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The Evolving Science, Skepticism, and Limited Evidentiary Value of Firearm and Toolmark Identification

by Douglas Ankney

IN *PEOPLE v. KIRSCHKE*, 53 CAL.APP.3D 405 (1975), a firearm and toolmark identification (“FTI”) expert testified for the prosecution “that an evidence bullet had been fired by a particular firearm and that ‘no other weapon in the world was the murder weapon.’” But in post-conviction proceedings, court-appointed experts stated that a positive identification could not be made. The court found that the expert had “negligently presented false demonstrative evidence in support of his ballistics testimony.” Paul C. Giannelli, “*Daubert Challenges to Firearms Identifications*,” Case Western School of Law (2007) (“Giannelli’s Report”).

Then in 2006, departing from almost a century of judicial precedent, the U.S. District Court for the Southern District of New York limited the “expert” testimony of an FTI analyst by refusing to permit the expert to testify that, “to a reasonable degree of ballistic certainty,” a bullet and shell casings recovered at a crime scene came from firearms linked to the defendant. *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2006). District Judge Jed S. Rakoff observed in *Glynn* that whatever else ballistics identification analysis could be called, it cannot fairly be called science. *See Id.*

The following article will: (1) discuss the history of FTI, (2) explain the general methods and practices of FTI, (3) briefly examine the judiciary’s almost blind acceptance of FTI expert testimony, (4) review the criticisms of FTI that call into question its continued scientific validity, (5) review the leading studies of FTI that were designed to rebuff those criticisms and confirm the scientific validity of FTI, and (6) examine the attempts to make

FTI legitimate and reliable.

Part 1: The History of FTI

FTI, LIKE ALL FORENSIC SCIENCES, DID NOT develop as part of university research using the scientific method to discover truth about the natural world. Forensic science developed under the auspices of law enforcement in both investigating and prosecuting crime.

FTI is commonly referred to as “ballistics,” but this is a misnomer. “Ballistics is the study of the motion of a projectile. Interior ballistics concerns the study of the projectile within the firearm; exterior ballistics concerns the study of the projectile after it leaves the firearm; and terminal (wound) ballistics concerns the study of the effects of the projectile on a target. Giannelli’s Report.

On the other hand, the Association of Firearm and Toolmark Examiners (“AFTE”) (FTI’s largest professional organization) defines FTI as: “Toolmark Identification is a discipline of forensic science which has as its primary concern to determine if a toolmark was produced by a particular tool. Firearm Identification is a subcategory of toolmark identification, which has as its primary concern to determine if a bullet, cartridge case, or other ammunition component was fired by a particular firearm.”

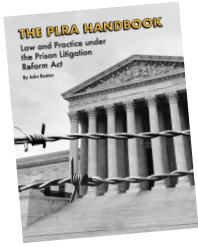
According to Joe Nickell and John F. Fischer’s *Crime Science: Methods of Forensic Detection* (1999) (“*Crime Science*”), the first recorded instance of a person attempting to match a gunshot to the person who fired it occurred in Lancashire, England, in 1794. The paper wadding that had been tamped down around the lead ball and gun powder in

the barrel had lodged inside the victim along with the lead ball. The wadding was a piece torn from a street ballad. When the suspect was arrested, found in his pocket was the remainder of the ballad which the piece from the wound matched exactly. He was convicted and sentenced to death.

However, it was not until 1835 that a bullet removed from a victim’s body (as opposed to wadding) was linked to a suspect in a crime. Crime Science. Henry Goddard, an assistant to a magistrate, observed a ridge-like blemish on a bullet removed from a murder victim. Upon observing a bullet mold at the home of the suspect that had a corresponding gouge

INSIDE

Op-Ed: Fix First Step Act, Irrebuttable Presumption	17
Column: Selfless Service – Compassionate Release	20
SCOTUS Announces SOL for § 1983, DNA Testing	22
MA S Ct Announces When SOL Runs Pretrial Detention	28
11th Cir Announces Ineligible Safety Valve § 355(f)(1)	28
NY Ct App Announces When Alt Juror ‘Discharged’	30
CA Ct App: Geofence Warrant Violates 4th Amendment	32
WA S Ct Announces ‘Automatic Reversal’ Bias Voir Dire	36
CA Ct App Announces ‘Plausible Justification’ Standard	43
OH S Ct: IAC to Mention ‘Neonaticide’ Not Explain It	44
Bloodstain Analysis in Short-Range Shootings	46
Study: High Rate of Police Killings in America	47
News in Brief	50



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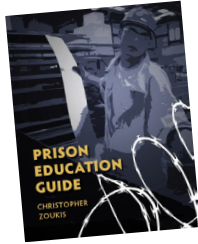
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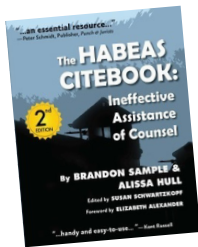
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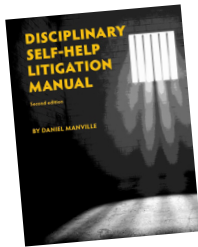
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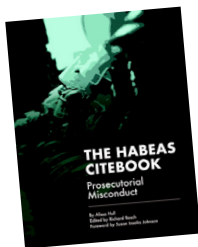
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Firearm Identification (cont.)

at the same location of the bullet, Goddard confronted the suspect, and he confessed to the murder. *Id.*

In 1898, German chemist Paul Jeserich was the first to microscopically compare a bullet that had been removed from a murder victim with another bullet test fired from the suspected murder weapon. *Id.* Jeserich testified that based upon the agreement of the two bullets' markings, the fatal bullet was fired from the defendant's gun.

But the "founder" of modern FTI is Calvin Goddard (no apparent relation to Henry Goddard). Crime Science. In 1927, Goddard examined the cartridge cases and bullets that were used as evidence in the convictions of Nicola Sacco and Bartolomeo Vanzetti.

Years earlier, Sacco and Vanzetti had been convicted of murdering two men during a robbery and were sentenced to death. The pair had been arrested days after the crime, and at the time of the arrest, Sacco had a .32 caliber pistol in his pocket. A total of six .32 caliber bullets had been recovered from the murder victims. At trial, the prosecution experts testified one of the fatal bullets was fired from Sacco's pistol, but the defense experts testified that the bullet could not have been fired from Sacco's gun. After the duo was convicted, there was a worldwide outcry with protests in Moscow, Paris, London, and major cities in Brazil. The British Labour Party, the German Reichstag, and the French Chamber of Deputies issued calls for their release.

It was widely believed that the two men, who were both impoverished immigrants and anarchists, were victims of the perverted justice of elite capitalists. Massachusetts Governor A.T. Fuller, bowing to international pressure, appointed a commission to review the facts of the case.

To this commission, Goddard volunteered his services. Using a comparison microscope, Goddard conducted comparisons of the cartridge cases and bullets from the crime scene with cartridge cases and a bullet test fired from Sacco's .32 pistol. Goddard explained that one of the shell casings and one of the fatal bullets recovered from the crime scene contained markings that matched the bullet and shell casing test fired from Sacco's pistol.

On August 23, 1927, Sacco and Vanzetti were executed in the Massachusetts electric chair. Vanzetti forgave "those who were executing an innocent man." Crime Science.

Almost 50 years later in 1977, then Massachusetts Governor Michael Dukakis, in an act that casts doubt on Goddard's conclusions, issued a proclamation exonerating Sacco and Vanzetti of any shame or disgrace attached to their names because their trial had been unfair. While Dukakis did not exonerate the men of their guilt (saying their guilt or innocence could not now be known), he stated that there was no question that the judge conducted the trial in a biased manner, and if held today, the verdicts would undoubtedly be reversed by the Massachusetts Supreme Court.

Goddard also used his comparison microscope and methodology in the investigation of the St. Valentine's Day Massacre in Chicago in 1929. On that date, two men wearing police uniforms entered a garage with guns drawn. Placing members of Bugs Moran's bootlegging gang along a wall, the two in police uniforms watched as two other men shot Moran's men to death with .45 caliber Thompson submachine guns. Crime Science. Chicago police called upon Goddard to compare the .45 caliber Thompson submachine guns used by the Chicago Police Department with the cartridge casings and bullets recovered from the crime scene to assure the public that the police did not murder those men. According to Goddard, none of the Police Department's submachine guns were used in the crime. Ten months later, Goddard compared cartridge casings and bullets test fired from submachine guns discovered in the home of one of Al Capone's men with the crime-scene evidence and testified at the man's trial that those guns were used in the massacre.

"Goddard's success was rewarded by two wealthy businessmen who had served on the coroner's jury and were so impressed that they financed Goddard's own Scientific Crime Detection Laboratory at Northwestern University. He later helped the FBI set up its firearms section when its Criminological Laboratory, as it was then known, was opened in 1932. Its very first piece of laboratory equipment was a comparison microscope." Crime Science.

Part 2: Common FTI Methods and Practices

AS WILL BE FULLY EXPLAINED IN PART 4, IN the discipline of FTI, no uniform or standard protocol is observed by all forensic science laboratories or analysts. But the Assistant General Counsel for the FBI's Forensic Laboratory at Quantico, Virginia, Colonel (Ret.) James R. Agar, II reports the following:

Firearm Identification (cont.)

“Contemporary firearms examinations closely follow the methodology Calvin Goddard pioneered nearly a century ago. During its investigation of President Kennedy’s assassination, the Warren Commission described the fundamental principles of firearm identification as follows:

A cartridge, or round of ammunition, is composed of a primer, a cartridge case, powder, and a bullet. The primer, a metal cup containing a detonable mixture, fits into the base of the cartridge case, which is loaded with powder. The bullet, which usually consists of lead or of a lead core encased in a higher strength metal jacket, fits into the neck of the cartridge case. To fire the bullet, the cartridge is placed in the chamber of a firearm, immediately behind the firearm’s barrel. The base of the cartridge rests against a solid support called the breech face or, in the case of a bolt-operated weapon, the bolt face. When the trigger is pulled, a firing pin strikes a swift, hard blow to the primer, detonating the priming mixture. The flames from the resulting explosion ignite the powder, causing a rapid combustion whose force propels the bullet forward through the barrel.

The barrels of modern firearms are ‘rifled,’ that is, several spiral grooves are cut into the barrel from end to end. The purpose of the rifling is to set the bullet spinning around its axis, giving it a stability in flight that it would otherwise lack. The weapons of a given make and model are alike in their rifling characteristics; that is, number of grooves, number of lands (the raised portion of the barrel between the grooves) and twist of the rifling. When a bullet is fired through a barrel, it is engraved with those rifling characteristics.

In addition to rifling characteristics, every weapon bears distinctive microscopic characteristics on its components, including its barrel, firing pin, and breech face. While a weapon’s rifling characteristics are common to all other weapons of its make and model (and sometimes even to weapons of a different make or model), a weapon’s microscopic characteristics are distinctive, and differ from those of every other weapon, regardless of make and model. Such markings are initially caused during manufacture, since the action of manufacturing tools differs microscopically from weapon to weapon, and since tools change microscopically while being operated. As a weapon is used, further distinctive microscopic markings are introduced by the effects

of wear, fouling, and cleaning.

When a cartridge is fired, the microscopic characteristics of the weapon’s barrel are engraved into the bullet (along with its rifling characteristics), and the microscopic characteristics of the firing pin and breech face are engraved into the base of the cartridge case. By virtue of these microscopic markings, an expert can frequently match a bullet or cartridge case to the weapon in which it was fired. To make such an identification, the expert compares the suspect bullet or cartridge case under a comparison microscope, side by side with a test bullet or cartridge case which has been fired in the weapon, to determine whether the pattern of the markings in the test and suspect items are sufficiently similar to show that they were fired in the same weapon.” Colonel (Ret.) James R. Agar, II, “The Admissibility of Firearms and Toolmarks Expert Testimony in the Shadow of PCAST,” 74:1 Bay. L. Rev. 93 (2022) (“Agar’s Report”).

The characteristics of the bullets and cartridge cases are typically identified as “class characteristics,” “individual characteristics,” or “subclass characteristics.” Agar’s Report. Class characteristics include the caliber of the bullet or cartridge case and their composition materials, the firing pin impression; general rifling characteristics (the number of lands and whether right- or left-hand twist); breech-face marks; manufacturer identification; headstamp; bullet weight; and priming material. *Id.* Class characteristics are the design factors that were determined prior to manufacturing. Class characteristics are useful in eliminating a bullet or cartridge case as being fired from a particular firearm or in restricting the pool of potential firearms that could have fired a bullet or cartridge case (e.g., if a fatal bullet is a .45 caliber, then the .22 caliber pistol in the suspect’s pocket could not have fired it). *Id.* Based on class characteristics, FTI analysts cannot identify an evidentiary cartridge case or bullet as coming from any particular firearm. *Id.*

Individual characteristics are marks that FTI analysts consider unique to an individual tool or firearm. These marks include random imperfections and irregularities during manufacturing. These individual characteristics are also caused by use of the firearm, cleaning, and/or corrosion. *Id.*

Between class characteristics and individual characteristics are the subclass characteristics. These are marks that may be found on a few dozen or even a few hundred firearms of the same make and model that occurred during an irregularity in manufactur-

ing, such as when a machining tool is out of alignment or is chipped. *Id.*

If the FTI analyst or expert determines that the class characteristics of the bullet(s) in evidence are compatible with the suspected firearm, the expert will fire a test bullet from the firearm into boxes of cotton waste or a recovery tank filled with water. Crime Science. An evidence bullet and test bullet are then examined simultaneously side by side beneath a comparison microscope as follows:

“After the two bullets are mounted, the usual practice is for the examiner to scrutinize the entire surface of the rotating bullets at relatively low magnifications for the purpose of locating on one of the bullets the most prominent group of striations. [Writer’s note: striations are slight or narrow furrows, ridges, stripes, or streaks usually in a parallel arrangement.] Once such marks are located, say on the evidence bullet, that bullet is permitted to remain stationary. Then the examiner rotates the other, or test, bullet in an attempt to find a corresponding area with individual characteristics that match those on the evidence bullet. If what appears to be a match is located, the examiner rotates both bullets simultaneously to determine whether or not similar coincidences exist on other portions of the bullets. Upon finding corresponding marks on other portions, while having the bullets in the same relative positions as when the first matches were observed, the examiner proceeds with further examinations of the same nature at higher magnifications. A careful study of all the detail on both bullets ultimately permits him to conclude that both bullets were or were not fired through the same barrel.” *Id.*

But “[e]ven if bullets were fired in succession from the same weapon, not all individual characteristics would be identical. There would be some striations caused by powder residues, rust, corrosion and pitting, sand or dirt, and other surface factors or ‘fugitive’ materials which of course are not likely to be duplicated on all bullets through that particular barrel. Moreover, there might be other striations on the bullets which would have no relationship to the interior of the barrel through which they were fired. For instance, there might be marks on metal-cased bullets due to imperfections on the interior of the sizing die used in the fabrication of the bullet. Likewise, fired bullets might contain crimp or burr impressions left there by the mouth of the cartridge case or shell. Obviously, the presence or absence of such marks, whether duplicated or not, must be discounted by the

firearms identification technician." *Id.*

Shell or cartridge case identification "is based on certain markings left on the case by the firearm's mechanisms. Most of the markings are found on the base, or closed end, of the case, the end where the primer is located, and they are studied and compared in juxtaposition with the comparison microscope. Firing pin indentations are produced when the firing pin is struck by the hammer and forced into the primer, leaving a crater. Breech face markings are caused by burning gases inside the casing forcing the cartridge back against the weapon's breech face. Any striations on the breech face are recorded on the shell. In semiautomatic and automatic firearms, both extractor markings and ejector markings are left by the respective mechanisms on the rim of the shell case. Also, in semiautomatic pistols, the magazine may leave marks on the side of the cartridge. And, depending on the firearm, certain additional markings may be imparted to the shell case as the result of some particular mechanism." *Id.*

Again, all of the markings on two cartridge cases from two successive firings of one firearm will not match. Possible causes of these differences include the position of the cartridge in the magazine; the difference

in the amount of force from the gases of the fired cartridges forcing the cartridge case onto the breech face; and markings on the case from striking the pavement or other objects after ejection from the firearm. "Regardless, the task of the firearms and toolmark examiner is to identify the individual characteristics of microscopic toolmarks apart from class and subclass characteristics and then to assess the extent of agreement in individual characteristics in the two sets of toolmarks to permit the identification of an individual tool or firearm." Agar's Report.

It must be emphasized that FTI analysts or examiners do not follow a uniform protocol. However, the Federal Bureau of Investigation ("FBI") permits FTI examiners to reach one of three conclusions or opinions: (1) Source Identification, (2) Source Exclusion, or (3) Inconclusive. *Id.* A Source Identification is defined as: "[A]n examiner's conclusion that two toolmarks originated from the same source. This conclusion is an examiner's opinion that all observed class characteristics are in agreement and the quality and quantity of corresponding individual characteristics is such that the examiner would not expect to find that same combination of individual characteristics repeated in another source and has

found insufficient disagreement of individual characteristics to conclude they originated from different sources.

The basis for a 'source identification' conclusion is an examiner's opinion that the class characteristics and corresponding individual characteristics provide extremely strong support for the proposition that the two toolmarks originated from the same source and extremely weak support for the proposition that the two toolmarks originated from different sources." *Id.*

Source Exclusion is defined as "the examiner's opinion that two bullets or cartridge cases did not come from the same source or firearm." *Id.*

Inconclusive permits the FTI examiner to opine that his or her examination or comparison is inconclusive because, "while the observed class characteristics agree, there is insufficient quality and/or quantity of corresponding individual characteristics that the examiner is unable to identify or exclude the two toolmarks as having originated from the same source." *Id.*

In similar fashion, the AFTE's Theory of Identification is:

"1. The theory of identification as it pertains to toolmarks enables opinions of

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Firearm Identification (cont.)

common origin to be made when the unique surface contours of two toolmarks are in sufficient agreement.

2. This sufficient agreement is related to the significant duplication of random toolmarks as evidenced by the correspondence of a pattern or combination of patterns of surface contours. Significance is determined by the comparative examination of two or more sets of surface contour patterns comprised of individual peaks, ridges, and furrows. Specifically, the relative height or depth, width, curvature, and spatial relationship of the individual peaks. Ridges and furrows within one set of surface contours are defined and compared to the corresponding features in the second set of contours. Agreement is significant when it exceeds the best agreement demonstrated between two toolmarks known to have been produced by the same tool. The statement that sufficient agreement exists between two toolmarks means that the likelihood another tool could have made the mark can be considered a practical impossibility.

3. The current interpretation of individualization/identification is subjective in nature, founded on scientific principles and based on the examiner's training and experience."

Part 3: The Judiciary's Historical Acceptance of FTI Evidence

IN *PEOPLE v. BERKMAN*, 139 N.E. 91 (ILL. 1923), the Supreme Court of Illinois opined

that the positive identification of a bullet was not only impossible but "preposterous." Yet in just seven years, that same court became one of the first in the United States to admit firearms identification evidence. *People v. Fisher*, 172 N.E. 743 (Ill. 1930). And the technique rapidly gained widespread judicial acceptance. As District Judge Rakoff wrote: "By way of general background, for many decades ballistics testimony was accepted almost without question in most federal courts in the United States." *Glynn*. The vast majority of reported opinions in criminal cases revealed that trial judges rarely excluded expert testimony, and reported appellate opinions revealed that challenges to the admission of expert testimony were seldom successful.

For the first 50 years, the admissibility of expert FTI testimony was governed by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Agar's Report. Admission of expert testimony under *Frye* required a scientific principle or discovery to be "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye*. FTI experts encountered little difficulty in passing the *Frye* test as the courts looked to Goddard's earlier cases as the blueprint to evaluate the FTI discipline and the testimony of purported FTI experts. Agar's Report.

In 1975, the Federal Rules of Evidence ("FRE") were adopted by the federal courts. FRE 702 addresses the admissibility of expert opinion testimony. Amended several times thereafter, the current FRE 702 reads:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

Then in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), a unanimous U.S. Supreme Court determined that FRE 702 superseded the *Frye* test. Agar's Report; see also *Daubert*. The *Daubert* Court instructed that federal judges have a "gatekeeping" role to ensure that admitted expert evidence is both relevant and reliable. Courts were long experienced with determining whether evidence is relevant, but determining

whether evidence is reliable was another matter. Though, whether expert witness testimony is reliable is really the crux of expert witness testimony itself.

The *Daubert* opinion listed five non-exhaustive factors to guide courts in determining whether evidence is reliable. Factor (1) considers whether a scientific theory or technique can be (and has been) tested. Factor (2) asks "whether the theory or technique has been subjected to peer review and publication." Factor (3) considers any "known or potential rate of error." Factor (4) weighs "the existence and maintenance of standards controlling the technique's operation." And factor (5) evaluates the "general acceptance" within the "relevant scientific community." The *Daubert* Court cautioned that the focus "must be solely on principles and methodology, not on the conclusions they generate" and reiterated that FRE 702's reliability determination is a "flexible one."

The U.S. Supreme Court later clarified that the federal courts' "gatekeeping" function "applie[d] not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge [and] a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability." *Kumho Tire Co., LTD. v. Carmichael*, 526 U.S. 137 (1999).

The *Kumho Tire* Court emphasized that, irrespective of the *Daubert* factors, "the relevant reliability concerns may focus upon personal knowledge or experience." Additionally, FRE 702 permits evidence that would have been inadmissible under *Frye*. *Id.*

In *United States v. Hicks*, 389 F.3d 514 (5th Cir. 2004), it was observed that "the matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades." Agar's Report. And in *United States v. Williams*, 506 F.3d 151 (2d Cir. 2007), the Court found that, even in the absence of an admissibility hearing, the firearm expert's testimony was admissible based on her education, training, and experience.

"A survey of reported opinions from U.S. district courts and state courts from 2000-2008 reveals many of the courts reviewed the admissibility of firearms identification testimony. One of these early cases was *United States v. Santiago* [199 F. Supp. 2d 101 (S.D.N.Y. 2002)], where the Southern District of New York opined expert testimony for firearms identification would be admis-

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sible even if such expertise was not from the 'scientific community' and 'was based purely on experience.' No pre-trial admissibility hearing was held in *Santiago*. Yet the trial court relied, in part, on the implicit endorsement of firearms expert witnesses by the U.S. Supreme Court in *United States v. Schaeffer* [523 U.S. 303 (1998)], where the Court upheld the exclusion of polygraph evidence at a court martial because a polygraph examiner was 'unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene....' Agar's Report.

Because the *Daubert* Court had cautioned that reliability determinations "must be solely on principles and methodology, not on the conclusions they generate," the prosecution's expert FTI witnesses were often able to testify to outlandish conclusions. The experts made "assertions that their matches are certain beyond all doubt, that the error rate of their methodology is 'zero,' and other such pretensions." *Glynn*.

According to the 2016 report from the President's Council of Advisors on Science and Technology ("PCAST Report"), trial transcripts reveal the exaggerations of forensic experts testifying that their

conclusions are "100% certain;" have "zero," "essentially zero," "vanishingly small," "negligible," "minimal," or "microscopic" error rate; or have a chance of error so remote as to be a "practical impossibility." Such statements are scientifically indefensible since all laboratory tests and feature-comparison analysis have error rates greater than zero. And yet, such unsupported claims have been made in a myriad of criminal trials.

Undoubtedly, such factually inaccurate testimony contributes to miscarriages of justice. For example, at the trial of Patrick Pursley for a murder that occurred in Rockford, Illinois, on April 2, 1993, the State had no eyewitnesses, no confession, and no DNA or fingerprint evidence linking him to the crime. Undeterred by the lack of any legitimate evidence, the State built its case on the testimony of an FTI expert who testified that the bullets and cartridge casings recovered from the crime scene matched to a 9-millimeter Taurus firearm recovered from Pursley's home "to the exclusion of all other firearms." Pursley was convicted but maintained his innocence. In 2007, the Illinois postconviction forensic testing statute was amended, permitting comparisons of the test fired evidence and the crime scene evidence using digital images

from the National Ballistics Identification Network ("NIBIN"). [Writer's note: In the early 1990s, the FBI and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") developed separate databases of images of bullets and cartridge cases that could be queried for potential matches. The National Institute of Standards and Technology ("NIST") integrated these databases, and it is now the NIBIN maintained by the ATF.]

Ultimately, based on these NIBIN images and re-examination of the trial evidence, two independent experts concluded that neither the cartridge cases nor the bullets from the crime scene came from the firearm recovered from Pursley's home. In January 2019, Pursley was re-tried and acquitted. He served nearly 24 years in prison for a murder he did not commit due to the factually indefensible and thoroughly exaggerated testimony of a so-called FTI expert.

Part 4: Questioning FTI's Scientific Validity

IN 2008, THE NATIONAL ACADEMY OF SCIENCES NATIONAL RESEARCH COUNCIL ("NRC") published a landmark report titled "Ballistic Imaging." Agar's Report. In *Ballistic Imaging*, the NRC commissioned a review to assess the feasibility, accuracy, and technical

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Firearm Identification (cont.)

capability of a national ballistics database to criminal investigations. In concluding that a national ballistics image database was not feasible at that time, the NRC Committee found that the “validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated.” *Id.* Also, the Ballistic Imaging report was careful to “note that the committee does not provide an overall assessment of firearms identification as a discipline nor does it advise on the admissibility of firearms-related toolmarks evidence in legal proceedings: these topics are not within its charge.” *Id.*

In 2009, the NRC published the congressionally mandated study of forensic science in a report entitled “Strengthening Forensic Science in the United States: A Path Forward” (“NRC Report”). The NRC Report reviewed a broad spectrum of forensic science and criticized several forensic disciplines, including FTI: “With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual source.” The NRC Report made clear that “problems, irregularities, and miscarriages of justice [could not] simply be attributed to a handful of rogue analysts or underperforming laboratories but [were] systemic and pervasive.” PCAST Report. With

regard to FTI, the NRC Report observed: “Knowing the extent of agreement in marks made by different tools, and the extent of variation in marks made by the same tool, is a challenging task. AFTE standards acknowledge that these decisions involve subjective qualitative judgments by examiners and that the accuracy of examiners’ assessments is highly dependent on their skill and training. In earlier years, toolmark examiners relied on their past casework to provide a foundation for distinguishing between individual, class, and subclass characteristics. More recently, extensive training programs using known samples have expanded the knowledge base of examiners.”

The NRC Report further observed that “[m]uch forensic evidence – including, for example, bite marks and firearm and toolmark identifications – is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.” Janis C. Puracal and Aliza B. Kaplan, “Science in the Courtroom: Challenging Faulty Forensics,” *The Champion* (Jan./Feb. 2020) (“Puracal and Kaplan’s Report”).

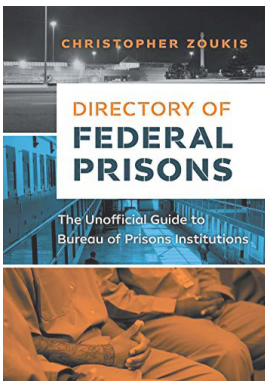
The NRC Report revealed “[t]here is no uniformity in the certification of forensic practitioners, or in the accreditation of crime laboratories. Indeed, most jurisdictions do not require forensic practitioners to be certified, and most forensic disciplines have no mandatory certification programs. Moreover, accreditation of crime laboratories is not

required in most jurisdictions. Often there are no standard protocols governing forensic practice in a given discipline. And, even when protocols are in place ... they often are vague and not enforced in any meaningful way.” Jessica D. Gabel, “Realizing Reliability in Forensic Science from the Ground Up,” 104 *J. Crim. L. & Criminology* 283 (2014) (“Gabel’s Report”). The NRC Report concluded that the problems with forensic evidence could “only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.” Gabel’s Report.

Most critical of FTI, the NRC Report explained: “Because not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods. The committee agrees that class characteristics are helpful in narrowing the pool of tools that may have left a distinctive mark. Individual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable.”

A fundamental problem with toolmark and firearm analysis is the lack of a precisely defined process. As noted above, AFTE has adopted a theory of identification, but it does not provide a specific protocol. It says that an examiner may offer an opinion that a specific tool or firearm was the source of a specific set of toolmarks or a bullet striation pattern when ‘sufficient agreement’ exists in the pattern of two sets of marks. It defines agreement as significant ‘when it exceeds the best agreement demonstrated between tool marks known to have been produced by different tools and is consistent with the agreement demonstrated by tool marks known to have been produced by the same tool.’ The meaning of ‘exceeds the best agreement’ and ‘consistent with’ are not specified, and the examiner is expected to draw on his or her own experience. This AFTE document, which is the best guidance available for the field of toolmark identification, does not even consider, let alone address, questions regarding variability, reliability, repeatability, or number of correlations needed to achieve a given degree of confidence.”

Since publication of the NRC Report, many studies were undertaken and much



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literature was produced that exposed additional flaws of FTI and called the discipline's validity and evidentiary value into question. As is noted in Kenneth S. Broun, "McCormick, Evidence," 6th ed. (2006) §210: "[A]ny expert giving any opinion on whether the scientific test identifies the defendant as being the person who left the incriminating trace, such as a ... bullet ... necessarily bases this conclusion on an understanding or impression of how similar the items being compared are and how common it is to find items with these similarities. If these beliefs have any basis in fact, it is to be found in the general experience of the criminalists or more exacting statistical studies of these matters." Giannelli's Report. FTI falls into the former category since it is based on the experience of the examiners and not on statistical studies. And it is the reliance on this experience that critics question. *Id.*

Even when marks on two or more casings are the same, it does not mean the casings came from the same gun, and when marks on the casings are different, it does not mean they came from different guns. *Id.* In one study, 52% of matching striations were observed in samples known to not be from the same firearm, and a maximum of only 86% of matching striations were observed in samples known to be from the same firearm. William A. Tobin and Peter J. Blau, "Hypothesis Testing of the Critical Underlying Premise of Discernible Uniqueness in Firearms-Toolmarks Forensic Practice," 53 *Jurimetrics J.* 122 (2013) ("Tobin and Blau").

