

IN A CASE OF FIRST IMPRESSION, THE VERMONT Supreme Court held “that in determining whether the criminal court would have accepted a plea agreement,” the Post-Conviction Relief (“PCR”) “court can consider only evidence that was available to the criminal court at the time it would have considered the plea.”

Rein Kolts was charged in May 2014 with aggravated sexual assault of a child in violation of 13 V.S.A. § 3253a(a)(8), based on multiple sexual assaults of [his] then 13-year-old niece. “That charge carried a mandatory minimum sentence of twenty-five-years-to-life.” § 3253a(b). “Prior to his arraignment, petitioner twice confessed to committing the crime: first, to two plainclothes officers after thirty minutes of questioning, and second, to a family friend who worked at the court,” the Vermont Supreme Court noted.

Before arraignment and at the jury draw, Kolts was offered a plea agreement that provided “he would plead guilty to a lesser charge of aggravated sexual assault, 13 V.S.A. § 3253(a)(8), in exchange for a sentence of ten-years-to-life, split to serve five years.” Kolts was not informed by his attorneys of the mandatory minimum sentence before he rejected those plea offers. A jury found Kolts guilty as charged. The Court observed that the “criminal court expressed its view that home detention would be sufficient to protect the public,” but “it ultimately sentenced petitioner to the mandatory minimum of twenty-five-years-to-life.” The Vermont Supreme Court affirmed the conviction and sentence on appeal.

Subsequently, Kolts filed a PCR petition in January 2019, alleging multiple claims of ineffective assistance of counsel. The PCR court dismissed all claims except the one “that alleged that attorney [Mark] Furlan failed to provide effective assistance in the plea-bargaining process by neglecting to inform him about the mandatory minimum sentence and by not advising him to accept the plea offer.”

“At the PCR trial, [Kolts] continued to insist on his innocence, stating that he was ‘emphatically’ not guilty,” the Vermont Supreme Court said. “On cross-examination, [Kolts]

stated that he would be willing to falsely admit his guilt if necessary for his release.”

The PCR court found Kolts “would have accepted the plea offer but for attorney Furlan’s ineffective assistance, the sentence in the plea offer was less severe than the sentence petitioner received at trial, and there was no evidence that the State would have withdrawn the offer prior to trial.” The PCR court, however, concluded that Kolts “could not demonstrate prejudice because he could not show that the criminal court would have accepted his guilty plea to aggravated sexual assault.” It reasoned that even if relief were granted, the criminal court “would be unable to accept the reoffered plea deal because it was ‘obviously aware of [Kolts]’ persistent claim of innocence and of his intention to lie under oath.”

Kolts timely appealed, making two arguments. First, he argued “that the PCR court erred by relying on his postconviction statements in determining that the criminal court would not have accepted his guilty plea.” He raised the narrow question of “whether the PCR court erred in relying on his postconviction assertions of innocence in reaching this conclusion.” The Court found the issue was preserved and ripe for review. It concluded that “case law from other jurisdictions suggests that PCR courts should not consider postconviction evidence in this aspect of the prejudice inquiry.”

In *Medina v. United States*, 797 Fed. App’x 431 (11th Cir. 2019) (per curiam), the Eleventh Circuit noted that the District Court’s consideration of the petitioner’s defenses at trial and on appeal was inappropriate because “if counsel’s deficient performance had not occurred here, [the petitioner] would have pled guilty and his claims of innocence at trial and on direct appeal would not have occurred.” Similarly, in *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996), the Second Circuit ruled that subsequent claims of innocence do not pose an automatic bar to a finding of ineffective assistance of counsel. The Court stated that neither Kolts nor the State identified any cases from other jurisdictions directly on point regarding the current case. Nevertheless, the Court determined that “case law from other

jurisdictions suggests that PCR courts should not consider postconviction evidence in this aspect of the prejudice inquiry.”

In agreeing with *Medina* and *Boria*, the Vermont Supreme Court announced that “the prejudice inquiry is only retrospective in nature, with the PCR court seeking to evaluate whether there is a reasonable probability that the outcome would have been different if counsel had provided effective assistance. Given that [Kolts] had not yet made any attestations of his innocence under oath at the time of trial, a guilty plea would only have been perjury if [Kolts] was in fact innocent. Because the State is not arguing that petitioner was innocent, there is no issue of perjury with respect to the prejudice inquiry.”

In reviewing Kolts’s second issue, the Court determined that the “PCR court erred by concluding without a hearing that it could not accept his guilty plea even if postconviction relief were available.” It ordered that the case be heard in front of a different judge “to prevent ‘inadvertent prejudice or any appearance of unfairness to either side.’”

Thus, the Court reversed the PCR court with instructions for the PCR court “to determine whether there is a reasonable probability that the criminal trial court would have accepted the plea offer, limiting its inquiry to evidence that would have been available to the criminal court at the time of trial. If it finds that such a probability exists, it may then order the prosecution to reoffer the plea deal, and assuming petitioner accepts the offer, the criminal court may then exercise discretion in determining whether to accept or reject the plea.”

Accordingly, the Court reversed the decision of the PCR court and remanded the case. See: *In re Kolts*, 2024 Vt. LEXIS 1 (2024). 📌

Writer’s note: The State’s argument that the court cannot accept a perjured plea is ironic when one considers the prevalence of fictional pleas. In addition, prosecutors routinely force innocent defendants into *Alford* pleas in an attempt to avoid state liability in wrongful conviction cases while dangling the release and non-prosecution carrot.

Time Served Under the First Step Act: Reduction, Not Revolution

by Jo Ellen Knott

THE FIRST STEP ACT (“FSA”), A 2018 LAW designed to curb recidivism among formerly incarcerated individuals on the federal level, is showing modest but positive results in reducing the amount of time people serve in the federal Bureau of Prisons (“BOP”) system.

An analysis performed by Avinash Bhati, expert in Mathematical and Empirical Modeling Statistical Analysis, finds that people released under the FSA in 2022 served an average of 7.3% less of their imposed sentence compared to those released beforehand. This translates to an average reduction of five months in prison time.

Bhati wrote a three-part series of his FSA analysis for the Council on Criminal Justice starting in August of 2023. This part of the series is called “Time Sentenced and Time Served” and was published in December 2023.

An important finding from this analysis is that individuals released under the FSA in 2022 served about 82 percent of their sentence on average while individuals released pre-FSA served almost 90 percent of their time.

Although these sentence reductions are encouraging and moving the needle in the right direction, they are modest. Most sentence reductions were less than a year. For 92 percent of those released under FSA, the release date was moved up less than a year. Seventy percent of BOP prisoners under FSA saw reductions of less than six months, and 40 percent of those taking advantage of FSA provisions saw their sentences reduced by three months or less.

Bhati emphasizes that his analysis has limitations. One is that the data only comes from the 2022 group of released prisoners who may have or may not have had limited access to FSA programs; therefore, the data used in this analysis may not be representative of future releases. The BOP implemented more recidivism reduction programs in 2023, which could lead to larger sentence reductions in the future.

Another limitation which the author has acknowledged across the series is the lack of individual-level data. Those data are needed to

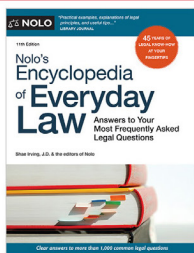
understand the impact specific provisions have on time served and prison population size.

What are some of the FSA provisions and their impact? The act allows prisoners to earn more good time credits. Earning more days off a sentence for good behavior incentivizes positive conduct. The FSA allows early release for those facing serious illness or other extraordinary circumstances and shows mercy is possible for those living in hopeless situations. The FSA also reduces mandatory minimums. This provision gives judges more discretion in sentencing for certain offenses and can lead to shorter sentences and less overcrowding.

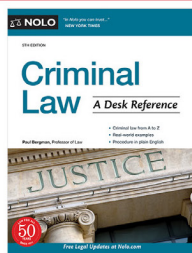
Bhati concludes by acknowledging the modest gains made toward the FSA’s goals of reducing incarceration and focusing on rehabilitation to reduce repeat offending. He emphasizes the need for continued research and monitoring to fully understand the long-term impact of the FSA. 📖

Source: Council on Criminal Justice

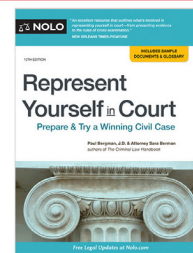
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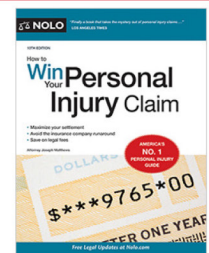
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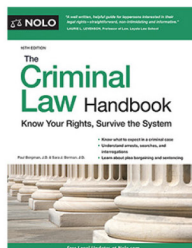
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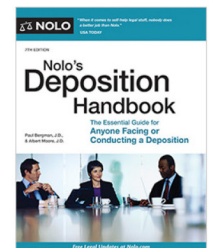
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Edited by Richard Resch

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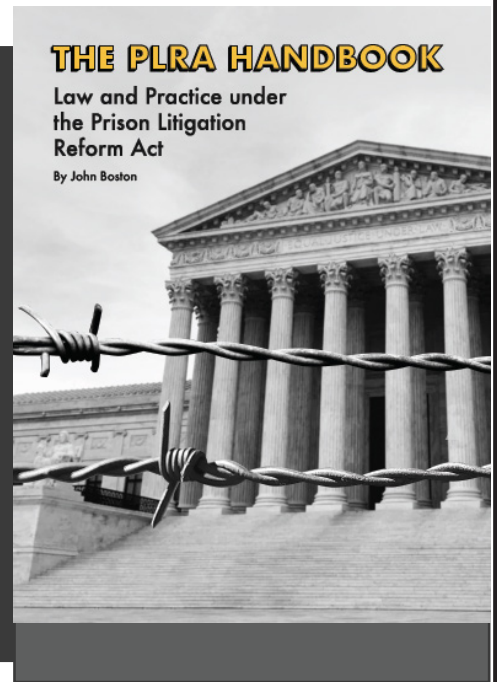
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One Year of New Orleans Police Department Facial Recognition Data

by Michael Dean Thompson

ABOUT A YEAR AFTER THE NEW ORLEANS Police Department (“NOPD”) performed its first facial recognition scan under a new policy that reauthorized its use, they have little to show for it. That is according to NOPD’s own data, which was analyzed by *Politico*. The new policy reintroducing automated facial recognition (“AFR”) was instituted in response to a jump in the crime rate. Businesses, police, and the mayor supported AFR use as an “effective, fair tool to identifying criminals quickly,” according to *Politico*. Instead, the data show AFR use is focused on Black people, and it has been associated with comparably few arrests, giving it a low effectiveness.

