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Geofence Warrants: Little-Known Search Makes Innocent People Suspects Simply for Having a Phone Near a Crime Scene

by Anthony W. Accurso

The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and requires that warrants be issued only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

This language was crafted in response to general warrants issued in pre-revolutionary American colonies which allowed officers to conduct a "general, exploratory rummaging" through the homes and businesses of any person remotely suspected of criminal activity. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). While such warrants were not strictly legal under English law, the structures of judicial oversight were often rigged against the colonists.

Sometimes known as "writs of assistance," these warrants were "widely used by British officials to search colonists' imported goods to ensure compliance with the tax code." In an 1817 letter, Founding Father and future President John Adams referred to a speech (which condemned such abuses) given by James Otis, a young lawyer from Boston, as "the birth of America's struggle for independence."

The wording of the Fourth Amendment with respect to warrants has been interpreted since the founding to have two primary requirements: (1) a showing of probable cause and (2) sufficient particularity in relation to that showing.

Probable cause is proof that a crime has been committed. This bar prevents officials from seizing and searching just any persons to discover whether a crime has been committed.

Particularity requires a limitation as to the places or persons to be searched, and it is to prevent leaving to the discretion of executing officials the decision as to which persons should be arrested and which places should be searched. This requirement is always perceived in relation to the showing of probable cause such that the places searched or seized have to do with the crime in question.

Search warrants alleged that there is a "fair probability" that evidence of a crime will be located in a particular location. This is often direct evidence but can also include witnesses. Such a warrant, when issued, allows a law enforcement officer to search an area otherwise deemed private and protected by the Fourth Amendment. However, because officers need no warrant when evidence of a crime is readily apparent, a large portion of case law is devoted to determining when a search actually occurs.

In the past, "the greatest protections of privacy were neither constitutional nor statutory, but practical," because technological limitations made certain types of intrusion and surveillance either impossible, difficult, or prohibitively expensive. *United States v. Jones*, 565 U.S. 400 (2012). Yet an 1890 law review article published by Samuel Warren and Lewis Brandeis warned that "recent inventions … call attention to the next step which must be taken for the protection of the person" and that "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house tops.'"

And those inventions did come. First the telephone, followed shortly by the wiretap and pen registers. The facility with which computers handled digital records led to enormous amounts of data about customers kept for ever-longer periods – an enticing source of evidence for law enforcement. Eventually, global positioning systems and smartphones would introduce a whole host of constitutional questions.

These technologies were employed by citizens in the course of ordinary life but also by police to catch criminals. Many of these

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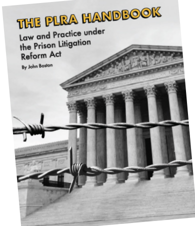

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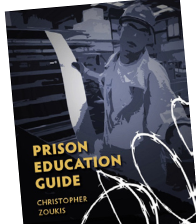

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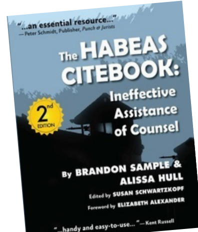

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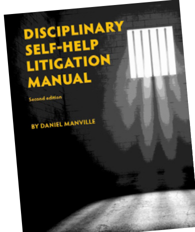

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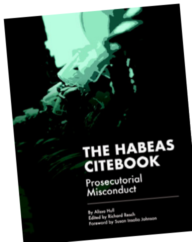

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Geofence Warrants (cont.)

attempts were eventually brought before the Supreme Court of the United States ("SCOTUS") for adjudication on the issue of when a search occurs, thus necessitating a warrant.

In 1928, SCOTUS considered a case brought by one of several convicted bootleggers whose criminal case was, at least in part, based on evidence obtained from wiretaps. SCOTUS upheld a lower court's denial of the defendant's suppression motion with Chief Justice Taft writing, "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." *Olmstead v. United States*, 277 U.S. 438 (1928).

This ruling was so broadly unpopular that Congress passed Section 605 of the Communications Act of 1934 at least partly in response. This law was eventually deemed ineffective because it did not prevent wiretaps per se, allowing law enforcement to "wiretap freely so long as it did not seek to use the product as evidence at trial."

Olmstead's literal interpretation of the Fourth Amendment was overturned in 1967 in another case concerning wiretaps. *Katz v. United States*, 389 U.S. 347 (1967). SCOTUS suppressed evidence obtained when police used a wiretap on a public phone booth used by Katz. Justice Stewart famously described the Court's shift in reasoning by writing, "the Fourth Amendment protects people, not places."

It was Justice Harlan's concurrence in *Katz* which announced a two-part test for determining whether a search had occurred. He wrote: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

The negative corollary to the Court's reasoning in *Katz* produced the third-party doctrine, "which asserts that disclosure of private facts to a third party constitutes forfeiture of reasonable expectation of privacy." This rule has seen frequent use since its inception in *United States v. Miller*, 425 U.S. 435 (1976), in which SCOTUS held no warrant was required to obtain a defendant's financial records from his bank. Consequently, law enforcement need only issue a subpoena or request to a company to obtain business records, even those regarding a customer.

A further distinction was drawn between "content" and "metadata" in *Smith v. Maryland*, 442 U.S. 735 (1979), when SCOTUS authorized use of a pen register, "for pen registers do not acquire the contents of communications," they merely make a record of the numbers dialed from a defendant's phone.

The Electronic Communications Privacy Act of 1986 statutorily codified these rules but also included electronic communications data "in transit, and when they are stored on computers."

The most significant and recent shift away from the third-party doctrine came from the SCOTUS' ruling in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Law enforcement sought "tower dumps" – metadata stored by cellular companies which include location data – for the purpose of tracking the movements of Timothy Carpenter over a 127-day period. The lower courts denied Carpenter's suppression motion, ruling the data was "business records" maintained by the carrier which did not require a warrant. SCOTUS reversed, citing the "novel circumstance" of being able to retroactively track a person's movements over such a period of time, deeming this a significant invasion of privacy.

Although though *Carpenter* seemed to contradict or limit the third-party doctrine, it was in keeping with the Court's ruling in *United States v. Jones*, 565 U.S. 400 (2012). In *Jones*, the Court held that "the government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements [over a four-week period], constitutes a search under the Fourth Amendment."

Justice Scalia wrote in *Jones*, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations," and that "[t]he government can store such records and efficiently mine them for information years into the future."

However, the Court expressly stated that *Carpenter* was a narrow ruling, which has been interpreted in two very different ways. Privacy advocates see it as requiring a warrant to obtain business records if those records contain location data; whereas, law enforcement has taken it to mean that a warrant is required for tower dumps only.

For instance, *Criminal Legal News* has reported that, despite harsh criticism, the Department of Homeland Security and other federal agencies have purchased location data from app data brokers with the intent of

investigating crimes such as tax evasion, drug smuggling, and illegal border crossings.

Google's Location History

Google stands out as one of the most visibly successful tech companies of the modern era. It began as an internet search provider but has greatly expanded its product offerings. Its Android operating system "controls around eighty-five% of the global smartphone market," though only "46.8% of … U.S. smartphones." Even on Apple smartphones, which comprise most of the remaining smartphone market in the U.S., people use Google products such as Search, Mail, and Maps. "[F]or the over 220 million estimated U.S. Mobile search users, 96% of searches were conducted via Google as of the first quarter of 2020."

Despite many of its products ostensibly being offered for free to people all over the world, Google is extremely profitable, and the largest share of its earnings comes from advertising. The company has become infamous for the amount of data that it obtains from even casual users of its products, all in the name of providing "tailored ads" to customers.

This customer data is perceived as a vast library of records which can be obtained by police to investigate crimes. "From January to June 2020, for example, Google received – from domestic law enforcement alone – 15,588 preservation requests, 19,783 search warrants, and 15,537 subpoenas, eighty-three percent of which resulted in disclosure of user information."

"Google is increasingly the cornerstone of American policing," observed Albert Fox Cahn, a lawyer and executive director of the Surveillance Technology Oversight Project.

Among Google's portfolio of products is its Maps application. It was launched in 2009 to help customers locate businesses and get directions. As of 2018, "sixty-seven percent of smartphone users who use navigation apps prefer Google maps." The next most popular navigation app is Waze, which was purchased by Google in 2013.

In time, Google perceived value in not only providing directions but also in tracking the physical locations of its users. This allows for precision location-based advertising. For example, while using a navigation product in a particular area, a user will receive targeted ads from businesses physically near their reported location. Google can also correlate user location and business info to assess "conversion rates." If Google shows an ad for a nearby business to a customer, and then observes the customer entering the business, it can use such data to impress other businesses with the efficiency and success of its advertising model.

Because of its usefulness, Google attempts to locate a user in physical space anytime the person accesses one of its products, even simple internet searches. When GPS is enabled on the device and made accessible to the app, the accuracy can pinpoint a user within a few feet. "In some instances, Google's estimation of a device's location may include an estimate of where a device is in terms of elevation. For example [Google] has the capability to determine if a user is on the second floor of a mall."

According to court testimony by Marlo McGriff, a Google employee, "if a user opens Google Maps and looks at the blue dot indicating Google's estimate of his or her location, Google's goal is that there will be an estimated 68% chance that the user is actually within the shaded circle surrounding the blue dot."

The "blue dot" is also referred to as the "Maps Display Radius." This confidence rating can vary widely based on the sensor Google is using to estimate a user's location. While GPS is an obvious source of data, even when GPS isn't available, Google can attempt to locate a device from its nearness to cell phone towers (cell-site location information or "CSLI"). Android phones also, by default, constantly scan for Wi-Fi and Bluetooth signals. These can also be used to determine the location when compared to known data. For instance, a user might disable GPS, but when they drive past a Wi-Fi hotspot at a McDonald's, Google can infer their location.