Compounding the problem is the fact that there is no objective standard in determining whether a mark is a class characteristic, subclass characteristic, an individual characteristic, or even an accidental mark. The case of *United States v. Green*, 405 F. Supp. 2d 104 (D. Mass. 2005), highlights this critical flaw. In *Green*, the FTI expert testified that shell casings recovered from the crime scene came from a specific .380 caliber Hi Point pistol linked to the defendants and that the "match" was made "to the exclusion of every other firearm in the world." Yet, when questioned at a *Daubert* hearing about a marking unique to one cartridge case that was an "upside down checkmark" in appearance, the FTI expert stated he did not know what it was, did not know what caused it, and did not attach any significance to it. The expert testified the mark was accidental in nature, whether caused by the manufacturer, the primer, or scratched prior to being placed in the gun.

When asked how he knew that, the

expert answered, "I do not know that." He testified that his decision to ignore the mark and still call the casings a match was not based on any studies or database but was based solely on his opinion, yet remarkably, he apparently believed he was justified in declaring that the gun in question was a "match" to the crime scene shell casings "to the exclusion of every other firearm in the world."

David L. Faigman, Chancellor and Dean at the University of California, Hastings, College of Law, reports that in one study (identified as Ames II), FTI examiners were tested as to proficiency. Faigman, et al., "The

Field of Firearms Forensics Is Flawed," *Scientific American* (May 25, 2022). The examiners reported false positives and "inconclusive" 52 percent of the time. Faigman counted "inconclusive" as an error because the examiners knew beforehand that the bullets either did or did not come from the firearm. He compared the Ames II study to a "true/false exam" where "I don't know" or "inconclusive" is not an option.

Most disturbingly, when the same items were later sent to the same Ames II participants for reevaluation, the examiners reached the same conclusions only two thirds of the

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ADVERTISING MATERIAL

Firearm Identification (cont.)

time. *Id.* When different examiners compared the same bullets, their conclusions agreed with the first examiners' conclusions less than one third of the time. *Id.*

Many critics compare FTI with the now defunct (perhaps "debunked") forensic practice of comparative bullet lead analysis ("CBLA"). Tobin and Blau. For almost 40 years, courts accepted CBLA analysis and the corresponding experts' opinions that, since the material composition of a crime-scene bullet matched the material composition of the bullets in a box of bullets recovered from the suspect's home, the crime-scene bullet must have come from that box.

CBLA experts explained in great detail the sophisticated nature of their analytical instrumentation and their ability to measure compositional constituents to the parts per million. But it was all brought to naught when, in 2005, researchers published studies showing that retail distribution of bullets showed no "uniqueness" of bullet composition from store to store or box to box. Tobin and Blau. The concentrations of indistinguishable product in local and regional areas demonstrated that consumers could not have purchased different product compositions even if they had deliberately attempted to do so. Consequently, even though the material composition of a bullet removed from a murder victim was identical with the composition of bullets recovered from the suspect's home, it is not relevant evidence because every box of bullets of the same brand within that region has the same composition. Just as FTI examiners assume each firearm leaves discernible and unique marks, the CBLA examiners had assumed (quite errantly) the unique composition of the bullets in each box.

Tobin and Blau sum it up best. Identifying a bullet or cartridge casing as coming from a particular firearm requires discernment of marks unique to that firearm. Discernment of uniqueness requires: "(1) some criteria, indicia, or 'parameters of detection' for uniqueness, and (2) rules of application for those indicia to discern 'same' from 'different.' An exhaustive review of the domain literature reveals no such criteria. Thus, there is no apparent official or scientifically acceptable protocol for distinguishing 'same' from 'different.'"

The criticism and exposure of the flawed nature of FTI and other forensic "sciences" prompted former President Barack Obama

to ask PCAST "whether there are additional steps on the scientific side, beyond those already taken by the Administration in the aftermath of the highly critical 2009 National Research Council report on the state of the forensic sciences, that could help ensure the validity of forensic evidence used in the Nation's legal system." The PCAST Report was the published answer to that question.

Significantly, the PCAST Report observed that per *Daubert*, the legal standard of admissibility of FRE 702 requires evidence to be based on "reliable principles and methods" and that the expert in each case "reliably applied the principles and methods." PCAST coined the term "foundational validity" to mean "the scientific standard" corresponding with FRE 702's "reliable principles and methods," and PCAST coined the term "validity as applied" to equate with the expert having "reliably applied the principles and methods."

Because FTI is a feature-comparison method, it belongs to the discipline of metrology (the science of measurement and its application). PCAST Report. "For a metrological method to be scientifically valid and reliable, the procedures that comprise it must be shown, based on empirical studies, to be repeatable, reproducible, and accurate, at levels that have been measured and are appropriate to the intended application." *Id.*

PCAST defined "repeatable" as "with known probability, an examiner obtains the same result, when analyzing samples from the same sources." It defined "reproducible" as "with known probability, different examiners obtain the same result, when analyzing the same samples." And "accurate" was defined as "with known probabilities, an examiner obtains correct results both (1) for samples from the same sources (true positives) and (2) for samples from different sources (true negatives)." Finally, "reliability" was defined as "repeatability, reproducibility, and accuracy."

"To meet the scientific criteria of foundational validity, two key elements are required:

(1) a reproducible and consistent procedure for (a) identifying features within evidence samples; (b) comparing features in two samples; and (c) determining, based on the similarity between the features in two samples, whether the samples should be declared to be a proposed identification ("matching rule");

(2) empirical measurements, from multiple independent studies, of (a) the method's false positive rate – that is, the probability it declares a proposed identification between

samples that come from different sources and (b) the method's sensitivity – that is, the probability that it declares a proposed identification between samples that actually come from the same source." *Id.*

The accuracy of a forensic method can only be determined based on appropriate empirical testing. *Id.*

Feature-comparison methods may be classified as either objective or subjective. *Id.* Objective methods consist of procedures that are each defined with enough standardized and quantifiable detail that they can be performed either by an automated system or human examiners exercising little or no judgment. Subjective methods include key procedures that involve significant human judgment, e.g., which features to select within a pattern or how to determine whether the features are similar to be called a probable match. *Id.*

Because FTI is a subjective feature-comparison method, "black-box studies" are necessary to assess the method. A black-box study is defined as "an empirical study that assesses a subjective method by having examiners analyze samples and render opinions about the origin or similarity of samples." *Id.* A black-box study is basically a proficiency test.

While "foundational validity" means that a method can, in principle, be reliable, "validity as applied" means that "the method has been reliably applied in practice." *Id.* The key criteria for validity as applied are:

"(1) The forensic examiner must have been shown to be capable of reliably applying the method and must have actually done so. Demonstrating that an examiner is capable of reliably applying the method is crucial – especially for subjective methods, in which human judgment plays a central role. From a scientific standpoint the ability to apply a method reliably can be demonstrated only through empirical testing that measures how often the expert reaches the correct answer.... Determining whether an examiner has actually reliably applied the method requires that the procedures actually used in the case, the results obtained, and the laboratory notes be made available for scientific review by others.

(2) Assertions about the probability of the observed features occurring by chance must be scientifically valid. (a) The forensic examiner should report the overall false positive rate and sensitivity for the method established in the studies of foundational validity and should demonstrate that the samples used in the foundational studies are relevant to the

facts of the case. (b) Where applicable, the examiner should report the random match probability based on the specific features observed in the case. (c) An expert should not make claims or implications that go beyond the empirical evidence and the applications of valid statistical principles to that evidence." *Id.*

Perhaps the most critical statement in the PCAST Report regarding FTI is: "Firearms analysts have long stated that their discipline has near-perfect accuracy. In a 2009 article, the chief of the Firearms-Toolmarks Unit of the FBI Laboratory stated that 'a qualified examiner will rarely, if ever, commit a false-positive error (misidentification),' citing his review, in an affidavit, of empirical studies that showed virtually no errors. With respect to firearms analysis, the 2009 NRC report concluded that 'sufficient studies have not been done to understand the reliability and reproducibility of the methods' – that is, the foundational validity of the field had not been established."

The PCAST Report acknowledged that beginning around 2001, a number of studies were undertaken in an attempt to estimate the accuracy of FTI examiners' conclusions. But many of those "studies were not appropriate for assessing scientific validity and estimating reliability because they employed artificial

designs that differ in important ways from problems faced in casework." For example, bullets and casings were in pristine condition; whereas, in live work, these items are often misshapen, smashed, etc. In several studies, the bullets and casings were fired from consecutively manufactured barrels and slides.

Also, many of those empirical studies were "closed set," i.e., the answer was always present within the test, meaning the examiner could use the process of elimination to arrive at the correct answer. The exact method of these studies is described in Part 5.

But to illustrate, suppose two shots are fired from each of 10 .38 pistols for a total of 20 bullets. The examiner is given 10 bullets – each one fired from a different one of the 10 guns – labeled "A" thru "L." The examiner is given the other 10 labeled "1" thru "10." The test requires the examiner to identify which two bullets came from each firearm. If the examiner is unable to identify any markings on bullet #2 but knows that bullet "F" has not yet been paired, the examiner – via process of elimination – will pair bullets "F" and "2" as coming from the same firearm but will not have arrived at that correct answer through comparison of the marks on the bullets. This defeats the entire point of the study, i.e., to test

the validity of the method itself.

To accurately estimate FTI's false positive rate and sensitivity rate, the empirical studies must be "black box, open set." In that vein, the PCAST Committee analyzed four closed-set studies; one partly open-set study ("Miami-Dade Study"); and one open-set study ("Ames Laboratory Study"). Of these, only the Ames Laboratory Study was an appropriately designed study for measuring validity and estimating reliability.

The PCAST Report explained that empirical measurements of the false positive rate ("FPR") and sensitivity ("SEN") of forensic comparison methods "must be based on large collections of known and representative samples from each relevant population, so as to reflect how often a given feature or combination of features occurs."

However, "since empirical measurements are based on a limited number of samples, SEN and FPR cannot be measured exactly, but only estimated. Because of the finite sample size, the maximum likelihood estimates do not tell the whole story. Rather, it is necessary and appropriate to quote confidence bounds within which SEN, and FPR, are likely to lie." *Id.*

By convention, a confidence level of 95%

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Firearm Identification (cont.)

is the most widely used. Consequently, when the frequency of false positives in a study is reported as “1.5 percent (upper 95 percent confidence interval 2.2 percent),” it means the FTI examiners participating in the study incorrectly identified a bullet or cartridge case as coming from a particular firearm 1.5% of the time – but since the number of firearms and the number of examiners in the study are but a fraction of the total number in the world, there is a 5% chance the actual frequency could be as high as 2.2%. These two figures, in turn, translate to estimated FPRs of 1 in 66 with an upper bound of 1 in 46 – meaning that based on this study it is estimated that the FTI examiners make a false “match” an average of one time in every 66 cases but there is a five percent chance they could be making false matches one time in every 46 cases.

Regarding the foundational validity of FTI, the PCAST Committee made these findings: “firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability. The scientific criteria for foundational validity require more than one such study, to demonstrate reproducibility. Whether firearms analysis should be deemed admissible based on current evidence is a decision that belongs to the courts. *If firearms analysis is allowed in court, the scientific criteria for validity as applied should be understood to require clearly reporting the error rates seen in appropriately designed black-box studies (estimated at 1 in 66, with a 95 percent confidence limit of 1 in 46, in the one such study to date).*” (emphasis supplied)

With respect to validity as applied, PCAST observed: “If firearms analysis is allowed in court, validity as applied would, from a scientific standpoint, require that the expert: (1) has undergone rigorous proficiency testing on a large number of test problems to evaluate his or her capability and performance, and discloses the results of the proficiency testing; and (2) discloses whether, when performing the examination, he or she was aware of any other facts of the case that might influence the conclusion.”

As the flawed nature of FTI became known, some courts began gradually limiting the expert testimony of FTI examiners. In *Green*, the court refused to allow the prosecution’s expert to testify that the cartridge casings

from the crime scenes came from a particular .380 Hi Point pistol “to the exclusion of every other firearm in the world.”

In *Glynn*, the prosecution’s expert wanted to testify that the evidence bullet and cartridge casings came from firearms linked to the defendant “to a reasonable degree of ballistic certainty.” But the court permitted the expert to state only that it was “more likely than not” that the bullet and casings came from those firearms.

In *United States v. Taylor*, 663 F. Supp. 2d 1170 (D.N.M. 2009), Judge William Johnson explained that the Government’s FTI expert, ATF expert Ronald G. Nichols, could “give to the jury his expert opinion that there is a match between the .30 caliber rifle recovered from the abandoned house and the bullet believed to have killed [the victim]. However, because of the limitations on the reliability of firearms identification evidence discussed above, Mr. Nichols will not be permitted to testify that his methodology allows him to reach this conclusion as a matter of scientific certainty. Mr. Nichols also will not be allowed to testify that he can conclude that there is a match to the exclusion, either practical or absolute, of all other guns. He may only testify that, in his opinion, the bullet came from the suspected rifle to within a reasonable degree of certainty in the firearms examination field.”

In *United States v. Ashburn*, 88 F. Supp. 3d 239 (E.D.N.Y. 2015), the Court refused to permit the FTI expert to say he was “100% certain” or that it was a “practical impossibility” that another firearm could have fired the items in evidence or that the identification was to “the exclusion of all other firearms in the world.” However, the Court in *Ashburn* permitted the expert to testify that his conclusions were to “a reasonable degree of ballistics certainty.”

In 2016, then-U.S. Attorney General Loretta Lynch ordered forensic examiners to stop using the terms “reasonable scientific certainty,” “reasonable [degree of firearms discipline] certainty,” or any words to that effect.

In *United States v. Medley*, 312 F. Supp. 3d (D. Md. 2018), the Court refused to permit the expert to use the words “identify” or “identification” and allowed the expert only to state the cartridge cases recovered from the crime scene were “consistent with” cartridge cases from the firearm linked to the defendant.

In *Williams v. United States*, 210 A.3d 734 (D.C. Ct. App. 2019), the Court held “it is plainly error to allow a firearms and toolmark examiner to unqualifiedly opine, based on pat-

tern matching, that a specific bullet was fired by a specific gun.”

In *United States v. Tibbs*, 2019 WL 4359486 (D.C. Super. 2019), the Court limited the FTI expert to opining that “based on his examination and the consistency of the class characteristics and microscopic toolmarks, the recovered firearm cannot be excluded as the source of the cartridge case found on the scene of the alleged shooting – in other words, that the firearm may have fired the recovered casing. [The FTI expert] may not state an ultimate conclusion in stronger terms. Similarly, [the FTI expert] will be precluded at any point in his testimony from stating that individual marks are unique to a particular firearm or that observed individual characteristics can be used to ‘match’ a firearm to a piece of ballistics evidence.”

Regrettably, other courts continue to permit FTI experts to render exaggerated opinions with little or no restrictions thereby misleading juries. In *United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017), the Court affirmed a conviction where the FTI expert testified that a bullet from the crime scene “matched” the test bullet from a pistol found in the possession of the defendant. The Court acknowledged the criticism of the FTI discipline but seemingly dismissed it because the FTI expert had been cross examined by the defense; the expert did not testify he was “absolutely certain” in his testimony; the defense was free to call its own expert; and the defense could find “only one case” (*Glynn*) where a court would not permit an expert to testify as to a match.

In *United States v. Gil*, 68 F. App’x 11 (2d Cir. 2017) (unpublished), the Court affirmed a trial court’s decision to allow unrestricted FTI expert testimony, finding that the FTI discipline has an error rate “in the range of 1%,” which the trial court dismissed as “de minimis,” and concluded that “challenges to the admission of ballistics expert opinion are meritless.” That seems to be an incredible position to take in light of the scientific evidence, or lack thereof, regarding firearm pattern matching.

In *Garrett v. Commonwealth*, 534 S.W.3d 217 (Ky. 2017), the FTI examiner opined at trial that the pistol obtained from the defendant had fired the bullet recovered during the murder investigation. The Kentucky Supreme Court, unmoved by the NRC Report’s criticism of the AFTE Theory of Identification, concluded that the AFTE Theory of Identification satisfied *Daubert*, and the Court observed that: “The proper avenue for Garrett

to address his concerns about the methodology and reliability of Collier’s testimony was through cross-examination, as well as through the testimony of his own expert. In this way, the jury was presented with both parties’ positions, and with any limitations to the testimony, and charged with weighing all the evidence presented.”

Part 5: Rebutting the Criticism

TO PUT IT MILDLY, “[T]HE PCAST REPORT was not universally welcomed,” according to Puracal and Kaplan’s Report. To respond to the criticism of the PCAST Report, PCAST released “An Addendum to the PCAST Report on Forensic Science in Criminal Courts 2” (“Addendum”) in 2017. *Id.* For example, the U.S. Department of Justice (“DOJ”) attempted to discredit the PCAST Report by claiming the PCAST authors had failed to consider relevant research studies. The Addendum explained PCAST’s efforts to obtain additional studies and the DOJ’s response “that it had no additional studies for PCAST to consider.” And it appears that those affiliated with law enforcement and the prosecution of criminal cases have not slowed in their efforts to refute the science and to discredit the PCAST Report.

For example, Agar’s Report, published in 2022, states: “[T]he PCAST Report contains multiple problems that undermine the integrity of the report, rendering it an unreliable source – as a matter of science and law – to evaluate the firearms and toolmark discipline. These shortcomings include the makeup of persons who were affiliated with the PCAST Report, the use of terms and definitions alien to the firearms examination discipline or forensic science in general, and the use of arbitrary criteria to weigh the reliability of firearm analysis.”

Agar states that 38 people “researched, analyzed, drafted, and reviewed the PCAST Report on forensic science.” He then attempts to discredit these people for not possessing what Agar believes to be proper credentials, e.g., none were FTI examiners, none had ever been the director of a forensic laboratory, none had ever prepared an FTI report or testified as an FTI expert, none were AFTE members, only two had backgrounds in forensic science, none were affiliated with the DOJ, or with law enforcement or with prosecutors, etc. Agar’s Report.

Agar next faults the PCAST Report for identifying FTI as belonging to the discipline of science known as metrology, “the science

that deals with measurement.” Agar quotes the DOJ: “Traditional forensic pattern examination methods – as currently practiced – do not belong to the scientific discipline of metrology. Forensic examiners visually compare the individual features observed in two examined samples, they do not measure [them.] The result of this comparison is a conclusion that is stated in words (nominal terms), not magnitudes (measurements).”

Agar also takes issue with the PCAST Committee coining the term “foundational validity.” According to Agar, the term is unscientific because the term is not found in any other scientific literature, is not found in FRE 702, and is different from the term “scientific validity” used by the U.S. Supreme Court.

Further, Agar argues that the requirements for a forensic method to achieve foundational validity – i.e., repeatability, reproducibility, and accuracy – are “rigid, dogmatic criteria.” Agar contends such requirements are “inapposite” to the U.S. Supreme Court’s statement that application of FRE 702 is a “flexible one.”

Agar contends that the PCAST Committee had no legal or scientific basis to support the requirement of “black box studies” that deliver a “reproducible and consistent proce-

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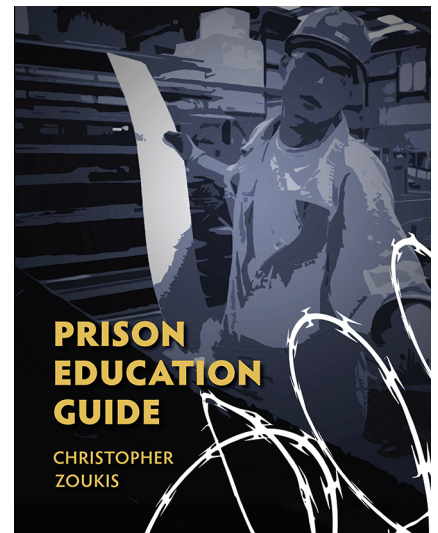
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ture for ... identifying features within evidence samples” and derive “empirical measurements, from multiple independent studies.”

Agar also discredits the PCAST Report by claiming it has not been peer reviewed. He then cites no fewer than five organizations, viz., the American Society of Crime Laboratory Directors; the AFTE; the Organization of Scientific Area Committee (“OSAC”) Firearms and Toolmarks Subcommittee; the ATF; and the FBI, that had critiqued and criticized the PCAST Report’s assessment of FTI.

Agar also disputes the PCAST Report’s declaration that “[c]ase work [alone] is not scientifically valid research, and experience alone cannot establish scientific validity.” According to Agar, that declaration is incorrect because FRE 702 permits a witness to be qualified as an expert based on experience alone.

Agar also argues that state and federal courts admitting FTI expert testimony post-PCAST Report discredit the report. According to Agar, since the publication of the PCAST Report, state courts in California, Connecticut, Delaware, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, and Washington as well as federal district courts in Arizona, California, the District of Columbia, Nevada, New York, Oklahoma, and Virginia have admitted FTI expert testimony with few restrictions. (See Agar’s Report for supporting case citations from those courts)

Agar also attacks the credibility of the PCAST Report indirectly by arguing that the judges that have limited FTI expert testimony based on the PCAST Report have abused their judicial discretion. He alleges that by not permitting FTI examiners to testify that bullets or cartridge cases are “identified” as coming from a particular firearm, the judges are exceeding their authority under FRE 702. And by requiring the FTI examiners to opine only that a particular firearm “could not be excluded,” or “is consistent with,” or “more likely than not” is the firearm used in the crime, the judges are changing witness testimony, causing witnesses to commit perjury and so forth. Agar sums up his view of judges who limit FTI expert testimony by stating: “It is a lamentable day for science and the law when people in black robes attempt to substitute their opinions for those who wear white lab coats.”

Part 6: Improving the Reliability of the FTI Discipline and Expert Testimony

THE IMPLEMENTATION OF CORRECTIVE measures in response to the NRC and PCAST Reports has been lethargic at best. “In many respects, although [the NRC Report] could hardly be characterized as new information, the [NRC] Report laid forensic science’s shortcomings to bare and brought to the surface the weaknesses that have plagued forensic science for decades.” Gabel’s Report. Professor Gabel details the history of the abysmal state of forensic practice and of crime laboratories, beginning with “1967 when President Lyndon B. Johnson’s Commission on Law Enforcement and the Administration of Justice found that many police labs lacked both equipment and expertise.” Throughout the 1970s and 1980s, numerous grants to fund improvements were handed out that seldom achieved any success.

In the 1990s, DNA came to be the “gold standard” in law enforcement and forensic investigations. Consequently, even though the National Institute of Justice (“NIJ”) teamed up with the Office of Law Enforcement Standards to fund the “Forensic Summit: Roadmap to the Year 2000” to report persistent deficiencies in public crime labs and calling for greater standardization, increased research, and quality controls in all forensic disciplines, the lion’s share of federal funding allocated to crime labs for those improvements was tied to only DNA research.

In 2004, President George W. Bush spearheaded the formation of a new forensic science commission with the passage of the Consolidated Appropriations Act that “obligated the NIJ to provide Congress with a report on forensic science and medical examiner communities’ needs beyond DNA initiatives.” Also, the DNA Sexual Assault Justice Act of 2004 was passed that required the Attorney General to create a national forensic science commission that would, among other things, make recommendations and disseminate best practices to public crime labs. But the forensic science commission was never funded. As the NRC and PCAST Reports reveal, with regard to forensic science disciplines generally, and FTI specifically, very little had changed since the Johnson Administration.

But the news is not all bad. In addition to some conscientious judges preventing FTI experts from making greatly exaggerated and scientifically unsubstantiated claims, there

have been other improvements. For example, as of 2014, 88% of America’s 409 publicly funded crime labs had been accredited by an independent and professional forensic science organization. Agar’s Report. In 2022, 83% of crime labs in the United States were accredited by one organization: ANSI-ASQ National Accreditation Board (“ANAB”). While ANAB offers accreditation in numerous forensic fields, 251 of its accredited labs are accredited in FTI. *Id.* The ANAB accreditation requires training of examiners, testimony monitoring, validation of procedures, and annual proficiency testing to determine whether FTI examiners perform to industry standards.

Collaborative Testing Services (“CTS”) is the dominant testing service. Twice a year, CTS provides a proficiency test, which requires an FTI examiner to compare four questioned bullets or cartridge cases with three known bullets and cartridge cases. Apparently, these are closed-set examinations because at least one or more of the four questioned items are a “match.” *Id.* The results of CTS FTI testing for 2018 and 2019 revealed that of the 1,191 tests given, 1,172 examiners returned the correct answers. *Id.*

The DOJ has also stepped up to the plate. For example, the FBI Handbook of Forensic Science of 1994 stated: “Firearms identification is the forensic science discipline that identifies a bullet, cartridge case or other ammunition component as having been fired by a particular firearm to the exclusion of all other firearms.” Giannelli’s Report. But the DOJ’s current Firearms Uniform Language of Testimony and Reporting (“ULTR”) prohibits FTI examiners from testifying that their source identification opinion “excludes all other firearms in the world.” Agar’s Report.

But perhaps most promising is the implementation and growing use of computer databases and comparison of bullets and cartridge cases that have been electronically scanned. In addition to the ATF’s NIBIN, in 2016, the NIST created the Ballistics Toolmark Research Database (“NBTRD”). The NBTRD’s database consists of images of bullets and cartridge cases that are scanned with a 3D high-resolution microscope. Researchers may both download images from the database and upload their own images. In this manner, the database continues to grow in size, providing more information for developing and validating algorithms that quantify the similarity between firearm toolmarks. As the number of bullets and cartridge cases available for comparison increases, the foundational

uncertainty of “unique” or “individual” characteristics is addressed.

As of yet, none of the NBTRD’s data is used in actual casework, i.e., criminal investigations and prosecutions. NIST mechanical engineer Hans Soons explained that a similarity score between two pieces of evidence by itself is often meaningless. “A comparison score needs context,” he said, adding, “How does it compare with scores obtained when comparing samples fired from the same firearm versus scores obtained when comparing samples fired from a different firearm?” To address this concern, the NIST is collaborating with the FBI and the Netherlands Forensic Institute to develop the Reference Population Database of Firearm Toolmarks (“RPDFT”). The purpose of NBTRD and RPDFT is to eventually be able to give a statistical statement in court, confidently stating the likelihood that two samples came from the firearm with a high degree of certainty. But the process is going to take years because the RPDFT must be populated with a sufficient number of images to permit the expert to testify that he or she knows what a match and non-match looks like.

Additionally, NIST mechanical engineer John Song reported in *Forensic Science International* that a statistical approach for

cartridge case comparisons had been developed that might enable numerical testimony. Song and his colleagues developed Congruent Matching Cells (“CMC”). Three-dimensional surface scans of the breech face impressions on cartridge cases are compared by an algorithm. CMC divides one of the scanned surfaces into a grid of cells and then searches the other surface for matching cells.

In their recent study, 135 cartridge cases fired from 21 different 9mm pistols were scanned, producing 433 matching image pairs and 4,812 non-matching pairs. The CMC algorithm correctly classified all the pairs. Importantly, it was observed that almost all the non-matching pairs had zero matching cells – only a handful had one or two due to random effects. Conversely, all of the matching pairs had a minimum of 18 matching cells – meaning the matching and non-matching pairs fell into highly separated distributions based on the number of matching cells. Using this method, an FTI expert could testify about how closely two cartridge cases match based on the number of matching cells and the probability of a random match – like expert DNA forensic testimony. But for now, CMC lacks a large enough and diverse enough dataset of scanned images to calculate realistic error rates

for use in actual casework.

The FTI discipline is controversial. The most recent evaluation is Agar’s Report. While Agar’s Report is informative and sheds light on the current state of FTI, his acerbic tone takes on the nature of a diatribe against the PCAST Report – calling into question as to whether his report is an unbiased review of current FTI facts and science.

For example, Agar begins his critique of the PCAST Report by attacking the messengers instead of the message. Seeking to discredit the PCAST Committee, he lists numerous qualifications that none of the members possessed – yet he in large measure fails to disclose the qualifications the members possess. Members included the President of the Broad Institute of Harvard and MIT; the President and CEO of Aerospace Corporation; a dean of a medical school; and professors of chemistry, science, technology, biochemistry, and electrical engineering from Princeton, Northwestern, the University of Texas at Austin, the University of Maryland, and elsewhere.

With these backgrounds, Agar claims the members are not qualified to evaluate the scientific validity of FTI because none of the members were experienced in preparing an

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Firearm Identification (cont.)

FTI report and testifying as an FTI expert, directed a forensic lab, etc. This is tantamount to saying only an astrologer experienced with creating a birth chart and casting a horoscope is qualified to evaluate the scientific validity of astrology. While members of the PCAST Committee might not have the FTI background and experience for which Agar condemns them, they are undoubtedly eminently qualified to determine whether a discipline satisfies the scientific method and the principles of evaluating whether a discipline can properly be classified as scientific.

Moreover, the PCAST Report details the manner in which the members further educated themselves. Their study included an extensive literature review and was also informed by inputs from forensic researchers at the FBI's Laboratory, NIST, and other forensic scientists.