It makes sense that police departments would reach to tools to help them with recognizing faces because people tend to be fairly bad at it, especially with regard to identifying people of other “races” than themselves. What the NOPD data show, however, is that AFR has amplified the underlying human biases they are trying to correct.

New Orleans Councilmember At-Large J. P. Morrell, a Democrat who voted against using the technology, told *Politico*, “The data has pretty much proven that [civil rights] advocates were mostly correct” and added, “It’s primarily targeted towards African Americans and it doesn’t actually lead to many, if any, arrests.”

Nevertheless, a slim majority of New Orleans City Council members, all Democrats, support the use of AFR. City Councilor Eugene Green voted for lifting the AFR ban that had been put into place in the wake of George Floyd. Although civil rights advocates have long pointed out AFR’s biases, Green—a Black Councilor representing a majority Black district—sides with Mayor LaToya Cantrell and a coalition of businesses in support of its use. “If we have it for 10 years and it only solves one crime, but there’s no abuse, then that’s a victory for the citizens of New Orleans.” It seems unlikely that the people whose hard-earned dollars pay for the AFR would agree that such poor effectiveness is worth it from a cost-benefit perspective. Nor is it clear that there has been no abuse, much less that there won’t be any for nine more years.

There were just 19 recorded facial recognition requests in the year that followed New

Orleans’ lifting of the ban. All the recorded requests were for serious crimes, like murder and armed robbery. Two of the 19 requests were canceled as police identified the suspects by other means before the results came back. Two more requests were denied because the supporting investigations did not meet the required severity of the crime threshold. Of the 15 remaining requests, nine were unable to match. Six of the 15, less than half, returned matches, and half of those were wrong, i.e., false positives. So, there were 15 accepted requests, and only three correct matches.

Three false positives out of six matches is remarkable. The first failure happened as police searched for a gunman in November of 2022. The AFR returned a match on a suspect photo, but police discovered that the actual suspect was someone else through monitored jail phone calls. In February of 2023, police submitted an image to the state police for facial recognition. They do not say why the image match was wrong, only that they found the correct suspect through other means. In April 2023, NOPD received another bad match from a photo provided with a tip. The police later learned the person the AFR identified as being in the photo was not in the area during the murder.

NOPD claims the data show they followed policy and readily point out that there were no arrests based solely on positive matches. Investigators instead sought corroborating evidence rather than relying solely on the technology.

Randal Reid from Georgia has a somewhat different story to tell. In late 2022, cops submitted an image of a suspect during a credit card theft. The AFR identified Reid, and the local police in Georgia were sent a warrant. They did not tell Reid’s hometown police that the arrest warrant was the result of a positive match that came from ClearView AI’s facial recognition software with whom the police had contracted. Fortunately for Reid, his attorney had sharp ears and overheard an officer refer to Reid as a “positive match.” It turned out that the thief and the “positive match” possessed some glaring differences such as an obvious facial mole and about 40 pounds of weight. Reid spent six days in jail and thousands of dollars in attorney fees

because ClearView AI, which sources its images from social media, news feeds, and other web sources as well as mugshot databases, found an image it determined similar. As it turned out, Randal Reid had never even been to Louisiana, much less New Orleans. No doubt, he has a very different view of AFR than Councilor Green.

Politico was able to retrieve information on the 19 AFR requests by NOPD because New Orleans had implemented a requirement that AFR use be reported to the city council. It was the first city in the U.S. to mandate transparent use of AFR. At the time of this writing, however, it is not clear why Reid’s case was not included in *Politico*’s coverage, though his case was covered at the time by the *Associated Press* and *Criminal Legal News*. Shortly after *Politico*’s piece, it was also discussed by *The New Yorker*.

There is not a lot of transparency around AFR’s use. An examination of federal law enforcement use of AFR by the Government Accountability Office (“GAO”) in 2023 found approximately 63,000 uses between October 2019 and March 2022. That number, however, was a known undercount. The FBI, the largest admitted consumer of commercial AFR services in federal law enforcement by a long shot, could not account for its use of two of the three services it used. Yet another agency, Customs and Border Patrol (“CBP”) had no data on its use of two services. A previous GAO report from 2021 had found that many agencies could not even list which AFR services were used. All three of the largest police departments in the U.S. use AFR. The New York City Police Department (“NYPD”) has been using it since 2011. In 2019, the NYPD reported it had used AFR 9,850 times that year alone. Of that figure, the NYPD claimed there were 2,510 potential matches—just over 25%. However, they failed to indicate how many of those were false positives.

NOPD’s use of AFR prior to the 2020 ban was no different. When the police asked the city to reauthorize its use, the city asked for data on its previous use. The NOPD admitted then that it had no data on how AFR had previously been used or even how successful it had been. Nonetheless, the city reauthorized its use, wrongly believing it could help with in-

vestigations, though they mandated some data collection. Among the details to be collected were the officer making the request, the crime being investigated, a declaration of reasonable suspicion, the suspect's demographic information, the officer's supervisor who approved the search, matches found, and the investigation's result. Those requirements probably have discouraged excessive requests over the first year NOPD returned to using the technology. "We needed to have significant accountability on this controversial technology," said Helena Moreno, a council member who coauthored the 2020 ban on AFR.

As part of the ban being lifted, there was an unofficial agreement between the City Council and NOPD that quarterly reports would show how the NOPD is using AFR. The first quarterly report, which covered October through December 2022, likely did not give them much hope. NOPD used AFR six times during that period. Of those, three had no match. Another photo had a match, but it was a false positive. The remaining two cases were still open when *Politico* published its article. The next report showed four more requests, including three with no matches and another false positive.

Corporations and police foundations have been pushing hard for police departments throughout the country to use unproven new technologies, the so-called "bleeding edge" in information technology circles. For example,

the International Association of Chiefs of Police and the Integrated Justice Information Systems, both of which are funded by private and corporate donations, produced a catalog that instructed police departments to speak out about the effectiveness of AFR in supporting investigations. Based on what has been discussed here, that should be a tough sell. Jeff Asher, who was hired by the New Orleans City Council as a criminal justice consultant, read the data and came to a different conclusion from the International Association of Chiefs of Police and the Integrated Justice Information Systems. "It's unlikely that this technology will be useful in terms of changing the trend [of rising crime rates]," he said in a September 2023 interview. "You could probably point to this technology as useful in certain cases, but seeing it as a game changer, or something to invest in for crime fighting, that optimism is probably misplaced."

A look at overall trends shows even that statement was likely a bit too optimistic. Research at Georgia State University by Thaddeus Johnson took a bigger picture view. He found that among the police departments that have adopted AFR, there has been a 55% increase in the arrests of Black adults and a corresponding 21% decrease in the arrests of white adults. There was not enough data according to Johnson, who had also been a Memphis police officer, to draw any causal links for the skewed results. One possible

contributing factor may be that many AFR systems draw their photos from mugshot databases. Since Black people are substantially overrepresented in these databases, the systems would be more inclined to return Black matches. Johnson points out, "If you have a disproportionate number of Black people entering the system, a disproportionate number being run for requests for screenings, then you have all these disproportionalities all cumulatively building together." It is worth noting that IDEMIA, a French software company that provides the AFR technology to the Louisiana State Police—and therefore, the NOPD—sources its data from mugshots.

Politico notes that in nearly every publicized case of false arrest based on AFR, the technology's victim has been Black. That includes two arrests in Detroit, one of which involved a pregnant woman. She was accused of robbery and carjacking. It also includes the Georgia resident Randal Reid. Of the 15 fulfilled AFR requests by the NOPD, only one person was white. Yet, an NOPD spokesperson addressing a question about the disparity said, "Race and ethnicity are not a determining factor for which images and crimes are suitable for racial recognition review." Despite the rhetoric, the numbers seem to tell a different story. 🗞️

Sources: *politico.com*, GAO report: *Facial Recognition Services (September 2023)*

Police Bodycams: If You Film It ...

by Michael Dean Thompson

ONE HUNDRED PETABYTES IS A DIFFICULT quantity to comprehend. In plain English, that is about 113 quadrillion or 113 followed by 15 zeroes. According to *ProPublica*, that is the rough data equivalent of 25 million copies of the movie *Barbie*. One hundred petabytes is also approximately the volume of bodycam video held by Axon's cloud storage system. In that sense, then, even the comparison to *Barbie* does not quite capture the magnitude of the data, as the bodycam data is not as prolific a bit generator as a high-definition movie. For that reason, it is far more than the 5,000 years of high-definition video the *Barbie* comparison implies. New York City alone generates millions of hours of bodycam video per year. The numbers continue to grow. And the majority of it remains unwatched.

Police bodycams came about as an intended solution to a problem. It was hoped

that the tools would help build back public trust after several high-profile police killings. It is certainly true that transparent use of video footage can reveal what actually happened during a disputed encounter. In 2020, Louisiana State Police arrested Antonio Harris, during which the troopers kned, slapped, and punched the man after he surrendered. Despite the troopers' "wholly untrue" reports about the incident, the bodycams showed at least part of the truth. The first trooper to approach Harris—who had already surrendered—kned and slapped Harris before thinking to turn off his bodycam. The troopers later laughed and bragged about the incident via text messages.

The promise of bodycam truth telling extends beyond examining incidences after the fact, which is too late. Such violent police encounters are rarely isolated incidents. Cameras

that are always on enable systematic reviews of officer behaviors so that problematic behaviors can be captured, flagged, and addressed before they escalate. Furthermore, the videos can then be used to train future cops to identify both effective and destructive behaviors. The problem is one of scale. Cops can either hire hordes of bodycam video watchers or find some automated mechanism of flagging suspicious or problematic police activity.

Polis Solutions and Truleo are among an increasing number of companies attempting to use AI-based solutions to do just that. Paterson, New Jersey, hired Truleo to review their footage after police killed a community activist who in the midst of a mental health crisis called 911 for help. Truleo's software allows police supervisors to identify which behaviors to flag. Those behaviors can range from interrupting civilians and using profanity

to muting the camera or using force. These are behaviors that would have flagged the Louisiana troopers who initially failed to reveal any footage existed to investigators. Truleo has found that “There are officers who don’t introduce themselves, they interrupt people, and they don’t give explanations. They just do a lot of command, command, command, command, command,” Anthony Tassone, cofounder of Truleo, told *ProPublica*. “That officer’s heading down the wrong path.”

Polis Solutions of Dallas, Texas, has its own software called TrustStat that grew out of a Defense Advanced Research Projects Agency project that sought to understand how soldiers in what may be hostile environments could prevent conflicts from escalating. The AI

tools within TrustStat analyze speech, facial expressions, and even body movements to try and flag both positive and negative encounters.