Further Google attempts to track users in near real time. According to court testimony by Spencer McInvaille, a forensic expert, "geolocation data is routinely collected from those sensors at certain intervals, about every two minutes, but the intervals can fluctuate."

Google stores these signals in a database known as Sensorvault, tracking access to its products from billions of devices from all over the globe.

According to Google, a person who registers for an account can control whether this location data is retained for a specific period of time. This is through a lesser-known product called "Location History." Google ostensibly provides this service so users can "keep track of locations they have visited while in possession of their mobile device. For example, a user can observe their visit to a ski resort and their travel to that ski resort from their hotel."

Though Location History must be intentionally enabled by a user, it is one of the default options presented to a person who is configuring a new Android smartphone. According to court testimony by Emily Mosley, another Google employee, approximately "one-third of all active Google users had location history enabled on their accounts," such that in "October 2018, there were approximately 592 million daily active users of Location History worldwide."

Google and Geofence Warrants

The information stored in Sensorvault is exactly the kind of surveillance data that the government desires when it seeks to identify a suspect.

"The government wants haystacks. It firmly believes it can find needles," wrote Tim Cushing for TechDirt.

Beginning in 2016, some creative and enterprising police officers begin asking Google for this information. Because this data was perceived as "business records" stored by a third party, these initial requests were unofficial requests or subpoenas for all the user data associated with any device that was present within some arbitrary number of meters of the location a crime was committed, further narrowed by an arbitrary time during which police suspected the crime took place.

This is how geofence warrants got their name, from the invisible fence erected around a geographical space inside which users may be identified. They are also referred to as "reverse location search warrants" in that, instead of identifying a known suspect and seeking to search that suspect's property, reverse location warrants first seek to identify the suspect from a suspected location.

During that first year, Google received fewer than 100 requests. The process has evolved significantly in the intervening years due to its popularity as a law enforcement tool, and it isn't difficult to understand why.

Imagine someone is shot in a nightclub. Also imagine that, before the shooter or any potential witnesses are allowed to flee the scene, police are able to cordon off the area and interview people about their movements when the shooting occurred and even throughout the proceeding 24 hours. Officers would have a reasonable expectation that they would be able to identify the shooter, not necessarily by finding a firearm on a particular person, but by gathering enough information to

make a reasonable determination. Imagine also that when doing this, they had other indexed information available such as prior criminal histories, gang association data, and whether someone present was on probation or supervision.

Having a magical device which transported officers to the scene to accomplish this detective work would be invaluable. Even more so if they could be transported to the scene of the crime even if several days or months had passed.

The Location History data in Sensorvault, in many ways, allows police to do just this. They can determine who was nearby when a crime was committed, even after a significant amount of time has passed. They can track the movements of those persons of interest back to their homes or jobs and interview them. Importantly, this location data can be correlated against other databases in the possession of law enforcement, in an investigative strategy known as "fusion."

With enough historical data, police can in theory solve almost any crime, for murders on down to petty theft. And previously, where officers would have to do a significant amount of legwork to identify and then investigate a suspect, police can now instead use location history information to get a wealth of data on anyone near where a crime was committed.

This new tool by police to identify suspects and witnesses proves so useful that police from all over the country are going to Google to get data. What began as a trickle of requests in 2016 has become a veritable Niagara Falls of requests. And while Google has worked with police to fulfill lawful requests, it has adopted several legal positions and policies since 2016 to manage this process.

Google has decided that only Location History data "is responsive to a geofence search warrant, as it is the only location data that is associated with a Google account with sufficient precision." Thus, the company has so far refused to fork over location data it collects on casual users of its products.

Google has also decided that Location History information is the private property of its users. Since the company consulted with the Department of Justice's Computer Crime and Intellectual Property Section ("CCIPS"), it now requires that all requests for Location History data must be in the form of a court issued warrant.

Google also began charging $245 per request in 2020 pursuant to federal law, which allows private entities to offset the costs of complying with warrants and subpoenas by charging police.

This fee was also seen as an effort to stem the tide of requests. "Tallies have continued to grow, however, and Google received an average of more than 30 geofence warrants per day in 2020," according to an article in the *Stanford Law Review*. Haley Amster & Brett Diehl, "Against Geofences," *Stanford Law Review*, vol. 74, Feb. 2022. The most recent count was that Google received 11,554 geofence warrants in 2020, up from 8,396 in 2019 and 982 in 2018.

Finally, also in coordination with CCIPS, Google has required all warrants it receives to comply with its guidelines, which define three steps for each request. Under threat of noncompliance and a costly court battle, police have largely complied with these guidelines.

According to the National Association of Criminal Defense Lawyers ("NACDL"), the "geofence process involves up to three steps, which may be completed through a single or multiple warrants or through a combination of warrants and other forms of process." This means that each step may comprise a single warrant, be separated into three warrants, or

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Environmental Indifference

How exposure to radon in prisons may be functioning as a form of mass capital punishment

by Anthony Moffa

I can't breathe.
– Eric Garner, George Floyd, and at least seventy others[1]

The thought of radioactive gas in the night air in the place you lay your head is the stuff of nightmares. That nightmare has been a hidden reality for much of the United States for decades. When scientists and epidemiologists finally exposed the prevalence of radon gas in our nation's structures and the unimpeachable connection to lung cancer, the approach of homebuyers, home sellers, and homeowners permanently shifted. No prudent person would purchase a house in New England without first testing for radon; no seller would refuse to permit such a test; no responsible owner would fail to install the relatively inexpensive mitigation system. As a result, many people have adapted to life with our inert radioactive roommate. Nonetheless, over two million Americans live in structures over which the government has exclusive control—prisons. The exposure of prisoners to radon gas threatens lives and violates the constitution.

An odorless and invisible radioactive gas, radon comes from the natural decay of uranium found in soils and rock formations. Uranium, a trace element in rocks common to construction such as granite, shale, and limestone, produces the gas. Radon gas escapes from the structure itself or the ground underneath it and moves into the indoor air by traveling through cracks and other holes in the foundations of buildings. Structures of any shape, size, age, degree of insulation, and level of sealing can experience radon gas infiltration. The resulting exposure kills an alarming number of Americans each year by causing lung cancer. The chart below from the Environmental Protection Agency's ("EPA") informational materials demonstrates the relative danger of radon as a killer.

Because of the prevalence of the hazard and the well-established close connection between inhalation of radon and lung cancer, the U.S. Congress professed, "[t]he national long-term goal of the United States with respect to radon levels in buildings is that the air within buildings in the United States should be as free of radon as the ambient air outside of buildings." Sadly, it is quite likely that many of our nation's prisons fall well short of that goal; at the very least, citizens and officials lack information on that life-and-death figure. Put simply, radon in prisons kills.

Radon gas is far from the only environmental hazard that plagues our nation's prisons,

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some hybrid including a subpoena only for unmasking.

Step One ("the dump") is where "the government first seeks anonymized numerical identifiers [device IDs] and time stamped location coordinates for every device that passed through an area in a specified window of time," according to the NACDL.

The result is a spreadsheet with the following details for each "hit": device ID, date, time, latitude, longitude, source (i.e., GPS, Wi-Fi, or CSLI), and Maps Display Radius (in meters).

Step Two ("selective expansion") requires the police to choose some subset of the devices identified in Step 1 for which they can obtain location information from outside the initial time window. This is accomplished by correlating other known evidence with the data from Step One. For instance, if robbery suspects were seen fleeing in a vehicle, the police would focus on device IDs that left the area at the speed of a vehicle in the reported direction. Google would then provide information about where a suspect's vehicle traveled before and after the crime was committed – a suspect's home perhaps.

Step Three ("unmasking") involves police requesting user account details on device IDs of interest remaining after expansion from Step Two. This includes all identifying information on the user such as full name, birthdate, phone number, and even recovery email addresses.

Google Warrants and the Courts

Criminal Legal News readers may, at this point, wonder if other tech companies collect location data about their users and whether police have attempted to obtain this data. According to the *Harvard Law Review*, though "Apple, Lyft, Snapchat, and Uber have all received these warrants, Google is the most common recipient and the only one known to respond." "Geofence Warrants and the Fourth Amendment," *Harvard Law Review*, May 2021 ("*HLR* Article").

Large tech companies have vastly more resources than most law enforcement agencies or their parent jurisdictions, with the possible exception of the federal government. That the companies have been unwilling to release user location data and have been allowed to maintain this position without significant litigation speaks to a variety of factors. Of course, it may simply be that Google has more users, more data, and more precision than any other company and is willing to release it to police. This may be why, in large part, Google has been able to dictate the terms under which it releases the data, for better or worse.

Requiring police to obtain a warrant has had the effect of normalizing the idea that obtaining this data is in fact a "search" under the Fourth Amendment. The warrant requirement, until recently, has proven no great barrier to obtaining data. Despite the fact Google has processed approximately 25,000 geofence warrants since it began doing so in 2016, very few appear to have been denied by magistrate judges or even subjected to any kind of serious scrutiny.

"Additionally, geofence warrants are usually sealed by judges," according to the *HLR* Article, though there seems to be no requirement for doing so. "In fact, geofence warrants, like most warrants, are almost certainly 'judicial records,' which 'are the quintessential business of the public's institutions' and should, by default, be available to ensure 'the transparency of the Court's decision making process.'"

Ideally, judges who issue warrants are "neutral and detached" whose decisions regarding issuance are "informed and deliberate." *United States v. Lefkowitz*, 285 U.S. 452 (1932). But judges do not always understand the technology involved or its implications when considering criminal investigations. See the statement of Kennedy, J., during oral argument in the case of *City of Ontario v. Quon*, 560 U.S. 746 (2010), "asking whether, if you are trying to text somebody who is simultaneously texting someone else, you will get a voicemail saying that your call is very important to us; we'll get back to you."