Agar argues that the PCAST members were wrong in identifying FTI as belonging to metrology. According to Agar, FTI is not metrology because FTI examiners make comparisons and do not measure. Yet, the AFTE Theory of Identification clearly states: "Significance is determined by the comparative examination of two or more sets of surface contour patterns comprised of individual PEAKS, RIDGES, and FURROWS. Specifically, the relative HEIGHT or DEPTH, WIDTH, CURVATURE, and SPATIAL RELATIONSHIP of the individual PEAKS, RIDGES and FURROWS within one set of surface contours are DEFINED and compared to the corresponding features in the second set of contours." (Emphasis added.) The very use of terms such as height, depth, width, curvature, spatial relationship, peaks, ridges, and furrows imply measurement. To say "the depth of the groove identified as Groove A on bullet #1 is comparatively equal to the depth of Groove A on bullet #2" is a visual measurement regardless of whether or not the depth of the grooves was actually measured in millimeters or micro millimeters, etc.

Agar's criticism of the PCAST members coining the term "foundational validity" is shortsighted. He alleges that the term is unscientific because it is not found in any other scientific literature, nor is it found in the opinions of the U.S. Supreme Court. Using that standard, the term "genocide" is invalid because there is no instance of its use prior to the Nuremberg Trials after World War II.

Furthermore, the individual words "foundational" and "validity" are quite common and their meanings, taken together, are easily discerned. The foundation of FTI is the assumption that firearms leave unique marks on cartridge casings and bullets and those marks can be identified by FTI examiners to determine that the cartridge casings or bullets came from that particular firearm. The validity, or correctness, or genuineness of that assumption is not known. It may be correct, or it may be utter balderdash, which many suspect.

Likewise, Agar's criticism of the PCAST members' requirements of repeatability, reproducibility, and accuracy is foolish. Those are the requirements for testing the validity of any scientific assumption. One thing that is very troubling is the inability of the examiners in the Ames II study to reach the same conclusions when comparing the same items a second time. This indicates that in the first comparison, the examiners designated some marks or striations to be individual characteristics, but in the second examination, the examiners designated other marks as individual characteristics. This lack of objective criteria demonstrates FTI's lack of repeatability.

The closed-set studies described by Agar are wholly inadequate for assessing FTI's validity. First, as the PCAST Report observed, in the closed-set studies the examiners reported an inconclusive result 0.2% of the time, but in the open-set studies, the inclusive result jumped to a whopping 41.8% in the Miami-Dade Study and 33.7% in the Ames Laboratory Study. This indicates that in the closed-set studies, the examiners made the correct identifications but did so without using the proposed FTI method of identifying unique marks or "individual characteristics."

Moreover, the closed-set studies were not representative of FTI practice in actual criminal prosecutions. The use of consecutively manufactured barrels is one example. While the theory behind using those barrels was to make the identifications more difficult, it may be the opposite is true. To illustrate, suppose the calibration of a manufacturing tool was slightly off, resulting in a barrel with a striation of an etched line with a slight downward tic curved at the right end. On the next barrel, the same striation occurs but the tic is slightly longer. The tic grows in length with each consecutive barrel until it begins to take on the shape of the letter "C." An examiner could discern the sequence of the barrels' manufacturing by observing the length and shape of the tic mark and use that information

to pair the unknown bullet or cartridge case with the known.

As for the Miami-Dade Study, the firearms employed EBIS barrels specifically designed to enable source identification. But few firearms actually recovered in criminal investigations and subjected to FTI examinations have EBIS barrels.

And of the one appropriate study – the Baldwin (Ames) Study – Agar failed to discuss the examiners' latent desire to find a "match." This is demonstrated by the examiners' response of "inconclusive" when given kits that contained non-matching known and unknown samples. That is, instead of excluding the firearm that fired the known sample as being the firearm that discharged the unknown sample, the examiners reported "inconclusive" 735 times when examining the 2,180 non-matching samples – or 34% of the time. This could be indicative of FTI examiners being prone to make matches and hesitant to report exclusions. In addition, Agar's argument that trial judges abuse their discretion when limiting the testimony of FTI examiners has one fatal flaw. No appellate court has found that those judges abused their discretion.

Agar is not an unbiased author. He is the Assistant General Counsel for the FBI lab in Quantico, Virginia. He has been under fire for his remarks recorded in a handout from an online lecture. Agar instructed FTI examiners on how to circumvent judges' restrictions on the examiners' testimony and advises the examiners to inform the judges that any effort to restrict their testimony is tantamount to asking them to commit perjury. "Why a High-Ranking FBI Attorney is Pushing 'Unbelievable' Junk Science on Guns," thedailybeast.com (Feb. 2022).

It seems Upton Sinclair could have been describing Agar and his pushback on valid criticisms of FTI's lack of scientific rigor when he famously wrote, "It is difficult to get a man to understand something, when his salary depends on his not understanding it."

As it now stands, it appears the only opinion an FTI expert ought to be permitted to give to a factfinder in a criminal proceeding is that some of the markings on a bullet or cartridge case could possibly be unique to the particular firearm in evidence, and those marks are consistent with marks found on the crime-scene bullet or cartridge case. Anything more than that risks convicting the innocent and letting the guilty go free.

Agar has it wrong. It is a lamentable day for science and the criminal justice system when

police conceal their uniforms beneath the pretense of wearing white lab coats while testifying at trial as unbiased, scientific experts. 📄

Sources: [nytimes.com](https://www.nytimes.com); 332forensics.pbworks.com; mentalfloss.com; Paul C. Giannelli, "Daubert Challenges to Firearms Identifications," *Case Western School of Law* (2007); Joe Nickell and John F. Fischer, *Crime Science: Methods of Forensic Detection* (1999); Agar, J., "The Admissibility of Firearms and Toolmarks Expert Testimony

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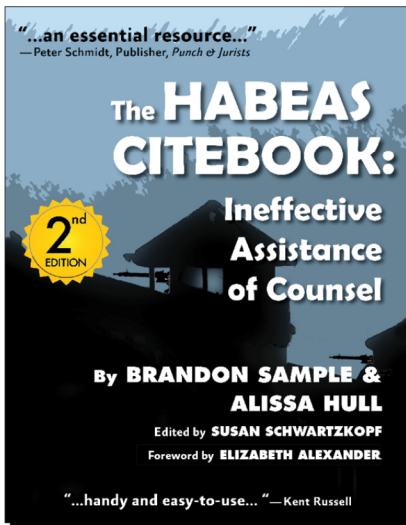
Op-Ed: Fix the First Step Act and Let Reformed Prisoners Out From Behind Bars – Time Credits and the Irrebuttable Presumption Doctrine

by Christopher D. Cobb

I AM A FEDERAL PRISONER HOUSED AT THE Federal Satellite Low located in Jesup ("Jesup"), Georgia, and a subscriber to both *PLN* and *CLN*. I obtained a Paralegal certificate from Blackstone Institute in January of 2020, with a corresponding Advanced Certificate in Criminal Law in July of 2020. Since then I have assisted the others incarcerated here at Jesup with filing for detainer removals, quashing pending

warrants, dismissing various state charges, compassionate release motions, assisted both paid and appointed attorneys in legal research for multiple direct appeals for my fellow prisoners, prepared nearly a dozen successful § 2255 petitions for fellows prisoners, and most recently, have devoted much effort towards the proper standards for both earning and having applied the First Step Act's ("FSA") Time Credits Program.

The many Latino prisoners housed here have recently credited me (undeservably in my opinion) with getting the Bureau of Prisons ("BOP") to recognize the mandatory nature of the Time Credits as expressed in the BOP's Change Notice issued on March 10, 2023, in which the BOP acknowledged that those with both detainers and pending charges are now able to apply the Time Credits toward prerelease custody



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(Halfway House and Home Confinement). I believe that this Change Notice now cements the argument that I have prepared for those of us who are “ineligible” for earning the FSA’s Time Credits.

I have recently filed a habeas petition under 28 U.S.C. § 2241 with the U.S. District Court for the Southern District of Georgia – *Christopher Cobb v. Warden Jeffrey Fikes*, Civil Action No. 2:23-cv-08. In this Petition, I argued that the FSA’s list of exclusions, codified at 18 U.S.C. § 3632(d)(4)(D), is unconstitutional on its face and as applied to me under my specific exclusion. I argued that my exclusion represents an “irrebuttable presumption” that “based upon a false premise” and that because “there is not reasonable opportunity to demonstrate that the premise is false as applied to any individual,” it therefore violates the Due Process and Equal Protection Clauses of the Fifth Amendment to the U.S. Constitution.

I pointed out that the mandatory nature of the Time Credits earning and application (18 U.S.C. § 3632(d)(4)(A)(i), (ii) and § 3632(d)(4)(C), respectively) makes access to them a liberty interest issue. See *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974) (concluding that prisoners have a liberty interest in good time credits earned); *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995) (determining that state and federal law may create liberty interests in time credits that are protected by the Due Process Clause of the Fifth Amendment); *Board of Pardons v. Allen*, 482 U.S. 369, 377 (1987); *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463 (1989); *Olim v. Wakinakona*, 461 U.S. 238, 249 (1983). Together, these five cases establish that “substantive predicates” on an agency’s determinations create a liberty interest that cannot be denied based on categorical exclusions and that in order for a prisoner to be denied the benefits others receive, there must be an individual determination.

This is entirely in line with the Supreme Court’s line of cases concerning the “Irrebuttable Presumption” doctrine. See *Turner v. Dep’t of Employment Security*, 423 U.S. 44 (1975); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971) (applying Irrebuttable Presumption doctrine when the private interests are important – such as not being in prison – and the governmental interests

are based upon a false premise). “[C]onvenience alone is insufficient to make valid what otherwise is a violation of due process of law.” *LaFleur*, 414 U.S. at 647. [Editor’s note: The Irrebuttable Presumption doctrine holds that a statute cannot confer or deny a right on the basis of a presumption that is not universally accepted as true. It shifts the issue from whether a person is a member of the classification to whether the classification itself is properly drawn.]

The reason that this is an unconstitutional practice is that there is no opportunity to demonstrate that the premise is false as applied to any individual as opposed to the category that is denied the benefit in question (in this case, access to the Time Credits program), which requires the discussion of both an “individual determination” and the underlying premise that led to the exclusions in the first place.

First, the FSA ordered the DOJ and BOP to create a “system” to determine the likelihood of recidivism for each federal prisoner. See 18 U.S.C. § 3632(d). This “system” was enacted by the BOP as the “PATTERN Scoring System” – which rates each prisoner based on a number of metrics, some that do not change over time and some that do. This system is not perfect by any means, and previous incarnations have even been deemed racist, which resulted in a change for number of points required to be considered a “Low” versus a “Medium” risk under this system. The system is still undergoing evaluation and changes but has been determined to be “effective at distinguishing recidivists from non-recidivists.” DOJ’s April 2022 Report on the FSA, pages 8-18 (available online at: <https://www.bop.gov/inmates/fsa/reports/jsp>).

The earning and application of the Time Credits is specifically tied to the PATTERN Score’s individual determination. 18 U.S.C. § 3632(d)(4)(A), (C). This is the evidence that I presented to the District Court to show that if I had received an evaluation, I would have earned Time Credits for my “college correspondence” course where I earned my Paralegal Certificate as well as my UNICOR work assignment under Code of Federal Regulations (“CFR”) § 523.42(b)(2) (dubbed presumed participation). This portion of the CFR concerns those who were imprisoned at the time of passage of the FSA on December 21, 2018 until January 14, 2020.

For those who have come to federal

prison after that date, the relevant Regulation is 28 CFR § 523.41(c). This distinction is important because § 523.42(b)(2) does not tie the taken programs with the BOP’s recommendation or its specific inclusion on the lists of EBRRs and PAs, but § 523.41(c) does. As such, a petitioner incarcerated after January 14, 2020, must show that he/she has participated in the programs specifically recommended by the BOP for that individual to take. At least, that is the rule as it currently stands. There may be future litigation that causes the need for the recommendation by the BOP to be divorced from the ability to earn Time Credits, as the FSA does not require the recommendation by the BOP to be tied to the earning and application of the Credits themselves (but because this is not the subject of the issue presented here, I will refrain from going into detail on that point).

This should be enough to establish that any excluded individual who has received a Low or Minimum Score would receive Time Credits under an individual determination if one were available as long as they have participated in appropriate programming.

So, the only thing left to establish is that the presumption that underlies the exclusions is “based on a false set of premises.” (At least for the Due Process Claim)

To this end, I presented to the District Court (and the Respondent has not addressed in the least on any of these petitions) that the legislative history of the First Step Act reveals conflicting purposes in relation to the Time Credits and the exclusion by category of the ability to earn said credits. First, Congress created in the FSA a system of “Time Credits” to encourage prisoners to participate in the particular programming needed by them (individually) as indicated by their PATTERN Assessment. See 18 U.S.C. § 3632(d). Yet, second, the statute provides exclusion to earning said Time Credits based upon categorical exclusions that lack any sort of individual assessment, as those who are eligible to earn said credits are afforded as referenced previously. This categorical exclusion creates a “second class” of prisoner as ruled unconstitutional in *LaFleur*, which was the specific intent of Senator Tom Cotton in his demand for the exclusions. See Sen. T. Cotton (R-Ark.), *National Review* Op-Ed, “Fix The First Step Act And Keep Violent Criminals Behind Bars” (Dec. 17, 2018).

In this op-ed, Senator Cotton com-

plains that only extremely long sentences can deter crime and states that: "One of the best predictors of having committed a crime in the future is having committed a crime in the past." (However, that presumption is demonstrably false. See DOJ April 2022 Report, p 54, chart 2.)

This statement expresses a clear intent that those on the list of exclusions are not worthy of, and are not capable of, rehabilitation; therefore, they should not be allowed to earn the same incentives as those who are not on this list (and therefore deemed capable of rehabilitation). Further, the complaints of Senator Cotton were heard and adopted by both chambers of Congress, as can be seen in the Senate Judiciary Committee's announcement that the amendments and specifically the exclusions were placed in the First Step Act "to address concerns by certain parties [like Senator Cotton], exclusions from Time Credits was placed in the FSA of 2018." Announcement available at: <https://www.judiciary.senate.gov/imo/media/doc/2018-11-15%20-%20Revised%20First%20Step%20Act%20-%20Summary.pdf>.

The exclusions were placed as an appeasement to the assertions that those

convicted of an offense listed should not be allowed to be incentivized in an equal manner as they are not redeemable as a category. A premise that is demonstrably false. In support of his argument, Senator Cotton presented the case of Richard Crawford, writing in his op-ed: "Crawford was sentenced to nearly 11 years in federal prison, but the statute he was convicted under does not appear in First Step's 'ineligible prisoners' list."

This use of categorical exclusions based upon only a single example is exactly what has been declared to be a violation of due process under the Irrebuttable Presumption doctrine. The false presumption here is that any and all persons convicted of a disqualifying offense will necessarily equate with Richard Crawford's offense conduct, as well as the worst offenders also on said list. In other words, that the opposite finding for the reasons presented in section (d) should be applied categorically, not individually. In addition to this, many of the crimes excluded categorically from earning Time Credits have lower recidivism rates than those which are not excluded. Compare recidivism rates among various crime categories as listed in the Department

of Justice's "First Step Act Annual Report" from April 2022" ("Report"), available for download online at: <https://www.bop.gov/inmates/fsa/reports.jsp>.

On page 54 of the Report, there is a chart that lists recidivism rates by category. As can be seen, drug crimes (which make



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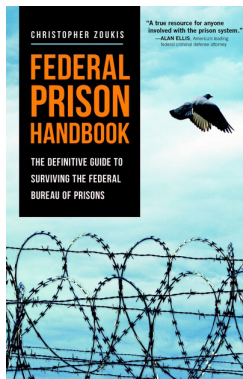
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up the majority of eligible prisoners) have a rate of 15.4%, but fraud crimes have a recidivism rate of only 4.5% and are excluded by statute from earning the Time Credits. See §3632(d)(4)(D)(xxiii). In addition, the same page of the Report contains another chart showing conclusively that the longest sentences do not have a substantially different rate of recidivism (chart 2). Among various length of sentences, there is only a difference of 7.7%. Therefore, it is unreasonable to say that longer sentences deter future crimes because the data does not support that conclusion.

Readers should take note that in none of the Petitions that I have helped ineligible prisoners to file has the Respondent addressed this portion of the argument at all. Furthermore, there is the Equal Protection argument that can be made for most, if not all, of the excluded offenses. This is because most of the excluded offenses have analog statutes that are eligible such as 18 U.S.C. § 1589, having an analog in § 1594 (at least under Eleventh Circuit caselaw – as conspiracy crimes are treated the same as having completed the act in the Circuit. Other Circuits, such as the Fourth Circuit, however, have decided to treat them as separate offenses).

For those convicted of sex offenses, one could use the fact that historically all sex offenses have been grouped together into one expansive category (as demonstrated by the chart on page 54 of the Report, in which sex offenses are grouped together as one category), yet “clickers” (simple receipt and possession of child pornography) are excluded while a myriad of “hands on” offenses (such as Conspiracy to Commit Sex Trafficking, Unlawful Sexual Abuse of a Minor, and Transportation of Minors Across State Lines) are “eligible.”

For excluded drug offenders, one can use the argument that all drug weights are sentenced under the same portion of the Sentencing Guidelines to demonstrate that they are “similarly situated” to others who have received benefit of the Time Credits.

In conclusion, I have presented these arguments to the U.S. District Court for the Southern District of Georgia, a court that is historically anti-defendant. I believe that the more who present these arguments, the more likely they are to succeed. If presented in friendlier U.S. District Courts, this would have a better chance of success, and if presented by an attorney, this would have an even better chance of success. If you are on the list of exclusions, maybe you should be looking into these issues.

On a parting note, it is worth mentioning that administrative remedies are generally required before filing a § 2241, but this requirement is neither jurisdictional nor absolute. There are exceptions. One exception is when a petitioner is challenging the underlying statute as being unconstitutional, as the issue is beyond the jurisdiction of the BOP to resolve. See *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

Salfi dealt with a § 1983 challenge, which carries a statutory jurisdictional requirement for administrative remedy exhaustion. Due to this, I have argued that the requirement in that case for the Petitioner to at least have attempted to file admin-

istrative remedy is distinguishable from the FSA argument under § 2241 because there is no jurisdictional requirement for administrative exhaustion here. One who is contemplating filing such a petition due to this article, however, may wish to get it in writing that the BOP cannot make a determination on this issue, though, if simply to avoid having to argue back and forth on the exhaustion issue in court.

“I don’t wanna live, to waste another day underneath the shadow of mistakes I’ve made” – Shinedown featuring Lzzy Hale (“Breaking Inside”)

“Believe and act as if it were impossible to fail” - Charles Keetering 🎸

Beyond Rehabilitation: Personal Achievement and Selfless Service as Grounds for Federal Compassionate Release

by Luke E. Sommer and James A. Lockhart

PRIOR TO THE PASSAGE OF THE FIRST Step Act of 2018, federal prisoners had to rely on the Director of the Federal Bureau of Prisons (“Director”) to file motions for compassionate release on their behalf. Weirdly enough, that rarely happened. As a result, Congress took action and altered Title 18, U.S.C., § 3582(c)(1)(A) to allow prisoners to file their own motion. The floodgates opened, and thousands filed with a significant portion receiving relief. According to the U.S. Sentencing Commission Compassionate Release Data Report, Fiscal Years 2020 to 2022, out of 25,416 applications, 4,194 prisoners have received a sentence reduction or release through this statute.

This gold rush was not without its problems. The statute authorizing U.S. District Courts to disturb the finality of federal sentences requires that “extraordinary and compelling” grounds exist in order to justify relief and points to the U.S. Sentencing Guidelines for guidance in determining what extraordinary and compelling actually means. While this seems like a non-issue, the reality is a little more complicated.

The Guideline at issue – § 1B1.13 – hadn’t been updated since compassionate release was first conceived decades prior and, as a result, was hopelessly out of date. The § 1B1.13 policy statement referred only to motions filed by the Director. This cre-

ated the judicial equivalent of bedlam, with thousands of motions filed and contradictory rulings being issued from one side of the nation to the other. For the most part, the chaos in the lower courts was alleviated when all but one Circuit (the Eleventh going its own way in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021)) ruled that the policy statement is “not applicable,” leaving discretion to District Court judges to puzzle out exactly what qualifies as extraordinary and compelling.

However, there is one exception. According to 28 U.S.C. § 994(t), “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason” for a reduction in sentence. While disappointing to hundreds of prisoners who are well and truly rehabilitated, this makes a certain degree of sense. As U.S. District Court Judge Sidney H. Stein put it, “the ordinary meaning of ‘rehabilitation’ is a change in a defendant’s circumstances that leads to a return to society with no further criminal activity.” *United States v. Torres*, 464 F. Supp. 3d 651 (S.D.N.Y. 2020). “Under this definition,” Judge Stein continued, “rehabilitation is not uncommon.” And it isn’t. According to *Recidivism Among Federal Offenders: A Comprehensive Overview*, the U.S. Sentencing Commission found that out of 25,000 offenders, 68.3% never returned to prison.

For prisoners whose only grounds

for compassionate relief stem from their post-sentencing rehabilitation and other personal accomplishment, this is a bitter pill to swallow. It is especially frustrating when you see the spectrum of what courts have found to constitute rehabilitation; it is not uncommon to see petitioners with six months of clear conduct time and a couple of prisoner-led education classes under their belt being lumped in with men and women who have amassed decades of clear conduct and earned four-year degrees or better. Unfortunately, it's the law.

Or is it? When a term goes undefined by statute, the Supreme Court has directed that the term be given its ordinary meaning. In most Circuits, that means roughly whatever we find in the dictionary. In the case of rehabilitation, the statute is silent, leaving District Courts to pore over the dusty copy of Webster's sitting on their desk (or a more recent smartphone app) as they hunt for a fitting definition. The one Judge Stein found, quoted above, shows just how low a bar rehabilitation sets, and more importantly, it points out that a majority of the truly impressive accomplishments accumulated by prisoners over the years are not actually evidence of rehabilitation at all

but rather of something more. In short, if a prisoner accomplishes something beyond what is necessary to safely reintegrate them into their release community without further criminal misconduct, then that accomplishment is not simply more evidence of rehabilitation. As Judge Stein reasoned, it "exceed[s] the bound[s] of what we consider rehabilitation."

This is good news, for obvious reasons. Federal prisons have no shortage of programs that offer prisoners the ability to contribute to both their prison and release communities. The Life Connections program offered by the Religious Services Department at U.S. Penitentiary Terre Haute has historically offered program participants the opportunity to make "Happy Hats," which are then donated to sick children. The Psychology Services Department likewise offers prisoners opportunities to contribute to institutional mental health through participation in a variety of programs such as the Inmate Companion program, where participants sit with prisoners struggling with suicidal ideation and help them through some of the darkest periods in their life.

Compassionate release remains a highly

subjective process, with each District Court Judge using their own best judgment. Still, this trend of recognizing conduct that goes above and beyond the low bar set by the common definition of rehabilitation is encouraging to say the least. Hopefully, this trend will continue, and the new § 1B1.13 policy statement due for release at the end of the year will cement this as a fixture in the calculus that governs sentence reduction motions under § 3582(c)(1)(A).

Luke Elliott Sommer is a former U.S. Army Ranger who is incarcerated because of a PTSD related event. He is presently halfway through his BSc in Psychology, is taking a Harvard Law School course, and has a novel ready for release. He works in the education department mentoring prisoners to pass their GED, and he was a successful pro se recipient of a Compassionate Release case.

James A. Lockhart is also working on a Psychology degree, taking a Harvard Law School course, and is in the process of completing his first novel. He and Sommer help other prisoners write and submit Compassionate Release motions and other legal documents. 📖

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SCOTUS Announces Statute of Limitations for § 1983 Claim Challenging State’s Postconviction DNA Testing Procedures Begins to Run Upon Completion of State-Court Litigation, Including Appeals

by Richard Resch

THE SUPREME COURT OF THE UNITED STATES held that when a prisoner’s request for postconviction DNA testing of evidence in accordance with the process established by the state is denied and the prisoner files a 42 U.S.C. § 1983 procedural due process claim challenging the constitutionality of the state process, the statute of limitations (“SOL”) for the § 1983 claim begins to run at the completion of the state-court litigation – including state-court appeals – not when the state trial court denies the request for DNA testing.

In 1996, Stacey Stites was strangled to death; Rodney Reed was charged with her murder. At trial, Reed argued that her fiancé or another acquaintance murdered her. The jury rejected his defense and convicted him. He was sentenced to death. His conviction and sentence were affirmed on appeal, and his state and federal habeas petitions were unsuccessful.

In 2014, Reed filed a motion requesting DNA testing on more than 40 items of evidence pursuant to Texas’ postconviction DNA testing law. See Tex. Code Crim. Proc. Ann., Arts. 64.01-64.05 (Vernon 2018). The state prosecutor, Bryan Goertz, opposed the motion, and the state trial court subsequently denied it. The court reasoned that (1) several of the items Reed requested testing on were not preserved through a proper chain of custody and (2) he did not show that he would have been acquitted if the DNA results were exculpatory. The court’s decision was affirmed on appeal by the Texas Court of Criminal Appeals (“CCA”), which also denied Reed’s subsequent motion for rehearing.

Reed then filed suit under § 1983, challenging Texas’ postconviction DNA testing law for failing to provide procedural due process. The U.S. District Court for the Western District of Texas dismissed his complaint. The U.S. Court of Appeals for the Fifth Circuit affirmed on the ground that his suit was time-barred because it was filed after the two-year SOL applicable to § 1983 suits had run. The Fifth Circuit ruled that the SOL began to run when the Texas trial court denied Reed’s motion for

postconviction DNA testing, which occurred more than two years before Reed filed his § 1983 suit. *Reed v. Goertz*, 995 F.3d 425 (5th Cir. 2021). However, the Fifth Circuit’s ruling was in direct conflict with the Eleventh Circuit, which had ruled that the SOL in this situation begins to run at the conclusion of the state-court litigation denying postconviction DNA testing – including state-court appeals. See *Van Poyck v. McCollum*, 646 F.3d 865 (11th Cir. 2011).

SCOTUS agreed to hear Reed’s appeal to resolve the Circuit split on the issue of when the SOL begins to run on § 1983 suits challenging a state’s postconviction DNA testing procedures. This is a question of federal law. See *Wallace v. Kato*, 549 U.S. 384 (2007).

The Court began its analysis by reciting the general rule governing SOLs, i.e., they begin to run when the plaintiff has a “complete and present cause of action.” *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192 (1997). In determining the point at which the plaintiff has a “complete and present cause of action,” courts focus on the specific constitutional right claimed to have been violated. See *McDonough v. Smith*, 139 S. Ct. 2149 (2019).


In the present case, procedural due process is the specific constitutional right at issue. The Court noted that a procedural due process claim involves two elements: “(i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process.” See *Zinermon v. Burch*, 494 U.S. 113 (1990). A procedural due process claim “is not complete when the deprivation occurs;” instead, the claim is “complete” only when “the State fails to provide due process.” *Id.*

Under Texas’ process for requesting postconviction DNA testing in capital cases, both trial court proceedings as well as appellate review by the CCA are part of that process. Tex. Code Crim. Proc. Ann., Art. 6405. Additionally, a motion for rehearing is part of the CCA’s appellate review process. Tex. Rule App. Proc. 79.1 (2022).

With those principles in mind, the Court explained “the State’s alleged failure to provide Reed with a fundamentally fair process was complete when the state litigation ended and deprived Reed of his asserted liberty interest in DNA testing.” Thus, the Court held that the SOL on Reed’s § 1983 claim began to run when the CCA denied his motion for rehearing – that is, his § 1983 claim was “complete” at that time because that is when the state litigation ended – and therefore, Reed’s § 1983 suit was timely.

The Court stated that this is the correct conclusion because it is “reinforced by the consequences that would follow” from a different approach. *McDonough*. For instance, if the SOL were to run when the state trial court denies the prisoner’s request for testing, the prisoner would likely continue with the state proceedings but also “simultaneously file a protective federal § 1983 suit challenging that ongoing state process,” the Court surmised. But such parallel litigation runs “counter to core principles of federalism, comity, consistency, and judicial economy.” *Id.* The Court declared: “We see no good reason for such senseless duplication.”

Furthermore, the Court explained that there are “systemic benefits” for starting the SOL at the conclusion of the state-litigation process. For example, if there are flaws in the state process, they may be exposed and remedied during the state appellate process, which would render a § 1983 suit unnecessary. Additionally, if the state appellate court interprets the state DNA testing statute, that would “streamline and focus subsequent § 1983 proceedings,” the Court reasoned.

Accordingly, the Court reversed the judgment of the Fifth Circuit. See: *Reed v. Goertz*, 2023 U.S. LEXIS 1665 (2023). 

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Oregon Supreme Court: Right to Counsel Violated by Police Questioning Defendant About an Uncharged Crime in Connection With Charged Crime for Which Defendant Represented by Counsel

by Mark Wilson

THE SUPREME COURT OF OREGON vacated a murder conviction, holding that police questioning of a represented criminal defendant about an uncharged crime associated with the charged crime for which he had counsel violated his right to counsel under the Oregon Constitution. It also held that all evidence resulting from that violation should have been suppressed.

In 2011, George West Craigen was charged with four counts of Felon in Possession of a Firearm ("FIP"). He retained counsel, Gushwa, to represent him on those charges, and Gushwa sent notice of representation to the prosecutor, stating: "Please instruct all police officers and personnel of your office not to speak to the defendant without first obtaining written permission from me."