Similarly, Washington State University’s Complex Social Interactions Lab uses a combination of 50 reviewers drawn from the university’s students and AI to review videos from Pullman, Washington, to identify features and outcomes of police behavior.

Unfortunately, one of the key promises of bodycam video—police transparency—has not been fulfilled. As *ProPublica* notes, departments using Truleo have not been willing to make their findings public. Meanwhile, police departments in Seattle and Alameda, California, canceled their contracts after backlash from police unions. In Philadelphia, depart-

ment policy prevents officers caught violating procedures during bodycam spot checks from being disciplined. And, across the country, police departments themselves are the gate keepers when it comes to public access to the video.

The truth is that catching the trends early and intervening can save lives and prevent unnecessary brutality, but that seems to have little effect on policy. As the case with the Louisiana troopers who attacked Harris shows, we cannot expect errant cops to be prosecuted. All three of Harris’ attackers are having their charges quietly dismissed. 🗨️

Sources: *ProPublica.org*, *Associated Press*

The FBI’s Rapidly Expanding DNA Database

by Anthony W. Accurso

THE FBI HAS AMASSED OVER 20 MILLION DNA profiles in its database and has requested Congress double its budget for handling DNA samples “to process the rapidly increasing number of DNA samples collected.”

The Combined DNA Index System, or CODIS, is the FBI’s centrally searchable repository for DNA profiles maintained by the agency. It started in the early 1990s but was formalized as a central database in 1998. At first, it was limited to samples from crime scenes, unidentified remains, and people convicted of sex crimes.

“If you look back at when CODIS was established, it was originally for violent or sexual offenders,” said Anna Lewis, a Harvard researcher specializing in the ethics of genetics research. “The ACLU warned that this was going to be a slippery slope, and that’s indeed what we’ve seen.”

Now, all states and federal jurisdictions collect DNA from individuals convicted of any felony, and 28 states collect samples from people arrested on suspicion of a felony, regardless of whether they are eventually convicted.

“It changed massively,” said Lewis. “You only have to be a person of interest to end up in these databases.”

In April 2023, FBI director Christopher Wray testified before Congress about the FBI’s request to add \$53.1 million to its then budget of \$56.7 million to increase the agency’s capacity to process and catalog samples. He stated

that the agency was collecting around 90,000 samples a month and “expected that number to swell to about 120,000 a month, totaling about 1.5 million new DNA samples a year.”

Much of this expansion has been driven by the Department of Homeland Security. In 2009, that agency was tasked with collecting DNA from detainees processed by Customs and Border Patrol, but the Obama Administration exempted the department from collection requirements for non-U.S. detainees because the mandate came without additional funding from Congress.

This exemption was lifted in 2019 by the Trump Administration. But COVID hit soon after, and Title 42 expulsions did not require DNA collection.

Wray’s new estimate of 120,000 a month is the expected number of collections once Title 42 expulsions were set to end, a mere few weeks after his April testimony. The director also requested the additional budget to process the current backlog, so newly screened detainees can be checked through CODIS in a timely manner.

“This substantial increase in sampling has created massive budget and personnel shortfalls for the FBI,” wrote Wray in his statement to Congress. “While the FBI has worked with DHS components to automate and streamline workflows, a backlog of approximately 650,000 samples has developed, increasing the likelihood of arrestees and non-U.S. detainees being released before identification through investigative leads.”

This backlog may seem daunting, but sampling has gotten cheaper, easier, and faster, with samples being processed by machines within 1-2 hours from when the cheek swab is taken, “without a lab or human involvement.”

Just how easy such processing has become is troubling for privacy advocates like Vera Eidelman, a staff attorney at the ACLU, who says that advances in efficiency mean that surveillance tech like DNA sampling “tends to get used more often—often in ways that are troubling.”

Eidelman’s concerns about FBI mission creep developing into a universal DNA database is particularly scary since the National Oceanic and Atmospheric Administration has begun a program of “autonomously collected [environmental] DNA testing,” also known as eDNA collection.

“Just by breathing, you’re discarding DNA in a way that can be traced back to you,” said Lewis.

“Our DNA is personal and sensitive: It can expose our propensity for serious health conditions, family members, and ancestry,” Eidelman told *The Intercept*. “A universal database really just would subvert our ideas of autonomy and freedom and the presumption of innocence, and would be saying that it makes sense for the government to track us at any time based on our private information.” 🗨️

Source: *theintercept.com*

Federal Habeas Corpus: Understanding Second or Successive Petitions for State Prisoners

by Dale Chappell

IN THE NAME OF FINALITY, FEDERAL courts are reluctant to undo criminal judgments of the state courts—especially repeated attempts by petitioners to do so under federal habeas corpus. When the Antiterrorism and Effective Death Penalty Act (“AEDPA”) came along in 1996, codifying longstanding rules prohibiting multiple attempts at habeas relief, Congress slammed the door shut for nearly all petitions filed after a first habeas petition is denied. We’ll briefly go over what it takes to get another “bite at the apple” in the federal habeas court.

What Is a Second or Successive Habeas Petition?

Before we get into what a second or successive habeas corpus petition (“SOS petition”) is, let’s talk about what it’s *not*. Not every habeas petition by a state prisoner under 28 U.S.C. § 2254 after a first petition is denied will be a SOS petition. In *Magwood v. Patterson*, 561 U.S. 320 (2010), the U.S. Supreme Court

held that a habeas petition that attacks a new judgment is not a SOS petition. This means that if you had a successful habeas petition earlier, a petition attacking the new criminal judgment would not be a SOS petition.

However, the courts are split over whether a petition attacking the new judgment can also raise issues that had existed at the time of the first petition. Some courts allow an attack on not only the new judgment, but also any errors that existed at the time of the old judgment. See *Insignares v. Sec’y Dept. of Corr.*, 755 F.3d 1273 (11th Cir. 2014).

If the court dismissed your first petition *without prejudice*, then another petition raising the same claims would not be an SOS petition. The term “without prejudice” simply means that there’s nothing against you filing another petition. A good example of this kind of dismissal happens when a state prisoner fails to exhaust post-conviction remedies in state court prior to filing a habeas petition in federal court. A state prisoner is required to exhaust any avenues in

state court first. If not, then the federal petition is dismissed without prejudice to allow the petitioner to come back with the same petition once state remedies are completed.

Certain claims might not have been “ripe” at the time when the first habeas petition was filed and may be raised in another petition once ripe. An example of this would be a claim where a state prisoner serving a death sentence raises a claim that his mental condition has deteriorated over the years and he’s now unable to be executed. In *In Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court held that it’s unconstitutional to execute the “insane.” The Court then held in *Panetti v. Quarterman*, 551 U.S. 930 (2007), that a *Ford* claim is not an SOS petition, because a petitioner could not have known at the time of the first petition that he would become incompetent enough not to be executed.

So, what is a “second or successive” petition? The term “second or successive” may seem redundant, but it’s actually two legal

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terms with different meanings. The term “second” is another form of “abuse of the writ,” which occurs when a petitioner should have raised the claim earlier but did not. This was once used as a tactic to keep the habeas option open if the original petition failed to bring relief. The term “successive” refers to a petition that has the same claims as an earlier petition that was denied. See *Kuhlman v. Wilson*, 477 U.S. 436 (1986), for a good explanation of this.

Authorization to File an SOS Petition Is Jurisdictional

The AEDPA added a provision to the federal habeas statutes that any SOS petition must be authorized by the applicable Court of Appeals before it’s filed in the District Court: “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

This provision is a jurisdictional bar preventing the district court from even hearing your SOS petition. “A district court, faced with an unapproved second or successive habeas petition, must either dismiss it or transfer it to the appropriate court of appeals.” *Pratt v. United States*, 129 F.3d 54 (1st Cir. 1997).

Use the Form Provided and Attach Your Petition

Every Court of Appeals uses a form for requesting permission to file a second or successive habeas petition, and it’s provided by the clerk at no cost. This form is actually the “motion” that is filed to invoke the provisions under § 2244. Its purpose is for the court to screen your request, without having to dig through a long motion drafted from scratch. Some courts have local rules that require use of the form, and some say it’s fine to forgo the form if you follow the same format with your own motion.

Even if it’s not required, it’s a good idea to attach your proposed SOS petition for the District Court to your form filed in the Court of Appeals. Anything you file with your application may be considered by the court in support of authorizing a SOS petition.

When Is an SOS Habeas Petition Considered ‘Filed?’

Most courts consider your SOS petition “filed” when you file your motion in the Court of Appeals for authorization. In *Gilmore v.*

Berghuis, 2015 U.S. App. LEXIS 4501 (6th Cir. Jan. 30, 2015) (unpublished), the Court provided some valid reasons why attaching your proposed SOS petition to the form is a very good idea. In that case, the government argued the form wasn’t the actual petition, and so, it wasn’t “filed” until the approved petition was filed in the District Court. Pointing to 28 U.S.C. § 2242, the Court disagreed and said that a habeas petition is considered “filed” when it is addressed to a judge on the Court of Appeals with an explanation of why it couldn’t have been filed in the District Court. The form provided that explanation, and so, the attached petition was filed when the application was filed.

But in *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002), the Fifth Circuit ruled that the form filed in the Court of Appeals is not the “motion” required by the statute, and therefore, the actual petition wasn’t “filed” until it was in the District Court. Note that it’s the rule in the Fifth Circuit that the proposed SOS petition is attached to the form filed in the Court of Appeals. See *In re Epps*, 127 F.3d 364 (5th Cir. 1997).

There’s a Time Limit to File an SOS Habeas Petition

Under the AEDPA, there’s a one-year time limit for any habeas petition filed by a state prisoner. § 2244(d). This includes any SOS petition authorized by the Court of Appeals. But unless the petition, if authorized, would “clearly” be out of time, most courts say it’s best left up to the District Court to determine the timeliness of an SOS petition. See *In re McDonald*, 514 F.3d 539 (6th Cir. 2008).

An SOS Habeas Petition Is Screened by Both Courts

Your request to file an SOS petition in the District Court gets screened by both the Court of Appeals and the District Court to determine whether it meets the strict criteria to file such a petition. First, the Court of Appeals is required to dismiss any claims that were “presented in a prior application.” § 2244(b)(1). For any new claims, the court determines whether the motion makes a *prima facie* showing that it meets the SOS criteria under § 2244(b)(2) (see below). This determination is made by a panel of three judges and “not later than 30 days.” § 2244(b)(3)(C)-(E). However, the 30-day limit is not a hard rule, and courts frequently go beyond that deadline. *Ezell v. United States*, 778 F.3d 762 (9th Cir. 2015).