Reporting by Tim Cushing of TechDirt in February 2019 showed that Minnesota police submitted warrants that "contain GPS coordinates but no map of the area covered," such that the "warrants likely don't give judges any idea how many people will be swept up in these data requests." Cushing also wrote that, of "the 22 reverse location search warrants issued in Hennepin County, only three times did the warrant applications include [a] map demonstrating the geographic area being targeted by the warrant. And yet, the time difference between an officer signing a warrant request, and a judge approving it, was sometimes just a few minutes."

One of the first and most widely publicized rebukes of geofence warrants came from the United States District Court for the Northern District of Illinois, in which police sought a geofence warrant to investigate "the theft and resale of certain pharmaceuticals." *In re Search of Info. Stored at Premises Controlled by Google*, 481 F. Supp. 3d 730 (N.D. Ill. 2020). Of the three geofences requested, one "covered a 100-meter radius (over 7.7 acres of land) during the afternoon in a densely populated area containing restaurants, various commercial establishments, and at least one large residential complex." The other two covered an area including "medical offices and other single and multi-floor commercial establishments that are likely to have multiple patrons."

The reviewing Magistrate Judge, M. David Weisman, acknowledged that the suspect's phone data would likely be included in the data but that the requested search was overbroad. Weisman wrote that it "strains credibility" to believe that individuals within the entire geofence either participated in, or bore witness to, the exchange of a mail package inside a business. To do so, potential witnesses would need to "possess extremely keen eyesight and perhaps x-ray vision to see through … many walls."

Weisman explained that the Government's request was insufficiently narrowed with regards to the crime scene. The "geographic scope of this request is a congested urban area encompassing individuals' residences, businesses, and healthcare providers," such that the "vast majority of cellular telephones likely to be identified in this geofence

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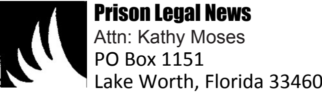

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will have nothing whatsoever to do with the offenses under investigation." He summarized by saying, "the warrant does not limit agents to only seeking identifying information as to the 'five phones located closest to the center point of the geofence,' or some similar objective measure of particularity."

As more courts write unsealed opinions about geofence warrants, Weisman's assessment and rejection would signal a theme. First, courts have agreed with Google's assessment that geofence warrants are a "search" covered by the Fourth Amendment and, second, that the geofenced area must be sufficiently narrow in place and time such that most of the devices identified would belong to either suspects or likely witnesses. Or, in the words of the courts, that the search occasioned by such a warrant must be sufficiently particularized.

The officers investigating the pharmaceutical theft and sale would go on to try two more warrants in the Northern District of Illinois, only to be rejected both times.

In rejecting the second warrant application, Magistrate Judge Gabriel Fuentes noted that, though the government requested somewhat smaller geofenced areas, "the Court still has no idea how many devices and their users will be identified under the warrant's authority."

The third warrant requested was also reviewed by Fuentes. This request did not include an unmasking step, and the Government limited "the anonymized information [sought] to that which identifies individuals who committed or witnessed the offense." Fuentes found these alterations also failed constitutional muster. He correctly assessed that the unmasking step performed by Google was unnecessary for police because they already had a wealth of other surveillance data on citizens such that they would likely attempt to "accomplish indirectly what it may not do directly."

His criticism of the instruction for Google to return device IDs belonging to only suspects or witnesses noted that police provided no "further methodology or protocol" explaining "how Google would know which of these sought after anonymized information identifies suspects or witnesses."

In June 2021, District of Kansas Magistrate Judge Angel Mitchell denied a geofence warrant regarding an unspecified crime. *In re Search of Info. That is Stored at the Premises Controlled by Google, LLC*, 542 F. Supp. 3d 1153 (D. Kan. 2021). The geofence there encompassed "two public streets, that the subject building contains another business, and that the area just outside of the perimeter … includes residences and other businesses." She wrote that the results of the search "would undoubtedly show" where certain devices were during the time requested, including the suspects, but the Government's statements were "too vague and generic to establish a fair probability – or any probability – that the identity of the perpetrator or witnesses would be encompassed within the search."

She was also concerned with how the Maps Display Radius functions, writing that the Government failed to "explain the extent to which the geofence, combined with the margin of error, is likely to capture uninvolved individuals from … surrounding properties."

While these four warrants were denied for lack of probable cause and particularity due to the geofences potentially sweeping up too many uninvolved persons, at least one notable approval occurred in a U.S. District Court.

Magistrate Judge Sunil Harjani – also from the Northern District of Illinois – approved a geofence warrant in 2020 in relation to a series of approximately 10 arsons in the

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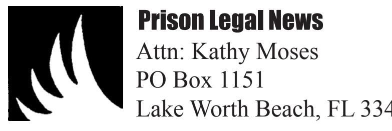

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Chicago area. *In re the Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, 497 F. Supp. 3d 345 (N.D. Ill. 2020). However, the geofence was very carefully crafted to obtain information on devices belonging to suspects or witnesses.

A summary in the *Stanford Law Review* stated: "The government requested six geofences, four located in commercial lots where the vehicle fires had occurred and two along areas of roadway where the unknown arsonists were alleged to have traveled. Each spanned between fifteen and thirty-seven minutes in length during early morning hours. All but one covered less than a city block, with the fourth proposed geofence covering an elongated roadway area approximately the length of 1.25 city blocks."

Harjani noted that the warrant request was appropriately narrow because the buildings and streets contained in the geofences were unlikely to be occupied during the early morning hours requested, and thus, the warrant was "narrowly crafted to ensure that location data, with a fair probability, will capture evidence of the crime only."

Despite these published opinions, it appears that the vast majority of geofence warrants are approved with very little comment or oversight. The gatekeeping function of the courts is not limited to magistrate judges however. Where individuals have been charged with a crime that was investigated in part using a geofence warrant, few so far have been challenged in the form of a suppression motion. [*Editor's note*: Although the defendant's motion to suppress was denied, anyone interested in this topic is encouraged to read *United States v. Rhine*, 2023 U.S. Dist. LEXIS 12308 (D.D.C. 2023), in which the Court provides an exceptionally thorough analysis and application of the current law governing geofence warrants.]

A notable ruling on a suppression motion came from the case of alleged bank robber Okello Chatrie, who was charged in September 2019 with robbing $195,000 from a bank in Midlothian, Virginia. *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022). However, in this case, the geofence was very large.

"The area covered by the geofence was 78,000 square meters, or about 17 acres, but with the approximate margin of error added, the effective range was 470,000 square meters, or about 116 acres," summarized a *Stanford Law Review* article. The geofence warrant covered a mixed residential commercial area alongside a busy regional highway. "In addition to the bank that was robbed, the geofence encompassed the entirety of a megachurch housed inside of a converted Costco superstore. Just outside of the geofenced region is a hotel with 68 guest rooms, the occupants of which would have been included in the Google returns if their maps display radii extended beyond a few yards."

Law enforcement was particularly aggressive during the three-step process as well, repeatedly seeking data "for one hour on either side of the robbery … without geographic restriction" for *all* the devices contained in the initial dump. However, "Google did not comply until investigators identified a subset of nine users for further scrutiny."

Remarking on the scope of the warrant, Judge M. Hannah Lauck wrote that the warrant "plainly violates the rights enshrined" in the Fourth Amendment because it "swept in unrestricted location data for private citizens who had no reason to incur government scrutiny."

Though the warrant itself was deemed unconstitutional, the evidence obtained from it will still be used to prosecute Chatrie thanks to the *Leon* good faith exception. *See United States v. Leon*, 468 U.S. 897 (1984).

"Lauck ruled that the evidence could stand in this case, saying the detective who sought the warrant was not at fault because he had no one telling him it was unconstitutional; he had successfully sought geofence warrants in past cases and had consulted with prosecutors," reported NBC News.

A similar outcome would have occurred in a California state case were it not for the foresight of that state's legislators.

LaQuan Dawes was charged with the burglary of a residence in San Francisco that was executed on October 24, 2018, and he filed a suppression motion for the geofence warrant used to identify him. *People v. Dawes*, No. 19002022 (Superior Ct. of Cal 2022) (Order Granting Motin to Quash Geofence Search Warrant).

Honorable Linda Colfax of the Superior Court of California for the County of San Francisco made three significant points in her 59-page ruling, which granted the suppression motion.

First, though all the federal courts had been relying on Fourth Amendment precedent to determine that obtaining location data from Google constitutes a search, Colfax noted that Cal. Penal Code § 1546.1(a)(1), a provision of California's Electronic Communications Privacy Act ("CalECPA"), defines "electronic communication service" and that the location data stored by Google is such a service. Further, § 15461.1(a)(2) states that this data is "protected," meaning that a search warrant is required by law to obtain it.

The judge then found the warrant overbroad in two respects. The design of the geofenced area "not only included the burglarized residence [in addition to the entire street area in which the suspect vehicle traveled], but also five other private homes on the same block." She continued, writing that the "geofence search warrant application affirmatively targeted location information of the innocent habitants and visitors of the neighboring residences along with the suspects."

She further took issue with the second step in Google's process, in which it is left to police to determine which devices will be subject to additional scrutiny. "The discretion to select which devices for which Google must provide additional step to data should fall on the judiciary, not the executive," wrote Colfax, "to ensure that the selection process comports to the Fourth Amendment's reasonableness requirement."

Colfax's final significant point related to the exclusion of the evidence obtained from the geofence warrant. She too found that the officer relied in good faith on the advice provided to him regarding such warrants, but this was insufficient under CalECPA. She ruled that, though the Lost text does not categorically exclude geofence warrants, "the Legislature deliberately chose not to incorporate a good faith exception into the statutory exclusion rule." In making this decision, she referenced §§ 1546.4(a) and 1546.1(d)(1).