When Craigen was scheduled to appear for a status conference on the FIP charges, he shot and killed his neighbor, Clark, on December

30, 2011. Two days later, detectives interrogated Craigen about the shooting but did not notify Gushwa because they mistakenly believed he no longer represented Craigen on the FIP charges. Gushwa later moved to withdraw, but he was still counsel of record when Craigen was interrogated.

Early in the interrogation, detectives asked why Craigen shot Carter. He said he believed Carter and his family had set him up on the FIP charges. A detective then asked about the FIP charges, including about how Craigen came to possess the firearms. Detectives continued to ask about the motive for shooting Clark, and Craigen replied several times that Carter had set him up on the FIP charges to ensure that he would serve a lengthy prison term.

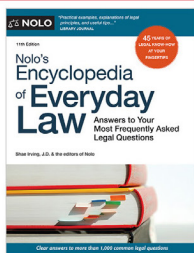
After the interrogation, the State charged Craigen with murder and other offenses related to the shooting. Before trial, Craigen moved to suppress evidence stemming from the interroga-

tion, arguing that the questioning violated his right to counsel under Article I, section 11, of the Oregon Constitution.

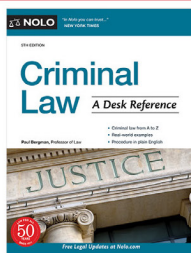
The trial court denied the motion to suppress, and the case proceeded to a jury trial. Craigen did not dispute that he shot Carter but asserted two mental defenses: insanity and extreme emotional disturbance. The defense offered evidence that Craigen has brain damage and a history of delusional thinking, including delusions about Carter. Although the two men had been friends, Craigen believed that Carter caused Craigen's wife to leave him, plotted to have him put in jail, and intended to acquire his property. The State disputed Craigen's mental defenses, playing a video of the interrogation, which it used to argue that the shooting was not a product of insanity or an extreme emotional disturbance.

The jury rejected Craigen's mental defenses and found him guilty of murder and three other

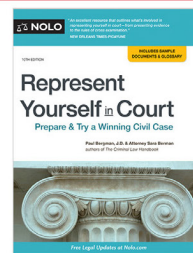
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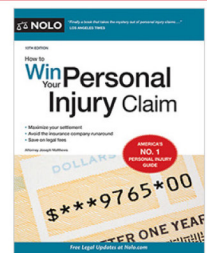
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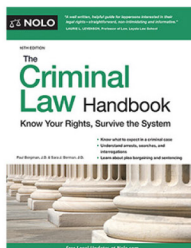
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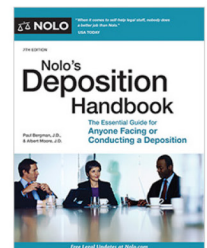
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offenses. The trial court then sentenced him to life imprisonment with a 25-year minimum on the murder conviction.

The Oregon Court of Appeals reversed, holding that the trial court erred in denying Craigen's motion to suppress. The court explained that under *State v. Hensley*, 383 P.3d 333 (Ore. 2016), and *State v. Savinsky*, 399 P.3d 1075 (Ore. 2017), "if a defendant is interrogated in violation of his right to counsel under Article I, section 11, any evidence discovered as a result – including evidence of other crimes – must be suppressed unless the state demonstrates that the evidence was not the product of the constitutional violation."

The State appealed to the Oregon Supreme Court, where review was also pending in *Savinsky*. The Supreme Court held that the questioning did not violate Savinsky's right to counsel because it concerned a "new, uncharged and ongoing conspiracy to illegally undermine the pending charges." *State v. Savinsky*, 441 P.3d 557, *adhered to as modified on recon.*, 445 P.3d 307 (Ore. 2019) ("*Savinsky II*"). The Court then granted the State's petition for review in Craigen, vacated the Court of Appeals' earlier decision, and remanded for reconsideration in light of *Savinsky II*.

On remand, the Court of Appeals considered whether the questioning violated Craigen's right to counsel under *Savinsky II*, ultimately concluding that *Savinsky II* did not change the law in a way that affected its prior holding. It then adhered to its earlier decision that the detectives violated Craigen's right to counsel by continuing to question him without notifying his counsel when it was reasonably foreseeable that doing so would lead to incriminating evidence on the FIP charges. The court also affirmed its holding that the trial court erred in failing to suppress the evidence resulting from the violation of Craigen's right to counsel.

The Court began its analysis by noting that the right to counsel under Article I, section 11, includes the right in connection with both charged crimes as well as interrogations regarding certain uncharged crimes. *State v. Sparklin*, 672 P.2d 1182 (Ore. 1983); *State v. Prieto-Rubio*, 376 P.3d 255 (Ore. 2016); *Savinsky II*.

Specifically, the issue in the present case involves police interrogation of a represented defendant about uncharged crimes. The Court stated that police interrogation of a defendant who is represented by counsel, but not present, about uncharged crimes violates the defendant's right to counsel under Article I, section 11, when the uncharged crimes are related to the charged crimes. *Sparklin*.

The *Prieto-Rubio* Court set forth the rule to determine whether a defendant's right to counsel for charged crimes includes the right to counsel during questioning about uncharged crimes as follows: "[T]he appropriate test for determining the permissible scope of questioning of a criminal defendant who is represented by counsel is whether it is objectively reasonably foreseeable that the questioning will lead to incriminating evidence concerning the offense for which the defendant has obtained counsel." Without such a rule, the right to counsel provided for in the state Constitution would be circumvented, according to the *Prieto-Rubio* Court.

The *Savinsky II* Court subsequently created a narrow exception to the *Prieto-Rubio* rule, which denies the benefit of that rule where police question a represented "defendant about a new, uncharged and ongoing conspiracy to harm witnesses to a pending prosecution." It explained that the right to counsel "does not guarantee that the state will provide notice to a defendant's attorney" in this specific circumstance.

Applying the foregoing principles to the present case, the Court held that police questioning of Craigen violated the rule announced in *Sparklin* that "once an attorney is appointed or retained, there can be no interrogation of a defendant concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and

afforded a reasonable opportunity to attend." Specifically, the interrogators asked him about the FIP offenses for which he was already represented by counsel, violating *Sparklin*. The narrow *Savinsky II* exception does not apply to sanction the police questioning because there was no "ongoing conspiracy to harm witnesses."

The Court then turned to the issue of whether Craigen's statements obtained in violation of his right to counsel must be suppressed. The Oregon Constitution mandates that both testimonial and physical evidence obtained in violation of a defendant's constitutional rights cannot be used as evidence against him. *State v. Jones*, 435 P.2d 317 (Ore. 1967). The remedy for such violations "is the exclusion of any prejudicial evidence obtained as a result of" the violation of a defendant's constitutional rights. *Prieto-Rubio*.

Turning again to the present case, the Court stated that "like the Court of Appeals, we conclude that the trial court erred in denying defendant's motion to suppress.... Because the trial court failed to suppress the evidence and because the admission of the evidence was prejudicial as to defendant's murder conviction," the Court held that "reversal of that conviction is required."

Accordingly, the Court affirmed the decision of the Court of Appeals and remanded to the trial court for further proceedings consistent with its opinion. See: *State v. Craigen*, 524 P.3d 85 (Ore. 2023). 📖

Idaho Supreme Court: Confession Obtained in Violation of *Miranda* Inadmissible in State's Case in Chief but May Be Used for Impeachment Purposes Where Defendant's Will Was Not 'Overborne' During Interrogation

by Douglas Ankney

THE SUPREME COURT OF IDAHO HELD that a confession obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), is inadmissible in the State's case in chief against Daniel Lee Moore, but the confession may be used to impeach any claim of innocence by Moore if he were to testify at trial because Moore's will was not "overborne" when he gave his statement, i.e., his confession was not coerced.

During Moore's videotaped custodial interrogation regarding the fatal shooting of Dr. Brian Drake, who was shot through a window at his chiropractic office in Bonners Ferry, Idaho, Detective Sergeant Michael Van Leuven and Idaho State Police Detective Gary Tolleson accused Moore of killing Drake, which Moore repeat-

edly denied. After approximately four and a half minutes into the custodial interrogation, Van Leuven finally advised Moore of his *Miranda* rights and continued the interrogation.

They then outlined the evidence they had against Moore. Van Leuven explained to Moore the difference between a premeditated killing versus blindly shooting through a window, with the former resulting in a charge of first-degree murder and the latter being a lesser offense. Moore stated he did not know Drake and did not shoot him.

Van Leuven said, "if you don't explain to us your intent, then we infer your intent based on what we see, which is [f]irst [d]egree [m]urder."

Moore replied, "Well, I didn't shoot him.

And I'm sorry, but that's – that's what it is. So, I guess if you are going to do that, *then I need to get an attorney.*" (emphasis supplied) Moore's invocation of his right to counsel occurred approximately 15 minutes into the interrogation.

Van Leuven said, "[O]K," and told Moore to "sit tight [a]nd we'll be right back with ya." At that point, Van Leuven terminated the interrogation. He would subsequently testify that he ended the interrogation "because it sounded to me like he asked for a lawyer."

Van Leuven consulted Assistant Chief Ryan, and the two officers decided that Ryan would continue the interrogation because he knew "Moore from their many years in the Bonner's Ferry community."

After sitting alone in the interrogation room for about 41 minutes, Ryan entered and immediately began interrogating Moore. Fourteen and a half minutes into this second interrogation, Moore said, "I need to talk to an attorney then."

Nevertheless, for another 12 minutes, Ryan made a pretense of not understanding if Moore genuinely wanted an attorney and attempted to persuade Moore into confessing until Moore again unequivocally invoked his right to counsel yet again. Ryan then told Moore: "We're done.... I can't f*ckin' talk to you anymore Daniel. Okay, buddy?" Ryan left the room.

Tolleson entered the room and told Moore his vehicle would be towed and warrants were being served for his house, vehicle, and office. Moore asked Tolleson if he could speak with Ryan one more time.

Ryan returned and again pressed Moore to confess. At one point, Ryan assured Moore that if he told the truth (confessed), "I promise you this ... I'll go talk to him what booking we're lookin' at ... and it won't be first degree murder, I can guaran-damn-tee."

Moore subsequently incriminated himself in Drake's murder, telling Ryan "I did not go there to murder him." Eventually, he confessed to killing Drake. The total interrogation time

was approximately three hours.

Moore moved to exclude all the statements he made during the interrogation after he first invoked his right to counsel, i.e., about 15 minutes into the interrogation. At the preliminary hearing, the magistrate ruled that there were no grounds to suppress the confession because Moore had reinitiated the interrogation when he asked to speak with Ryan after Ryan had ended the interrogation. The magistrate court, finding probable cause based on the videotaped statement, bound Moore over to the district court.

In the district court, Moore again moved to suppress all statements made by him after he first invoked his right to counsel as well as all statements made prior to the reading of his *Miranda* rights. The district court found that Moore had unequivocally invoked his right to counsel during the initial questioning by Van Leuven. Van Leuven left the room and 41 minutes later sent Ryan to continue the interrogation. Moore did not ask to speak with Ryan upon his first entry into the interrogation room. Ryan entered the room and continued the interrogation without ever mentioning Moore's earlier request for an attorney.

The district court ruled that all statements made prior to the reading of Moore's *Miranda* rights as well as those made after he invoked his right to counsel during questioning by Van Leuven must be suppressed. Additionally, because Ryan then repeatedly ignored Moore's request for counsel, the district court concluded that "Moore's will was overborne by the badgering and overreaching of police" and that "Moore's subsequent confession was not voluntary, but rather, was the product

of coercion." As such, the confession could not be used in any criminal trial for any purpose – including for impeachment purposes should Moore claim innocence and testify at trial.

The State appealed. While admitting a *Miranda* violation occurred, the State argued, among other things, that Moore's will was not overborne and his confession could be used for impeachment purposes.

The Idaho Supreme Court noted that the parties agree that the police violated *Miranda* when they continued to interrogate Moore after his first request for an attorney – approximately 15 minutes into the interrogation. *Edwards v. Arizona*, 451 U.S. 477 (once a defendant requests an attorney, questioning must immediately cease until an attorney is present). However, they disagree on whether excluded evidence based on a *Miranda* violation automatically results in suppression of derivative evidence and bars its use for impeachment purposes.

The Court explained that the test for determining *Miranda* violations is different than the test for coercion and due process violations, stating "[w]hether a defendant has waived *Miranda* rights and whether a confession was voluntary have overlapping – though different – analyses." *State v. Samuel*, 452 P.3d 768 (Idaho 2019). Quoting *Samuel*, the Court further explained:

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“*Miranda* warnings are premised on and designed to protect the Fifth Amendment privilege against self-incrimination, while the exclusion of involuntary confessions is grounded in the Due Process Clause of the Fourteenth Amendment, and it applies to any confession that was the product of police coercion, either physical or psychological, or that was otherwise obtained by methods offensive to due process.”

Although statements suppressed because they were obtained in violation of *Miranda* may not be used as substantive evidence in the prosecution’s case in chief, they are admissible for impeachment purposes. *Michigan v. Harvey*, 494 U.S. 344 (1990). The U.S. Supreme Court explained the rationale for this rule: “The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.” *Harris v. New York*, 401 U.S. 222 (1971).

In contrast, in the event of coercion, the confession is not deemed voluntary and is inadmissible for any purpose at trial because compelled confessions are a due process violation. *Mincey v. Arizona*, 437 U.S. 385 (1978). The U.S. Supreme Court explained: “The Fifth and Fourteenth Amendments provide that no person ‘shall be compelled in any criminal case to be a witness against himself.’ ... [A] defendant’s compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial. ‘But any criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law.’” *New Jersey v. Portash*, 440 U.S. 450 (1979) (quoting *Mincey*); see also *Kansas v. Venstris*, 556 U.S. 586 (2009). That is, not all *Miranda* violations are also automatically due process violations.

The State bears the burden of proving “by a preponderance of the evidence that the confession was voluntary,” *State v. Culbertson*, 666 P.2d 1139 (Idaho 1983), and if “the defendant’s free will [was] undermined by threats or through direct or implied promises, then the statement is not voluntary and is inadmissible.” *Samuel*. When determining whether a defendant’s free will was overborne, courts examine the “totality of the circumstances,” which includes: “(1) whether *Miranda* warnings were given; (2) the youth of the accused; (3) the accused’s level of education or low intelligence; (4) the length of detention; (5) the repeated and prolonged nature of the questioning; and (6) deprivation of food or sleep.” *State v. Cordova*, 51 P.3d 449 (Idaho) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); *Arizona v. Fulminante*, 499

U.S. 279 (1991).

Violation of the defendant’s *Miranda* rights is one factor courts consider when determining whether a statement was involuntary. *Woodward v. State*, 123 P.3d 1254 (Idaho Ct. App. 2005). Importantly, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” *Colorado v. Connelly*, 479 U.S. 157 (1986).

Turning to the present case, in order for the State to use Moore’s statements for impeachment purposes, it must show that they were not coerced and voluntary. The Court observed that (1) Moore was given *Miranda* warnings although his multiple invocations of the right to counsel were not respected, (2) Moore was 63 at the time of the interrogations, (3) Moore was an educated, intelligent man as evidenced by his successful chiropractic practice, (4) Moore was detained for one hour and 41 minutes before he gave his incriminating statements, (5) Ryan’s questioning was prolonged, and (6) although not given food, Moore was provided with water and a blanket and was provided opportunity to use the restroom upon request. Consequently, the Court stated that the decisive factors are the length of

Moore’s detention and the repeated, prolonged nature of Ryan’s questioning.

Moore was detained for approximately three hours total, which, standing alone, is insufficient evidence to support a finding of coercion. *Bergbuis v. Thompkins*, 560 U.S. 370 (2010). And Ryan’s initial prolonged questioning did not convince the Court that Moore’s will was overborne, despite the fact his repeated requests for an attorney were ignored. After the prolonged questioning and Ryan had left the interrogation room, Moore requested to speak again with Ryan and then confessed. If the prolonged questioning had overborne Moore’s will, he would have confessed during that questioning, the Court reasoned, not after Ryan had already left the interrogation room and Moore asked to speak with him again, which the Court found particularly compelling. Thus, the Court concluded that “the State met its burden to show that the confession was voluntary and uncoerced by a preponderance of the evidence.”

Accordingly, the Court affirmed the district court’s ruling that the confession is inadmissible in the State’s case in chief but reversed the ruling that the confession is inadmissible for impeachment purposes. See: *State v. Moore*, 516 P.3d 1054 (Idaho 2022). ■

Ohio Supreme Court: Good-Faith Exception to Exclusionary Rule Inapplicable to Warrant Based on Affidavit Stating Cellphones Found at Scene of Traffic Crash ‘May’ Contain Evidence

by Anthony W. Accurso

THE SUPREME COURT OF OHIO HELD THAT the Court of Appeals erred in applying the good faith exception to the exclusionary rule where the search warrant for cellphones found at the scene of a traffic accident stated that evidence of a crime “may” be found on the defendant’s cellphone.

A vehicle being driven by Alan Schubert crossed the center line, striking another vehicle. Only Schubert survived, and while he was unconscious and receiving care at a nearby hospital, investigators determined that his blood tested positive for amphetamine, methamphetamine, and fentanyl.

Shortly thereafter, police sought a search warrant to inspect three cellphones they recovered at the scene of the accident. The affidavit accompanying the warrant stated that the phones “may” contain additional evidence in connection with the investigation, so police wanted to obtain “personal identifiers” and

metadata for “incoming and outgoing calls, text messages and/or internet browsing information,” including any of this information that could be obtained from “cloud storage,” on the premise that this information “may contain evidence ... to the crime” of aggravated vehicular homicide. (emphasis supplied)

While searching Schubert’s phone, police discovered pictures of nude juveniles sufficient to support multiple counts of pandering obscenity involving a minor.

Schubert filed a suppression motion, challenging the sufficiency of the warrant to search his cellphone. The trial court denied the motion and sentenced him to eight years in prison for the vehicular homicide and four years for the pandering, to be served consecutively for a total of 12 years. Schubert appealed.

The Court of Appeals affirmed the denial, but it concluded that, though the warrant was

deficient, the evidence need not be suppressed because the officer relied on the magistrate to determine whether the warrant was sufficient – that is, it applied the good-faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897 (1984), and adopted by the Ohio Supreme Court in *State v. Wilmoth*, 490 N.E.2d 1236 (Ohio 1986).

The Court of Appeals rejected the trial court's conclusion that there was probable cause to support the search warrant because of the mere fact that evidence related to a traffic accident "may" be found on cellphones located at the crash scene were sufficient to establish probable cause, the Court of Appeals explained that there would be probable cause to search every cellphone discovered at a crash scene. It declined to adopt such a blanket rule.

On review, the Ohio Supreme Court reviewed both the warrant's validity and the application of the good-faith exception.

The Court began its analysis by recounting the rationale for the exclusionary rule, stating that it protects people's Fourth Amendment rights through its deterrent effect. *United States v. Calandra*, 414 U.S. 338 (1974). Because there is a high societal cost of excluding "inherently trustworthy tangible evidence," the U.S. Supreme Court has instructed that the exclusionary rule should only be applied in those situations where it will actually have a deterrent effect regarding violations of the Fourth Amendment. *Herring v. United States*, 555 U.S. 135 (2009). The *Leon* Court explained that when law enforcement's conduct is objectively reasonable, "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way." *Id.* Consequently, the U.S. Supreme Court adopted the objective-good-faith exception to the exclusionary rule, which is applied to situations where the police behaved in an objectively reasonable manner. *Id.*

The *Leon* Court instructed that generally when police rely on a warrant issued by a judicial officer – even when it's subsequently determined to be invalid – that is sufficient to show that they "acted in good faith in conducting the search." *Leon*. But even when relying on a warrant in good faith, reliance on the warrant must still be "objectively reasonable." *Id.* One circumstance in which it is not reasonable to rely on a warrant is when the supporting affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.*; see also *Illinois v. Gates*, 462 U.S. 213 (1983).

Such affidavits are known as a "bare

bones" affidavit. *United States v. White*, 874 F.3d 490 (6th Cir. 2017). A bare bones affidavit doesn't establish a "minimally sufficient nexus between the item or place to be searched and the underlying illegal activity," the Court stated, citing *United States v. McPhearson*, 469 F.3d 518 (6th Cir. 2006). An affidavit must show more than mere "suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge" and make a connection "between the illegal activity and the place to be searched" in order to avoid being a bare bones affidavit. *United States v. Christian*, 925 F.3d 305 (6th Cir. 2019).

According to the U.S. Court of Appeals for the Sixth Circuit, "[I]f the reviewing court is able to identify in the averring officer's affidavit some connection, regardless of how remote it may have been – some modicum of evidence, however slight – between the criminal activity at issue and the place to be searched, then the affidavit is not bare bones and official reliance on it is reasonable." *White*.

Turning to the present case, the Court agreed with the Court of Appeals regarding the warrant's invalidity, stating the affidavit in support of the warrant does not contain the requisite "minimal connection between

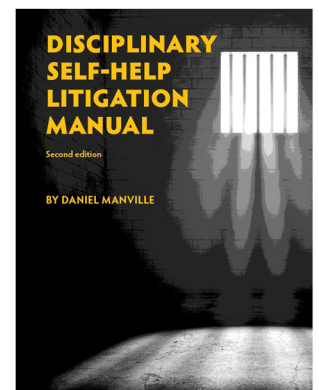
the alleged criminal activity and the three cell phones discovered at the scene of the car crash." It reasoned: "[I]f the affidavit's assertion that there 'may' be evidence of the cause of the crash on the phones were enough to establish probable cause to search the phones, then there would be probable cause to search any phone discovered at the scene of a crash based on the mere speculation that the crash was caused by distracted driving."

Proceeding to the issue of whether the good-faith exception applies, the Court stated that the repeated use of the word "may" in the affidavit indicates that the officer's belief about possible evidence on the phones was "based in complete speculation." It chided: "A well-trained police officer offering or encountering this language should know that such conclusory and speculative statements, without more, do not support a finding of probable cause." See *Aguilar v. Texas*, 378 U.S. 108 (1964) (an affidavit that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances pertaining to veracity, reliability, and basis of knowledge, is a bare bones affidavit). Additionally, there isn't a single fact or basis for inferring in the entire affidavit suggesting that the phones had anything to do with the vehicular homicide

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under investigation, according to the Court.

Thus, the Court held that the officer's reliance on the warrant was objectively unreasonable, regardless of the magistrates blessing, and therefore the good-faith excep-

tion to the exclusionary rule does not apply in this case.

Accordingly, the Court reversed the Court of Appeals' denial of the motion to suppress, but noted that it affirms the Court

of Appeals' determination that the warrant affidavit failed to establish probable cause and that the warrant should not have been issued, and remanded the case. See: *State v Schubert*, 2022 Ohio LEXIS 2599 (2022).¹¹

Massachusetts Supreme Court Announces When Clock Begins to Run on Statutory Pretrial Detention

by Harold Hempstead

THE SUPREME JUDICIAL COURT OF Massachusetts held that the pretrial detention period in General Laws c. 276, § 58B begins to run when a defendant is detained, not when an order of detention is formally issued.

On December 26, 2021, while Chayanne Velazquez was on bail on cases he had pending in the Boston Municipal Court ("BML") and the Superior Court in Middlesex County ("SCMC"), he "allegedly committed an assault and battery...." He was arraigned on the new charge on February 2, 2022, in the Lynn Division of the District Department ("Lynn District Court"). The Commonwealth filed motions in the Lynn District Court, requesting pretrial detention for Velazquez on his new case, GLC 276, § 58A, that his bail be revoked, and that he be detained on the cases he had pending in the BML and the SCMC. § 58B.

The arraignment judge found that probable cause existed under § 58A to detain Velazquez without bail until the court heard arguments on the Commonwealth's motions. At the February 8, 2022, hearing on the motions, the judge ordered Velazquez be detained until June 8, 2022, (120 days) on the Lynn District Court case (§ 58A) and until May 9, 2022, (90 days) on his BML and SCMC cases. The judge entered the 90-day detention date on the docket as starting on February 2, 2022.

On April 7, 2022, the Lynn District Court charge was dismissed, and Velazquez motioned the court to reconsider its order revoking his bail on his other cases. The court denied his motions and his request to have the record corrected to show that his 90-day detention period started on his arraignment date, not on the date that the final order was issued.

Velazquez sought extraordinary relief pursuant to G.L.C. 211, § 3 in the county court. A Justice of the Supreme Judicial Court transferred the petition to a Justice of the Appeals Court. That Justice granted Velazquez's requested relief and "reported the case to a panel of that court." The Supreme Judicial Court granted Velazquez's application for direct appellate review to address the question of whether the 90-day pretrial

period in § 58B begins to run when a defendant is detained or from when an order of detention is issued.

The Court observed that the sentence at issue in § 58B reads, "A person detained under this subsection, shall be brought to trial as soon as reasonably possible, but in the absence of good cause, a person so held shall not be detained for a period exceeding ninety days excluding any period of delay as defined in [Mass. R. Crim. P. 36(b)(2), 378 Mass. 909 (1979)]."

The Court held that the 90-day clock starts to run from the date of detention. It explained that the rationale for this position is that the 90-day detention period in § 58B "balance[s] the liberty interest of individuals presumed innocent against public safety concerns posed by high-risk defendants [in that] it is 'temporary and provisional' and 'the trial itself provides an inevitable end point to the state's preventative authority.'" *Mushwaalakbar v. Commonwealth*, 169 N.E.3d 184 (Mass. 2021).

The Court noted that its holding is con-

sistent with its decision in *Commonwealth v. Lougee*, 147 N.E.3d 464 (Mass. 2020), wherein it explained "by stating ... that persons held in pretrial detention shall be brought to trial as soon as reasonably possible, the Legislature declared its intent that pretrial detainees be given priority when there is a queue of criminal cases awaiting trial" and that "this sentence sets a presumptive time limit for such cases to be brought to trial – [ninety days]."

The Court explained that this is the only interpretation of § 58B that is consistent with the principles of statutory construction, the Legislature's intent concerning § 58B, and the rule of lenity. See *Josh J. v. Commonwealth*, 89 N.E.3d 1123 (Mass. 2018); *Abbott A. Commonwealth*, 933 N.E.2d 936 (Mass. 2010); *Lougee*.

Accordingly, the Court affirmed the order of the Appeals Court single justice allowing the petition for extraordinary relief. See: *Velazquez v. Commonwealth*, 201 N.E.3d 1250 (Mass. 2023).¹²

Eleventh Circuit Announces Defendant Must Satisfy All Three Subsections of § 3553(f)(1) to Be Ineligible for Safety Valve Relief

by Douglas Ankney

THE U.S. COURT OF APPEALS FOR THE Eleventh Circuit, sitting en banc, held that a defendant must satisfy all three subsections of the First Step Act, 18 U.S.C. § 3553(f)(1) in order to be ineligible for "safety valve" sentencing relief.

Julian Garcon pleaded guilty to one count of attempting to possess 500 grams or more of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a) and 846. His offense carried a statutory minimum of five years' imprisonment.

At sentencing, Garcon requested application of the "safety valve" provided for in § 3553(f), which provides that for certain crimes – including Garcon's crime of convic-

tion – the sentencing court "shall impose a sentence pursuant to [the U.S. Sentencing] [G]uidelines ... without regard to any statutory minimum sentence, if the court finds at sentencing" that the defendant satisfies each of the five numbered subsections. § 3553(f)(1)-(5).

While both Garcon and the Government agreed that he satisfied the requirements of subsections 3553(f)(2)-(5), the Government argued that Garcon's prior 3-point offense made him ineligible under 3553(f)(1)(B). Garcon countered that he must meet the requirements of § 3553(f)(1)(A), (B), and (C) in order to be ineligible. The U.S. District Court for the Southern District of Florida sided with Garcon, applied the safety valve, and sentenced

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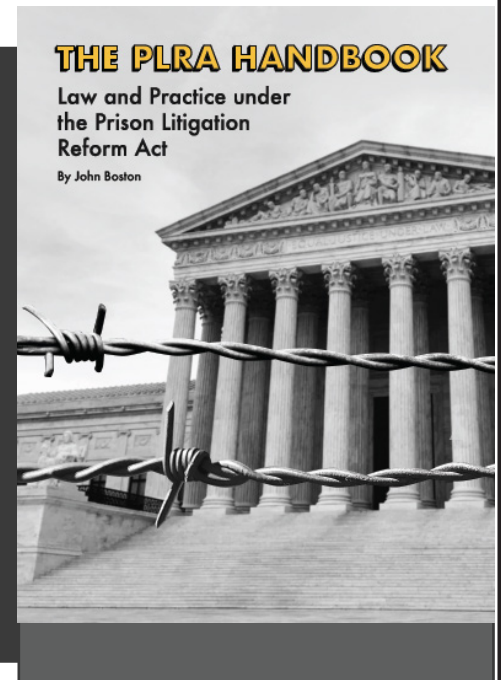
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him to 36 months.

The Government appealed, and a panel of the Eleventh Circuit disagreed with the District Court, vacated, and remanded, reasoning that the word “and” in subsection (f)(1) actually means “or.” *United States v. Garcon*, 997 F.3d 1301 (11th Cir. 2021). The Eleventh Circuit subsequently voted to vacate the panel’s opinion and rehear the appeal en banc. *United States v. Garcon*, 23 F.4th 1334 (11th Cir. 2022).