Criteria for Filing an SOS Habeas Petition

There are two narrow circumstances that allow the filing of an SOS petition in the District Court, and there haven’t been any exceptions to this in the more than 25 years the AEDPA has existed. The first circumstance allows a claim that “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” § 2244(b)(2)(A). There are two parts to this requirement. First, it has to be a new *constitutional* decision by the Supreme Court that is substantive. This would be a ruling that declares part of a criminal law unconstitutional and now prohibits certain people from being punished by that law. *Johnson v. United States*, 576 U.S. 591 (2015), is an example of such a case.

In the second circumstance, the Supreme Court itself has to make its decision retroactive on collateral review. While the Court hardly ever says when its decision is retroactive, if it applies the decision to a collateral review case, it’s considered retroactive. See *Tyler v. Cain*, 533 U.S. 656 (2001).

Section 2244(b)(2)(B) allows a claim where: “The factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

In other words, you have to provide new evidence that you could not have found earlier through reasonable means and that would convince the court by more than a 50/50 chance that you’re not guilty of the offense. A recent case provides some instruction on how all of this would work where the prosecutor withheld crucial evidence that would have undermined the jury’s finding of guilt. *In re Jackson*, 12 F.4th 604 (6th Cir. 2021). Note that this was the petitioner’s *fourth* attempt at federal habeas relief. Never give up!

Erroneous Transfer of a Non-SOS Habeas Petition

If you filed a habeas petition in the District Court and it transferred it to the Court of Appeals for authorization as an SOS petition, you don’t *appeal* the District Court’s transfer. Instead, you must file *in the Court of Appeals*

where the petition was transferred to a “motion to remand,” asking the court to send your petition back to the District Court because it’s not an SOS petition.

Appealing the Denial of an SOS Habeas Petition

If your application to file an SOS petition was denied by the Court of Appeals, you may not appeal that decision, nor can you file a motion for a rehearing. § 2244(b)(3)(E). However, you can “suggest” that the Court rehear its denial, since the Court has the power to do

this on its own. See *In re Johnson*, 814 F.3d 1259 (11th Cir. 2016).

If your application was approved and then the District Court denied relief, even if that court says you couldn’t meet the SOS criteria, you file an appeal the same way you would for any first habeas petition. Once your petition is approved by the Court of Appeals, it’s a normal habeas petition, and all the same rules apply.

Conclusion

Filing a second or successive habeas petition in federal court is not an easy task. There

are lots of steps to take, and one wrong step can prevent the chance for any relief, regardless of how strong your claims may be. Take some time to understand these steps, so you have the best possible chance of obtaining relief. 📖

Dale Chappell has published hundreds of articles on federal habeas relief for state and federal prisoners and is the author of the *Insider’s Guide* series of post-conviction books, including *Habeas Corpus for Federal Prisoners* and *Federal Habeas Corpus for State Prisoners*.

‘Trail ’Em, Nail ’Em, and Jail ’Em’: Issues Private Probation and Parole

by Jo Ellen Nott

VINCE SCHIRALDI TALKS PRIVATE PROBATION and parole in his new book *Mass Supervision: Probation, Parole, and the Illusion of Safety and Freedom*. When Schiraldi was selected to run the troubled New York Department of Corrections (“DOC”) during the COVID pandemic crisis, the *New York Times* called him “a cerebral reformer who has spent an illustrious career in public life trying to end mass incarceration.”

Schiraldi’s tenure as commissioner of the New York DOC was short-lived at six months. He arrived late in the game, in June 2021, to fix a jail that had been getting worse for years and then exploded into waves of violence and death because of the pandemic. Schiraldi initiated programs and reforms to help guards whom the *New York Times* described as “exhausted, scared and quick to go on the offensive” and to help detainees who are often “ignored, debased, violated and easily triggered.”

Newly elected Democratic mayor Eric Adams did not support Schiraldi’s efforts to help the situation of both guards and detainees at Rikers Island and replaced him with the more hardline ex-cop Louis Molina. Schiraldi went on to become the Secretary of the Maryland Division of Youth Services and to write this book about the national problems in probation and parole.

An excerpt from *Mass Supervision: Probation, Parole, and the Illusion of Safety and Freedom* was published in September 2023 in Literary Hub. The online aggregator of contemporary literature called Schiraldi’s book about the privatization of America’s criminal justice system “an unholy marriage of fiscal conservatism and law and order.”

The excerpt in Literary Hub talks about the widespread practice of paying for probation supervision across the U.S., with over 48 states imposing costs on those under probation and parole. Schiraldi writes: “Paying to be on probation has flourished in small towns throughout the South (where private companies often receive the proceeds) as well as in big cities (where more often the recipients are government probation or parole departments).”

The numbers are depressing for those navigating the justice system and spell potential personal economic disaster for those caught in its clutches. Forty-nine states require or allow individuals on probation or parole to pay for the cost of their electronic leashes. According to Schiraldi, “Over a thousand courts in the U.S. assign the supervision of people convicted of misdemeanors to private, for-profit probation companies. Hundreds of thousands of people are supervised on privately run probation annually in the United States.”

Private probation systems have come under scrutiny for their lack of due process protections and the potential for abuse. The profit motive in private probation encourages those companies to make probation conditions unnecessarily harsh to increase the chance that the person on parole breaks one of the many frivolous rules. The profit motive also prompts companies to prolong probation terms and to incarcerate individuals to extract money from them and their families. The only winner is the bottom line of the private probation company.

The conflict of interest within private probation is strikingly obvious, as these

companies often determine the ability of individuals to pay fines and fees while at the same time profiting from their financial struggles. Pay-only probation is a practice that unethically targets the poorest and most vulnerable among us and contradicts the intended purpose of probation as an alternative to incarceration. Instead of serving as a rehabilitative tool, it becomes a fee-collection mechanism, doubling or tripling the original costs for those unable to pay immediately.

Schiraldi relates the story of Thomas Barrett, a white, middle-aged, former pharmacist from Georgia who found himself trapped in a pay-only probation nightmare. After becoming addicted to some of the same drugs he dispensed, Barrett lost his job, his family, and his middle-class life. He ended up on the streets and had several brushes with the law over public drunkenness.

His nightmare started when he stole a \$2 can of beer. Before his arrest, he had found a \$25-a-month subsidized apartment and was barely getting by on food stamps. After his arrest, he could not afford the \$50-public-defender cost the county required, so he was fined \$200 and sentenced to 12 months on probation with electronic monitoring. Because he could not pay the electronic monitoring startup fee of \$80, he had to spend two months in jail. His Alcoholics Anonymous sponsor paid the \$80 to Sentinel Offender Services to get him out of jail.

The costs of the electronic monitoring were well beyond what Barrett could cope with as an individual selling his blood plasma to survive. The electronic monitor, \$12 a day, plus a service fee to Sentinel of \$30 a

month, added up to around \$400 a month. He skipped meals to pay for his probation costs and was frequently too weak to donate blood.

By February 2013, Barrett owed Sentinel \$1,000 in back fees, five times his original \$200 court fine for the stolen \$2 beer. Sentinel filed a technical violation on Barrett for not paying his fines and fees, and a judge sentenced him to one year in jail. Barrett's response? "To

spend 12 months in jail for stealing one can of beer? It just didn't seem right."

In his book, Schiraldi questions the rationale behind charging individuals for probation and parole, especially considering the financial challenges faced by the majority of those in the justice system. He points out the ill-considered imposition of fees on those already economically vulnerable can result in driving individuals to commit more crimes,

transform probation officers into bill collectors, strain the relationship between officers and those under supervision, and lead to increased punishment, ultimately sending the individual into incarceration—a counterproductive and illogical outcome for community supervision programs. 📖

Sources: *Literary Hub*, *New York Times*, *PBS*

New York Court of Appeals: Admission of Prior Bad Acts Evidence to Prove Propensity to Commit Crime Harmful Error

by David M. Reutter

THE COURT OF APPEALS OF NEW YORK held a trial court erred in admitting evidence of prior bad acts evidence. It further concluded the error was not harmless and reversed, ordering a new trial.

Sebastian Telfair was arrested in June 2017 after a traffic stop, during which the officer saw a lit marijuana cigarette on the center console. An inventory search uncovered marijuana, cash, three handguns, and ammunition. The guns were registered to Telfair in Florida. A jury convicted Telfair of one count of criminal possession of a weapon in the second degree in connection with the gun recovered from the truck's center console and acquitted of all other charges. The Appellate Division affirmed. It concluded the trial court properly exercised its discretion in admitting the evidence under *People v. Molineux*, 61 N.E. 286 (N.Y. 1901). Judge Barros dissented and granted the Telfair's application for leave to appeal to the Court of Appeals and for a stay of execution of the judgment. That Court extended the stay pending determination of his appeal.

On appeal, "Telfair argued that the Superior Court deprived him of his right to a fair trial in admitting evidence of alleged prior bad acts under *Molineux* and by allowing the prosecutor to make propensity arguments during summation," the Court summarized.

Under *Molineux*, "the general rule is that evidence of a defendant's prior uncharged crimes or bad acts is inadmissible in a criminal trial." In applying that rule, courts have recognized the "natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge"

People v. Zackowitz, 172 N.E. 466 (N.Y. 1930). "Excluding such evidence avoids the risk of infecting jury deliberations with forbidden propensity inferences," the *Molineux* Court explained. It also recognized exceptions for "motive, intent, absence of mistakes or accident, common scheme or plan, or identity of the defendant."

A *Molineux* ruling requires the court to address a pure question of law: "whether the People have [identif]ied] some issue, other than mere criminal propensity, to which the evidence is relevant." *People v. Hudy*, 535 N.E.2d 250 (N.Y. 1988). "If the evidence is relevant to some issue other than propensity, [courts] consider whether the probative value of the evidence outweighs its potential for prejudice." *People v. Ely*, 503 N.E.2d 88 (N.Y. 1986).

"The key question at trial was knowledge: whether Telfair knew that the guns were in his truck. That focus was clear at a pretrial hearing, in defense counsel's opening statement and on summation, and in an exchange with the court following the jury's question on the significance of the *Molineux* evidence," the Court stated.

During the trial, the People admitted the testimony of a police officer and an assistant district attorney to admit "*Molineux* evidence regarding the two prior incidents in which the defendant previously possessed guns outside of Florida."

"The threshold question" on appeal was "whether the prior incident evidence was relevant to an issue other than propensity." That question was answered in the negative: "Evidence of the 2006 and 2007 incidents was not relevant to whether Telfair knew that the guns in question were in his vehicle in 2017. The warning theory has no application here; that Telfair unknowingly possessed other guns in two completely different circumstances

about 10 years prior could not have put him on notice that there might have been guns in his truck this time," the Court determined.