Legal Criticisms

One of the main arguments made in criticizing geofence warrants is that they search an unknown number of persons that likely have nothing to do with the crime under investigation and, as such, constitute a general warrant similar to the writs of assistance that were used to harass early American colonists.

An analysis in the *HLR* Article notes that "a general warrant is one that 'specifies only an offense,' leaving 'to the discretion of executing officials the decision as to which persons should be arrested and which places should be searched.'" As with many divisive topics in America, whether geofence warrants

involve the unfettered discretion of government agents to conduct a general rummaging depends on the details.

One such detail is when the actual search occurs. Thus far, every court that has reviewed a geofence warrant has determined that the search occurs when Google provides location data to police at the end of Step One.

But the *HLR* Article argues that the search occurs earlier than this. Google has told courts that, in order to produce data in Step One, it must compare *every* record and Sensorvault to the searched criteria. And, arguably, Google is acting as "a government agent" when it does so, because it is searching Sensorvault in response to legal compulsion and "with the participation or knowledge of a government official." *United States v. Jacobsen*, 466 U.S. 109 (1984). The logical extension of this argument is that every person who uses Google's location history is searched every time Google responds to any geofence warrant. This searching is even more broad than a CSLI tower dump.

"The difference between a tower dump and step one of Google's framework is obvious: the tower dump involves only data tied to the cell tower's location, while Google searches all of its location data even though none of it may be within the parameters of a geofence warrant," explains the *HLR* Article.

If geofence warrants were to be assessed from this position, it is likely that none would pass constitutional muster, and accordingly, a strong argument could be made to support a legislative ban on this misuse of Google's data.

However, the *HLR* Article notes that the Supreme Court may choose to allow geofence warrants, even if the search is determined to occur at the beginning of Step One, because it involves an extremely limited intrusion into a person's private space. The Supreme Court's rulings in *Jones* and *Carpenter* both involved a significant period of time in which the suspect was under a kind of electronic surveillance.

Knowing where an individual is at one point in time is much less intrusive than following them around for days or weeks, largely because the latter allows police to ascertain historically private details such as religious associations or sexual habits. Piecing together a picture of a person's life using continuous surveillance or multiple types of surveillance in concert has been dubbed "mosaic theory." According to Tim O'Brien, an ethical tech advocate at Microsoft, this is a means of identifying Fourth Amendment searches by "analyzing police actions over time as a collective 'mosaic' of surveillance," and thus, a "mosaic can count as a collective Fourth Amendment search even though the individual steps taken in isolation do not."

Also, to be considered in this context is how such data, once obtained by police, contributes to the surveillance milieu of other data collected by police. Large metropolitan police departments such as the Chicago and Los Angeles police departments have been known to collect mountains of data from various sources such as gunshot detectors, automated license plate readers, public and private security cameras, and social media posts. The inclusion of historical location data must be viewed in this context.

Even where the data released by Google is indexed by device ID and is never unmasked – some geofence warrants, especially when the three steps are separated into individual warrants for each step, do not involve an unmasking – this is no guarantee of anonymity.

O'Brien notes that in "2013 researchers studied fifteen months of human mobility data for one and a half million individuals and found that even coarse-grained data that

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specifies a person's location hourly was 'enough to uniquely identify ninety-five percent of the individuals.'"

Other allusions to the constitutionality of geofence warrants pointed to the Supreme Court's ruling in *Ybarra v. Illinois*, 444 U.S. 85 (1979). Ventura Ybarra was a patron of the Aurora Tap Tavern who was searched when police were executing a warrant that authorized the search of the tavern and the bartender for evidence of heroin distribution. In searching the "tavern," police conducted physical searches of all the bar's patrons, during which they found Ybarra in possession of heroin.

The Court noted that "the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, and a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." In suppressing evidence of the search, the Court instructed that "a person's mere propinquity to criminal activity does not, without more, give rise to probable cause to search that person."

But this case, which seems to disfavor geofence warrants at all, must be balanced against the Court's ruling in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), which held that drunk-driving checkpoints are not *per se* unconstitutional searches.

The Court described the checkpoint process as follows: "All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made."

Amster and Diehl, writing in the *Stanford Law Review*, argue that geofence warrants, including the selective expansion step, are similar to sobriety checkpoints such that "all individuals in the area are preliminarily inspected and, at the officer's discretion, searched."

Yet another criticism is whether there ever is a fair probability that Google has information on a suspect or witnesses to a crime. Judge Colfax concluded there was a fair probability that the suspects were: (1) located inside the geofence during the specified period; (2) using their cell phones; (3) communicating location history to Google through the cell phones; and (4) traceable through the information stored in Google's Sensorvault.

This was based on "84% of Americans owning smartphones in 2018," that there were "592 million daily active users of Location History worldwide and roughly one-third of those active users had Location History enabled on their accounts."

But this is a misunderstanding of the statistics that is at odds with Google's claims. The number of active Location History users is 592 million, but that number is the worldwide figure. A more important number would be the number of active Location History users in the U.S. as compared to the general population. If Android users are just under half the adult population in the U.S., and only one third of Google users have Location History enabled, there's only an approximately one-in-six chance that the data sought will be in Google's database. Is that a fair probability?

The last legal criticism of geofence warrants is more of a criticism of the justice system in general, and it is that the mechanisms of oversight are lacking where geofence warrants are concerned. Indeed, where the vast majority of such warrants are approved and Google rejects some portion as overbroad, the only effective check on police misuse appears to be corporate, not judicial.

As mentioned before, the majority of geofence warrants are judicially sealed so that the public cannot inspect them. Hence, warrants are processed and approved without the knowledge of the users who are affected.

"The thing about these abuses in these instances is they're hidden," remarked tech security expert Bruce Schneier. "If there's an abuse, you're not going to know because of parallel construction, which is the way data obtained illegally is washed and not used in court, but data obtained from that data is used."

"I'm sure it happens a lot where the NSA passes the FBI data," Schneier said. "The NSA tells the FBI, 'This thing is happening on a street corner,' and the FBI just happens to have an officer there, and the NSA involvement is never mentioned. And, of course, if the FBI has this kind of data, they're likely to use it for whatever they [want]."

Police departments also seem reluctant to reveal that they are using geofence warrants. All law enforcement agencies in California are required by state law to disclose executed geofence warrants or requests for geofence information, accessible by the public through California's OpenJustice dataset.

"Between 2018 and 2020, [Google] said in a recent transparency report, it had received 3,655 geofence warrant requests from agencies operating in the state." Yet a review by markup.org revealed that "of the state's data between 2018 and 2020 found only 41 warrants that could clearly constitute a geofence warrant."

"When the providers are telling you one thing, and the government is telling you another, then something's broken and it needs to be fixed," said Albert Gidari, who previously served as consulting director of privacy at the Stanford Center for Internet and Society.

In addition to blatant abuses which may go unnoticed, there is a more subtle issue at play: asymmetric expertise. Geofence warrants are a comparatively new tool and one with a complicated technological and legal underpinning. A great many magistrate judges and criminal defense attorneys have not heard about them or, if they have, don't have the training to meaningfully understand the issues at stake.

Law enforcement officers who use novel technology techniques are thus at a distinct advantage. Officers applying for warrants regularly attest to receiving specialized training in "digital forensics, cellular phone analysis and cellular technology" or "formal on the job training in cybercrime investigation techniques, computer evidence identification, and computer evidence seizure and processing," according to O'Brien.

Though judges are encouraged to obtain continuing education, most have no specific requirement to get training, especially in specialized areas of technology. Further, one of the largest providers of continuing education for judges, the National Judicial College, had no courses in its 2021 online catalog that mentioned the terms "geofence" or "reverse location."

Public defenders, who litigate the bulk of criminal cases in the U.S., are similarly at a disadvantage. "Public defenders are often the most overworked and underpaid lawyers in the criminal justice system, with little time and few resources to research the new technology now being used against their clients," wrote Johana Bhyiyan, a reporter for *The Guardian*. "This, in turn, creates an uneven playing field that disadvantages the most vulnerable people: those who can't afford private attorneys."

"Often for the folks who are most targeted by these tools and the criminal legal system, the only person standing between them and a jail cell is their public defender," said Jumana Musa, the director for the Fourth Amendment center for the NACDL. Her group provides resources and, sometimes, litigation support to attorneys unfamiliar with new investigative tools. The litigation director for the Fourth Amendment Center, Mike Price, describes the situation as "playing Whac-A-Mole," because even as the group identifies and learns about a new surveillance technology, the rapidity of development and police usage exceed their ability to keep pace.

Our justice system is, in theory, supposed to safeguard the constitutional rights of all citizens, regardless of their ability to afford a lawyer. But this knowledge asymmetry further disrupts the standard adversarial process to heavily favor the government at a time in history where government already has the upper hand for numerous other reasons.

Problems and Solutions

The criminal justice system in this country is already suffering the strain of having to support decades of mass incarceration, and the introduction of new tools like geofence warrants presents yet another strain on the system. The normal checks and balances on police abuses are alarmingly absent in with respect to geofence warrants, and the situation will become even more alarming if geofence warrants persist as a judiciary only problem. What's needed is active intervention by politicians who are accountable to the public.

Most people in the U.S. are unaware of the actual surveillance capabilities of law enforcement, and this includes geofence warrants. Despite warnings about government and corporate collection of data, approximately a third of Google account holders enable the Location History feature, despite most never using the "benefits" advertised by Google for doing so.

When a crime is committed and police have no suspects, they will almost certainly go to Google with a geofence warrant. Whether or not the perpetrator had a smartphone that was reporting its location to Google, police are going to develop suspects from this pool of data exhibiting what is obviously an availability bias. This means that every person who uses the Location History feature has unknowingly entered themselves in a wrongful arrest (and possibility conviction) lottery.