The Court observed that its analysis of this issue must begin with the text of the statute. See *Ross v. Blake*, 578 U.S. 632 (2016). The Court’s interpretation of the text is guided by the “ordinary-meaning canon, ‘the most fundamental semantic rule of interpretation.’” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 6 (2012) (“Scalia and Garner”). Under that canon of statutory interpretation, the Court stated that its duty “is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute,” *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067 (2018), “unless the context in which the word[s] appear” suggests a different meaning. *Taniguchi v. Kan. Pac. Saipan, Ltd.*, 566 U.S. 560 (2012).

The Court noted that the determinative issue under review in this case is whether the word “and” in § 3553(f)(1) is conjunctive or disjunctive. Section 3553(f)(1)(A) - (C) provides that safety valve relief shall be applied if:

(1) the defendant does not have –

(A) more than 4 criminal history points, excluding any criminal history points from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines.

The parties are in agreement that the “and” is conjunctive with respect to subsections (f)(1) through (f)(5), meaning the defendant must satisfy each of the subsections of the overall list of conditions in order for the safe harbor to apply, according to the Court. That means the parties agree the “and” in subsection (f)(4) is conjunctive. Consequently, the presumption of consistent usage instructs that the “and” has the same meaning when used in subsection (f)(1) as it does in subsection (f)(4), the Court explained. See *Brown v. Gardner*, 513 U.S. 115 (1994) (explaining that the “presumption that a given term is used to mean the same thing throughout a statute” is “at its most vigorous when a term is repeated

within a given sentence”).

Another component of the presumption of consistent usage is the rule that “a material variation in terms suggests a variation in meaning.” Scalia & Garner. When Congress intended for conditions to be disjunctive in § 3553(f), it used the word “or,” the Court explained. For example, “or” is used in § 3553(f)(2), and it is clearly disjunctive in that subsection.

The Court also pointed to the Senate’s legislative drafting manual to support the interpretation that “and” is conjunctive in § 3553(f)(1). It instructs drafters of legislation on proper usage and that “and” is conjunctive and “or” is disjunctive. Senate Off. of the Legis. Couns., *Legis. Drafting Manual* § 302(a) (1997). See *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021) (the “Senate’s own legislative drafting manual tells us that ‘and’ is used as a conjunctive in statutes structured like [§] 3553(f)(1)”). Thus, the Court concluded that “and” is conjunctive in § 3553(f)(1) and

“joins together the enumerated characteristics” within that subsection, so “a defendant must” satisfy § 3553(f)(1)(A), (B), and (C) “before he is ineligible for relief.” Because Garcon satisfied only one of the conditions, he is eligible for safe-harbor relief, the Court held.

Accordingly, the Court affirmed the judgment of the District Court. See: *United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc).

Writer’s note: The Court also provides an in-depth discussion of the “absurdity doctrine” in statutory interpretation, which allows a court to “depart from the literal meaning of an unambiguous statute ... where a rational Congress could not conceivably have intended the literal meaning to apply.” *Vachon v. Travelers Home & Marine Ins. Co.*, 20 F.4th 1343 (11th Cir. 2021) (Pryor, C.J. concurring). Anyone with a particular interest in statutory interpretation will likely find the discussion interesting. 📖

New York Court of Appeals Announces When an Alternate Juror Is ‘Discharged’ and no Longer ‘Available for Service’

by Douglas Ankney

THE COURT OF APPEALS OF NEW YORK ruled that under state law an alternate juror discharged from service cannot subsequently be seated to deliberate the case.

Hasahn D. Murray and two codefendants were tried on assault and robbery charges. After counsel for both parties had given their summations to the jury, the trial judge addressed the two alternate jurors: “I can’t let you go without thanking you and telling you [that] you are excused from this case and from jury duty for about six years, that is the good news. You are excused now.” The court sent the jury to lunch, and the two alternate jurors left the courthouse.

During the break for lunch, the court learned that one of the trial jurors had discussed the case at a social gathering. The court dismissed the trial juror and – over defense counsel’s objection – contacted the two discharged alternate jurors, confirmed they had not discussed the case nor formed an opinion, and directed them to return to the courthouse the following morning. The next morning, the court re-seated the first alternate juror on the jury. The jury then began deliberations, ultimately finding

Murray guilty of two counts of robbery in the second degree and assault in the second degree.

Murray appealed, arguing, inter alia, that the dismissed juror could not subsequently be seated on the jury and that Murray was entitled to a mistrial. A divided Appellate Division affirmed, but the dissenting justice granted Murray leave to appeal to the Court of Appeals.

The Court observed “[i]n determining whether the substitution of the recalled alternate juror was permissible, we turn first to the plain language of the relevant provisions of the Criminal Procedure Law [“CPL”].” Under CPL 270.30(1), a trial court “may in its discretion” select up to six alternate jurors who “must take the same oath as the regular jurors” and be qualified in the same manner. At the point the jury retires for deliberations, the court’s discretion is further limited to either discharging the alternates with the consent of the parties or direct the alternates not to discuss the case and order they be kept separate and apart from the trial jurors. *Id.*

When a trial juror is unable to con-

tinue serving or has committed substantial misconduct that in and of itself does not require a mistrial, the trial court must discharge that juror and may, under limited circumstances, replace the discharged juror with an alternate as per CPL 270.35(1): “If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the jury has begun its deliberations, the defendant must consent to such replacement ... *If no alternate is available, the court must declare a mistrial....*” (emphasis supplied)

The Court explained that “[a]s used in the statute, the terms ‘discharged’ and ‘available for service’ with respect to alternate jurors are mutually exclusive.” That is, an alternate juror cannot be both “discharged” while also remaining “available for service,” reasoned the Court, citing a provision added to the statute in 1995 (with regard to alternates in capital cases) emphasizing the relationship between the terms – alternate jurors in such cases “shall not be discharged and shall remain available for service,” demonstrating that “available for service” entails “not be[ing] discharged.” 1995 McKinney’s Session Laws of NY, Ch. 1, section 16. Thus, the Court concluded that “where the alternate jurors have been discharged, the court’s sole remedy is to declare a mistrial.” CPL 270.35(1).

However, that does not end the inquiry because “we must determine when an alternate juror is in fact ‘discharged’ from service,” the Court stated. The Criminal Procedure Law does not define the term, so the Court sought guidance from Black’s Law Dictionary (11th ed. 2019), which defines the discharge of a juror as relieving the “juror ... from further responsibilities in a case.” See *People v. Aleynikov*, 104 N.E.3d 687 (N.Y. 2018). The Court instructed that under this definition, an alternate juror is “discharged” when the court states on the record that the juror has no further responsibilities in the case. It adopted this bright-line rule because it “is consistent with the relevant CPL provisions and with our State Constitution.” See CPL 270.35(1); *People v. Ryan*, 224 N.E.2d 710 (N.Y. 1966); see generally *People v. Page*, 665 N.E.2d 1041 (N.Y. 1996).

Applying the newly announced rule to this case, the Court stated that “there can be no doubt that when the trial judge thanked the alternate jurors for their service and ‘excused

[them] from this case,’ the alternate jurors were discharged.” At that moment, they were no longer jurors and were not available for service. See *Ryan*. Thus, the Court held the trial court erred by replacing the dismissed

trial juror with an alternate.

Accordingly, the Court reversed the order of the Appellate Division and ordered a new trial. See: *People v. Murray*, 198 N.E.3d 466 (N.Y. 2022). 📌

Seventh Circuit: Fugitive Who Leased Condo Under Alias Retained Expectation of Privacy so Landlord Could Not Give Valid Consent for Warrantless Search of Premises

by Richard Resch

THE U.S. COURT OF APPEALS FOR THE Seventh Circuit ruled that a suspect in a federal drug investigation who leased a condominium using a false name retained a subjective expectation of privacy in the premises that society recognizes as reasonable, and thus, the landlord could not give valid consent to the police to conduct a warrantless search of the premises.

During the course of a federal drug investigation in Indiana targeting Michael Thomas, he obtained multiple fake identification documents, including one under the name “Frieson Dewayne Alredius.” Using this identity, he leased a condominium in Atlanta, Georgia; nevertheless, federal investigators tracked him to the area and arrested him outside the building.

The landlord of the unit told investigators that she had leased it to an individual going by the name of “Alredius Frieson.” With her consent, investigators searched the unit and found drugs, drug paraphernalia, and six cellphones. Investigators obtained warrants to search the phones; they discovered evidence on them that Thomas was trafficking methamphetamine.

Thomas was indicted for conspiracy to distribute methamphetamine. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846. He filed a motion to suppress evidence recovered from the leased condo unit, arguing that the landlord could not provide valid consent to search it. The Government conceded that Thomas had a subjective expectation of privacy in the unit but contended that society is not prepared to accept that expectation as reasonable because he obtained the lease for the unit by deceiving the landlord about his identity, which is a crime in Georgia. Ga. Code §§ 16-9-121(a)(4).

The U.S. District Court for the Southern District of Indiana denied Thomas’

motion. He pleaded guilty, reserving his right to appeal the suppression order. The court sentenced him to 180 months in prison. He timely appealed.

The Court began its analysis by noting that Thomas was the leaseholder of the unit at the time it was searched. Tenants may lawfully exclude others from leased premises, including law enforcement, despite the fact the landlord purports to grant consent to a search. *Chapman v. United States*, 365 U.S. 610 (1961). The Court explained that the mere fact Thomas leased the unit using an alias does not automatically deprive him

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of a legitimate expectation of privacy with respect to the unit, stating courts recognize that people have innocent reasons to use an alias. *United States v. Pitts*, 322 F.3d 449 (7th Cir. 2003); see also *United States v. Watson*, 950 F.2d 505 (8th Cir. 1991) (legitimate expectation of privacy in house bought under fictitious name); *United States v. Villarreal*, 963 F.2d 770 (5th Cir. 1992) (same for packages addressed to fictitious names); *United States v. Newbern*, 731 F.2d 744 (11th Cir. 1984) (same for hotel room registered under fictitious name).

The Court observed that Thomas' use of an alias, however, was not for an innocent purpose, but again, this still does not automatically mean he lacked a subjective expectation of privacy in the unit. The determinative issue in the case is whether society is willing to accept as reasonable his subjective expectation of privacy in the leased unit that he obtained through deception, according to the Court. See *Katz v. United States*, 389 U.S. 347 (1967).

The Court stated that an executed lease does not immunize a deceptive lessee from consequences. As the owner of the unit, the landlord retained a legitimate right to protect her ownership interest in the unit from a fugitive like Thomas. "But *how* she was entitled to protect this interest bears on the reasonableness of Thomas's expectation of privacy," the Court explained. She could have rightfully brought an eviction proceeding against Thomas because his deception violates Ga. Code § 13-5-5 (fraud renders contracts voidable at the discretion of the "injured party"), but that right does not give her the right to invite the police to search his residence. See *Chapman*.

The Court noted that the Fourth Amendment is not dependent upon the "intricacies of state law." But state law "nonetheless can indicate whether society recognizes as reasonable the expectations of tenants such as Thomas," according to the Court. Under Georgia law, a landlord must resort to the judicial process in order to remove a tenant, even a deceptive one like Thomas, from the leased premises. See Ga. Code §§ 44-7-2, 44-7-50. Consequently, even if the landlord had initiated eviction proceedings against Thomas, he remained "entitled to all the rights of any other leaseholder, including the right to exclude strangers such as police officers, until the proceeding concluded in the landlord's favor," the Court explained and

concluded that "his expectation of privacy in the interim is one that society recognizes as reasonable." Thus, the Court held that the landlord could not give valid consent to a warrantless search by police of the unit leased by Thomas.

Accordingly, the Court reversed the District Court's denial of the motion to suppress and remanded for further proceedings consistent with its opinion. See: *United States v. Thomas*, 2023 U.S. App. LEXIS 9306 (7th Cir. 2023). 🏠

California Court of Appeal: Geofence Warrant Violates 'Particularity' Requirement of Fourth Amendment and Is 'Overbroad' but Good Faith Exception Applies Because of the Novelty of Geofence Warrants at Time Sought and Executed

by Richard Resch

THE COURT OF APPEAL OF CALIFORNIA, Second Appellate District, held that a geofence warrant used to gather evidence in a homicide investigation that resulted in two murder convictions lacked the requisite particularity and was overbroad in violation of the Fourth Amendment. Nevertheless, the Court affirmed the convictions based on the good faith exception to the exclusionary rule due to the newness of geofence warrants as an investigative tool at the time the warrant was sought and executed.

Facts of the Case

ON THE MORNING OF MARCH 1, 2019, Adbadalla Thabet was shot and killed as he exited his car at a bank in Paramount, California. Surveillance video showed a gray sedan and red sedan following him. The driver of the gray car pulled slowly up to Thabet, farally shot him, and sped away. The driver of the red car retrieved Thabet's backpack and fled the scene.

Investigators learned that Thabet managed several local gas stations and had just picked up cash receipts from multiple locations prior to arriving at the bank. Upon reviewing surveillance video from those locations, the red and gray cars are seen tailing Thabet at two pick-up locations, but their license plate numbers are not legible in any of the footage. Investigators concluded that the two cars had been following Thabet that morning in anticipation of him making a large cash deposit at the bank.

The Search Warrant

DETECTIVE JONATHAN BAILEY APPLIED FOR A

search warrant directing Google to identify all persons whose location history data ("LHD") showed they were near the six locations visited by Thabet on the morning of March 1, 2019. In his supporting affidavit, Bailey recounted the facts surrounding Thabet's murder, the various surveillance videos, and the gray and red cars. He did not disclose how many of the six locations in question had available surveillance footage or which locations the two cars were spotted.

Bailey provided generic boilerplate language in his affidavit about how Google tracks and stores LHD and wrote: "I know most people in today's society possess cellular phones and other items (e.g. tablets, watches, laptops) used to communicate electronically... Most people carry cellular phones on their person and will carry them whenever they leave their place of residence." He added: "Suspects involved in criminal activity will typically use cellular phones to communicate when multiple suspects are involved." Thus, he claimed that identifying the individuals near Thabet's various locations on the morning of his murder would help investigators identify the drivers of the two cars seen on video.

Bailey's warrant application targeted six separate locations and sought the LHD of individuals near those locations during a specific timeframe as follows: (1) Thabet's apartment located in the center of a large city block and surrounded by residential and retail buildings – the targeted search area comprised about seven-and-a-half acres with the timeframe being 6:00 a.m. to 7:15 a.m.; (2) a gas station in Downey located on the corner of a busy intersection surrounded by retail businesses –

the targeted search area comprised more than four acres with the timeframe being 7:00 a.m. to 7:30 a.m.; (3) a gas station in Bellflower surrounded by other businesses – the targeted search area comprised nearly two acres with the timeframe being 7:30 a.m. to 9:40 a.m.; (4) a strip mall in Compton surrounded by other businesses and parking lots – the targeted search area comprised about one-and-a-half acres with the timeframe being 9:40 a.m. to 10:15 a.m.; (5) a gas station in Lynwood surrounded by other buildings, including an apparent residential building – the targeted search area comprised about three acres with the timeframe being 10:15 a.m. to 10:30 a.m.; and (6) the bank in Paramount where the shooting occurred surrounded by neighboring businesses and parking lots – the targeted search area comprised more than four acres.

The warrant in question contained a three-step process: (1) investigators instruct Google to search LHD for the six locations during the timeframes and provide an anonymized list of devices located within the search areas; (2) investigators review list to determine which devices not relevant to investigation and can request additional LHD from Google if needed to make that determination, even if that data is beyond the initial search parameters; and (3) without additional legal process, investigators demand Google provide identifying information for all devices deemed relevant to the investigation.

On March 21, 2019, a Los Angeles Superior Court judge, acting as magistrate, signed the geofence warrant.

The three-step warrant procedure was not strictly followed. Google advised that the location search at the strip mall produced “voluminous results.” Upon consultation with investigators, Google narrowed the search to those devices present at two or more of the six locations during the timeframes set forth in the warrant. Google provided a list of eight anonymized accounts that satisfied the modified search parameters.

Following a review of the anonymized data provided by Google, investigators requested identifying information for the eight devices. Google complied and provided associated email addresses. Investigators obtained search warrants for two of the email addresses, which ultimately resulted in the identification of Daniel Meza and Walter Meneses. They were both charged with numerous offenses related to the killing of Thabet.

They filed a motion to quash the geofence warrant and suppress all evidence

obtained as a result of its execution, arguing that Bailey’s affidavit failed to establish probable cause and that the geofence warrant lacked the particularity required under the Fourth Amendment. A suppression hearing was held on April 12, 2021.

An expert on geolocation and mobile devices named Spencer McInville testified for the defendants that Google cannot pinpoint a user’s location with 100% accuracy. In fact, he explained that a device’s recorded location provided by Google is “not a physical actual location of the device ... just the estimate derived from the measurement that they took [from GPS, Bluetooth signals, cellular network data, and strength of nearby WiFi networks].” He further testified that Google’s goal is to estimate a device’s location with 68% accuracy, i.e., there is a 68% chance the device is actually located within the circle created by the confidence interval – measured in meters reflecting Google’s confidence in the location of the target device.

The trial court ruled that there was sufficient probable cause for the issuance of the geofence warrant and also concluded that the warrant satisfied the particularity requirement of the Fourth Amendment. It thus denied the motion.

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Meza pleaded guilty to first-degree murder and was sentenced to 25 years to life, and Meneses pleaded no contest to second-degree murder and was sentenced to 15 years to life. They timely appealed the denial of their motion to suppress.

Discussion

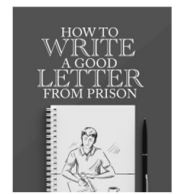
THE COURT BEGAN ITS ANALYSIS BY recounting the governing rules of law. The Fourth Amendment prohibits unreasonable searches and seizures and provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

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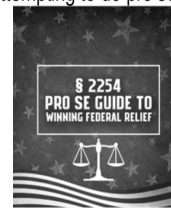
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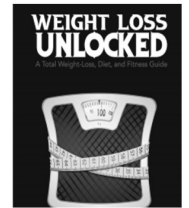
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and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const., 4th Amend.; see *People v. Robinson*, 224 P.3d 55 (Cal. 2010). A search is presumed to be reasonable when supported by a warrant that describes with sufficient particularity the items and places to be searched. See *People v. Weiss*, 978 P.2d 1257 (Cal. 1999). The reason for the particularity requirement is to prevent “general searches” that constitute “the wide-ranging exploratory searches the Framers intended to prohibit.” *People v. Amador*, 9 P.3d 993 (Cal. 2000); see *Maryland v. Garrison*, 480 U.S. 79 (1987).

The Court noted that courts must evaluate three factors when determining the validity of a warrant: (1) probable cause, (2) particularity, and (3) overbreadth. See *Illinois v. Gates*, 462 U.S. 213 (1983); *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847 (9th Cir. 1991); *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990). Probable cause exists if “the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.” *People v. Westerfield*, 433 P.3d 914 (Cal. 2019). Particularity requires the warrant to “clearly state what is sought,” *In re Grand Jury*, with sufficient precision that investigators can determine with reasonable effort the place to be searched, *Steele v. United States No. 1*, 267 U.S. 498 (1925). Overbreadth requires that “the scope of the warrant be limited by the probable cause on which the warrant is based.” *In re Grand Jury*. Although related to particularity, overbreadth is a distinct concept that “prevents the magistrate from making a mistaken authorization to search for particular objects in the first instance, no matter how well the objects are described.” *Weber*; see also *United States v. Purcell*, 967 F.3d 159 (2d Cir. 2020).

Turning to the present case, the Court first addressed the claim that the search warrant was not supported by probable cause because there was no evidence that either defendant was using a cellphone during the relevant timeframes. The Court rejected their argument, explaining that it was reasonable for the magistrate to conclude the suspects were using cellphones to coordinate their movements on the morning of the shooting. In reaching its conclusion, the Court relied on Bailey’s opinion that, based on his training and experience, suspects use cellphones to coordinate their criminal activity, commenting that such an inference is “reasonable in today’s society.” See *Riley v. California*, 573 U.S. 373 (2014) (cellphones “are now such

a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy”; cellphones “have become important tools in facilitating coordination and communication among members of criminal enterprises”).

The Court then addressed the particularity issue, concluding that the warrant failed to satisfy the Fourth Amendment’s particularity requirement “because it provided law enforcement with unbridled discretion regarding whether or how to narrow the initial list of users identified by Google.” The Court reasoned that at Step 2 of the warrant process, investigators were authorized to expand the geographic boundaries of the search and request information on “potentially thousands of users identified without any objective criteria limiting their discretion.” Similarly, at Step 3, investigators were permitted to demand “identifying information of any of the users found within the search parameters without restriction on how many users could be identified or any further showing that information concerning each individual user would be relevant to the case.” Thus, the Court ruled that the lack of any “meaningful restriction” on the investigators’ discretion “renders the warrant invalid.” (See full opinion for citations to cases from other jurisdictions that are in accord with the Court’s ruling.)

Next, the Court addressed whether the search warrant was overbroad. It reiterated that courts must determine (1) “whether probable cause existed to seize all items of a category described in the warrant” and (2) “whether the government could have described the items more particularly in light of the information available at the time the warrant issued.” *United States v. Shi*, 525 F.3d 709 (9th Cir. 2008).

The Court concluded that the geofence warrant violated both requirements. Regarding the first requirement, the warrant permitted the identification of all individuals within six large, urban search locations without any particularized probable cause with respect to each person or their location, the Court stated. Of particular concern to the Court was the fact the warrant allowed the search of both residential and commercial buildings despite there being no evidence or reasonable inference that the suspects ever left their vehicles during the timeframes under scrutiny. Additionally, the geographic boundaries described in the warrant included

“more surface area where the suspects were not believed to have been present (inside buildings) than area where they were (adjacent roads and intersections),” the Court noted disapprovingly.

Moving on to the second requirement, the Court criticized law enforcement for not drawing the search boundaries as narrowly as possible in light of the information available to them at the time. For instance, at the first location described in the warrant (the victim’s apartment building), the search location encompassed the entire building and surrounding areas, but the suspects were not believed to have been in any buildings. The roads surrounding the victim’s apartment building were the legitimate target search location because the suspects were believed to have been following the victim in their vehicles, but the search location described in the warrant was not confined to just the roads.

Similarly, the Court determined that the timeframes for search locations provided in the geofence warrant were not narrowly tailored sufficiently to pass constitutional muster. The Court noted that the victim met a relative at the Bellflower gas station at about 9:00 a.m., and they left at about 9:40 a.m. However, the warrant sought information on devices at that location from 7:30 a.m. to 9:40 a.m. There was no evidence suggesting that either the victim or the suspects were located at the gas station 90 minutes before the victim met with his relative. Thus, the Court concluded that the warrant was unconstitutionally overbroad.

It is worth noting that the Court issued the following instructive statement: “The failure to sufficiently narrow the search parameters potentially allowed a location-specific identification of thousands of individuals – likely a search within the ambit of the Fourth Amendment – for whom no probable cause existed. While we recognize it may be impossible to eliminate the inclusion of all uninvolved individuals in a geofence warrant, it is the constitutionally imposed duty of the government to carefully tailor its search parameters to minimize infringement on the privacy rights of third parties.”

Finally, the Court considered whether the good faith exception to the exclusionary rule articulated in *United States v. Leon*, 468 U.S. 897 (1984), applies in this case. The good faith exception holds that a suppression motion must be denied in those situations where a search has been conducted “in objec-

tively reasonable reliance on a subsequently invalidated search warrant.” *Leon*. The *Leon* Court described four scenarios in which the good faith exception does not apply: (1) “[T]he magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth”; (2) if “the issuing magistrate wholly abandoned his [or her] judicial role”; (3) the affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; or (4) if the warrant was “so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.” *Id.* The burden is on the government to establish that the exception applies. *People v. Willis*, 46 P.3d 898 (Cal. 2002).

Meza and Meneses argued that the third and fourth scenarios apply and thus preclude the application of the good faith exception, but the Court ruled that the standard for neither was satisfied. The Court already concluded that probable cause existed to support the issuance of the warrant, so the third scenario is inapplicable.

Turning to the fourth scenario, the Court explained that at the time investigators sought and executed the geofence warrant, they were still a new investigative tool, so law enforcement had very little experience in seeking and executing them. Furthermore, there were no published cases at that time anywhere in the country evaluating their constitutionality. See *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022) (when the warrant was obtained in June 2019, “no court had yet ruled on the legality” of geofence warrants). Although the investigators failed to follow the steps provided for in the warrant, the Court pointed out that their deviation from the procedures outlined in the warrant actually “narrowed, not expanded, the search authorized by the warrant.” Finally, the Court reasoned that in light of the “dearth of authority directly on point and the novelty of the particular surveillance technique at issue, the officers were not objectively unreasonable in believing the warrant was valid, even if the issue, upon close legal examination, is not a particularly close one [Writer’s note: The Court appears to be signaling to law enforcement that the police in this case are being given a pass because of the novelty of the issue at the time, but going forward, any geofence warrants

resembling this one will not be evaluated with the deference shown here.]” See *United States v. Smith*, 2023 U.S. Dist. LEXIS 22944 (N.D. Miss. 2023) (applying good faith exception to geofence warrant given lack of legal authority on the issue). Thus, the Court held that the good faith exception applies in this case and upheld the trial court’s denial of the defendants’ motion to suppress.

Accordingly, the Court affirmed the judgments. See: *People v. Meza*, 2023 Cal. App. LEXIS 282 (2023).

Writer’s note: The Court’s opinion appears to be the first by an appellate court anywhere in the nation to review the constitutionality of a geofence warrant. But undoubtedly, it will not be the last. As the Court observed: “The government filed its first geofence search warrant in 2016, and by the end of 2019, Google was receiving about 180 search warrant requests per week from law enforcement officials across the country.... Between 2018 and 2020, Google received about 20,000 geofence warrant requests for data, including over 11,500 in 2020 alone.” Owsley, “The Best Offense Is a Good Defense: Fourth Amendment Implications of Geofence Warrants,” 50 *Hofstra L. Rev.* 829, 834 (2022). 📖

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Washington Supreme Court Announces Adoption of ‘Rule of Automatic Reversal’ When Prosecutor Flagrantly Appeals to Racial and Ethnic Bias During *Voir Dire*

by Mark Wilson

THE SUPREME COURT OF WASHINGTON, sitting en banc, announced a new rule for situations involving flagrant appeals to racial and ethnic bias by the prosecution during *voir dire* and vacated a Hispanic man’s convictions, concluding that the prosecution’s *voir dire* examination flagrantly “appealed to the jurors’ potential racial or ethnic bias, prejudice, or stereotypes and therefore constituted race based prosecutorial misconduct.”

Someone called police to report a possible vehicle prowler when they saw Joseph Mario Zamora walking to his niece’s house at about 9:30 p.m. on February 5, 2017. There was no actual vehicle prowler in the area.

When Zamora reached his niece’s driveway, police officer Kevin Hake approached, saying he needed to speak with him. Hake quickly became nervous, claiming later that Zamora was “looking through” him with eyes the “size of silver dollars.” Hake grabbed and attempted to restrain Zamora, supposedly fearing that he had a weapon. He did not. They struggled, and eight officers joined the fray, culminating in “what may be described as extreme acts of violence” perpetrated against Zamora.

Zamora did not have a heartbeat or pulse when responding paramedics arrived to find him restrained by two officers, handcuffed, hog-tied, and face down in the snow. It took seven minutes for paramedics to revive Zamora, and he spent four weeks in a hospital Intensive Care Unit.

Adding insult to injury, Zamora was charged with two counts of third-degree assault of a law enforcement officer. One count was for officer Timothy Welsh, who sustained injuries to his hand from repeatedly punching Zamora in the back of the head. The other count was for officer Hake, who claimed to have suffered a “couple small scratches around (his) hand and wrist” and some bruising – all of which was likely due to beating Zamora unconscious.

“The actions of the police officers involved in the confrontation are alarming,” the Washington Supreme Court later stated. “But the case reached our court, in part, because of the concerning actions of the Grant County prosecutor during jury selection.”

At the outset of *voir dire*, prosecutor Garth Dano introduced topics of border security, illegal

immigration, and crimes committed by undocumented immigrants. He then repeatedly elicited comments and views of potential jurors on these topics. He declared that “100,000 people” are crossing the border “illegally” each month and asked potential jurors if they felt we “have enough border security.” He also asked potential jurors if they had “heard about the recent drug bust down in Nogales, Arizona where they picked up enough ... Fentanyl that would have killed 65 million Americans.”

Inexplicably, defense counsel did not object to any of Dano’s race- and ethnicity-based comments or questions. The trial court expressed concern that defense counsel did not object to the prosecutor’s *voir dire* examination and asked why. Yet, the court did nothing to stop the prosecutor or to cure the harm his racist examination caused. A jury was seated and ultimately convicted Zamora of both assault charges. He appealed, arguing that his constitutional right to an impartial jury was violated by the prosecutor’s race-based misconduct during *voir dire* in which he appealed to ethnic and racial bias and stereotypes.

The Court observed that the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 3 and section 22 of the state Constitution guarantee defendants the right to an impartial jury, which includes an unbiased and unprejudiced jury. *State v. Davis*, 10 P3d 977 (Wash. 2000). Ordinarily, for a defendant to prevail on a prosecutorial misconduct claim, a defendant who objects to the alleged misconduct on a timely basis must prove that the misconduct “was both improper and prejudicial in the context of the entire trial.” *State v. Loughbom*, 470 P3d 499 (Wash. 2020). But when the defendant fails to object, courts apply a heightened prejudice standard on review, requiring the defendant to prove that the claimed misconduct was “so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.” *Id.* That is, the defendant must show the misconduct resulted in “incurable prejudice,” the Court stated.