The theory of warning applies, for instance, in a case where forgery evidence "at or near the same time the defendant had passed, or had in his possession, similar forged instruments" would be relevant to prove intent. "Not so here," the Court stated. "The 2006 and 2007 incidents were neither very similar nor close in time to the 2017 incident. Just the opposite: they involved different guns, different sets of circumstances, different excuses, and occurred more than 10 years earlier." The Court continued: "Whether labelled as knowledge or mistake, the evidence regarding the 2006 and 2007 incidents did not increase the possibility that Telfair knew there were guns in his car in June 2017."

The Court found no support for the position in Judge Rivera's dissent that *Molineux* evidence is regularly being used to prosecute gun charges. Even if that is the case, the Court had "no doubt that the People will be able to conform their tactics to our holding today in order to avoid reversal of firearm possession convictions on appeal."

Finding the trial court erred in admitting the *Molineux* evidence, the Court concluded that the error was not harmless. "There was circumstantial evidence from which the jury could have inferred that Telfair knowingly possessed the guns in this case, but not overwhelming proof of guilt, and we cannot conclude there was no significant probability the jury would have acquitted Telfair had the evidence of the 2006 and 2007 incidents been excluded."

Accordingly, the Court reversed the Appellate Division's and ordered a new trial. See: *People v. Telfair*, 2023 N.Y. LEXIS 1898 (2023). 📖

FBI's Bias for Keywords

by Carlos Difundo

IN SEPTEMBER OF 2021, THEN-ASSISTANT Director for Counterterrorism Jill Sanborn told the Senate that the FBI did not monitor publicly available social media conversations. "It's not within our authorities," she told them, adding that the First Amendment barred them from doing so. It turns out that statement was wrong, according to a report the Senate put together in June of 2023.

Prior to 2021, the FBI used a tool from Dataminr to scan social media. According to the company, the tool searched for a predetermined set of keywords. It did not perform any sort of link analysis, nor did it attempt to discover if the scanned accounts were related by location or group. They also added that their tool does not perform any kind of surveillance, apparently meaning it does not monitor specific accounts. That, however, seems to be a bit disingenuous. It is not difficult to find accounts where specific sets of keywords such as "#BlackLivesMatter" dominate their posts. A well-defined set of keywords can at least be highly selective even without including the account name. The FBI's goal, they claim, "is not to 'scrape' or otherwise monitor individual social media activity" but that it "seeks to identify an immediate alerting capability to better enable the FBI to quickly respond to ongoing national security and public safety-related incidents."

Keyword-based search tools can turn up some gems at times. However, they can also highlight the biases of the people who define keyword sets, as well as in how the agents poring through the data select "hits." Eliminating false positives is difficult at any time as well, especially for FBI agents trying to cast a wide net. False positives had Dataminr alerting the U.S. Marshal's office of peaceful abortion rights protests, jokes about Donald Trump's weight, and criticisms of the Met Gala, according to *The Intercept*.

The FBI decided to move away from Dataminr and focus on a tool from ZeroFox. This was despite lamentations from agents and ZeroFox' track record with the FBI. One FBI email closed by stating, "Dataminr is user friendly and does not require an expertise in social media exploitation." Yet, without that expertise, the agents become more reliant on the tools they use to separate the wheat from the chaff. Keyword searches will always be inherently "noisy." More importantly, it will always be a fairly simple process for bots to poison the results. Part of Google's process in

providing its search results is a strenuous link analysis to highlight bot-based "spamming" of its search engine, yet some bots still do break through the result list. If the FBI is doing raw keyword searches, bots will be able to send them on wild goose chases, especially if the predefined keywords are known.

Again, ZeroFox and the FBI have history. In 2015, ZeroFox took the bot-bait and decided DeRay McKesson and Johnette Elzie, Black Lives Matter protest leaders, needed "continuous monitoring." After trolls impersonating Elzie claimed that she planned to attend and violently disrupt the 2015 Republican Na-

tional Convention in Cleveland—despite her being in New Orleans at the time—the FBI paid her parents a visit to discourage her from attending. Since that event, ZeroFox claims to have improved its processes to include human analysis before the alert is forwarded to the client agency, but that still does not eliminate the problem. The workload is just shifted away from the agents who must take ownership of the task and introduces new opportunities for bias to creep in so that unforeseeable corporate and agency biases converge and multiply. 🗨️

Source: *TheIntercept.com*

Potential Dangers of Medical Monitors

by Michael Dean Thompson

MODERN MEDICAL SCIENCE HAS DELIVERED some remarkable lifesaving technologies. Included in the list of modern marvels are pacemakers equipped with telemetry systems that permit remote monitoring but also remote modification of their operating parameters. With such a pacemaker, a technician can monitor how the patient's heart responds to their daily routine and modify the settings as needed. Similar technologies exist for those who no longer produce their own insulin. Nevertheless, significant personal habits can be inferred from both what a person's body finds to be normal and how often it deviates from those norms.

We live in a society that collects large volumes of information about its individual members. Not all of that collected data serves an obvious purpose. For example, why does a car manufacturer track GPS coordinates with each "event," such as a door opening, a gear shift, and a press of the brake? Does a game downloaded onto a cellphone really need to track the user's location and search history? All that tracked information comes at a price to civil liberties. In essence, anything in the possession of corporate servers is likely accessible to the government. Many corporations sell their users' raw data on an open market to data brokers. Some of these massive corporations were once known for credit-related data collection and have expanded their reach to acquiring click-through and location histories and more. Those corporations then sell that data to fusion centers and High-Density Drug Trafficking Area centers for police analysis,

which by definition surveils innocent Americans with an assumption of guilt.

Given corporate complacency in government overreach and the inherently private nature of medical information, these new marvels must be clearly vetted for the kinds of data collected and under what conditions it is shared. While it may seem unlikely, a subdermal Bluetooth connector for an implantable cardioverter defibrillator would collect GPS locations, it is not impossible. It is, therefore, not unimaginable that a detective who discovers a suspect has had such a device implanted would decide to subpoena biometric indicators, such as heart rate and location information around the time of an incident.

Meanwhile, electronic monitors placed on parolees and immigrants alike are already expanding into biometric observations like voice and pulse. In December of 2023, the House passed the Support for Patients and Communities Reauthorization Act that allows for "a study on the effects of remote monitoring on individuals who are prescribed opioids." Jeffrey A. Singer and Patrick G. Ellington of the Cato Institute warned on Reason.com, "With such data in hand, misinformed anti-opioid crusaders in Congress will then take the next 'logical' step legislation requiring all patients prescribed for any reason to be remotely monitored (another example of cops practicing medicine')." And, who knows, once that technology is available, it will become yet another feature for electronic monitoring in general. 🗨️

Source: *Reason.com*

Crime Scene Context: Bridging the Gap Between Evidence and Reconstruction

by Jo Ellen Nott

F.D. ZIGAN, A VETERAN CRIME SCENE investigator who specializes in fingerprint analysis for the Roswell Police Department in suburban Atlanta, Georgia, writes about the disconnect between evidence collection and scene reconstruction in *Forensic Magazine*, November 2023.

Zigan points out that in a world of specialization, a crucial element of crime scene investigation is being overlooked—the context in which impression evidence is found. The separation between evidence collection and scene reconstruction limits the possibilities of forensic analysis, affecting everything from witness statements to suspect interviews.

The disconnect is based on three problem areas, according to Zigan. The first is the separation of disciplines within crime scene investigations. Crime scene technicians collect evidence, latent fingerprint examiners analyze prints, and reconstructionists solve the puzzle by arranging the pieces into an understandable narrative. Often, crucial context is lost in this handover.

The forensic consulting and education group Bevel, Gardner and Associates advises, “Finding a fingerprint at the scene may be important, but of greater importance is the context in which we find the fingerprint.”

Zigan explains the separation of the disciplines by saying there are crime scene investigators who are trained to document and collect evidence only. Then, there are latent fingerprint examiners who receive fingerprint cards and macro photos of fingerprints whose sole job is to analyze and compare the two. Next, there are technicians who process evidence in the labs, and finally, there are crime scene reconstructionists who try to make sense out of everything that was collected and documented separately.

When asked why there is a disconnect between the crime scene investigator and the crime scene reconstructionist, certified Crime Scene Reconstructionist Zack Kowalske explained that the two jobs “have evolved with such depth in their respective fields that a loss of translation knowledge and context has occurred. The over specialization of these professionals can cause them to not see the fundamentals of the crime scene as a whole.”

The second problem in the disconnect is

limited documentation. Impression evidence is documented differently than physical evidence, neglecting details like orientation and distortion that are vital for understanding its meaning.

In an example given by Zigan and supported by photographs in the article, he notes

“a subject was accused of looking into car vehicle windows and attempting to pull on car door handles to see if they were unlocked. Instead of the crime scene investigator simply notating that a friction ridge pattern was located on the car window and classifying it as the hypothenar area, the description could be

CLASS ACTION LAWSUIT CHALLENGING THE HIGH PRICES OF PHONE CALLS WITH INCARCERATED PEOPLE

Several family members of incarcerated individuals have filed an important class action lawsuit in Maryland. The lawsuit alleges that three large corporations – GTL, Securus, and 3CI – have overcharged thousands of families for making phone calls to incarcerated loved ones. Specifically, the lawsuit alleges that the three companies secretly fixed the prices of those phone calls and, as a result, charged family members a whopping \$14.99 or \$9.99 per call. The lawsuit seeks to recover money for those who overpaid for phone calls with incarcerated loved ones.

If you paid \$14.99 or \$9.99 for a phone call with an incarcerated individual, you may be eligible to participate in this ongoing lawsuit.

Notably, you would not have to pay any money or expenses to participate in this important lawsuit. The law firms litigating this case—including the Human Rights Defense Center—will only be compensated if the case is successful and that compensation will come solely from monies obtained from the defendants.

If you are interested in joining or learning more about this case, please contact the Human Rights Defense Center at (561)-360-2523 or info@humanrightsdefensecenter.org.

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more involved and state that the impression was cupped which is consistent with a person trying to shield the glare on the window so they could see in the vehicle better.”

“There is also no real discernable lateral distortion (directional movement) which indicates that the hand was held relatively still. This is obviously not an accidental touch as some attorneys claim. An overall photograph of the friction ridge pattern would help the investigator put this into proper perspective as well. Taking only close ups of friction ridge evidence can be detrimental to the case if the investigator, attorneys, and juries can’t see its original location.” Understanding the distortion and how the impression evidence is oriented is crucial to either proving or disproving a statement given by a suspect, victim, or witness.

The third problem in the disconnect is a lack of shared knowledge. Crime scene investigators focus on collection, and recon-

structionists lack a basic understanding of fingerprint patterns and distortion that affects their ability to interpret the crime scene dynamics.