Take the case of Jorge Molina from Avondale, Arizona. Police arrested Molina in connection with a March 2018 murder after determining a device linked to his Google account was at the scene of the crime. He was told by a police interrogator that his phone "one hundred percent, without a doubt" placed him at the crime scene, and he spent six days in jail. Further, police told dozens of media outlets that he was the primary suspect, and he subsequently "dropped out of school, lost his job, car, and reputation, and still has nightmares about sitting alone in his jail cell," according to the *HLR* Article.

Further investigation found that Molina had lent an old phone – which was still tied to his Google account – to "Marcos Cruz-Gaeta, the ex-boyfriend of Molina's mom," so the investigation pivoted away from Molina. However, the damage to his life was already done.

As outrageous as false arrests are, they are infrequent enough that they are unlikely to generate sufficient outrage for the public to demand change. A much more likely candidate will be when Google begins receiving warrants

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Geofence Warrants (cont.)

for data intended to prosecute politically divisive laws.

Though abortion providers in states where it has effectively been criminalized will likely choose to simply close down or pivot to providing other family healthcare services, nothing prevents police in Texas from obtaining a geofence warrant for a facility in New Mexico at random intervals with the intention to link it back to a Texas resident.

For the issue of abortion access, the issue of digital dragnets violating electronic privacy only begins with geofence warrants. It also branches out to other data stored with providers like Google.

It is not farfetched to see warrants seeking data from companies that operate period-tracking apps. Given a large enough database, police are sure to find more than a few women who go a month or two without a period and then start up again. Should we trust that the anti-abortion police aren't going to harass these women and maliciously interpret possible miscarriages?

Similar to geofence warrants are keyword search warrants. These involve police requesting information from Google on anyone who searches for a particular term on Google's main page. These have, most recently, been used to prosecute arsons, as arson suspects are believed to be interested in viewing news coverage about the fires they cause. But these could easily be wielded against women researching abortions or related services.

"It is so chilling. It is so broad. It is contrary to our civil rights. And yet, because Google has so much of our data, it's just a ticking time bomb for pregnant people," said Albert Fox Cahn. "This is the equivalent of going to a library and trying to search every person who checked out a specific book. We would never allow that in an analog world."

In July 2022, Google announced it was "committed to deleting location data that shows when people go to abortion providers, fertility centers and other 'particularly personal' places," and Google executive Jen Fitzpatrick wrote a blog post reminding users that they can manage Location History settings and remove history containing possibly sensitive information.

Google employees, some led by Ashok Chandwaney, a software engineer and part of the Alphabet Worker's Union, has criticized Google's commitments. "They're really looking for these short, punchy press releases that get this breathless, 'Wow, Google is doing such good things,' or 'Alphabet is doing such good things,' coverage in the tech media, but then aren't actually substantial," said Chandwaney. His group is pushing to "make it so that the data that could get people charged, or fined, or thrown in jail, or whatever for seeking out health care is not a thing that the company has to give to law enforcement."

Genuine solutions are going to have to come from legislatures. The courts are going to allow geofence warrants and other broad intrusions into cloud storage data, and police departments have shown they cannot be trusted to not abuse their surveillance capabilities.

"The laws have to be changed," said Bruce Schneier. "There's no magic thing you can do on your phone to protect it. These are systemic problems that need systemic solutions. So, make this a political issue."

CalECPA was a good start, because it at least provides for evidence suppression when warrants, geofence ones or otherwise, are constitutionally infirm. Assemblywoman Mia Bonta, D-Oakland, has introduced Assembly Bill 793, a bill to ban both geofence and keyword search warrants. It would modify CalECPA to totally reject such warrants instead of only overbroad requests by police. Similar legislation is also under consideration in New York state. And while these bills are a good start, we need to start seriously thinking forward about technology and privacy.

The NACDL's Mike Price said, you "have to imagine companies like Google know that if they collect [the data], [law enforcement] will come." Price's description of the dance between new surveillance tech subsidized by corporate giants and constitutional privacy protections as "Whac-A-Mole" will continue to be the status quo until we, as a society, decide that nobody – corporations or governments or whoever – should be able to collect and retain the amount of private information about people that Google and other tech companies have been doing.

An argument can be made that Google needs such data to effectively sell ads, but that efficiency is not significantly diminished when Google is unable to retain that data. The European Union's General Data Protection Regulation has done an adequate job at preventing companies from collecting user data, and it has provided for economic incentives that have shifted some of the power toward user control of data. The U.S., home to many of these tech companies, should be able to do better.

Without thoughtful, proactive legislation governing the entirety of the U.S., geofence warrants will only be the tip of the coming iceberg of dystopian, tech-enabled intrusions into the private lives of people, with many more and even more shocking intrusions to follow.

Sources: *Orin S. Kerr, "Geofence Warrants and the Fourth Amendment" (2021); Electronic Frontier Foundation, "Geofence Warrants and Reverse Keyword Warrants Are So Invasive, Even Big Tech Wants to Ban Them" (2022); National Association of Criminal Defense Lawyers, "Geofence Warrant Primer" (2022); Amster, Haley, and Brett Diehl, "Against Geofences" (2022); McBrien, Tom, and Joseph Jerome, "ACLU, public defenders push back against Google giving police your mobile data" (2017); Google Transparency Report, "Global requests for user information" (2023); The Guardian (2023); Libertas Institute, "Geofence 'Warrants': An Unconstitutional Abuse of Technology", (2023); Kanik, Zafer, "Fragility, Rescues, and Stability in Financial Networks" (2021); Electronic Frontier Foundation, "California Court Suppresses Evidence from Overbroad Geofence Warrant" (2022); Varner, Maddy and Alfred Ng, "Thousands of Geofence Warrants Appear to be Missing from a California DOJ Transparency Database" (2021); Johnson, Carrie and Marisa Kwiatkowski, "Google Data Shows Sharp Rise in Abortion Prosecutions" (2022); Capitol Weekly, "Bonta bill would bar 'geofence' warrants" (2023); NBC News, "Geofence Warrants Help Police Find Suspects Using Google. A Ruling Could Curb Their Use" (2022); 12news.com (2023); techdirt.com; MSNBC, "Geofence Search Warrants in the Jan. 6 Investigation" (2023).*

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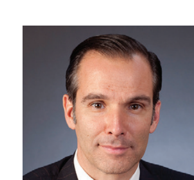

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What's 'Sufficient' Rehabilitation for Compassionate Release?

by James A. Lockhart and Luke E. Sommer

In the relatively short history of compassionate release motions filed by prisoners, courts have consistently found that rehabilitation is an important element in determining whether or not relief is appropriate. *See United States v. Johnson*, 2022 U.S. Dist. LEXIS 129168 (D.D.C. 2022). And where there is no supporting evidence of rehabilitation in the record, courts have denied petitioners' requests on the grounds that they pose continuing threats to the public and a risk of recidivation. *United States v. Mejia*, 2020 U.S. Dist. LEXIS 180206 (D. Haw. 2020). This makes some sense – having cancer or some serious medical condition that threatens your life is an extraordinary circumstance, but it does not compel a court to release a person whose release plan includes (1) checking in with probation, (2) buying a cellphone, and (3) robbing a bank.

The idea of putting someone back on the street who is likely to cause further harm is not something District Courts have embraced for what seem like obvious reasons. That said, what exactly is rehabilitation? Rehabilitation can, at a certain point, be grounds for compassionate release in and of itself. But at the opposite end of the spectrum, where does good behavior transition from not enough to just good enough?

These are important questions. Rehabilitation is not defined in the compassionate release statute – 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act – or 28 U.S.C. § 994(t). When a statute doesn't define a term, the Supreme Court has directed to use the word's ordinary meaning. *See, e.g., B.P. America Production Company v. Burton*, 549 U.S. 84, 91, (2006). As we wrote in our previous article in the June 2023 issue of *Criminal Legal News*, most Circuits generally point to dictionaries for guidance. According to the *American Heritage Dictionary*, rehabilitation is "to restore to health, or useful life, as through therapy and education." *Merriam-Webster's Dictionary of Law* defines rehabilitation as meaning "to restore (as a convicted criminal defendant) to a useful and constructive place in society through therapy, job training, and other counseling." In general, rehabilitation is anything that helps you prepare for release and gives you the tools you need to remain in society without reoffending.

The question of "when is rehabilitation enough" is more complicated. The answer is "it depends." Whether we want to admit it or not, there are classes among offenders. Prisoners with convictions for murder, kidnapping, or sex-based offenses are generally treated differently than those who have been found guilty of so-called "lesser" crimes. This is the case in practice, if not in the law. Because while it seems like the law "should" be the same for everyone, in reality, it isn't.

In some cases, records that would have qualified as going "beyond rehabilitation" have been rejected in the case of more serious offenses because the judge finds the conduct distasteful. A perfect example is *United States v. Hollis*, 2021 U.S. Dist. LEXIS 28772 (E.D. Cal. 2021), in which the Court denied the motion on the basis that there are no children in prison and therefore the defendant's accomplishments and good behavior did not establish that he would not reoffend. *See United States v. Asmodeo*, 2020 U.S. Dist. LEXIS 106580 (S.D.N.Y. 2020).