However, when the allegation of misconduct involves racial bias, courts apply a separate, burden-shifting analysis. When a prosecutor “flagrantly or apparently intentionally appeals

to racial bias in a way that undermines the defendant’s credibility or the presumption of innocence,” courts will vacate the conviction unless the State can prove beyond a reasonable doubt that the misconduct did not affect the jury’s verdict. *State v. Monday*, 257 P3d 551 (Wash. 2011). The Court explained that the rationale for the rule announced in *Monday* is similar to that of the U.S. Supreme Court’s for creating a separate set of standards in cases of alleged racial bias in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017) (explaining that while all forms of inappropriate bias undermine the trial process, “there is a sound basis to treat racial bias with added precaution”) (The Court held that the Sixth Amendment requires that the no-impeachment rule, which prohibits inquiry into jury deliberations, does not apply where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus in convicting the defendant.).

Turning to the present case, the Court vacated Zamora’s convictions. “During *voir dire* the prosecutor apparently intentionally appealed to the jurors’ potential racial bias in a way that undermined Zamora’s presumption of innocence,” the Court explained and concluded “Zamora was denied his constitutional right to an impartial jury because of the prosecutor’s race-based misconduct.”

Even under the heightened prejudice standard of *Loughbom* because of trial counsel’s failure to object, the Court had no problem finding that Zamora easily satisfied this heightened bar. “Because the prosecution is a representative of the State, it is especially damaging to” the constitutional right to an impartial, unbiased and unprejudiced jury “when the prosecutor introduces racial discrimination or bias into the jury system,” the Court stated. “In seeking equal and impartial justice, it is a prosecutor’s duty to see that a defendant’s constitutional rights to a fair trial are not violated.”

Noting that *voir dire* “is a significant aspect of trial,” the Court explained that “when the jury pool is tainted by race-based prosecutorial misconduct at the early stage of a case, the jury becomes infected in untraceable ways.” See *Pena-Rodriguez; Loughbom*.

The Court rejected the State’s claim “that

the prosecutor's conduct did not inject race into the case or appeal to racial bias," finding that "the prosecutor's questions and remarks implicated the defendant's ethnicity, and viewed in context, the conduct apparently appealed to the jurors' potential racial or ethnic bias, stereotypes, or prejudice."

Similarly, the Court also rejected the State's argument that deference was owed to defense counsel's failure to object. "Inaction by defense counsel cannot excuse a prosecutor's misconduct," the Court stated. "Defense counsel cannot waive his client's constitutional right to a fair trial, and we will not skirt the responsibility of upholding a defendant's constitutional rights because defense counsel failed to appreciate the impropriety of the prosecution's conduct."

Noting that "the trial court correctly expressed concern that the prosecutor's inappropriate questions and remarks were an appeal to ethnic or racial bias," the Court faulted the lower court for failing to *sua sponte* cure the violation when defense counsel failed to act. "It is incumbent on the trial courts to protect a defendant's right to a fair trial, even when defense counsel failed to object to conduct that is flagrantly or apparently intentionally appealing to racial or ethnic bias," the Court instructed.

"This case had nothing to do with borders or border security. Any mention of border security, immigration, undocumented immigrants, and drug smuggling was wholly irrelevant," the Court declared. "The apparent purpose of the remarks was to highlight the defendant's perceived ethnicity and invoke stereotypes that Latinxs are 'criminally' and 'wrongly' in the country, are involved in criminal activities such as drug smuggling, and pose a threat to the safety of Americans," according to the Court.

The Court noted that it had previously announced a burden-shifting rule and embraced the harmless error standard for race-based prosecutorial misconduct claims in *Monday*. "When a defendant shows that the prosecutors committed race-based misconduct, the burden shifts to the State to prove the misconduct was harmless beyond a reasonable doubt," the *Monday* Court instructed.

But as evidenced by the prosecutor's behavior in the present case as well as the Court of Appeals affirming Zamora's convictions, the Court determined that "*Monday's* past effort to address race-based prosecutorial misconduct by applying a harmless error standard has proved insufficient to deter such conduct."

Thus, the Court announced that it is replacing the harmless-error standard set forth in *Monday* and adopting the "tested and proven

rule of automatic reversal," as follows: "when a prosecutor flagrantly or apparently intentionally appeals to a juror's potential racial or ethnic prejudice, bias, or stereotypes, the resulting prejudice is incurable and requires reversal. This conclusion is consistent with our constitutional principles and reasoning discussed in *Monday*."

Applying the newly announced standard to

the present case, the Court held that the "prosecutor ... committed race-based misconduct during *voir dire*, and the resulting prejudice to the defendant is incurable and required reversal."

Accordingly, the Court reversed the Court of Appeals and vacated Zamora's convictions. See: *State v. Zamora*, 512 P.3d 512 (Wash. 2022).¹⁰

Fourth Circuit Reinstates Relief From Death Penalty, Citing State's Forfeiture of Argument Against Relief

by Dale Chappell

REFUSING TO UPHOLD AN UNCONSTITUTIONAL death sentence, the U.S. Court of Appeals for the Fourth Circuit held on March 22, 2023, that the State's forfeiture of a procedural defense in a habeas corpus appeal could not be revived after a remand from the U.S. Supreme Court.

Over 20 years ago, Sammie Stokes was convicted of murder and sentenced to death in a South Carolina state court. When all his appeals and state postconviction challenges were denied, Stokes filed for habeas corpus relief under 28 U.S.C. § 2254 in federal court. He raised, among other claims, that his trial lawyers were constitutionally ineffective for not presenting mitigating evidence of his strained upbringing at sentencing. However, this claim was not exhausted in state court, as required by federal habeas law, so the magistrate judge held an evidentiary hearing to determine whether Stokes' postconviction review ("PCR") counsel had failed to raise this claim.

The State objected to the federal court holding an evidentiary hearing, arguing that the Antiterrorism and Effective Death Penalty Act ("AEDPA") bars the court from considering any evidence that was not part of the existing state-court record at the time of the federal habeas filing. This provision, under § 2254(e)(2), states:

"If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not

have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim 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."

However, the federal court may hold an evidentiary hearing to determine whether state PCR counsel was ineffective for not raising a "substantial" claim in state court to excuse non-exhaustion of the claim in state court. *Martinez v. Ryan*, 566 U.S. 1 (2012). Critically, the State acknowledged this much but did object to the federal court's use of any evidence obtained at the evidentiary hearing to reach the merits of Stokes' claims.

When the magistrate judge submitted her report and recommendation ("R&R"), the judge found that Stokes' ineffective assistance of counsel ("IAC") claims were without merit. While the judge in fact relied on evidence obtained at the limited evidentiary hearing to reach this conclusion, the State failed to object to the R&R, instead agreeing with the final outcome. The district judge then adopted the R&R and denied Stokes' habeas petition.

Stokes appealed, and the Fourth Circuit reversed the denial of relief. The Court, relying on the same evidence the magistrate had used, found that Stokes' trial lawyers were ineffective. The State appealed to the U.S. Supreme Court, which then granted certiorari, vacated the Fourth Circuit's order, and remanded for reconsideration in light of *Shinn v. Ramirez*,

**Directory of Federal Prisons:
The Unofficial Guide to Bureau
of Prisons Institutions,
By Christopher Zoukis,
See page 54 for more information.**

142 S. Ct. 1718 (2022), in which the Supreme Court held that a federal habeas court may not hold an evidentiary hearing unless the restrictive conditions of 28 U.S.C. § 2254(e)(2) are satisfied.

On remand, the Fourth Circuit upheld its earlier decision that Stokes' lawyers were ineffective and vacated his death sentence once again. The Court found that it was not bound by the *Shimm* ruling because the State had failed to properly raise the issue and therefore forfeited it on appeal. First, the Court concluded that the State not only failed to raise § 2254(e)(2) on appeal but that it had also not objected to the R&R's use of evidence that was barred by that provision in finding Stokes' claims lacked merit. The Court stated that the State took its win without any questions.

Second, the State argued that § 2254(e)(2) is jurisdictional, requiring the Court to raise it *sua sponte* (on its own), but the Court rejected that argument. Pointing to numerous U.S. Supreme Court decisions that mandatory language in statutes does not always mean a provision is "jurisdictional," the Court explained that § 2254(e)(2)'s language is one of those non-jurisdictional provisions. Indeed, the Supreme Court treated § 2254(e)(2) in *Shimm* as non-jurisdictional.

Third, the Court refused to "exercise its discretion" to excuse the State's forfeiture of the procedural defense under § 2254(e)(2). While a court may raise a forfeited defense if the "interests of justice" so require, "a court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the issue and determine whether the interests of justice would be better served by reaching it," the Court stated.

The Court concluded that allowing the State to raise a forfeited argument that § 2254(e)(2) prevents the federal court from finding Stokes' lawyers were ineffective would unfairly prejudice Stokes in this case, stating: "It is difficult to conceive of a case where a party would be more 'significantly prejudiced' by a decision to reach an unreserved issue. We have already held that Stokes was deprived of his Sixth Amendment right to effective counsel during his capital sentencing. The State now urges us to strike that decision—and rubber-stamp an unconstitutional death sentence—based on an evidentiary limitation the State knew might apply but invited us to ignore on appeal. If excusing the State's forfeiture in this scenario best served 'the interests of justice,' justice would be a hollow word indeed."

The Court closed with this statement: "A § 2254 petitioner faces no shortage of procedural obstacles in federal court, most of which are unrelated to the actual merits of his or her constitutional claims. For petitioners like Stokes, who (through no fault of his own) did not exhaust a claim in state PCR proceedings, AEDPA erects a high wall to excusing that procedural default, even as § 2254(b)(3) shields states that fail to timely raise a procedural default defense. And even when new evidence would show cause for excusing a petitioner's procedural default, that evidence is almost never admissible in federal court. That the playing field in § 2254 cases tilts heavily in the State's favor comes

as no surprise—AEDPA was enacted to make winning habeas relief more difficult. But here, the State takes a step too far, telling us we must ignore its own flagrant forfeiture so it can enforce a death sentence we have already held was unconstitutional. Nothing in § 2254(e)(2), *Shimm*, or any other precedent requires us to reach such a perverse result, which would transform a 'difficult' task for Stokes into a Sisyphian one."

Accordingly, the Fourth Circuit reinstated its prior decision vacating the denial of Stokes' habeas petition and remanded for the State to grant Stokes a new sentencing hearing. See *Stokes v. Stirling*, 2023 U.S. App. LEXIS 6881 (4th Cir. 2023). 🏠

Massachusetts Supreme Judicial Court Affirms Granting of New Trial in Murder Case Based on IAC Where Counsel Failed to Investigate Exculpatory Evidence Contained in a Proffer and Provided to Counsel Prior to Trial

by Matt Clarke

THE SUPREME JUDICIAL COURT OF Massachusetts affirmed the granting of a motion for new trial in a murder case based on trial counsel's failure to investigate exculpatory information provided by the prosecutor.

A jury convicted Omay Tavares of first-degree murder. The prosecution's evidence supported its theory that a six-foot tall light-skinned man wearing a hoodie and skullcap and calling himself "O" had a loud argument with the victim at his apartment. "O" then pulled a 9mm pistol from his waistband and fired three shots into the victim. However, the two prosecution witnesses who saw the shooter at the apartment failed to identify Tavares when shown a photo array.

Cellphone records indicated that Tavares was in the vicinity of the apartment when the shooting occurred and was the last person to call the victim. Tavares explained that and his fingerprint being on the apartment's exterior doorknob by telling police he had previously been to the apartment and argued with the victim over the price he paid for some marijuana. A search of Tavares's apartment turned up marijuana, \$500 in cash, and some clothing similar to that worn by the shooter, but no murder weapon was recovered.

Two weeks prior to trial, the prosecutor told trial counsel Boston police had a proffer from a

confidential informant alleging another person was the shooter but did not provide a redacted copy of the proffer until the day before the trial was scheduled to begin. The proffer stated that two men went to the victim's apartment to rob him. One of them, H.H., was armed with a 9mm Taurus handgun and shot the victim when he lunged for the gun.

Trial counsel neither requested a continuance to investigate the information in the proffer letter, nor did he inform Tavares of it. At trial, counsel argued that police failed to investigate other leads but did not use the proffer evidence to support that defense. He never interviewed H.H., who appeared in court while the jury was being empaneled and was ordered by the judge to be available for trial.

When Tavares obtained new counsel posttrial, he moved for a new trial based on trial counsel's failure to investigate the proffer evidence. The motion was granted, and the Commonwealth appealed.

The Court began its analysis by setting forth the governing standards for a claim of ineffective assistance of counsel ("IAC"). Under Massachusetts Rules of Criminal Procedure 30(b), a judge "may grant a new trial at any time if it appears that justice may not have been done." For a motion based on a claim of IAC, the defendant must establish that (1) counsel's

performance fell “measurably below that which might be expected from an ordinary fallible lawyer” and (2) the deficient performance “likely deprived the defendant of an otherwise available, substantial ground of defense.” *Commonwealth v. Saferian*, 315 N.E.2d 878 (Mass. 1974).

The Court stated that when reviewing a decision to grant a new trial, the proper standard of review is for error of law or abuse of discretion. *Commonwealth v. Lessieur*, 175 N.E.3d 372 (Mass. 2021). Notably, the Court took the opportunity to clear up some confusion on the issue caused by its own prior decision. Tavares argued that the proper standard of review is the substantial likelihood of a miscarriage of justice pursuant to G.L.c. 278, § 33E, citing *Commonwealth v. Diaz Perez*, 138 N.E.3d 1028 (Mass. 2020). The Court acknowledged that it erroneously reviewed the decision to grant a new trial based on IAC under the § 33E standard in *Diaz Perez* because murder in the first degree was involved. However, that was incorrect because “the § 33E standard applies only in connection with the plenary review of direct appeals from convictions of murder in the first degree, it was not the appropriate standard to apply to review the decision to grant a new trial alone,” the Court clarified. See *Commonwealth v. Hill*, 739 N.E.2d 670 (Mass. 2000).

The duty to investigate is fundamental to effective assistance of counsel, the Court observed, because strategic decisions in defending a client can only be made when sufficiently informed of all possible options. *Commonwealth v. Long*, 69 N.E.3d 981 (Mass. 2017). When an IAC claim is reviewed, “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances ... [and counsel] has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland v. Washington*, 466 U.S. 668 (1984).

Turning to the present case, the Court first explained that a proffer is significantly different than “a rumor or neighborhood gossip” because it “is a written legal agreement between the government and an individual in which the individual agrees to provide information about one or more crimes to the government in exchange for the government’s promise that any information provided by the individual will not be used against him or her later in court.” See *United States v. Lopez*, 219 F.3d 343 (4th Cir. 2000).

In light of the potential importance of the information contained in the proffer, trial counsel was required to provide a satisfactory explanation why he did not use that information in Tavares’ defense or even request a continuance

to follow up on it, according to the Court. At the motion hearing, trial counsel claimed he failed to seek a continuance because he feared defense witnesses might not be available if the trial were delayed. The judge flatly rejected that explanation, noting that the defense’s primary witness “could not provide a confident alibi” and that there is nothing in the record to support counsel’s claimed concern. The judge ruled that trial counsel’s performance fell “measurably below that which might be expected from an ordinary fallible lawyer.”

For its part, the Commonwealth denied that trial counsel’s performance constituted IAC, arguing that the proffer evidence was actually more inculpatory than exculpatory because it confirmed the theory that Tavares was involved in the shooting.

The Court disagreed with the Commonwealth’s narrow definition of “exculpatory.” Quoting *Commonwealth v. Pope*, 188 N.E.3d 96 (Mass. 2022), the Court wrote: “[E]vidence is exculpatory if it provides some significant aid to the defendant’s case, whether it [(1)] furnishes corroboration of the defendant’s story, [(2)] calls into ques-

tion a material, although not indispensable, element of the prosecution’s version of the events, or [(3)] challenges the credibility of a key prosecution witness.”

Applying the foregoing definition, the Court stated that the proffer evidence “had the potential to aid the defendant in each of these ways.” The proffer evidence indicated that H.H. was the shooter, supporting Tavares’ mistaken identity claim; it undermined the prosecution’s theory that Tavares was the lone shooter; and it cast doubt on the credibility of two witnesses who stated that only one man visited the victim’s home on the night of the murder, reasoned the Court.

The Court noted that the motion judge stated that the evidence against Tavares was “strong” but “not overwhelming.” Use of the proffered evidence could have raised reasonable doubt. Thus, the Court ruled that the motion judge did not abuse her discretion by ruling that trial counsel’s performance was constitutionally ineffective.

Accordingly, the Court affirmed the order granting the motion for a new trial. See: *Commonwealth v. Tavares*, 202 N.E.3d 1238 (Mass. 2023). 🗨️

A Lie Is Still a Lie, Even if the Speaker Genuinely Believes It

by Jordan Arizmendi

WHAT DID YOU EAT FOR BREAKFAST this morning? Most of us could answer that question – with a good deal of confidence in the accuracy of the answer. But what if, on a particular morning, instead of drinking orange juice like you do every breakfast, you drank grapefruit juice? Or what if you ate scrambled eggs instead of sunny-side-up, as you do every morning? A new study published in *PLOS One* – conducted by scientists in the Netherlands, U.K., and Canada – reveals that our memories are shaped, almost immediately, by our preconceptions.

The study questions the accuracy of our memories, particularly in court cases that have been decided based on the deeply flawed memory of a single account. Many of these flawed memories stem from long-term memory. Few people could recall the shoes they wore on their first day of kindergarten. Anyone claiming to remember such a trivial detail would certainly be doubted. However, the study examined the reliability of short-term memory, which is typically not similarly doubted.

“This study is unique in two ways, in our opinion. First, it explores memory for events that basically just happened, between 0.3 and 3 seconds ago. Intuitively, we would think that these memories are pretty reliable,” said lead author Marte Otten, a neuroscientist at the University of Amsterdam, in an email to *Gizmodo*. “As a second unique feature, we explicitly asked people whether they thought their memories are reliable – so how confident are they about their response?”

The study utilized hundreds of volunteers over the course of four experiments. The subjects would review certain letters and then be immediately asked to name a highlighted one. Among these letters, scientists included backward letters. For example, did you just see a **᠋** or a **C**?

The scientists discovered that the subjects often misremembered the letters. However, the inaccuracy rates for backward letters were much higher than those for regular letters. Additionally, the longer the subjects waited before being asked to recall, the greater the number of wrong

answers given.

“It is only when memory becomes less reliable through the passage of a tiny bit of time, or the addition of extra visual information, that internal expectations about the world start playing a role,” Otten explained.

When a witness answers a question, all

of us – including the witness – tend to assume that the answer is the truth. However, there is much more happening in the brain regarding memories than we are currently aware of. According to this study, even short-term memory may be compromised by our assumptions. As a result, people

may be confident about the authenticity and accuracy of a false memory. Naturally, this has enormous implications for eyewitnesses in criminal investigations and prosecutions. 📖

Source: *Gizmodo.com*

Tennessee Supreme Court Announces State Statute Automatically Sentencing Juvenile Offenders Convicted of First-Degree Murder to Life in Prison Is Unconstitutional

by Douglas Ankney

IN A CASE OF FIRST IMPRESSION, THE Supreme Court of Tennessee followed the U.S. Supreme Court’s guidance for proportionality analysis when sentencing juvenile offenders convicted of first-degree murder; held that Tennessee’s sentencing regimen imposing automatic life sentences on juveniles is unconstitutional; and remedied the violation by applying the pre-1995 state statute governing parole to juvenile offenders serving life sentences in Tennessee.

In November 2015, then 16-year-old Tyshon Booker shot and killed G’Metric Caldwell while Caldwell resisted being robbed of money and marijuana by Booker’s friend, Bradley Robinson, who had yelled for Booker to shoot Caldwell after alerting that Caldwell had a gun. Booker fled the scene with Caldwell’s cellphone after the shooting and botched robbery attempt (Caldwell had lent Booker the cellphone so that he could call his girlfriend, and when he fled, he was unaware he still had the phone in his pocket).

Booker’s case was transferred from the juvenile court to the Knox County Criminal Court. A jury ultimately convicted Booker of two counts of first-degree felony murder and two counts of especially aggravated robbery. The trial court merged the two felony murder convictions and, without a hearing, sentenced Booker to life in prison – a 60-year sentence requiring at least 51 years of incarceration. The trial court, after a hearing, merged the two robbery convictions and imposed a sentence of 20 years to be served concurrently with his life sentence.

Booker challenged, in the Court of Criminal Appeals (“CCA”), the constitutionality of Tennessee’s automatic life sentence for first-degree murder when imposed on a juvenile. Tenn. Code Annotated § 40-35-501(h) (2). In its affirmance, the CCA acknowledged Booker’s argument but deferred to existing

precedent. The Tennessee Supreme Court granted his application for permission to appeal to address the constitutionality of Tennessee’s sentence of life imprisonment when automatically imposed on a juvenile homicide offender.

The Tennessee Supreme Court observed that more than a century ago, the Supreme Court of the United States (“SCOTUS”) “acknowledged that the principle of proportionality is embedded in the Eighth Amendment.” *Weems v. United States*, 217 U.S. 349 (1910). SCOTUS stated that “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Id.*

While SCOTUS’s application of the proportionality principle has not always been clear, *State v. Harris*, 884 S.W.2d 601 (Tenn. 1992), the Court noted that with regard to juveniles tried as adults, SCOTUS “has been clear about the central importance of proportionality when imposing significant criminal punishment.” In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), SCOTUS held that the Eighth Amendment prohibits executing juveniles who were under the age of 16 at the time of the offense.

Thompson was based upon three principles. The first principle was the “authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments.” *Id.* The second principle was proportionality in that the “punishment should be directly related to the personal culpability of the criminal defendant.” *Id.* And the third principle was that “there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults.” *Id.* To summarize, SCOTUS endorsed “the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable

crime committed by an adult,” and “[t]he basis for this conclusion [wa]s too obvious to require extended explanation” because “[i]nexperience, less education, and less intelligence [makes] the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” *Id.* But the *Thompson* Court declined to extend its decision to juvenile offenders older than 16.

Subsequently, in *Roper v. Simmons*, 543 U.S. 551 (2005), SCOTUS revisited *Thompson*, holding that the Eighth Amendment prohibits imposing the death penalty on all juvenile offenders. In addition to the proportionality principle, SCOTUS explained in *Roper* that three differences between juveniles and adults serve as the rationale as to why “juvenile offenders cannot with reliability be classified among the worst offenders.” According to *Roper*, these differences are: (1) juveniles lack maturity and have “an undeveloped sense of responsibility,” (2) juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and (3) “the character of a juvenile is not as well formed as that of an adult.”

Then in *Graham v. Florida*, 560 U.S. 48 (2010), SCOTUS – reflecting the reasoning of *Thompson* and *Roper* – announced another bright-line rule, holding that the Eighth Amendment prohibits sentencing juveniles who have committed offenses not involving homicide to life without parole (“LWOP”). *Graham* concluded that juveniles are “less deserving of the most severe punishments” because they are less culpable than their adult counterparts.

Two years later, SCOTUS held that mandatory LWOP sentences for juveniles – regardless of the offense committed – violates the Eighth Amendment. *Miller v. Alabama*,

LEGAL NOTICE

IF YOU, A CHILD IN YOUR CARE, OR ANOTHER LOVED ONE WERE HARMED BY ENDO OR A RELATED COMPANY, INCLUDING PAR OR AMS, OR THEIR PRODUCTS INCLUDING OPIOIDS, RANITIDINE, OR TRANSVAGINAL MESH, YOUR RIGHTS MAY BE AFFECTED BY DEADLINES IN THE ENDO BANKRUPTCY.

The deadline to file a claim in the bankruptcy is July 7, 2023, at 5:00 p.m. (prevailing Eastern Time).

The deadline to object to Endo's sale is July 7, 2023, at 4:00 p.m. (prevailing Eastern Time).

WHAT IS THIS ABOUT?

On August 16, 2022, Endo International plc and certain of its affiliates filed for chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. Certain Endo affiliates manufactured and/or sold, among other things, branded opioid medications (including but not limited to OPANA® (oxymorphone hydrochloride), OPANA® ER (oxymorphone hydrochloride extended release), and PERCOCET® (oxycodone and acetaminophen tablets)), generic opioid medications, generic ranitidine medications, and transvaginal mesh. **This notice is intended to inform you of your rights in this bankruptcy regarding the bar date and proof of claim process and Endo's proposed sale of substantially all of its assets.**

WHAT IS A CLAIM?

A "claim" means a right to seek payment or other compensation. If you, a child in your care, or another loved one were harmed by Endo or a related company, including Par or American Medical Systems (AMS), or their products, including opioids, ranitidine, or transvaginal mesh, you may have a claim against one or more of these entities. To make a claim, you will need to submit a proof of claim in the bankruptcy case. You may file a claim on behalf of yourself, a child in your care (including a child exposed to opioids in the womb), or a deceased or disabled relative. Examples of claims that may be filed in the Endo bankruptcy include but are not limited to:

- > **Opioid Claims:** Claims for death, addiction or dependence, lost wages, loss of consortium, or neonatal abstinence syndrome (sometimes referred to as "NAS"), among others.
- > **Ranitidine claims:** Claims for cancer, including bladder, esophageal, pancreatic, stomach, and liver cancer, among others.
- > **Transvaginal mesh claims:** Claims for pelvic pain, infection, bleeding, among others.

WHAT DO YOU NEED TO KNOW ABOUT THE BAR DATE AND PROOF OF CLAIM PROCESS?

The deadline to submit your proof of claim is called a bar date. The bar date, or the deadline to submit your proof of claim, is July 7, 2023, at 5:00 p.m. (prevailing Eastern Time). If you do not submit a proof of claim by the deadline, you will lose any rights you may have had to seek payment or compensation. You must file a proof of claim form so that it is actually received by the bar date. A proof of claim form can be filed by you, a legal guardian, survivors, or relatives of people who have died or are disabled. You do not need an attorney to file a proof of claim for you.

For a more complete list of relevant companies and products manufactured and/or sold by Endo and its related companies, including full prescribing information and BOXED WARNINGS for OPANA® (oxymorphone hydrochloride), OPANA® ER (oxymorphone hydrochloride extended release), and PERCOCET® (oxycodone and acetaminophen tablets), and for more complete details about the bar date and instructions on how to file a confidential personal injury claim, visit EndoClaims.com or call **877.542.1878 (Toll-Free)** or **929.284.1688 (International)**.

WHAT DO YOU NEED TO KNOW ABOUT THE SALE?

Endo intends to sell substantially all of its assets in an auction and sale process in the bankruptcy case and subject to approval by the bankruptcy court. **Endo is seeking relief that the sale will be free and clear of all claims, liens, and encumbrances.**

If you disagree with the proposed sale, you must object to the sale in writing, so that your objection is received on or before **July 7, 2023, at 4:00 p.m. (prevailing Eastern Time)**. **Any party in interest who fails to properly file and serve its objection by the objection deadline may lose its claim against Endo's assets if the sale is approved.** Objections not filed and served properly may not be considered by the bankruptcy court.

Complete details about the proposed sale, including any auction for Endo's assets, the date of the hearing to consider the sale, and instructions on how to file an objection, are available at EndoClaims.com or by calling **877.542.1878 (Toll-Free)** or **929.284.1688 (International)**.

IF YOU HAVE ANY QUESTIONS OR IF YOU WOULD LIKE TO OBTAIN ADDITIONAL INFORMATION:

CALL: 877.542.1878 (Toll-Free)
929.284.1688 (International)

VISIT: EndoClaims.com

EMAIL: EndoInquiries@ra.kroll.com

WRITE: Endo International plc Claims Processing Center
c/o Kroll Restructuring Administration LLC
Grand Central Station, PO Box 4850
New York, NY 10163-4850

567 U.S. 460 (2012). Based on *Thompson, Roper, and Graham*, the *Miller* Court stated that “[t]he concept of proportionality is central to the Eighth Amendment,” which “guarantees individuals the right not to be subjected to excessive sanctions,” and this right “flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.” Because juveniles “have diminished culpability and greater prospects for reform,”

the “distinctive attributes of youth diminish the penological justifications [viz., retribution, deterrence, prevention of crime via incarceration, and rehabilitation] for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes,” explained the *Miller* Court.

But *Miller* fashioned a different remedy than *Thompson, Roper, and Graham*. In lieu of a bright-line rule prohibiting imposition of LWOP sentences on juveniles, the *Miller*

rigidity before imposing a discretionary LWOP on a juvenile. *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

The Court, in determining whether Tennessee’s automatic life sentence imposed upon juvenile homicide offenders complies with the Eighth Amendment, considered whether: (1) the punishment for the crime conforms with current standards of decency, (2) the punishment is grossly disproportionate to the offense, and (3) the sentence goes farther than necessary to accomplish legitimate penological objectives. *Abdur’ Rahman v. Bredesen*, 181 S.W.2d 292 (Tenn. 2005) (citing *Roper*).

As to factor (1), “[r]eliable objective evidence of contemporary values” can be provided by a review of “legislation enacted by the country’s legislators.” *Perry v. Lynaugh*, 492 U.S. 302 (1989). In Tennessee, a juvenile sentenced to automatic life imprisonment must serve a minimum of 51 years but no more than 60 years. § 40-35-501(h)(2). By comparison, in 23 states and the District of Columbia, juvenile homicide offenders may be eligible for release within 25 years or less. (See full opinion for listing of states) In 12 other states, release eligibility for life sentences ranges from 25 to 35 years. (See full opinion for listing of states) Two states – Oklahoma and Texas – guarantee parole eligibility in 38 and 40 years, respectively. The remaining 12 states allow the sentencer to use discretion to impose a term of less than 50 years on juvenile homicide offenders. (See full opinion for listing of states)

Turning to factor (2), requiring a minimum of 51 years’ imprisonment may be disproportionate – depending upon the characteristics of the juvenile offender, according to the Court. Because Tennessee’s automatic life sentence imposed on juvenile offenders is a “one-size-fits-all” approach and does not consider the juvenile’s age and individualized circumstances, the Court concluded that it “lacks the necessary procedural protection to guard against disproportionate sentencing.”