The impact of the disconnect puts several obstacles in the way of solving a case. Evidence can be misinterpreted when there is not context and fingerprints are merely seen as an identification tool. Using fingerprints for ID purposes only causes the reconstructionist to miss out on valuable insights into sequence of events and actions of the perpetrator.

Another obstacle is weakened case building. If the crime scene reconstruction is incomplete, it hinders the investigators’ ability to corroborate witness accounts, challenge suspect alibis, and build a strong case.

A final obstacle is missed opportunities on several levels. Overlooked contextual clues can lead to missed leads, inaccurate conclusions, and worst of all, potential injustice.

The author proposes several paths to bridge the disconnect between collecting impression evidence and reconstructing the crime scene: (1) increasing collaboration and cross-training between the different groups, (2) sharing knowledge and understanding each other’s roles in solving a crime, (3) standardizing the documentation of impression evidence to include detailed descriptions of orientation, distortion and environment, and (4) training investigators to recognize and document the potential meaning of distortion in fingerprint patterns.

By encouraging collaboration, improving documentation, and equipping investigators with necessary knowledge, Zigan says the full potential of forensic analysis is possible and will bring investigators closer to the truth, which is the goal in every case. 📖

Sources: *Bevel, Gardner and Associates, Forensic Magazine, LinkedIn David Zigan*

Taxpayers Foot the Bill for Police Training on How to Violate Constitutional Rights

by Anthony W. Accurso

UNTIL RECENTLY, POLICE DEPARTMENTS in New Jersey were covering expenses for their officers to attend training sessions conducted by Street Cop Training (“SCT”), an organization that encourages “a hypervigilant warrior mentality” and trains officers to consider an arbitrary and contradictory list of behaviors as reasons to detain civilians.

SCT was founded in 2012 by Dennis Benigno. He was a Woodbridge, New Jersey, police officer until 2015. At an Atlantic City conference in October 2021, SCT provided training to current officers by current and former officers. Over the six-day conference, SCT trained nearly 1,000 officers, according to a report by Kevin Walsh, New Jersey’s acting Comptroller. Their employers paid the expenses—\$499 for training but also travel, lodging, and time off—meaning taxpayers were indirectly subsidizing SCT’s operations.

When officers have a reasonable, articulable basis to believe a person has, is, or about to, commit a crime, police can detain that person, usually driving a vehicle, to conduct a brief investigation.

SCT teaches officers that “every interaction with a civilian” is “a potential deadly

threat.” Officers are warned that any person, once detained, could “take your fucking life in a second,” so they should “treat every motor vehicle stop as if you are going to die and you might just live.”

Policing certainly can be dangerous, but many more civilians are killed each year by police than police are killed by civilians, totaling around 100 per month, according to ProPublica. Research, and nonfiction books like Malcolm Gladwell’s book, *Talking To Strangers*, have linked this aggressively suspicious posturing by police as a driving factor in police murders of civilians. Yet, speakers at the SCT trainings “made comments glorifying violence in the application of military techniques to policing,” according to Walsh. Reinforcing this mentality, SCT coaches encourage trainees to view seemingly random and contradictory behaviors by motorists as suspicious.

Wearing a hat “low to cover [your] face” is suspicious but so is removing a hat when stopped by police, which results in a situation where the person can do nothing to dispel suspicion. Other “reasonable suspicion factors” that made SCT’s list include: “texting, smoking, lip licking, yawning, stretching,

talking to a passenger while keeping your eyes on the road, signaling a turn early or late, maintaining ‘awkward closeness’ or ‘awkward distance’ during a stop, standing parallel or perpendicular to the car, saying you are heading to work or heading home, questioning the reason for the stop, and refusing permission for a search.”

While many of these factors are dubious at best, the last one is particularly troubling because it teaches officers that asserting one’s constitutional rights is “suspicious.” During trainings, Benigno will often show “a montage of people refusing consent in an attempt to illustrate that a motorist’s refusal to consent is a suspicious factor that justifies prolonging and investigative detention,” while offering the justification that innocent motorists will consent to a search because they have nothing to hide (or, of course, they may simply value their privacy and are unwilling to submit to an arbitrary demand to rummage through their personal belongings).

Walsh notes that in New Jersey, “it has been long settled that police must have reasonable suspicion of criminality before they ask for consent to search a motor vehicle,” and

many courts have ruled that “refusal to consent to a search cannot itself form the basis for reasonable suspicion.”

Brad Gilmore was one SCT trainer at the October 2021 conference, and he was also a narcotics detective with the Bergen County Prosecutor’s Office. And, despite the fact the U.S. Supreme Court in *Rodriguez v. United States*, 575 U.S. 348 (2015), held that even the briefest of extensions of a traffic stop beyond the original mission for the stop—typically, to address the traffic infraction—were unconstitutional (the so-called “*Rodriguez* moment”), Gilmore “endorsed the practice of pretending to conduct a computer lookup so an officer can illegally but surreptitiously continue and investigate during a motor vehicle stop that should have already concluded.”

Gilmore told trainees to be “finger-fucking your computer” or “playing Tetris,” which gives a narcotics officer time to arrive with a drug dog while the officer pretends to be working on the citation.

The New Jersey State Police has since told its employees to stop attending these trainings, and Gilmore’s comments encouraging flouting the law have already caused collateral consequences. In December 2023, New Jersey prosecutors dropped all drug charges against Francisco A. Paulino-Edua, who was arrested by Gilmore in 2017.

“The officer’s believability and credibility were so suspect that the government could not back up a prosecution based on his behavior,” said Brian Neary, Paulino-Edua’s attorney, to *The New York Times*.

Comptroller Walsh argues that “[t]his kind of training comes at too high a price for New Jersey residents, because the cost of attendance for training like this is small in comparison to the potential liability for lawsuits involving excessive force, unlawful searches and seizures, and harassment and discrimination.”

After the release of Walsh’s report, SCT was promptly banned from conducting training in nine states and filed for bankruptcy in February 2024. Although this particular actor is no longer training police officers, there’s little doubt that the tactics and mindset it taught are being spread by others within the law enforcement community.

Sources: *reason.com*, *msn.com*

Massachusetts State Police Facing Possible Class Action Lawsuit for Illegal Recordings

THE MASSACHUSETTS STATE POLICE (“MSP”) is the defendant in a potential class action lawsuit alleging that troopers secretly recorded nearly 200 individuals during criminal investigations, many of them drug cases. These recordings made by a phone app called Callyo violate federal and state laws and potentially jeopardize criminal cases across the state.

The lawsuit, filed against the state police and Motorola on February 23, 2024, claims that troopers violated the state’s two-party consent law by covertly recording interactions with at least 181 arrestees and then failed to disclose these recordings in court, denying the plaintiffs due process. Jason Courtemanche, Brett Foresman, Juan Rios, and Dennis Williams said in the complaint filed in U.S. District Court in Worcester that they were secretly recorded by state police using Motorola Solutions devices.

The recordings were added to a database maintained by Callyo, a law enforcement software company acquired by Motorola in 2020. The state wiretapping law prohibits recording audio without consent, except in cases related to organized crime investigations, which did not apply to the plaintiffs in this instance.

The ease of using the technology more than likely contributed to its widespread misuse. Callyo is a phone-based recording app commonly used by law enforcement and makes secret recordings without the complexi-

ties of traditional bugs and wiretapping. While Motorola is not directly responsible, in an ideal world, the company would monitor customers and prevent unlawful use of its product.

The troopers claim they used the app for “officer safety” during drug buys. However, they failed to obtain warrants required under Massachusetts law for covert recordings. Judge Timothy LoConto, presiding over one case, called their justifications “shocking” and questioned why recordings used for investigative purposes were initially claimed to be solely for officer safety.

The troopers and state police officials have offered conflicting explanations and deflected responsibility. They blamed each other and different drug unit practices for the lack of proper training, policy guidelines, and evidence handling. Judge LoConto expressed frustration at their lack of accountability, stating, “These are relatively simple tasks to complete. Producing evidence, turning over evidence. It’s very simple. And no one’s in charge, and no one’s responsible.”

TechDirt points out that it serves the MSP well not to have someone in charge or make anyone responsible for the Callyo database, because either one of those accountability measures would create a paper trail for the illegal recordings and eliminate any form of plausible deniability.

During court hearings, it was revealed that troopers received minimal training on

how Callyo worked. The software defaults to recording audio, and features like “Body Bug” allow audio transmission without visibility. Informants involved in drug buys were allegedly coerced with monetary “tips” and subjected to illegal searches of their phones.

The lawsuit, led by Fitchburg criminal defense attorney Christopher Batinsey, seeks class status for those recorded, compensation for affected individuals, legal costs, fines, and the appointment of a special master to oversee the case. This legal action adds to recent scandals in Massachusetts involving the state police, including a bribery scheme and overtime fraud.

The legal consequences for the state troopers remain unclear. While one case may be dismissed due to the illegal recordings, the state police are likely to contest the remaining hundreds of potential violations, at taxpayers’ expense, of course. 📰

Sources: *Patch*, *TechDirt*, *Worcester Telegram & Gazette*

Merriam-Webster Dictionary

This paperback dictionary is a handy reference for the most common English words, with more than 75,000 entries. 939 pages for \$9.95 from *PLN’s Book Store*. See page 53 for more information.

‘Blatant Miscarriage of Justice’: Oklahoma Man Exonerated of Wrongful Conviction After 35 Years Despite Former Prosecutor’s Attempt to Perpetuate Injustice

by Douglas Ankney

PERRY LOTT WAS EXONERATED IN ADA, Oklahoma, of a 1987 rape and burglary conviction after 35 years—30 of which Lott spent in prison—in spite of former District Attorney Paul Smith’s attempts to perpetuate such a gross miscarriage of justice.

In November 1987, a white woman was raped inside her home and her assailant took \$120 from her purse. Police took the victim to the Ada Hospital where a rape kit was collected. The victim told police her assailant was a clean-shaven Black man with gold teeth. Later, while filming a Crime Stoppers reenactment video, a detective spotted Lott in his car parked across the street. Upon questioning, Lott told the detective he had been with his girlfriend during the time of the crime, and Lott agreed to accompany the detective to the Ada police station for a lineup. But none of the other men in the lineup had gold teeth. Instead, the other men placed gold foil over their teeth. This meant Lott was the only one who could open his mouth and show gold teeth. The victim identified Lott as her assailant after about 30 minutes. Lott was arrested and eventually convicted of rape and burglary based on the victim’s identification in spite of exculpatory evidence—he sported a mustache and had an alibi. His sentence of 100 years was upheld on appeal.