While on the surface, this reasoning has some appeal, but it's both misleading and wrong. It's an example of the emotional reasoning that even seasoned judges will use when faced with topics that they find uncomfortable. The judge's premise was that good behavior was not evidence of rehabilitation on the part of a sex offender because the offender did not have the opportunity to commit new crimes of the type for which he was convicted while in prison. While it sounds reasonable, it is painfully inaccurate. Although there are no children in prison, there are numerous cases of prisoners contacting their existing (or even new) victims, obtaining child pornography, or otherwise committing new offenses. *See Velasquez v. Ahlin*, 2018 U.S. Dist. LEXIS 69826 (E.D. Cal. 2018); *United States v. Doe*, 2021 U.S. Dist. LEXIS 12281 (D. Maine 2021). And even though there are no banks in prison, courts have found that prisoners with bank robbery convictions who have achieved rehabilitation are worthy of mercy. Why? Because while defendants couldn't rob banks, they could easily steal from or rob other prisoners. They could act out in ways in line with the conduct that ultimately led them to prison in the first place.

But emotional reasoning or not, the judge who keyed in on the absence of children in prison made their way into the neighborhood of a good point even though they did drive past the right house. Being good is generally *not* enough for people convicted of sex-based offenses. The reality is that a large portion of sex offenders had relatively normal lives – on the surface. A recurring theme runs through the case law; in many situations, offenders were able to conceal their crimes from those around them. *See Doe*. So, there is some superficial logic to the idea that good behavior isn't enough. That is, if you were "good" on the street, why would being good in prison matter? Would it be evidence of rehabilitation or further evidence of your ability to hide your misbehavior? It makes the standard for rehabilitation different for sex offenders than it is for most defendants.

And it isn't just sex offenders who bear the burden of this unspoken double standard – the Supreme Court has made it clear that homicide offenders are in a class by themselves. *See Kennedy v. Louisiana*, 554 U.S. 407, 438. And despite the fact that murderers generally get sentences that are lower than the top range of those given to sex offenders, they do have a similarly elevated threshold for obtaining relief. If you take a casual look through the extant case law, murder cases where relief has been granted tend to have the highest word count. This makes sense because judges want the public to have a clear understanding

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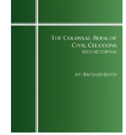

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of why they are letting someone convicted of murder out of custody and back into society.

So, what's the standard, unspoken or not? What do you have to do to get relief? Keeping clear conduct is a start, and for many, it is enough. But the reality is that the more serious your offense conduct is, the more you will generally have to do to successfully petition for relief. Compassionate release, unlike habeas corpus or direct appeal, is discretionary. The law controls, but after a point, the court will be able to make a call largely on their gut feeling. And there isn't much that anyone can say about it.

At that point, it is between you and your judge. Your job is to convince them that what you have done is enough. That raises two important points that we will be covering in future articles: (1) the power of narrative and (2) the importance of restorative justice. Telling a compelling story is a critical task in any compassionate release motion. If you submit a motion and it doesn't convey why you should be receiving relief, chances are you won't be. Judges aren't looking for the legal authority that allows them to let someone out of prison or reduce their time. They already have that. Under current precedent and the proposed § 1B1.13 policy statement, a District Court Judge (in most Circuits) can provide relief for practically anything.

No, this isn't about providing citations to favorable case law that allow them to grant you mercy; it's about telling a story that convinces them that they *should*. And part of that is doing something – anything – that will protect your victim class and prevent future crimes. The Alternatives to Violence and Victim Impact classes offered in the BOP, youth intervention and community outreach initiatives, and other evidence-based recidivism reduction programs aimed at bridging the gap between offenders and their victims are critical points that judges need to see. Because let's be real – there are a lot of ways in which prisoners are given a raw deal, but there are also a lot of ways in which we do not live up to our own potential. Putting in the effort to rebuild ties with the community and repair relationships is a key way of showing your judge you are serious about getting out and staying there.

Overall, the easiest way to think about rehabilitation is this: start with yourself. Get an education. Get a stable job in your institution and earn positive work evaluations. In general, find the holes in your life where your prosecutor and judge pointed out that you were lacking. And then *fill* them. And above all else – document it. If you were advised to take drug education classes, then be sure to take drug education classes and file the certificate. Finish your GED. Study the law. Take psychology programs and then ask for the related records. Have supervisory officers send notes to your case manager documenting your good behavior and positive accomplishments (see BOP Program Statement 5840.04 for more information on this process).

That's the general basis, the foundation on which you will build your future. But, like we said, for certain classes of offender, that won't be enough. For various reasons, your judge will be leaning towards turning you down. The onus is on you to tip the scales in your favor. And to do that, the focus of your rehabilitative efforts will – over time – move from focusing on *your* education and *your* personal growth and transition towards helping *others*. This is the holy grail, the key secret that every truly successful compassionate release case entails. The narrative in those cases tells the story of a person who started out broken, who worked hard and through force of will, open-mindedness, and humility accepted help, before ultimately turning it into a new lease on life. That story? It commands action. It compels.

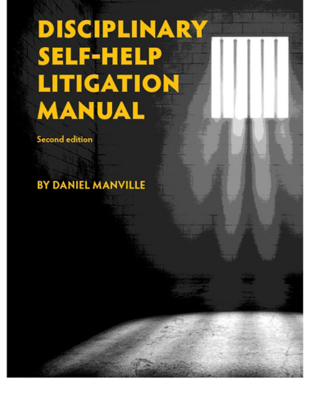
Rehabilitation is common. And it is also necessary. You may have the most extraordinary case in the world, but if you can't convince your judge that you are a completely (or even substantially) changed person who poses no continued risk to society, that is going to be an extraordinary story that you get to tell other prisoners.

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 and has a novel ready for release. Wired.com published his article titled "Inmates Need Internet to Prepare for Life After Prison." 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 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 documentation.

Disciplinary Self-Help Litigation Manual, Second Edition, by Dan Manville

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.



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Interrogating a Suspect With an Intellectual Disability Using the Reid Technique: Recipe for a False Confession

by Jo Ellen Nott

On April 25, 2023, the Virginia Supreme Court issued an order refusing to hear the case of Michael L. Ledford, a man who was convicted of arson and first-degree murder in September 2000 when he was just 23 years old and the father of a baby boy.

Ledford was sentenced in 2001 to a total of 50 years based on a coerced confession obtained after five hours of high-pressure interrogation. After years of pro se petitions, hearings, and appeals, the high court of Virginia shut the door on a possible exoneration for Ledford. The Mid-Atlantic Innocence Project with the pro bono help of law firm Baker Botts has represented Ledford since 2016.

The dry legal facts are merely the tip of the iceberg in the Ledford murder-arson conviction. Below the surface of that iceberg that shattered Ledford's life at 23 lie a mountain of police and prosecutorial missteps that put an innocent man in prison for half a century. First and foremost, Ledford is autistic. He was diagnosed by a University of Virginia clinical and forensic psychologist as being "in the autistic spectrum or [having] a severe nonverbal learning disorder."

On the night of October 10, 1999, Ledford left for the fire station where he volunteered after making sure his wife and infant son had fallen asleep. He stopped to gas up before heading to the station. Just 20 minutes later, while Ledford was doing paperwork, 911 calls started coming in about a house fire. Tragically, that fire was blazing in Ledford's apartment in the town of Stuarts Draft located on the northwest side of the Blue Ridge Mountains.

Ledford's journey to being wrongfully convicted began when police, witnessing him in mute shock, and misjudging a reaction typical to those on the autism spectrum, made Ledford their top suspect. Witnesses that night reported he did not try hard enough to run into the blazing living room. He did not cry or scream. Unknown to the bystanders Ledford stood locked within himself in fear and horror.

Because of his spectrum behaviors Ledford was not well regarded by others, and his wife Elise's family did not like him. As *Time* magazine described Ledford, "He was abrasive, cold, quiet. He was awkward, a mess in social situations. Sometimes he had a temper, sometimes a deep gloom. To the police, this husband and father wasn't performing a convincing husbandly or fatherly grief."

Despite Ledford being in shock over losing his one-year-old son to toxic smoke inhalation and his wife lying in a hospital with third-degree burns, the police interrogated him for five hours without a lawyer. They used a common but brutal interrogation method known as the Reid Technique, designed to intimidate and deceive hardened criminals.

The Reid Technique begins with lies: the interrogator tells the suspect emphatically that his or her guilt is established, that all the evidence has been gathered, and there is nothing the suspect can say to disprove it. The interrogator then says all he or she wants to

Prison Education Guide

by Christopher Zoukis

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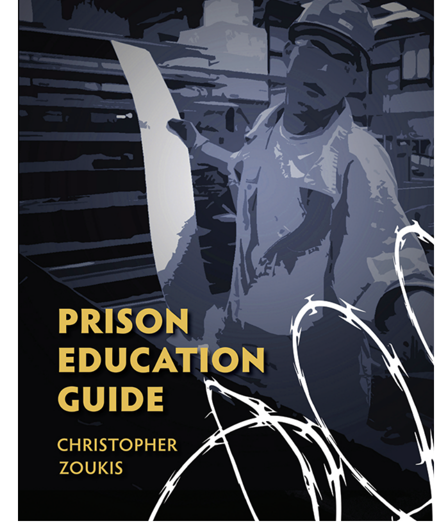

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know is "why." The interrogator blocks every attempt the suspect makes to claim innocence.

To end the interrogation the detective offers a tempting option — "a more socially acceptable reason for the crime, one that shows conscience." The interrogator makes the suspect believe he can help him if the suspect confesses to the reasonable explanation the interrogator has invented instead of the awful reason he has falsely presented as the supposed real motive.

In Ledford's case, the interrogator invented a kind-hearted desperation on Ledford's part to appeal to his wife's family and the community in large who do not like him: "You set the fire, you leave, maybe come in and be the hero. That's fine and I, I can respect you for that." The interrogator cleverly manipulated Ledford to admit he committed arson to save the day and be a hero to his wife and her family.