Finally, regarding factor (3), the rationale for retribution is mitigated with respect to juveniles because of their reduced culpability, as explained at great length by SCOTUS in its line of cases on the topic. The need for deterrence is likewise reduced because a juvenile’s immaturity, recklessness, and impetuosity make him or her less likely to consider potential punishment. Preventing crime via incarceration is not justified because it implies incorrigibility, and “incorrigibility is inconsistent with youth.” *Graham*. Additionally,

Then in 2016, SCOTUS held that *Miller* had announced a new substantive rule of constitutional law, meaning it applies retroactively. *Montgomery v. Louisiana*, 577 U.S. 190 (2016). The *Montgomery* Court instructed that applying *Miller* retroactively to juveniles sentenced to LWOP does not require resentencing, but rather, *Miller* violations can be remedied by allowing the affected prisoners to be considered for parole. Significantly, SCOTUS later ruled that the Eighth Amendment does not require separate findings or an on-the-record explanation of permanent incor-



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the Court explained that requiring 51 years' imprisonment is inconsistent with the goal of rehabilitation because: "[a]lthough a state need not guarantee a juvenile offender eventual freedom, it must not foreclose all genuine hope of a responsible and productive life or reconciliation with the community." *Graham*.

Thus, the Court held that Tennessee's automatic life sentence with a minimum prison term of 51 years when imposed on juvenile offenders with no consideration for age and attendant circumstances violates the Eighth Amendment's prohibition against cruel and unusual punishment.

In exercising judicial restraint and not

usurping the powers of the state legislature, the Court applied as a remedy for the unconstitutional statute the sentencing policy adopted by the General Assembly in its previous enactment of § 40-35-501(h)(1). This unrepealed section was in effect from November 1, 1989, to July 1, 1995, which remains in effect for conduct during that time period. It now permits juvenile offenders like Booker to be eligible for supervised release on parole after serving between 25 and 36 years, and at the appropriate time, Booker and similarly situated juvenile offenders will receive an individualized parole hearing, taking into account age at time of

the offense, rehabilitation, and other relevant circumstances. The Court emphasized that its holding applies only to juvenile offenders, not adults, convicted of homicide.

Accordingly, the Court reversed the judgment of the CCA to the extent that it upheld Booker's automatic life sentence. See: *State v. Booker*, 656 S.W.3d 49 (Tenn. 2022). ❏

Editor's note: Anyone with an interest in the topic of the Eighth Amendment and juvenile sentencing – specifically, the principle of proportionality – should read the Court's full opinion.

California Court of Appeal Announces 'Plausible Justification' as Standard for Claiming Entitlement to Discovery Under Racial Justice Act of 2020

by Mark Wilson

IN A CASE OF FIRST IMPRESSION, THE Court of Appeal of California, First Appellate District, vacated a trial court's denial of a criminal defendant's discovery request under California's Racial Justice Act of 2020 and announced the framework for evaluating whether defendants are entitled to discovery of requested materials.

The California Legislature enacted the Racial Justice Act of 2020 ("Act"), effective January 1, 2021, mandating that "the State shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." Cal. Penal Code, § 745(a). Four categories of conduct violate the Act: (1) "the judge, an attorney ... , a law enforcement officer ... , an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin;" (2) during trial, in court and during the proceedings, "the judge, an attorney ... , a law enforcement officer ... , an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful;" (3) "the defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution

more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained;" and (4) "a longer or more severe sentence was imposed on the defendant than was imposed on similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed." § 745(a)(1)-(4).

The defendant may seek relief from a violation of the Act by filing a motion in the trial court before entry of judgment. The defendant bears the burden of proving a violation of the Act by a preponderance of the evidence. § 745(c). Claimed violations may also be raised post-judgment. § 745(e)(2)(A)-(B).

Upon a *prima facie* showing of a violation of the Act, the trial court must hold a hearing on the motion. It may appoint an independent expert, and the parties may present statistical evidence, aggregate data, expert testimony, and sworn witness testimony.

At the conclusion of the hearing, "the court shall make findings on the record." § 745(c). Upon finding a violation of the Act, the court may: declare a mistrial; discharge the jury and empanel a new jury; dismiss enhancements, special circumstances allegations,

or other special allegations; or reduce one or more charges. § 745(e)(1)(A)-(C).

"A defendant may file a motion requesting disclosure ... of all evidence relevant to a potential violation" of the Act "in the possession or control of the state." § 745(d). "Upon a showing of good cause, the court shall order the records to be released."

Solano County prosecutors charged Clemon Young, Jr., with Possession of Ecstasy for Sale in 2019. Based on the evidence presented at his preliminary hearing, Young argued that racial profiling in a traffic stop led to his drug arrest. He also cited publicly available statistics showing that, statewide, Blacks were more likely to be searched during traffic stops than other citizens.

In May 2021, Young filed a motion to "compel disclosure of relevant data" under the Act. He sought the names and case numbers of everyone similarly charged dating back five years; police reports that formed the basis of all such charges; the disposition of each of those cases; the names and case numbers of every individual prosecutor who declined to prosecute dating back five years; the names and case numbers for every sentencing that occurred, dating back five years; and the criminal history of every defendant identified in the preceding requests.

The prosecution opposed the motion, arguing that Young did not make the required good cause showing. The prosecution argued that Young bore the burden of showing that

prosecutorial discretion was exercised with intentional and invidious discrimination in his particular case, but he failed to make that showing.

"I'm not comfortable with making this requirement ... because there's so little guidance, and it's unclear whether or not there needs to be any other information other than simply the race of your client to require it," the trial court stated in denying Young's motion. "I'm doing that in part because maybe we'll get some, maybe this case will lead to us getting some, if you want to appeal my decision in some way. I'm happy to get further guidance because it is not clear to me what simply indicates, where you have the race of the defendant being the only reason we get into a consideration request under" the Act.

Young filed a petition for writ of prohibition, which is authorized to restrain further action by a tribunal that is acting in excess of its jurisdiction. Yet, the California Court of Appeal construed Young's petition as seeking a writ of mandate, which is authorized to correct an abuse of discretion or to compel the performance of a ministerial duty. See Cal. Civ. Proc. §§ 1085 and 1102.

Young asked the Court of Appeal to vacate the order denying discovery and restrain the trial court from proceeding further until it enters a new and different order granting his discovery motion. Amicus curiae briefs were filed in support of Young's position by California State Assemblymember Ash Kalra, who sponsored the Act, the State Public Defender, the American Civil Liberties Union of Northern California, and the Equal Justice Society.

The Court of Appeal vacated the trial court order. Noting that "the court's only articulated reason for the denial was that Young's good cause showing appeared to rest on nothing more than his race," the appellate court found that "the trial court's reason for denying Young's motion was incorrect as a factual matter." Specifically, "the grounds for the motion went beyond 'simply' Young's race and the Attorney General's reformulation of that mistaken premise, to the extent his ... argument has any bearing on good cause, goes to the breadth and scope of allowable discovery not to whether discovery should be allowed at all."

"Borrowing from the minimal threshold showing that is required to trigger an obligation to provide so-called *Pitchess* discovery," the Court instructed "that Young may claim entitlement to discovery" under the Act "if he makes a plausible case based on specific facts,

that any of the four enumerated violations of § 745(a)(1)-(4) could or might have occurred." See e.g., *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974).

Even so, the Court explained that satisfying the newly announced plausible justification standard "is merely a threshold consideration," and the trial court must then "consider and balance a number of (other) factors" related to whether: (1) the requested material is adequately described, (2) the requested material is reasonably available to the Government, (3) production of the requested material would violate confidentiality, privacy rights, or any protected governmental interest, (4) defendant has acted in a timely manner, (5) the time needed to produce the requested information would necessitate an unreasonable delay of defendant's trial, and (6) production of the requested material would place an unreasonable burden on the Government.

"Whether Young can satisfy this multi-

factor test of good cause remains to be seen," the Court noted. Instead of granting his request to reverse outright and order the grant of his requested discovery, the Court remanded for the trial court to apply "the plausible justification standard we adopt here, taking other pertinent factors into account."

The Court instructed: "Described broadly, the court's task will be to engage in a discretionary weighing of the strength of Young's factual showing, the potential probative value of the information he seeks, and the burdens of gathering the requested 'records of information' for disclosure."

Accordingly, the Court issued a peremptory writ of mandate directing the trial court to vacate its order denying Young's motion for discovery and to conduct a new hearing to reconsider his motion consistent with its opinion. See: *Young v. Superior Court*, 79 Cal. App. 5th 138 (2022). 📖

Ohio Supreme Court: IAC for Counsel to Mention 'Neonaticide' at Sentencing but Fail to Explain and Use It as Mitigating Evidence

by Douglas Ankney

THE SUPREME COURT OF OHIO RULED that Emile Weaver's trial counsel was ineffective at her sentencing when he made mention of the term "neonaticide" without explaining its meaning and how neonaticide was applicable to Weaver's case. The Court also found, in an unusually forceful manner, that the trial court judge demonstrated bias in denying Weaver's postconviction motion for relief.

In 2014, Weaver was a sophomore at a university in New Concord, Ohio, and lived in a sorority house. Upon obtaining birth control at a wellness center, she was informed that she was pregnant. She testified at trial that she did not "completely" believe she was pregnant because she did not show any of the normal signs of pregnancy, e.g., she did not (1) gain weight, (2) have morning sickness or exhaustion, or (3) stop menstruating. Whenever her sorority sisters or friends asked if she was pregnant, she denied it. She never told her mother.

At trial, Weaver explained that she lied about her pregnancy because she was scared, "felt like [she] had no one," and was "worried about getting in trouble." When she discussed her pregnancy during her "rocky relationship"

with her boyfriend, he encouraged her not to tell anyone. She described him as "controlling and judgmental" as well as "abusive."

In April 2015, Weaver, believing she was having a bowel movement, went into the sorority house bathroom. She then realized she was in labor; silently and alone, she delivered the baby into the toilet. The baby was later discovered by two sorority sisters in a trash bag next to the sorority house.

After a jury found Weaver guilty in 2016, a sentencing proceeding ensued. While her attorney offered as mitigating evidence a short, cursory statement about neonaticide, he did not explain the term or its application to Weaver and potential effect on her sentence. The trial court sentenced Weaver to consecutive terms of one year for gross abuse of a corpse, three years for tampering with evidence, and life without parole ("LWOP") for aggravated murder. In support of this sentence, the trial court found that (1) Weaver lacked remorse, (2) her crimes harmed her sorority sisters, (3) her conduct consisted of "the worst form" of aggravated murder, and (4) her "relationship with the victim caused [the crime]." The Court of Appeals ("COA")

affirmed.

In 2017, Weaver filed a petition for postconviction relief, claiming ineffective assistance of counsel (“IAC”) based on her trial counsel’s failure to present evidence about neonaticide as a mitigating factor at sentencing. She supported her petition with an article on neonaticide written by former Associate Professor Michelle Overman at DePaul University College of Law and an affidavit from Dr. Clara Lewis, a professor at Stanford University who had studied the social and cultural causes of neonaticide in America.

After Lewis reviewed the evidence and personally interviewed Weaver, she opined that: Weaver’s case was “a typical example of contemporary neonaticide;” that her LWOP sentence was “disproportionately harsh when compared to sentences given to others convicted of this crime;” and that defense counsel’s failure to “introduce relevant information about the social and cultural causes of neonaticide” deprived the trial court of “information that would have provided context for understanding [Weaver’s] crime.” Lewis acknowledged that Weaver needed to be punished for her conduct but emphasized that had the existing body of research on neonaticide been presented at Weaver’s sentencing, it “would have demonstrated that there are substantial grounds to mitigate her culpability.” Significantly, Lewis emphasized that panic is “central” to cases involving neonaticide, which suggests the crime is “not carefully planned.”

The trial court denied Weaver’s petition without a hearing, ruling her IAC claim was barred by *res judicata*. On appeal, the COA concluded the trial court erred in finding her claim was barred by *res judicata* because her claim dealt with matters outside the trial record, i.e., Lewis’ affidavit and report. [Editor’s note: *Res judicata* – known as “claim preclusion” – is the principle that a cause of action may not be relitigated, by the same parties, after it has been judged on the merits (and in most jurisdictions, also applies to dismissals based on a failure to state a claim).]

On remand, the trial court conducted a hearing. While Lewis did not testify on Weaver’s behalf, psychotherapist Dr. Diana Barnes did. The State did not object to Barnes’ expert testimony, which substantially aligned with Lewis’ affidavit and report regarding Weaver. Barnes focused on the interplay between neonaticide and “pregnancy-negation syndrome” (“PNS”). A closely associated precursor to neonaticide, PNS is “a clinical syndrome that encompasses both the con-

cepts of pregnancy denial and pregnancy concealment,” in which women “negate and detach from their pregnancies to the point that their bodies respond with fewer and less physical signs of pregnancy, such as no morning sickness, no sensation of fetal movement, minimal or no weight gain, no recognition of the start of labor, and continual spotting during pregnancy.”

Because PNS causes women to “distance themselves psychologically from the pregnancy for all nine months ... they often act detached after the events of birth and neonaticide, which people may interpret as indifference.”

Barnes opined that Weaver met the criteria for PNS. In addition to the facts already cited, Barnes also observed that Weaver, “after suffering deep internal vaginal lacerations and loss of blood during the birth, was discovered sitting cross-legged on her bed typing a term paper shortly after the birth ... indicat[ing] her detachment from the reality of the situation.”

At the close of the hearing, the trial court found Barnes to be “unbelievable and biased” (for reasons that will be discussed below) and denied her petition. Weaver appealed, arguing that the trial court discredited Barnes’ testimony due to the judge’s bias. The COA affirmed the trial court’s judgment, relying upon the “well established” standard that an appellate court “may not substitute [its] own credibility determination for that of the trial court.” *State v. Weaver*, 2021-Ohio-1025 (“*Weaver II*”).

The Court accepted Weaver’s discretionary appeal wherein she argued that the trial court abused its discretion by disregarding Barnes’ testimony “without good reason.”

The Court observed “[g]enerally, ‘the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.’” *State v. DeHaas*, 227 N.E.2d 212 (Ohio 1967). However, in *State v. White*, 885 N.E.2d 905 (Ohio 2008), the Ohio Supreme Court determined: “the trial court abused its discretion in determining that the petitioner had failed to establish an intellectual disability when the trial court did not provide ‘any rational basis grounded in evidence for rejecting the uncontradicted testimony of two qualified expert witnesses in the field of psychology.’” Although trial courts are not required to automatically accept the opinion of an expert witness, courts may not arbitrarily ignore an expert’s opinion, but instead, they must provide some objective rationale for ignoring the opinion. *Id.*

In *White*, (1) the trial court focused its attention on largely irrelevant evidence, (2) no evidence was offered to call into doubt the reliability of the test administered by the experts, and (3) the trial court made no finding that the expert witnesses lacked either credentials or credibility. The *White* Court concluded: “[w]hile the trial court is the trier of fact, it may not disregard credible and uncontradicted expert testimony in favor of either perceptions of lay witnesses or of the court’s own expectations” and doing so demonstrated “an arbitrary, unreasonable attitude toward the evidence before the court and constitute[d] an abuse of discretion.”

“Additionally, although an appellate court must not reweigh the witness testimony when reviewing a trial court’s credibility determination, that does not mean it may skip reviewing a court’s credibility determination of a witness in the name of deference,” as the COA had done in the present case. “Had the [COA] objectively reviewed the trial court’s determination that Barnes was ‘unbelievable,’ it would have observed that the trial court’s representation of Dr. Barnes’s testimony as ‘unbelievable’ was based on immaterial information, its own fundamental misunderstanding of neonaticide, and its own biases pertaining to the subject of Barnes’s testimony,” the Court declared.

For example, the trial court twice noted in its entry denying Weaver’s petition that Barnes was not a medical doctor, stating: “She can’t do some of the things she was asked to do with trying to apply brain trauma to the issues in this case because she’s not a medical doctor.” And “[s]ince she’s not an MD, I have a hard time calling it a diagnosis; but her findings.”

However, the Court corrected that Barnes held a Ph.D. in psychology, and psychologists can and do make diagnoses. Furthermore, expertise in trauma and application to the brain is one of the topics psychologists often deal with in their practice, according to the American Psychological Association. But beyond that, the trial court failed to “explain why the ability to apply ‘brain trauma’ to the issues in this case weighed so heavily against believing Dr. Barnes’s expert opinion that Weaver met the criteria for pregnancy-negation syndrome.” The criteria for diagnosing PNS include numerous factors other than “trauma,” the Court noted.

The trial court also found Barnes was “unbelievable and biased” because “she would bounce back and forth on what is [pregnancy] denial, what is [pregnancy] concealment,” and

“when that didn’t work, she came up with a third name for her diagnosis or whatever you want to call it.”

But again, the Court criticized the trial court by stating that “those statements exemplify the trial court’s misunderstanding of Dr. Barnes’s testimony regarding ‘pregnancy negation,’ a clinical syndrome encompassing both pregnancy denial and pregnancy concealment.” Addressing the trial court’s mischaracterization, the Court stated that Barnes “did not ‘bounce back and forth’ but rather explained several times during her testimony that pregnancy denial and pregnancy concealment are terms that ‘describe the same phenomenon with different intensity levels regarding the amount of conscious awareness throughout the pregnancy....’ Consequently, the terms are generally used interchangeably, and pregnancy-negation syndrome serves as a term to describe not just women who are in denial of their pregnancy but also women who have knowledge of their pregnancy and conceal it.”

The Court concluded: “We find that the trial court’s decision demonstrated its arbitrary disregard of Dr. Barnes’s uncontradicted expert opinion. Furthermore, the trial court’s decision was based on an unfounded and capricious credibility determination and ‘an arbitrary, unreasonable attitude toward the evidence before it.” See *White*.

The Court then reviewed Weaver’s IAC claim under the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984): (1) the attorney committed errors that fell below an objective standard of reasonableness, meaning the attorney performed deficiently and (2) if not for the attorney’s deficient performance, there is a reasonable probability the outcome of the proceeding would have been different.

The Court observed Weaver’s trial counsel failed to (1) define the term ‘neonaticide’ for the trial court, (2) explain the social and cultural causes of neonaticide and provide a personality and demographic profile of women who commit this act and the pattern of behaviors that are typical leading up to the crime, and (3) describe how Weaver and her actions fit into this profile and pattern, thereby contextualizing her actions as those of extreme panic rather than premeditation. Counsel did nothing more than simply mention the term “neonaticide.” The Court stated that it could not conceive of any “‘reasonable professional judgment’ that counsel might have exercised here by merely mentioning neonaticide, but not providing any context or potential impact

of it at Weaver’s sentencing, especially in light of the two uncontradicted experts Weaver provided in the postconviction proceedings, who each have opined that Weaver’s case fits into the classic personality and demographic profile of women who commit neonaticide and that her actions were consistent with neonaticide patterns.” Thus, the Court determined that Weaver satisfied *Strickland*’s first prong.

As to *Strickland*’s prejudice prong, the evidence “provide[d] a compelling narrative that could have framed Weaver’s actions not as premeditated, but those of desperation and panic from an immature and isolated young woman,” reasoned the Court and concluded “there is a reasonable probability that her sentence would have been different but for counsel’s deficient performance.” Thus, she satisfied the second prong and established IAC under *Strickland*.

As to the issue of judicial bias, the Court made an explicit finding of such, citing the trial judge’s behavior that demonstrated his “fixed anticipatory judgment” regarding Weaver’s sentence. Judicial bias has been described as “a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the laws and the facts.” *State ex rel. Pratt v. Weygandt*, 132 N.E.2d 191 (Ohio 1956).

To support this finding, the Court observed that at Weaver’s original sentencing, the judge stated: “(1) You can’t get any younger than this victim,” (2) it’s aggravated murder based upon the age of the victim, and (3) “what I find in this case is that for a number

of months, you tried over and over to take that baby’s life.”

Then after the hearing on Weaver’s petition, the trial judge “made dismissive statements about Weaver that did not pertain to the [IAC] issue at hand [such as]: ‘The [c]ourt is required to sentence based upon what [Weaver] is convicted of and taking anything else [into] mitigation, age, this, that, and the other, prior history, she had none.’” The trial judge then echoed his same findings of the original sentencing: “The offense becomes a life sentence based upon the age of the victim. You can’t get any younger than the victim in this case. And you couldn’t have tried more times to kill this child than she did throughout the nine months she was pregnant. That was the [c]ourt’s finding at that point in time. It’s still the [c]ourt’s finding at this time.”

The Court observed “[t]hese statements indicate that the trial-court judge wanted to punish Weaver not only for the offenses with which she was charged, but for her behavior throughout her pregnancy, which he found to be personally reprehensible.”

Accordingly, the Court reversed the COA’s judgment in *Weaver II* and remanded to the trial court for a new sentencing hearing and for assignment to another trial judge of that court. See: *State v. Weaver*, 2022 Ohio LEXIS 2470 (2022). 📖

Writer’s note: This opinion provides a detailed and in-depth explanation of the causes and symptoms of both neonaticide and pregnancy-negation syndrome. Anyone with an interest in this topic is encouraged to read the Court’s full opinion. This is the first time the topic has been covered in *CLN*.

Bloodstain Analysis in Short-Range Shootings

by Jordan Arizmendi

IN A STUDY BY AIP PUBLISHING IN *PHYSICS of Fluids* researchers from the University of Chicago and Iowa State University developed an explanation as to how a short-range shooter may stay completely clean of any drops of blood.

Whenever a forensics team is evaluating a crime scene, the blood back splatter caused by the “turbulent vortex ring” caused by a gunshot, will push the blood droplets back to the victim. However, according to the author of the study, Alexander Yarin, “Droplets are also deflected aside, and our predictions showed that some can even land behind the victim,

even though initially they were moving from the victim toward the shooter.”

The discovery might lend credence to the inexplicable courtroom puzzle as to how a short-range shooter may stay clean of any drops of blood. According to the research, the gases that emit from a firing gun interact with blood droplets in various yet predictable ways.

“The results reveal the usefulness of multiphase flow fluid mechanics for the forensic discipline of back splatter analysis,” said Yarin. 📖

Source: forensicmag.com

Study Explores Factors Underlying High Rate of American Police Killings

by Eike Blohm, MD

FATAL ENCOUNTERS WITH POLICE OCCUR in the U.S. with disturbing frequency, setting us apart from other Western industrial nations. A recent study published in the *Annual Review of Criminology* explores the drivers behind this American exceptionalism.

If one were to consider three countries, one with religious views and persecution, one that started as a brutal prison colony, and one that was founded by entrepreneurial and religious immigrants on the values of equality, freedom, and democracy, odds are one would be utterly incorrect in trying to predict which will have the highest rate of fatal police violence (“FPV”) two centuries later.

This is no hypothetical scenario but pertains to Germany, Australia, and the U.S. respectively. Each year about 11 people are shot by police in Germany, and 18 Australians lose their life at the hands of law enforcement officers. The number of citizens killed by American police in 2020 was an astonishing 1,133. In fairness, the incidence of FPV must be interpreted with population size in mind, so if Germany had the same population as the U.S., one would expect about 35 deaths – still a world apart.

America is only surpassed in annual FPVs by Brazil (6,416 deaths) and Venezuela (5,286 deaths), countries in which extrajudicial killings by police are often tied to organized crime or directed by an authoritarian government as a means of suppressing dissent among its populous. Neither of these factors contribute significantly to the peculiarly high FPV rate in the U.S., so other explanations must be sought.

Causality is impossible to establish. To prove scientifically that a factor such as high rates of gun ownership is the reason for high FPV rates requires a randomized controlled trial. Researchers only have observational data, which can establish correlation, highlighting that a factor co-occurs with high FPV rates. For example, beards correlate with prostate cancer, but that does not mean beards *cause* prostate cancer.

How predictably a factor co-occurs with an outcome is measured by a correlation (r) coefficient between -1 and 1 . If $r = 0$, there is no correlation. An r of 1 indicates perfect correlation; if the factor increase by 10% , so does the outcome. A negative r value signifies

inverse correlation; if the factor goes up, the outcome goes down.

The correlation coefficients cited in the study are based on data that are challenging to measure. For example, police in the U.S. are not uniformly required to report FPV encounters, and killings by off-duty police officers are tracked inconsistently. In Russia, FPV incidents often occur during confinement rather than during arrest. In Great Britain, where police are seldom armed, most deaths occur from restraint asphyxiation rather than police shootings and may not be considered an FPV event.

With these limitations in mind, the cited study deconstructed FPV encounters into three distinct components:

(1) The encounter must have a volatile element such as an armed suspect, no-knock warrant or raid, a person in a mental health crisis.

(2) The response of the police officers to the volatile element influenced by their training and culture, policies, accountability, and use-of-force alternatives.

(3) The response of the suspect and their degree of defiance, resistance, and combativeness.

Some of these factors are under the control of law enforcement officers, but some are the result of a nation’s gun laws, welfare system, or healthcare system. The most pertinent factors are discussed below.

The Role of Racism

THE HISTORY OF THE U.S. IS STEEPED IN racism. We were one of the last Western nations to abolish slavery only to replace it with segregation, the sequelae of which are still apparent today. Compared to non-Hispanic Whites, Blacks are 2.5 times more likely to be killed by police. But we are not the only racist country. About 10% of the French population are of African descent, and 7.8% of Belgians and Dutch are Muslim, all of which face ethnic discrimination. Yet the FPV rates of these nations are nowhere close to America’s police killings. An American is 11.7 times as likely to die at the hands of police than a French citizen. If the U.S. minority deaths are taken out of FPV statistics, Americans are still 9.6 times more likely to have a fatal police encounter. Racism might be a factor,

but it is clearly not the primary driver behind U.S. police killings.

The reason for minority deaths’ surprisingly minor contribution is the way ethnic discrimination is incorporated in America’s society and judicial system. Laws created with Black and Latino offenders in mind (e.g., marijuana and crack cocaine laws) ultimately also increase the odds of volatile encounters for Caucasians, thus driving up their FPV rates. The status quo is maintained by judges, prosecutors, and sheriffs who, unlike in Europe, are often elected officials and thus must pander to society’s racial elements with policies disguised as “safe schools” or “tough on crime” that often target minorities. In addition, American law enforcement is decentralized, which precludes national oversight. A county sheriff can institute policies of racially selective policy.

That said, racism correlates very well with FPV rates ($r = 0.83$). Countries that treat minorities poorly tend to have more police killings.

The Potential for Volatile Encounters

POLICING IN AMERICA IS DANGEROUS. A U.S. police officer is 44 times more likely to die in the line of duty than a German police officer. In a country that sells firearms at Wal-Mart, police are more likely to encounter guns during even the most basic interaction with the public such as a traffic stop for running a stop sign. Presence of a firearm renders any situation volatile. In 64% of American fatal police encounters, a civilian firearm was present, compared to 25% of FPVs in Canada.

Not only are guns omnipresent in America, but little to no regulations exist that preclude individuals with profound mental illness from obtaining firearms. The prevalence of major mental illness and incidence

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of suicide are far greater in the U.S. than most Western nations, and access to mental health care is poor and coupled with economic hardship. It is unsurprising that gun violence *perfectly* correlates with FPV rates ($r = 0.97$).

Police Perception

THE UNIQUE COMBINATION OF FIREARMS and mental illness in American society renders police officers hyperalert. Any vaguely gun-shaped object such as a cell phone is perceived as a threat. A civilian reaching into their pocket raises no eyebrows in Europe but raises police firearms in America.

The proclivity of U.S. police to unholster their guns has its root in their training and culture. American police academies essentially train cadets for war, focusing on combat and weapons training while grossly inflating expectations of violence encountered on the job. This is coupled with a hero complex nurtured by police culture but valorizes bravery and ridiculous retreat and de-escalation.

An international study investigated officers' responses to a hypothetical encounter with a person smoking marijuana in a car and subsequent verbal abuse and flight from the scene. The differences between American and European officers were profound. European officers simply shrugged off the insults and sought to deescalate through persuasion. American officers from urban areas universally opted to arrest the civilian berating them.

When the suspect fled, most European officers opted against hot pursuit whereas nearly all U.S. police stated they would chase the person either on foot or by car. Police chases are dangerous: about one-third of foot pursuits in Chicago end violently, and a quarter of police shootings in Las Vegas were the result of unnecessary foot chases. Surveys of U.S. police officers found that they crave car chases and the associated adrenaline rush.

Police Training

AMERICAN POLICE TRAINING IS INCONGRUENT with police work. While academies focus on weapons and combat proficiencies, actual duties align more with social work. Police are called mostly to mental health emergencies, deal with the indigent and homeless, and often interact with intoxicated or suicidal individuals. Due to the brevity of American police training – averaging 21 weeks of didactics – little classroom time remains for cultural sensitivity, conflict resolution, and negotiation strategies.

In stark contrast, Scandinavian countries

require two years of national police colleges, and German recruits must master intervention strategies, basic psychology, applicable law, sociology, and behavioral training. About half of German officers opt for three additional years of training at a police university. College-educated officers on average use significantly less force.