Decades later, the Innocence Project was able to secure DNA testing of the genetic material in the rape kit. In 2014, Lott was excluded as the contributor of the DNA. Despite this evidence proving Lott’s innocence, Smith opposed Lott’s motion for vacatur. In 2018, two days before the hearing on Lott’s motion, Smith offered Lott a sentence modification that allowed for his immediate release, but the conviction would remain on Lott’s record. Lott, after serving 30 years in prison for a crime he did not commit, understandably lacked confidence in the justice system and jumped at the chance for freedom. He accepted Smith’s offer.

Then in 2023, the Innocence Project asked newly elected District Attorney Erik Johnson to vacate Lott’s conviction based on the exonerating evidence. After a thorough review of the evidence, Johnson concluded Lott’s conviction should be vacated. “Former District Attorney Smith’s opposition to the irrefutable evidence of Lott’s innocence was a blatant miscarriage of justice,” said Barry Scheck, Innocence Project’s cofounder and special counsel. “This unwillingness to acknowledge the truth in addition to the systemic factors at play in Lott’s wrongful conviction cost him 35 precious years and

have plagued other wrongful conviction cases in Ada for decades.”

Intentionally suggestive identification procedures as those undertaken in this case are found twice as often in Black and Latino exonerations compared with white exonerations, according to the National Registry of Exonerations (“NRE”). Compounding the problem is the fact that eyewitness misidentifications are the leading contributing factor in wrongful convictions. Eyewitness misidentifications were a contributing factor in 64% of the Innocence Project’s exonerations. Cross-racial identifications are particularly problematic. According to the NRE, 60% of sexual assault exonerees are Black, but less than 25% of people imprisoned for sexual assault are Black—suggesting that Black people are 800% more likely than white people to be falsely identified and imprisoned for sexual assault.

But perhaps nothing better exposes the appalling nature of America’s prosecutorial system than when prosecutors deliberately convict innocent people and maddeningly refuse to admit their error even in the face of conclusive evidence of factual innocence. 🗨️

Source: *forensicmag*

News in Brief

Colorado: On February 28, 2024, Chiara Wuensch, a DNA Analyst for the Weld County Sheriff’s Office at the Northern Regional Forensic Lab for more than 10 years was fired. The termination was the result of a roughly one-month internal investigation, which concluded that Wuensch’s case work had significant inconsistencies. Wuensch reportedly violated the Weld County Code for expectations of proper conduct as well as the Sheriff’s Office’s standards of conduct policy by refusing to cooperate with the investigation. The Colorado Bureau of Investigation began a separate investigation into their own staff, which was how Wuensch’s anomalies initially came to light. Exactly what inconsistencies

were committed by Wuensch have not been released because the investigation is ongoing. The Sheriff’s Office expects criminal charges to be filed against Wuensch.

England: According to the *Daily Mail*, the escape of a woman from a police vehicle in traffic with her wrists tightly bound by a cable tie in September 2023 prompted the investigation of a Metropolitan police officer. Former officer Cliff Mitchell, 24, of southwest London, threatened his victim that if she vomited in his car he would “slit her belly.” Shortly after the woman escaped, Mitchell was found and arrested in Putney, a town seven miles away. He was then taken into custody. A 2017 rape investigation had yielded no charges

against Mitchell but following his arrest for the September 2023 rape and kidnapping, the case was re investigated. The new investigation resulted in an additional three counts of rape of a child under 13 and three other rape counts. Another seven charges tied to the victim who was threatened in the car took place between 2020 and 2023. On February 21, 2024, at Croydon Crown Court, Mitchell was found guilty on ten counts of rape, three counts of rape of a child under 13, one count of kidnapping and breach of non-molestation order.

Florida: On the morning of November 12, 2023, the Okaloosa County Sheriff’s Office received a report of a disturbance in

a local neighborhood allegedly caused by Marquis Jackson. A woman had called the sheriff's office accusing someone of stealing a vehicle and sending threats. Shortly afterwards, Jackson was detained and placed into the back of Deputy Jesse Hernandez' patrol vehicle. *Vice* reports that as Hernandez approached the side door of his car, he suddenly heard something that sounded like a gunshot. The dash-cam footage shows him immediately falling to the ground. "Shots fired!" He shouts. "I'm hit! I'm hit!" He then proceeds to unload his sidearm into the vehicle, where the handcuffed and unarmed Jackson sat. Hernandez' partner reacted and unloaded her firearm into the vehicle as well. During the investigation, Hernandez was adamant that shots had been fired. He also added that he did not have law enforcement experience before OCSO but had served as an infantry officer for a decade in Afghanistan. When the investigators showed Hernandez the footage of the event he saw, frame-by-frame, an acorn falling from a tree and hitting the car. That was the noise which caused him to believe he was shot and wounded. Hernandez resigned on December 4, 2023, while being investigated. Jackson says he is "psychologically impacted and damaged for life."

Florida: The *Miami Herald* reported on February 1, 2024, that a string of pharmacy robberies had occurred in Columbia County. The robber used a variety of disguises, but his loot was always the same: bottles of painkillers. In January 2022, a good Samaritan took note of the license plate number of the getaway car after witnessing one of the robberies. The license plate led investigators to Jesse Rance Moore, 46, of Bell. Moore had been a Florida highway patrol trooper from 2003 to 2017 but with numerous disciplinary issues on his record. He was even fired twice, but each termination changed into a suspension. In 2016, he was in a bad car accident after hitting a deer. The doctor prescribed 27 medications which led to his dependency and downfall. After his arrest, a jail doctor was "stunned by the number of medications (he) was on." Jail staff described Moore's detox behavior as "extremely bizarre." Investigators found that Moore googled on his phone "Do drug stores get robbed in Florida?" Moore was sentenced to 21 years in federal prison on January 31, 2024.

Illinois: According to the *Columbus Dispatch*, Adam Nguyen, 27, had been with the Columbus police since October 2021. On January 9, 2024, he pled guilty to a class 3 felony charge in the Circuit Court of Cook County of

taking videos under clothing. He admitted to taking upskirt video of an underage girl, without her consent, at an anime convention last year in Chicago. Nguyen was sentenced to 24 months of probation, 100 hours of community service and ordered to undergo a sex-offender evaluation, among other conditions. Although Ohio law disqualifies any person with a federal conviction from being a police officer, Nguyen was still listed as "relieved of duty" on January 25, 2024, meaning he was still being paid pending an administrative investigation by the Columbus police.

Louisiana: On August 25, 2023, the U.S. Court of Appeals for the Fifth Circuit ruled that Waylon Bailey's Facebook post in March 2020 was protected speech under the First Amendment and that he should not have been arrested for terrorism. Bailey, 27 at the time, learned that his Facebook messages were not amusing to the deputies of Rapides Parish Sheriff's Office when a dozen or so of them wearing bulletproof vests came busting into his garage. Bailey's subsequent 2020 lawsuit alleged the sheriff and a detective violated his First and Fourth amendment rights. The Western District of Louisiana dismissed Bailey's claims in 2022 citing qualified immunity. The post that caused such furor in Rapides Parish Sheriff's Office spoofed the Brad Pitt movie, *World War Z*, and directed deputies to shoot on sight if they encountered the infected during the first month of the pandemic. The wording, the hashtags and the replies made it clear it was not a call to violence. When Bailey was arrested, he apologized to the deputies, telling them he meant no ill will. The ruling by the Fifth Circuit cleared the way for a jury to rule in Bailey's favor in January 2024 and order the Rapides Parish Sheriff's Office to pay him \$205,000 in punitive and compensatory damages.

Mexico: In December 2023, five Tijuana policemen seized drugs from a home in a gated community. According to *Vice*, a few days later, local media released a recording of a phone call between a local police commander and an alleged cartel member. In the recording, the cartel member says to the cop, "We sent you to watch over the job on Friday, dude, what they were stealing from us, and you joined the fucking thieves." Since that phone call, six policemen have been killed and five have been injured on the streets of Tijuana. At the time of writing, the most recent Tijuana cop to be found was Keevin Gaxiola. The cartel tortured Gaxiola and left him naked and dead. The non-profit group in Mexico that tracks crime in the country, *Causa en Comun*, reports that

on average a police officer is murdered every day. In a recent report *Causa* states that "In our country it is easy to kill a policeman and on rare occasions an investigation will follow, or an arrest will be made."

New Jersey: As reported by the Tap into Asbury Park website, a multi-car accident on November 9, 2023, became worse once the police arrived. Sergeant William Major was working the scene when Chief Leonard Guida arrived in sneakers and plainclothes. Guida immediately approached Major and commanded him to leave the scene because letters were peeling off his police jacket. Major removed the jacket and continued working the accident. Guida continued telling tell him to



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leave. His unreasonable demands escalated into a verbal altercation. Major was heard saying, "I am working, I don't have time to argue about a jacket." When Guida grabbed Major's arm, Major pushed Guida backwards, and pinned him down on the hood of vehicle. During the fight, Major can be heard saying "drunk again." Guida ended the confrontation by telling Major he was suspended but he loved him. A Monmouth County Prosecutor's Office investigation reported that in December 2023 Guida was placed on paid administrative leave from his \$204,000 a year job, where he remains.

New Mexico: The family of a Native American father of five struck and killed by a long-time judge in Questa filed a wrongful death lawsuit on February 8, 2024. According to KOB-TV in Albuquerque, Municipal Court Judge Michael G. Rael Sr. was speeding on his way home after playing a gig in August 2023 and hit and killed Nathan Kee Charley, 48. The lawsuit accuses the judge of trying to use his authority to obstruct a 911 operator as well as several policemen. When Rael made the 911 call, he said that Charley was naked. Then a 911 operator relayed to dispatch that "a suicidal naked man jumped into the road in front of Judge Rael's vehicle." When the police arrived, they failed to perform a sobriety test on Rael. Nor did they ticket the judge for speeding or driving without insurance. The police officers appear to have colluded to pin the blame on Charley for having been drunk, walking on a dark road at night and allegedly leaping onto the roadway. The family's attorney accuses Rael of driving negligently. They contend that Charley was hit from behind while walking on the shoulder.

New Mexico: KRQE in Albuquerque reported on February 14, 2024, that Bernalillo County Sheriff John Allen made a press statement expressing his frustration and disappointment with the behavior of three deputies in the first six weeks of this year. The day before the press release, a third deputy was charged with a crime. Daniel Vasquez-Moreno was arrested early on February 13 on an aggravated DWI after a domestic violence call. Sheriff Allen's problems with deputies began on New Year's Day when BCSO deputy Adrienne Seay was arrested for DWI. A few weeks later, BCSO Deputy Michael Borrecco finished his shift and purchased a 100-ml bottle of vodka at a convenience store. He was in the parking lot of Circle K on January 24 and instructed a group of people to leave via his public address system. When they ap-

proached his vehicle, Borrecco pointed his gun at them and said he was going to take their souls. When Albuquerque police responded, they noted that Borrecco smelled of alcohol and initially denied having a gun. In his car they found a gun, several magazines, two body-worn cameras and three empty bottles of vodka. An arrest followed that discovery.