The Reid Technique is used extensively in police interview rooms. *Time* magazine explains: "It begins with the interrogator's dangerous unproven conclusion that the subject is guilty. It is not intended to draw out a confession that might condemn the suspect on its own, but to uncover new, unknown details—intimate ones that could then be corroborated, a body, a weapon, some real proof." In Ledford's case the interrogator made him believe and ultimately confess that he had thrown a lit candle on the living room chair while he walked out the door to go to the fire station.

After the interrogation, the police report was then re-written to reflect the sketchy details extracted from Ledford about the candle. It now matched the confession, and conveniently, no investigation was conducted to corroborate those details. The confession and the amended report were the prosecutor's only proof of guilt presented at the trial. Lacking physical evidence which could tie Ledford to the arson, the prosecution used Ledford's normal autistic behaviors (asking inappropriate questions about his wife's life support, for example) as something sinister. He was convicted and sentenced to 50 years.

Years later, the Mid-Atlantic Innocence Project ("MAIP") recreated, with the help of thermodynamic scientists, the scenario described in Ledford's confession—a lighted candle thrown onto an upholstered living room chair. They discovered the fatal blaze could not have happened. The burn patterns and the timeline given in Ledford's story did not square with forensic science.

In an evidentiary hearing in July 2021, Ledford's defense team discussed the expert findings from the fire experiment that led to alleged discrepancies in Ledford's confession. In his coerced confession, Ledford falsely admitted to throwing a candle onto the seat of a chair which then began the fire.

However, according to the expert findings, the MAIP arranged and financed, the burn patterns on the wall showed the fire began at the base and back of the chair, not the cushion, which Ledford's new defense counsel said would invalidate Ledford's confession.

There was no information that showed the source of the fire from the experiment, attorney Jana Seidl pointed out. She also argued that the timeline did not make sense for Ledford to have started the fire. Based on the amount of time the chair would have taken to burn and the 911 reports of the fire, Seidl proved it was impossible for Ledford to have been the arsonist.

Seidl said the MAIP's claim was solely based on the new scientific testing and conclusively proved the confession was false and Ledford was wrongly charged.

The evidentiary court established the MAIP's arguments as legal truth—a huge victory for Ledford. The Virginia Court of Appeals, however, denied Ledford a writ of actual innocence. On April 25, 2023, the Virginia Supreme Court refused to consider the case. Apparently, the Virginia judicial system cannot see fit to disregard a undoubtedly coerced and false confession.

Despite the forensic evidence in his favor and found valid in a Virginia court, Ledford will now spend another 27 years in prison. The last hope for Ledford is clemency. His defense team at the MAIP can appeal for a pardon from Republic Governor Glenn Youngkin.

Time magazine points out the daunting challenge of obtaining a pardon: "getting people with low bandwidth and mired in bureaucracy to 'dial into the substance' and to reckon with the truth—that false confessions happen, [and] that our judicial system, rigged against the vulnerable, may be unable to undo its own greatest mistakes."

Sources: *Baker Botts, Case Text, Mid-Atlantic Innocence Project, The Innocence Project, News Leader, Skeptical Juror, Time*

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Forensic Benefits of a Body Farm Facility

by Jordan Arizmendi

A BODY FARM IS OFTEN AN indispensable tool for investigators. A body farm is a facility that focuses on the details of human decomposition. Such an essential tool allows forensic scientists to study the decomposition process in a controlled environment. In many cases, body farms are the only way to determine the time of death, identification, how long the individual has been dead, as well as identifying many more crucial pieces of evidence.

The main purpose of a body farm is to study and form a conception of the decomposition processes that occur in our bodies. The research is then provided to medical, legal, and educational institutions.

Amy Rattenbury is a researcher at a body farm and also a senior lecturer in forensic science at Wrexham University in the U.K. She said, "The environment plays a significant part in the rates, stages and features of decomposition observed. Temperature, weather, oxygen, access by scavengers, clothing etc. all cause differences. A general rule is that exposed bodies will decompose faster than buried bodies which are again faster than those submerged in water, but it is not so simple and multiple factors must be considered."

The seven body farms in the U.S. are all at universities. Instead of body farms, researchers prefer to label such laboratories "decomposition research facilities" or "taphonomic research facilities."

A body farm is an outdoor site in which corpses are placed in a variety of different environments, such as dense woods, open fields, beaches, or shallow graves. The researchers then study how these factors affect the decomposition rates. In addition, by analyzing the environment, body farms can help investigators determine what happened to the body.

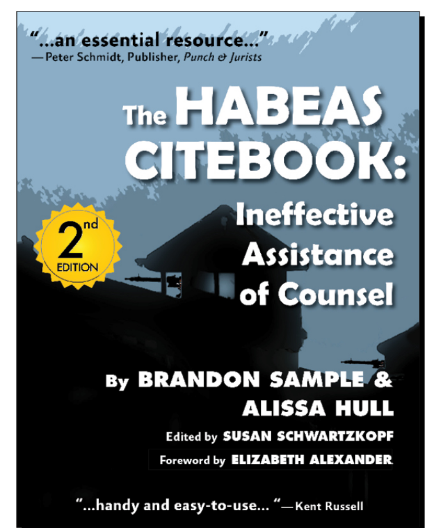
For example, what might initially be considered to be knife marks, could turn out to be caused by scavengers. Body farm techniques can also reveal if a body died in that spot, or if it had been moved. The presence of certain insects on a body can also be very telling.

The corpses that are used on body farms have been donated. Donors can arrange that, after death, their bodies are used for scientific purposes. Some body farms, like the one that Amy Rattenbury works on, uses the bodies of mammals instead of humans.

Oftentimes, investigators have nothing to work on. A body farm can provide essential clues to get an investigation going. For example, by calculating the precise time since death, also known as the post-mortem interval, investigators begin to establish a theory as to what happened and when. Once investigators have determined the time of death, they are able to start eliminating certain suspects.

All corpses undergo similar biological and similar phases. The intensification of each phase is determined by the environment surrounding it. For example, the second stage of decomposition is bloating because it is unable to release gas. Flies usually start laying eggs on the corpse during this phase. Larvae may start growing on the body at this phase as well. All of this morbid information helps investigators during death investigations.

Sources: *Proquest.com; newsweek.com*



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Police Can Get More From Your Phone Than You May Believe

by Michael Dean Thompson

Most of us would feel violated to learn that our spouse or partner had been digging through our phone. Imagine if they were to use that access to determine where we have been and who we have been near and then to gain access to our cloud services to examine long forgotten backups, images, and documents. Insatiably, they move on to access our social media accounts and peek into every post we and our friends have made. Most people would shudder in horror at such an intrusive sifting of our lives by people we love and hold most intimate, even if we believed we had nothing to hide.

Emma Well, a policy analyst at the technology research and advocacy organization Upturn asserts,"At no point in human history have we collected and stored so much information about our lives in one place."

The New York State Police, along with thousands of other law enforcement agencies in the U.S., wants to dig through your digital devices in such a manner. New York's Gov. Kathy Hochul has announced a $20 million expansion on top of tens of millions already quietly eased into the state's budget. Five-point-three million dollars of that set aside to modernize investigations by "linking devices to crimes." Experts assumed that was a reference to a technology toolset known collectively as Mobile Device Forensic Tools (MDFT). One such MDFT comes from the Israeli company Cellebrite, whose product is capable of breaking into phones that many have been led to believe are highly secure.

From a technology perspective, some of the tools available from Cellebrite are impressive. The tools include software and devices with the availability to automatically crack highly secure phones, devices, and SIM cards without the need to send them to Cellebrite for processing. Once cracked, the software can access search and web histories as well as spoof the user's identity to download social media, email, and cloud services. Information from a cracked phone can be analyzed and cross-referenced with information from other cracked phones. They have artificial intelligence to analyze images for content, including identifying faces, tattoos, drugs, weapons, and more. Other tools can then rifle through the collective data and create new leads without human assistance. Yet another AI aggregates the data and builds court documents.

Like most states, New York's warrant statute was written long before we collectively digitized our lives and focused their access into small mobile devices. That single point-of-failure creates a significant problem with consent searches when we consider that most people are simply not aware how invasive an MDFT can be during a search.

Well of Upturn describes the use of MDFTs as "an escalator" because it lifts the probe far beyond the original investigation. A Wisconsin suspect in a hit-and-run case told investigators they could search his text messages and signed a general consent. The MDFT the investigators used in the search pulled across – and stored – all of his phone data. That data was later shared with another police department for a separate investigation without a warrant or consent. This is not analogous to cops serving a warrant within a home and happening on evidence of another crime. The use of an MDFT is more akin to investigators being given consent to search a home then using that consent to make unlimited copies of that home's contents – down to the molecule – and sharing it with any interested parties. It is far beyond the scope of anything possible 50 years ago.

There is no consistency either when it comes to the various law enforcement agencies, MDFTs, and how the data is acquired and used. Almost half the agencies Upturn studied admitted to having no policies concerning MDFT searches. Upturn used the phrase "remarkably vague" to describe the policies of most of the rest. And the courts are in no position to provide leadership on solutions as they can only address the problems in front them. By the time a given problem can acquire a solution, the technologies have already evolved. Jerome Greco, the supervising attorney at the Legal Aid Society's digital forensics unit, noted, "Technology moves much faster than anything in law or politics."

As in the Wisconsin case, neither are there clear delineations regarding with whom the pilfered data can be shared or how it might be used. Emma Well summed it up well, "This is unprecedented law enforcement power."

Source: *NYSFocus.com*

Surveilling AI's Big Moment

by Michael Dean Thompson

AI is having its moment. And though much of what has been slapped with the AI label is generally a far cry from the large language models you may have experienced at Bing and Google, it can still be terrifying. These new generations of tools are enabling a surveillance state far beyond an Orwellian fever dream. And, it is not just the government watching you. Rather, the voyeurs are also corporations like Moderna and the NFL.