Content of training matters, not mere duration. Venezuela and Brazil (highest FPV rates) offer extensive training, but it is essentially paramilitary in nature. Among European countries, the amount of classroom time inversely correlates well with FPV rates ($r = -0.66$).

Permissible Deadly Force

WHEN A POLICE OFFICER IS ALLOWED TO USE deadly force varies between countries. The Supreme Court of the United States established in *Graham v. Connor*, 490 U.S. 386 (1989), that the threshold is *not* a probable and immediate threat but the mere *reasonable belief* that such a threat exists suffices. The U.S. shares the “reasonable belief” doctrine with Canada and Australia. In these three countries, officers are permitted to react violently before a threat actually materializes. As a result, more civilians are “reasonably killed.”

Taken to absurdity, this policy resulted in a West Virginia police officer being fired for *not* shooting a suicidal man who had a gun.

In European countries, the threshold for use of deadly force was enshrined in the European Convention on Human Rights in 1953. Deadly force must be absolutely necessary and proportional to the threat and importance of a law enforcement objective. European police officers have a duty to avoid deadly force, a duty to retreat when possible, and a duty of precaution. In fact, an officer could face prosecution for getting too close to a person wielding a melee weapon.

If shooting the suspect becomes unavoidable, police in European countries are encouraged to give warning shots or shoot at the legs. Their American counterparts are trained to shoot center mass where vital organs are located. In the rare instance where German police fire upon a suspect, an average of 1.7 bullets are expended. American suspects on average are shot 7.6 times. European officers shoot to stop; Americans shoot to kill.

Suspects brandishing melee weapons such as knives and clubs make up 23% of FPV victims in the U.S. American officers operate under the discredited assumption that a knife-wielding suspect can close a 21-foot distance

and fatally wound the officer in under 1.5 seconds. Hence, a person within this radius can “reasonably be believed” to represent a threat and legally killed. But a legal killing and a necessary killing are distinct events.

Stabbings are prevalent in the United Kingdom where access to firearms is restricted. There are about 40,000 to 50,000 encounters with blade-wielding suspects each year. Even though the majority of the U.K.'s police force is *unarmed*, officers get killed incredibly rarely. Odds are shooting suspects with knives in a 21-foot radius does not truly save lives.

Police Standard Procedure

THERE ARE SEVERAL BEST PRACTICES known to reduce FPVs. Fewer traffic stops, dispatching social workers to mental health calls, and restricting the pursuit of suspects on foot. Yet these policies are seldom implemented and enforced. The reasons for this are multifactorial.

U.S. police are bureaucratically fragmented. There are 18,000 independent police departments in America that all get to set their own rules and procedures. In contrast, Scandinavian countries have a single nationally unified police force. The most decentralized European police force is Belgium with 196 police agencies, leaving the U.S. one hundred times as fragmented.

Fragmentation leads to poor policies. In unified police forces, an expert committee writes data-driven directives with the input of expert consultants external to the police structure. In the U.S., this is done by the local police executive. Unfortunately, 36% of U.S. police executives lack a four-year college degree, and many have no training in critical analysis of scientific data. Consequently, pseudoscience permeates U.S. policies (see 21-foot radius policy above).

The situation is particularly dire in rural police departments. Funding and expertise are sparse, so policies and standard procedures are outdated or based on faulty data. Unsurprisingly, rural U.S. police contribute a disproportionate amount to FPVs.

Police Accountability

A RATIONAL POLICE OFFICER WILL BE deterred from violating policies and standard procedures if it is likely that the violation will be detected and punished. American police departments police themselves in contrast to the United Kingdom where police killings are all investigated by a civilian body. Self-policing can only work as long as oversight falls on

an individual who is both professionally and socially distanced from an officer involved in an FPV encounter.

The paragon of self-policing in the U.S. is the New York City Police Department (“NYPD”). Two parallel reviews of violent encounters and utilization of civilian investigators preclude cover-ups. As a result, the NYPD has the lowest FPV rate among the largest U.S. cities.

Smaller departments in America do not fare so well. Oversight is often invested into supervisors who are personal acquaintances and work professionally close to an officer involved in an FPV encounter. Even if the supervisor is diligent, a troublesome U.S. police officer can simply transfer to another department. In countries with a unified police force, violent officers are simply pushed out.

Civilian Behavior

THERE ARE VIRTUALLY NO DATA OR STUDIES that explore if there are unique characteristics among American FPV victims that contribute to our sky-high rate of police killings. One might hypothesize that the American culture of individualism and self-reliance foster an inherent resistance towards submitting to police. Long-standing tensions between police and American disadvantaged communities may also contribute to noncompliance. Ultimately, these explanations are plausible but speculative.

A Path Forward

AS STATED ABOVE, THE FACTORS DISCUSSED correlate with high FPV rates, but research cannot determine if they are causal. Fortunately, all correlating factors are modifiable.

The high rates of police killings in the U.S. are abnormal and must not be accepted as inevitable. Police officers deserve proper training and resources for the job that our society asks of them. And they deserve the protection of sensible gun control laws that reduce the danger officers face each day on the job. As hypervigilance declines, so will FPV rate.

These changes are political and therefore the responsibility of voters. Yet American police officers bear the responsibility to change their culture, identify and expel violent members of their profession, and return to their ideals of protecting and serving. 📌

Source: *Hirschfield, P. 2022 Exceptionally Lethal: American police killings in a comparative perspective. Annual Review of Criminology 6:11.1-11.28*

Proactive Online Stings Do Little to Protect Children

by Eike Blohm, MD

MANY AMERICANS LANDED THEMSELVES in prison for enticement of a minor as a result of a police sting operation. The practice continues although it has never been shown to actually prevent crimes against children.

The advent of the internet in the early 1990s led to an explosion of the distribution of child sexual abuse material (“CSAM”). In response, the U.S. Department of Justice created a task force initiative called the Internet Crimes Against Children (“ICAC”) program that provides grants to local police agencies to combat the online sexual exploitation of minors. The program remained small and received no federal funding until 2003.

This changed with the horrific kidnapping, sexual assault, and torture of Alicia Kozakiewicz, a 13-year-old girl who had chatted with a 38-year-old man online pretending to be a teenage boy. Her abuse was live-streamed on the internet. In response, Congress passed the PROTECT Our Children Act of 2008. The law quadrupled funding for the ICAC program to \$75 million per year.

There are now 61 ICAC task forces nationwide that compete for funding. Money is allocated based on the number of arrests and convictions each task force secures. By far, the easiest and most cost-effective way to generate arrests is proactive online stings

where an officer pretends to be a minor and attempts to entice an adult. The average “investment” to generate an arrest is a mere \$2,500.

Norman Achin, a then 50-year-old public school teacher, became part of that statistic when in 2018 he created a profile on the adult-only dating app Grindr. He was contacted by the user AlexVA, who during their conversation stated he was a 14-year-old boy. Achin replied through the app that he was looking for adult fun and was not interested in a relationship with a boy. He reported AlexVA to Grindr for violating its terms of use, and the company suspended the offending account.

Two weeks later, Achin was communicating with other adult Grindr users and exchanged nude selfies. Likely by accident, he sent a picture to the suspended account of AlexVA. The actual user of the AlexVA account was a Fairfax County, Virginia, police officer. Achin was arrested the following day, and a year later, he was convicted of using a communications device to solicit a minor. Achin served “only” seven months in prison, but the real fallout was the loss of his job and pension and the thousands of dollars in legal fees, in addition to now being a registered sex offender.

It is highly unlikely that a person such as Mr. Achin would ever actually have threatened the well-being of a child. This

raises the question whether the widespread practice of proactive stings does anything to reduce victimization of minors or solely serves as a source of funding for police departments.

The ICAC operations manual on operational and investigative standards notes that the target of the investigation should be allowed to set the tone, pace, and subject matter of the conversation. This is to prevent entrapment by law enforcement. Yet, this guideline is not always followed. In fact, task force lieutenant Michael Eggleston stated during a 2016 television interview that “[Police] are not enticing people to do something they don’t already have on their mind. We’re just taking advantage of this weakness.”

This approach is reflected in the transcript between “Crystal,” a police officer posing as a 12-year-old girl, and an adult man. After she disclosed that the stated age on her dating profile of 32 was fictitious, the man would not agree to anything more than “being friends” and would only agree to meet in a public location. Yet “Crystal” was unrelenting. Even after the man tried to disengage, she bombarded him with several more messages until he finally agreed to meet her for sex. At that point, he was arrested.

The ends simply don’t justify the means. A *Manitoba Law Journal* study in 2020 examined proactive stings by Canadian Police.

Rarely did any of the persons arrested engage in any other criminal activity such as possession of underage pornography. The argument that proactive stings protect children by arresting so-called “future predators” does not hold water.

Recently, lawmakers agreed to fund a study that compares the criminal histories of individuals arrested in proactive sting operations with those of persons arrested as a result of a reactive sting operation in which an adult actually sought out a child. The re-

sults of the research are expected in June of 2023 and will provide insight into whether proactive stings merely misallocate resources and unnecessarily lead to incarceration. 📖

Source: *The Appeal*

California Court Rejects Geofence Warrant

by Anthony W Accurso

A CALIFORNIA TRIAL COURT HELD THAT A geofence warrant obtained by the San Francisco PD violated the Fourth Amendment and the recently enacted California Electronic Communications Privacy Act (“CalECPA”), requiring future warrants to be more narrowly tailored.

People v. Dawes, Court No. 19002022, SW# 42739, involved a 2018 burglary for which the police had difficulty identifying a suspect. Police obtained a warrant to obtain location data from Google’s Location History database, which enabled police to identify Laquan Dawes.

For those unfamiliar with the details of geofence warrants, these usually involve a three-step process. First, Google returns advertising IDs and location history for all the Google-tracked devices in an area during a specific window of time. In the second step, police narrow the list of devices but may expand the geographic area and time window to track the movements of the devices of interest. The third step involves narrowing the list of devices further, and Google then provides detailed user info on the remaining devices.

In this era of mass incarceration and the surveillance state, most courts simply approve tech-oriented warrants without understanding

what they are authorizing police to do. However, a growing number of judges are pushing back against geofence warrants because they understand these warrants reveal private information on sometimes thousands of innocent people.

Police often go to Google because of the wealth of data the company collects on its users. As the U.S. District Court for the Eastern District of Virginia recently wrote, “Location History appears to be the most sweeping, granular, and comprehensive tool—to a significant degree—when it comes to collecting and storing location data.” *United States v. Chatrue*, No. 3:19cr130 (E.D. Va. 2022).

Yet experts have called the accuracy of Google’s location data into question, leaving many courts to suspect that this method regularly identifies false positives and fails to include actual perpetrators. Further, there is often no evidence that criminals were using a phone that contributes to Google’s database.

The court in *Dawes* found the warrant was unconstitutional for two reasons. First, the geographic area requested was too large. The court wrote, “[t]his deficiency in the warrant is critical because the geofence intruded upon a residential

neighborhood and included, within the geofence” several homes, a church, a chain restaurant, a hotel, apartments, a senior living facility, a self-storage business, and two busy streets. All the people having mobile phones in that geographic location had their data seized but “were not suspected to have any involvement in the burglary, either as a suspect, victim, or witness.” Second, the court also ruled that allowing a three-step process to ensue from one warrant “[p]rovided officers with unbridled discretion to determine who to target for further investigation.”

The trial court in *Dawes* used a provision of CalECPA to suppress the location history evidence but stressed the narrowness of the ruling. San Francisco PD will have to be more to narrow the scope of their geofence warrants going forward and will have to obtain a warrant for each stage of the process. But these warrants will continue to be issued and will allow police to pry into the private lives of innocent citizens until they are outlawed or Google quits spying on its users, neither of which seems likely in the near future. 📖

Source: *eff.org*

News in Brief

Arkansas: The DOJ announced on Jan. 24, 2023, that two former police officers in Crawford County were charged with excessive use of force after beating a man at a gas station. The *New York Times* reported that the two former officers, Zackary King and Levi White, assaulted Randal Worcester, 27, during an arrest on Aug. 21, 2022. The incident occurred around a gas station in Mulberry and was caught on camera by a witness in a video that made the rounds on social media. The video showed three officers manhandling Worcester, holding him down, shoving his head into the pavement, and hitting him. The third officer in the video, Thell Riddle, was placed on administrative leave by the Mulberry PD as an investigation was under way. King and White were fired by the Sheriff’s Department

in Oct. 2022. The Sheriff’s Dept. claimed that Worcester had been charged with resisting arrest, terroristic threatening, second-degree battery, and second-degree. If convicted, King and White could face fines of up to \$250,000 and sentences of up to 10 years in prison and 3 years of supervised release.

California: It was announced on April 7, 2023, that the former executive director of the San Jose Police Officers’ Association (“SJPOA”) was arrested in connection with a drug smuggling scheme. *CBS News* reported that the former executive director, Joanne Marian Segovia, was accused of working to import into the U.S. a fentanyl analogue called valeryl fentanyl, from various countries including India and Hungary. She had been under investigation since 2022 and had been interviewed in

Feb. and March of 2023, during which she attempted to lie about the matter. Segovia tried to say that her housekeeper was to blame for the incriminating purchases, messages, and packages. Between Oct. 2015 and Jan. 2023, Segovia had thousands of pills shipped to her house in 61 deliveries, using devices both personal and professional to arrange them. She also agreed to participate in distribution efforts inside the country, including using her SJPOA office to disperse pills. She was ousted by the SJPOA after an internal investigation and could face up to 20 years in prison if convicted.

Colorado: KDVR in Denver reported that a police officer in Boulder County resigned on March 25, 2023, after the sheriff’s department found that he was romantically entangled with a probation client. The now-

former officer, Matt Jones, resigned his office in the midst of an internal affairs investigation looking into his relationship with the client. Jones had initially tried to claim that it was just a friendship, but the department uncovered messages that indicated to investigators that it was something more. His dishonesty during the investigation and his failure to report the nature of his relationship were “grounds for termination” as they represented direct violations of department policy.

Florida: A police officer in Pinellas County was arrested after an incident of domestic battery and burglary on April 8, 2023. WFLA in Tampa reported that the officer, Michael Deerman II, 35, was arrested by the Sheriff’s office, of which he was a member as well. He was taken into custody after forcing his way into his ex-wife’s Seminole home and physically restraining her in a violent way that left bruises and red marks. She had told him not to enter. The incident was still under investigation at the time of the report. Deerman had been with the Sheriff’s office since April 24, 2017.

Iowa: The Chief of Police in Kingsley was arrested on Feb. 15, 2023, after being accused of using his powers to stalk a former girlfriend and those around her. KTIV in Sioux City and WHO 13 in Des Moines reported that the chief, James Dunn, 54, was taken into custody by the state Dep. of Criminal Investigation after it was requested by the Hinton PD to look into Dunn’s conduct. Dunn was accused of stalking a woman he had been in a relationship with until Nov. 2022. He had become aware at some point in Jan. 2023 of a new relationship she was in. He went on to figure out where her new boyfriend lived and compiled information on her, the new boyfriend, and the new boyfriend’s roommate. On Feb. 3, 2023, the victim asked Dunn not to contact her or anyone close to her. But she asked again on Feb. 7, after Dunn taped a letter to her boyfriend’s door and sent another letter to the roommate. The letters were written using city-owned materials, and he used city-property to gather information on the victims. Dunn also got in touch with the mother of the woman. The woman claimed that he was normally armed, even while off duty. A request for an official no-contact order was filed. Dunn was soon handed 14 additional counts in relation to the allegations.

Maryland: *Law & Crime* reported on April 6, 2023, that a sheriff in Frederick County was federally indicted on charges of using his station to benefit a political supporter. The sheriff, Charles “Chuck” Austin Jenkins, 66, was handed multiple counts, including various

gun-related crimes and “conspiracy to interfere with a government function.” Jenkins, and his alleged coconspirator, Robert Justin Krop, 36, were accused of entering into an arrangement from Aug. 2015 to May 2022 to fraudulently purchase machine guns. Jenkins used his status as a sheriff to use the office’s letterhead to make acquisitions of machine guns for Krop to rent out at his firearms business, The Machine Gun Nest. Jenkins claimed that the machine guns were to be used by the sheriff’s office as “samples for law enforcement demonstration purposes.” He claimed this despite renting out the weapons to Krop, who rented them to private citizens, turning him a profit of hundreds of thousands of dollars. The government also alleged that Krop made his political support clear in exchange. They could each face at least 5 years in prison for conspiracy if convicted. Krop was also accused of “unlawful possession of a machine gun” and could face up to 10 years in prison for that crime as well.

Michigan: A Michigan State Police officer in Saginaw was arraigned on March 3, 2023, on charges of on-duty assault and battery, WOOD-TV in Grand Rapids reported. The officer, Paul Arrowood, was accused of attacking a Black man while patrolling a neighborhood. The incident on Sep. 4, 2022, was caught on bodycam footage, which showed Arrowood and another officer approach the man, who was walking in the road and attempt to place him under arrest without giving him a clear explanation as to why. The victim declined to put his hands behind his back, trying to get a straight answer for why he was being taken into custody. The officers could then be seen in the video sending the man to the pavement and repeatedly striking him. Reporting indicated that there was no evidence the victim was ever charged with a crime. Arrowood was eventually placed on unpaid suspension on Sep. 30, 2022. If convicted, Arrowood could face a fine of up to \$10,000 and a sentence of up to 5 years in prison.

Missouri: A police officer in Potosi was federally indicted on March 29, 2023, and arrested on April 7, 2023, for charges of committing sex crimes with minors. KTTN in Trenton and KGOZ in Gallatin reported that the officer, Matthew N. Skaggs, 39, was handed charges of coercion and enticement of a minor, sex trafficking, and solicitation of child pornography. He was accused of trying to convince three underaged individuals to perform a “commercial sex act” and tried to convince at least one minor to engage in sexual activity. He is accused of committing these crimes while in uniform or

on duty and met the minors through his work as a police officer. He was accused of bribing one to provide sexually explicit content, bribing another to stay quiet about sexual abuse, and sexually abusing the third. The crimes took place between Jan. 1, 2022, and Aug. 10, 2022. If convicted, Skaggs could face a fine of up to \$250,000 and a sentence of up to life in prison.

New Jersey: *New Jersey 101.5* reported on March 10, 2023, that a police officer in Vernon pleaded guilty to making “sexual advances” on women while he was on duty as an officer. The officer, Emanuel Rivera, 38, was on suspension when he entered the plea for charges of “conspiracy to commit official misconduct.” He was accused of approaching multiple women while working in his official capacity and soliciting them for personal relationships. The charges stemmed from one incident in which he was also accused of attempted sexual assault and making inappropriate sexual remarks. He had at one point also faced counts of criminal sexual contact and attempted sexual assault. He admitted that there was an inappropriate imbalance of power between himself and the victims in the incidents. He worked with the police in Vernon Township starting in July 2013 and was suspended in August 2021 as a result of the indictment. As part of the plea deal, Rivera agreed to forfeit his position as an officer and not work in public employment ever again. Prosecutors will seek concurrent five-year prison sentences for each of the two counts.

New Mexico: KRQE in Albuquerque reported that a state police officer in Las Vegas was placed on administrative leave after being accused of raping a woman on Feb. 11, 2023. The officer, Kevin Keiner, went to pick up the victim, a female friend of 5 years, on the night in question after she had gotten into an argument with her brother. She had been to a bar earlier in the night, and after returning to the house where she got into the argument, she called Keiner to come get her. He did and took

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her to his home, where he suggested she take a shower to help her calm down. She told him that she was drunk. Keiner told investigators that she had indicated she was interested in sex, though they had never engaged in that before. The victim later claimed that she blacked out and remembered nothing after the shower, only waking up with Keiner on top of her. She also said that she felt taken advantage of. He was subsequently charged and placed under house arrest in Albuquerque with an ankle monitor.

New York: A former police officer in Queens was convicted on a plethora of counts for storming the U.S. Capitol on Jan. 6, 2021. *Law & Crime* reported that the former NYPD officer, Sarah Carpenter, 53, could be seen on surveillance footage from the attack, roaming around the halls of Congress brandishing a tambourine. At one point, she faced down a line of police officers and shouted, "I'm a fucking animal," while shaking her tambourine. She also smacked at police officers who tried to hold her back from getting deeper into the Capitol complex. The entire event was a day trip for Carpenter, who left New York in the dark hours of the morning and was back in Queens that night. Her sentencing date was set for July, 14, 2023. It took the jury in the case just a day to reach its conclusion. She was charged with numerous counts of felonies and misdemeanors, including obstruction of an official proceeding, which could earn her up to 2 decades in prison.

Ohio: A Columbus police officer was caught drag racing with a friend on the night of Jan. 3, 2023. WCMH in Columbus reported that the officer, Trier Knieper, 27, was accused of pushing 100 mph in a 65 mph zone with her friend Paige Slyman, 26. Knieper was tested for impairment when they were stopped by Ohio State Highway Patrol, and she was arrested, accused of drag racing while under the influence of an intoxicant. However, Knieper refused to consent to blood tests or a breathalyzer. She was soon handed counts of speeding per se, operating a vehicle impaired, and drag racing or street racing. Slyman pleaded guilty to the same charges on Feb. 8, 2023. Knieper remained on active duty at the time of the March 9, 2023, report.

Puerto Rico: A former officer with the Police of Puerto Rico was convicted on Dec. 20, 2022, for assault of a minor and efforts to cover it up. The DOJ reported that the former officer was Jose Cartagena, 47, and that he was chasing down a "juvenile" on a bicycle on Nov. 15, 2014, with then-fellow officers Shylene Lopez, Carlos Nieves, and Jimmy Davis. They stopped the chase when Nieves shot the victim

in the back. The four officers then arrested the minor, who complied by placing his hands behind his back. But even as he did, Cartagena used his gun to hit the youth in the back of the head, then, as they transported the victim in a car, repeatedly struck him in the face. The assaults necessitated hospital treatment for the minor. Cartagena then later tried to officially report that the boy had received all the injuries in the fall from his bicycle. The other three officers had already pleaded guilty to violation of constitutional rights by the time Cartagena was convicted. He could face up to 20 years in prison for his actions.

South Carolina: A police officer in Aiken County was fired and placed under investigation after it was found that he violated agency policy by opening fire on a car as it pulled away from a traffic stop. *The Augusta Press* reported that the officer, Christopher Williams, was dismissed after shooting at Brittany Norton as she tried to pull away from the traffic stop on March 7, 2023. Williams had pulled Norton over and thought he smelled marijuana coming from her car. He asked for her driver's license and opened her door for her to get out when she refused to exit. A scuffle ensued during which Norton attempted to drive off with Williams still physically engaged. He then shot into the car, hitting a "rear post." Norton drove off, eventually surrendering herself as another officer joined the chase. But it was not the first time Norton and Williams had encountered each other. The now-former officer had arrested Norton for marijuana possession and intended distribution before. Pills, including an illicit substance, were later found in Norton's vehicle. Norton was charged with possession and failure to stop for blue lights. A family member claimed that she was trying to drive to a safer area given her apparent familiarity with Williams.

Texas: A police officer in Sanger was fired and charged after using excessive force during an arrest on Oct. 23, 2022, KDFW in Dallas reported. The now former officer, Cole Thompson, was responding to a "vehicle disturbance" from the Denton County Sheriff's Office on the night in question when he and other officers stopped a driver on Willow Street. They ordered the driver to move to the back of the car, and they complied willingly. But even as they did, Thompson used his taser and "physical force" on the individual before handcuffing them. He was later accused of submitting a report that had details about the incident that did not align with what the body camera footage showed. He was fired on Dec. 9, 2022, and was soon charged with use of excessive force.

He had once been named "Officer of the Year."

Tennessee: A Tennessee air national guardsman was arrested on April 12, 2023, after being caught applying to be a hitman on RentAHitman.com, *The Guardian* reported. The man was Josiah Garcia, and he was caught registering for the site and then accepting what he thought was his first assassination mission. He had found the fake website, started in 2005, through an online add. He then filled out an application on Feb. 16, 2023, and sent multiple emails following up on his application, including one in which he included a section for "Why I want this Job." In that section, he claimed that he enjoyed his work as a soldier and wanted to continue it to support his future child. Eventually, an FBI agent posing as a "field coordinator" for the site got in touch with Garcia and asked him questions about his experience and why he was interested. During the conversation, Garcia indicated willingness to torture targets. Then, they met in person in a park, with the FBI agent providing Garcia a fake target package and a down payment. He was arrested later in the day. If convicted, Garcia could face up to 10 years in prison.

United Kingdom: On April 4, 2023, a former Metropolitan Police officer was convicted on charges of rape, the *BBC* reported. The former officer, Ireland Murdock, 26, was found guilty of raping a woman in Sep. 2021. He had previously pleaded guilty to improperly accessing a "restricted crime report" that had to do with her after she reported him for the assault. He had no official purpose to access the information, which was held on a law enforcement database. He had worked for the Central North Basic Command but was fired in July 2022 after his guilty plea.

West Virginia: WOWK-TV reported that on Feb. 23, 2023, a State Police officer in Ritchie County was charged with strangulation and domestic battery. The officer, Joseph Comer, was accused of committing acts of violence during child custody exchanges in a parking lot on Dec. 5, 2022, and Dec. 12, 2023. Comer's attorney claimed after he turned himself over that they would file suit in response for false arrest, retaliation, and defamation. The attorney claimed that the charges of battery and strangulation came the night before Comer was scheduled for a hearing. That hearing was regarding his being improperly demoted in response to his bringing of misconduct allegations within the department to his superiors. The attorney claimed that the charges against Comer were direct retaliation for his alleged efforts to elevate misconduct. ■■

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Prison Profiteers: Who Makes Money from Mass Incarceration, edited by Paul Wright and Tara Herivel, 323 pages. **\$24.95**. This is the third book in a series of Prison Legal News anthologies that examines the reality of mass imprisonment in America. Prison Profiteers is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. **1063**

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**

The Ceiling of America, An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright, 264 pages. **\$24.95**. PLN's first anthology presents a detailed "inside" look at the workings of the American justice system. **1001**

The Criminal Law Handbook: Know Your Rights, Survive the System, by Attorneys Paul Bergman & Sara J. Berman-Barrett, 16th Ed, Nolo Press, 648 pages. **\$39.99**. Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy-to-understand question-and-answer format. **1038**

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The Merriam-Webster Dictionary, 2016 edition, 939 pages. **\$9.95**. This paperback dictionary is a handy reference for the most common English words, with more than 75,000 entries. **2015**

The Blue Book of Grammar and Punctuation, by Jane Straus, 201 pages. **\$19.99**. A guide to grammar and punctuation by an educator with experience teaching English to prisoners. **1046**

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Deposition Handbook, by Paul Bergman and Albert Moore, 7th Ed. Nolo Press, 440 pages. **\$34.99**. How-to handbook for anyone who conducts a deposition or is going to be deposed. **1054**

All Alone in the World: Children of the Incarcerated, by Nell Bernstein, 303 pages. **\$19.99**. A moving condemnation of the U.S. penal system and its effect on families" (Parents' Press), award-winning journalist Nell Bernstein takes an intimate look at parents and children—over two million of them - torn apart by our current incarceration policy. **2016**

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**

The Best 500+ Non-Profit Organizations for Prisoners and Their Families, 5th edition, 170 pages. **\$19.99**. The only comprehensive, up-to-date book of non-profit organizations specifically for prisoners and their families. Cross referenced by state, organization name and subject area. Find what you want fast! **2020**

Criminal Law: A Desk Reference, by Paul Bergman, 5th Ed. Nolo Press, 456 pages. **\$44.99**. The book offers clear, plain English explanations of the law accompanied by real-world illustrations. **1101**

Blue Collar Resume, by Steven Provenzano, 210 pages. **\$16.95**. The must have guide to expert resume writing for blue and gray-collar jobs. **1103**

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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**

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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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The Habeas Citebook: Prosecutorial Misconduct, by Alissa Hull, 300 pages. **\$59.95.** This book is designed to help pro se litigants identify and raise viable claims for habeas corpus relief based on prosecutorial misconduct. Contains hundreds of useful case citations from all 50 states and on the federal level. **2023**

Arrest-Proof Yourself, Second Edition, by Dale C. Carson and Wes Denham, 376 pages. **\$16.95.** What do you say if a cop pulls you s to search your car? What if he gets up in your face and uses a racial slur? What if there's a roach in the ashtray? And what if your hot-headed teenage son is at the wheel? If you read this book, you'll know exactly what to do and say. **1083**

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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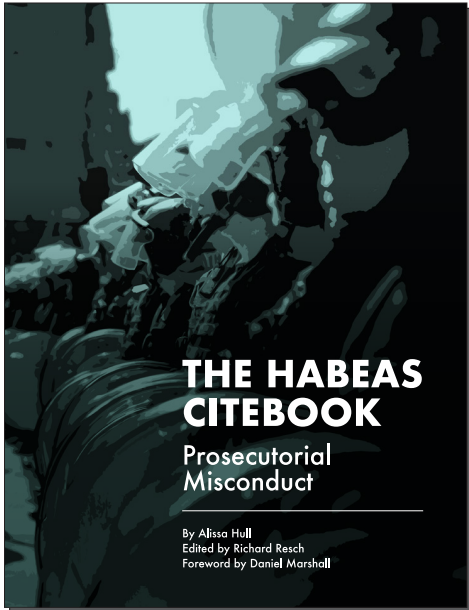
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The Habeas Citebook: Prosecutorial Misconduct

By Alissa Hull

Edited by Richard Resch

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—Brandon Sample, Esq., Federal criminal defense lawyer, author, and criminal justice reform activist

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