Ohio: WCPO in Cincinnati reported that on January 18, 2024, Andrew Golobic, 52, a former Blue Ash ICE deportation agent, was convicted on four criminal charges including depriving a Honduran rape victim of her rights, obstruction, destroying evidence, and tampering with a witness. Golobic had been with ICE since 2006. According to a second woman, Golobic forced her to have sex with him in exchange for her passport. Trading sex for something else defines sex trafficking, so that was one of his charges. The jury was unable to reach a unanimous verdict on that charge though, which would have meant a possible life sentence. Golobic's responsibility with ICE was to supervise women in the Alternative to Deportation (ATD) program. Golobic admitted to having sex with other vulnerable women in the ATD program even though he knew it was unethical. However, he insisted that he never forced them to have sex, nor did he ever try to destroy evidence or influence witnesses. Meanwhile, in the current case, Golobic admitted to deleting apps and incriminating phone calls once the FBI asked to inspect his personal phone as part of the investigation.

Tennessee: On the night of February 21, 2024, Meigs County Deputy Robert "R.J." Leonard took a call regarding a man and a woman fighting on a bridge. Around 10 p.m. he arrested the woman. According to a *Reason* article, it was his first arrest since graduating from the academy and joining the force in December. Sadly, it would also be his last. After radioing that he was transporting the handcuffed suspect, Tabitha Smith, he sent a text to his wife composed of one word, "Arrest." According to the police report his wife texted back and congratulated him. While reading that message, Leonard drove the wrong way down a boat ramp and into the Tennessee River. The rookie police officer drove into the water near a ferry landing, an area that locals say is especially hazardous at night due to a hill and a sharp curve. Officials noted that Leonard was originally from New York and was likely unfamiliar with the area. "R.J.'s" passing is certainly tragic, but the handcuffed mother of two, who died because of "R.J.'s" negligence, deserves equal attention.

Washington: *The New York Times* reported that on March 21, 2022, Nicole McClure, then 38, left work early because she had a headache and felt dizzy. According to a lawsuit filed on February 1, 2024, Trooper Jonathan Barnes noticed McClure driving very slowly and wandering from her lane. He tried to stop her, but she kept driving until she crashed into a roundabout. The dash-cam footage shows Barnes throwing her onto his car and handcuffing the dazed woman. He repeatedly questioned her about drug use. McClure replied that she was confused and tired. Barnes arrested her but crossed out the section in his report regarding health and medical questions he was supposed to ask. Barnes transported McClure to a hospital for a blood draw and discovered she had no drugs in her system. Her next stop was a jail cell. Despite vomiting, desperate pleas for help, and her inability to stand, McClure was deprived of medical attention for 24 hours. When McClure was finally taken to the hospital, she underwent emergency brain surgery and remained in the hospital for seventeen days. McClure had been suffering a life-threatening brain bleed at the time of her arrest. According to her lawyer, "Had Nicole received immediate medical attention, her condition would have been significantly easier to treat and the outcome far less severe."

Wisconsin: As reported by *Journal Times*, on February 8, 2024, Preston Kite, 37, a Racine County Sheriff's Office (RCSO) deputy was charged with possession of child pornography, five counts of child sexual exploitation, lewd and lascivious behavior and disorderly conduct. The RCSO investigated Kite after they were contacted by an individual who claimed that he had received a message on an app for gay, bisexual and curious men asking him to come to a bathroom stall at a gas station. While the individual was washing his hands, the stall door behind him opened and Kite appeared in full uniform with his genitals on display. The individual was alarmed, so he left and contacted Racine dispatch. Kite was taken into custody where he allegedly admitted that someone online agreed to meet him at the gas station. During the investigation of the bathroom rendezvous, officials found child porn on Kite's phone. On February 15, he appeared in court without a lawyer. The hearing was postponed to March 7, 2024, to allow his family time to find legal counsel. Kite is currently on unpaid administrative leave pending the termination process. 🗞️

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Prison Education Guide, by Christopher Zoukis, PLN Publishing (2016), 269 pages. **\$24.95**. This book includes up-to-date information on pursuing educational coursework by correspondence, including high school, college, paralegal and religious studies. **2019**

The Habeas Citebook: Ineffective Assistance of Counsel, 2nd Ed. (2016) by Brandon Sample, PLN Publishing, 275 pages. **\$49.95**. This is an updated version of PLN's second book, by former federal prisoner Brandon Sample, which extensively covers ineffective assistance of counsel issues in federal habeas petitions. **2021**

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. **\$54.95**. PLN's second anthology exposes the dark side of the 'lock-em-up' political agenda and legal climate in the U.S. **1041**

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Everyday Letters for Busy People: Hundreds of Samples You Can Adapt at a Moment's Notice, by Debra May, 287 pages. **\$21.99**. Here are hundreds of tips, techniques, and samples that will help you create the perfect letter. **1048**

Protecting Your Health and Safety, by Robert E. Toone, Southern Poverty Law Center, 325 pages. **\$10.00**. This book explains basic rights that prisoners have in a jail or prison in the U.S. It deals mainly with rights related to health and safety, such as communicable diseases and abuse by prison officials; it also explains how to enforce your rights, including through litigation. **1060**

Spanish-English/English-Spanish Dictionary, 2nd ed., Random House. 694 pages. **\$15.95**. Has 145,000+ entries from A to Z; includes Western Hemisphere usage. **1034a**

Writing to Win: The Legal Writer, by Steven D. Stark, Broadway Books/Random House, 303 pages. **\$19.95**. Explains the writing of effective complaints, responses, briefs, motions and other legal papers. **1035**

Roget's Thesaurus, 709 pages. **\$9.95**. Helps you find the right word for what you want to say. 11,000 words listed alphabetically with over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. **1045**

Beyond Bars, Rejoining Society After Prison, by Jeffrey Ian Ross, Ph.D. and Stephen C. Richards, Ph.D., Alpha, 224 pages. **\$14.95**. Beyond Bars is a practical and comprehensive guide for ex-convicts and their families for managing successful re-entry into the community, and includes information about budgets, job searches, family issues, preparing for release while still incarcerated, and more. **1080**

Directory of Federal Prisons: The Unofficial Guide to Bureau of Prisons Institutions, by Christopher Zoukis, 764 pages. **\$99.95**. A comprehensive guidebook to Federal Bureau of Prisons facilities. This book delves into the shadowy world of American federal prisoners and their experiences at each prison, whether governmental or private. **2024**

Merriam-Webster's Dictionary of Law, 634 pages. **\$19.95**. Includes definitions for more than 10,000 legal words and phrases, plus pronunciations, supplementary notes and special sections on the judicial system, historic laws and selected important cases. Great reference for jailhouse lawyers who need to learn legal terminology. **2018**

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Prisoners' Self-Help Litigation Manual, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 928 pages. **\$69.95.** The premiere, must-have "Bible" of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Includes detailed instructions and thousands of case citations. Highly recommended! **1077**

How to Win Your Personal Injury Claim, by Atty. Joseph Matthews, 9th edition, NOLO Press, 411 pages. **\$34.99.** While not specifically for prison-related personal injury cases, this book provides comprehensive information on how to handle personal injury and property damage claims arising from accidents. **1075**

Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A., by Mumia Abu-Jamal, 286 pages. **\$16.95.** In Jailhouse Lawyers, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned advocates who have learned to use the court system to represent other prisoners—many uneducated or illiterate—and in some cases, to win their freedom. **1073**

Sue the Doctor and Win! Victim's Guide to Secrets of Malpractice Lawsuits, by Lewis Laska, 336 pages. **\$39.95.** Written for victims of medical malpractice/neglect, to prepare for litigation. Note that this book addresses medical malpractice claims and issues in general, not specifically related to prisoners. **1079**

Disciplinary Self-Help Litigation Manual, by Daniel Manville, 355 pages. **\$49.95.** By the co-author of the Prisoners' Self-Help Litigation Manual, this book provides detailed information about prisoners' rights in disciplinary hearings and how to enforce those rights in court. Includes state-by-state case law on prison disciplinary issues. This is the third book published by PLN Publishing. **2017**

The PLRA Handbook: Law and Practice under the Prison Litigation Reform Act, by John Boston, 576 pages. **Prisoners - \$84.95, Lawyers/Entities - \$224.95.** This book is the best and most thorough guide to the PLRA provides a roadmap to all the complexities and absurdities it raises to keep prisoners from getting rulings and relief on the merits of their cases. The goal of this book is to provide the knowledge prisoners' lawyers – and prisoners, if they don't have a lawyer – need to quickly understand the relevant law and effectively argue their claims. **2029**

Federal Prison Handbook, by Christopher Zoukis, 493 pages. **\$74.95.** This leading survival guide to the federal Bureau of Prisons teaches current and soon-to-be federal prisoners everything they need to know about BOP life, policies and operations. **2022**

Locking Up Our Own, by James Forman Jr., 306 pages. **\$19.95.** In Locking Up Our Own, he seeks to understand the war on crime that began in the 1970s and why it was supported by many African American leaders in the nation's urban centers. **2025**

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Caught: The Prison State and the Lockdown of American Politics, by Marie Gottschalk, 496 pages. **\$27.99.** This book examines why the carceral state, with its growing number of outcasts, remains so tenacious in the United States. **2005**

Encyclopedia of Everyday Law, by Shae Irving, J.D., 11th Ed. Nolo Press, 544 pages. **\$34.99.** This is a helpful glossary of legal terms and an appendix on how to do your own legal research. **1102**

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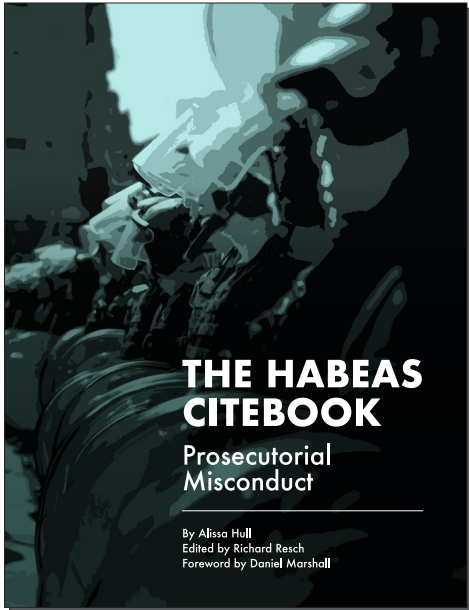
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By Alissa Hull

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