Maybe the most terrifying is something called correlation analysis. It turns out, your friends have a lot to say about you, even without opening their mouths. Using biometrics like facial recognition to identify you and your friends (who "co-appear" with you in images and videos), they analyze the amount of time you spend together and how often you meet. The system can then cross-reference other data and create a surprisingly accurate picture of you. The same type of technology has been put to use in China to track dissidents and protestors. Now, a company called Vintra has brought the concept to the U.S. and counts the Lee County Sheriff's office among its clients. The *Los Angeles Times* queried several police departments who have worked with Vintra, though none were willing to comment on whether they had used the co-appearance features. Nevertheless, the *Times* quoted several experts who believe the technology will likely see significant growth in the near future.

A Taiwan-based company, Vivotek, has launched a new tool to perform real-time facial recognition and vehicle tracking in up to 20,000 connected cameras. The AI-based VAST Security Station also has access to other intelligent image analysis tools to supplement its real-time monitoring.

South Korean company Hanwa Techwin is rebranding its own offering of AI-enhanced real-time data analytics in its video surveillance system, Hanwa Vision, for the American corporate and law enforcement consumer.

Ambient.ai out of California has integrated AI into forensics tools. Their goal is to provide search tools that work in near real-time for incident investigations. The tool even

manages to go further than facial recognition, capturing non-biometric identifiers such as clothing. The tool is being marketed to enterprises that "can quickly conduct investigations and meet regulatory requirements."

Senator Edward Markey of Massachusetts sees the danger of these systems that can have you "tracked, marked and categorized by public and private-sector entities that you have no knowledge of." For that reason, he plans to reintroduce a bill that would prevent law enforcement throughout the country from using facial recognition systems. A bill like that, however, does not go far enough. If an outright ban on facial recognition, including at the corporate level, is untenable, then limits should be set on how long any entity can hold biometric and related metadata, as well as how and to whom that data can be sold.

Source: *biometricupdate.com: New tools cash track who you have been with, as AI security evolves*

Wyoming Supreme Court Reverses 'Contempt of Cop' Conviction Because Police Were Not Lawfully Performing Their Official Duties

by Richard Resch

The Supreme Court of Wyoming reversed Myron Martize Woods' conviction for interference with a peace officer because the arresting officers' warrantless entry into his home, without any applicable exception, meant that they were acting unlawfully in effectuating his arrest, but an "elemental" requirement of this offense is that the police were lawfully performing their official duties.

On February 13, 2020, Cheyenne Police Department Officer Warren was called to the home of Brittany Jackson for a domestic disturbance. Jackson claimed that Woods grabbed her neck and pushed her. Warren did not see any marks on Jackson's neck, so he concluded that there was not probable cause to arrest Woods.

Approximately two hours later, Warrant and his supervisor, Sergeant Young, returned to Jackson's home in response to her request for further investigation. This time, the officers observed marks on her neck and determined that there was probable cause to arrest Woods for misdemeanor domestic battery. Mistakenly believing that an arrest warrant was not required under Wyo. Stat. Ann. § 7-20-102(a) because the alleged offense occurred less than 24 hours ago, the officers did not attempt to obtain an arrest warrant for Woods.

Warren, Young, and a third officer arrived at Wood's residence about an hour later to arrest him. They knocked on the front door, and Woods' girlfriend, Evelyn Rodriguez, answered the door and stood at the threshold of the residence with Woods behind her. The officers asked him to step outside to talk about what happened at Jackson's home, but Woods repeatedly refused, stating that nothing happened.

Eventually, Warren breached the threshold to grab Woods' wrist and drag him outside, but Woods broke free. At that point, the officers pushed past Rodriguez to physically subdue Woods and place him under arrest.

The State charged him with domestic battery and interference with a peace officer. Woods filed a suppression motion, challenging his warrantless arrest in his home and seeking all evidence related to the arrest suppressed as a violation of his Fourth Amendment rights. The trial court denied the motion, and he was acquitted of domestic battery but convicted of interference with a peace officer under Wyo. Stat. Ann. § 6-5-204(a). The court sentenced him to 365 days in jail. Woods appealed, and the appellate court affirmed. He timely appealed to the state Supreme Court.

The Court framed the dispositive issue as: "Whether the officers arrested Mr. Woods while engaged in the lawful performance of their official duties as required to convict him" under the statute. It answered this question in the negative.

The Court began its analysis with the axiom that the lawfulness of a defendant's arrest is "elemental" to the offense of interference with a peace officer because interference "is not a crime unless the officer is 'engaged in the lawful performance of his official duties." *Mickelson v. State*, 906 P.2d 1020 (Wyo. 1995) (quoting Wyo. Stat. Ann. § 6-5-204(a) and (b)). Whether an officer is lawfully performing official duties is a question of law that the Supreme Court reviews de novo. *Id*.

The Court turned to the Fourth Amendment in its analysis, noting that the U.S. Supreme Court ("SCOTUS") has advised that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573 (1980). SCOTUS draws "a firm line at the entrance to the house." *Lange v. California*, 141 S. Ct. 2011 (2021). Additionally, SCOTUS has cautioned that any "physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much…." *Kyllo v. United States*, 533 U.S. 27 (2001). Consequently, the general rule is that the Fourth Amendment requires the police to obtain a warrant prior to entering a person's home without consent. *Lange*.

The Court added that the state Supreme Court has similarly recognized "the important role of the Fourth Amendment in relation to the home." *Hawken v. State*, 511 P.3d 176 (Wyo. 2022). It noted that the State has the burden of establishing that an exception to the warrant requirement for entering a home applies such as consent, exigent circumstances, hot pursuit of a fleeing suspect among others. *Fenton v. State*, 154 P.3d 974 (Wyo. 2007); *Vassar v. State*, 99 P.3d 987 (Wyo. 2004).

Turning to the present case, Warren acknowledged at trial that at the time of arrest, he did not suspect: (1) Woods possessed any weapons, (2) he posed an imminent threat to Jackson, (3) he possessed any evidence in danger of being destroyed, and (4) there were any extenuating circumstances necessitating his immediate arrest. *See Lange* (when no exigency exists, "officers must respect the sanctity of the home – which means that they must get a warrant.").

The Court determined that the officers' warrantless entry into Woods' home was per se unreasonable and that the State has failed to prove that an exception to the warrant requirement applied. It further determined that the officers' warrantless entry into Woods' home to effectuate his arrest violated his Fourth Amendment rights. As a result, the officers were not engaged in the lawful discharge of their official duties when they arrested Woods, according to the Court. Thus, the Court held that his "conviction for misdemeanor interference with a peace officer cannot stand."

Accordingly, the Court reversed the decision of the appellate court. See: *Woods v. State*, 527 P.3d 264 (Wyo. 2023).

Sixth Circuit Suppresses Evidence Obtained as a Result of Warrant That Lacked Probable Cause of Criminal Activity in Arson Investigation

by Anthony W Accurso

The U.S. Court of Appeals for the Sixth Circuit required suppression of evidence based upon a warrant for evidence related to a structure fire where the government failed to establish probable cause to believe the fire was caused by arson or otherwise the result of criminal activity.

The Lexington, Kentucky, Fire Department sent Chris O'Bryan to investigate a structure fire at 428 Douglas Avenue. The fire consumed a portion of an unattached shed but did not spread to the vacant house on the property.

O'Bryan interviewed nearby residents and the non-resident owner who said "the word out there is that somebody pulled up in a vehicle and was … seen removing things out of the shed just prior to the fire."

He also noticed the residence at 430 Douglas Avenue had security cameras that may have captured video of the shed at the time of the fire. O'Bryan made contact with Quincino Waide, the owner of 430 and occupant of Apt. 3, who allegedly smelled of "what [O'Bryan] thought was marijuana." When asked about the DVR for the security cameras, Waide declined to share them.

Despite there being no reliable evidence to establish probable cause to believe that the fire was the result of criminal activity, O'Bryan obtained a warrant for the DVR ("DVR warrant") and asked the Lexington Police Department to assist with executing it. The group included narcotics officers Jared Curtsinger and Matthew Evans. O'Bryan also shared his suspicion that "there might be illegal narcotic activity occurring at the residence."

When officers arrived to execute the warrant, Waide's mother – who lived in Apt. 1 – informed officers that Waide was out, but she was able to summon him back to the home.

Upon his arrival, the officers signaled their intent to enter the apartment to serve the warrant. Waide offered instead to surrender the recordings from the DVR. Curtsinger then advised him they would be entering anyway and inquired about drugs in the apartment. Waide admitted "there may be a little marijuana." Officers eventually entered the apartment and found a significant quantity of drugs as well as a firearm.

Waide was charged with multiple drug and firearms offenses. He filed motions to suppress the DVR warrant and all evidence obtained subsequent to it for failing to link the fire to criminal activity, but the U.S. District Court for the Eastern District of Kentucky denied them. Waide accepted a conditional plea, received a 180-month prison sentence, and timely appealed, focusing on the DVR warrant.

The Court began its analysis by clarifying that although it may seem as though Waide "is afforded some protection because he was never suspected of having been involved in the shed fire…. That is not so." *See Zurcher v. Stanford*

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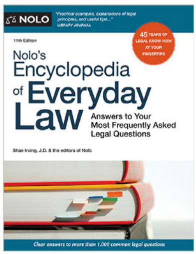
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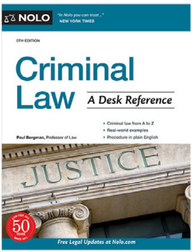
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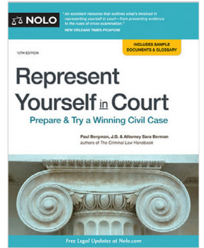
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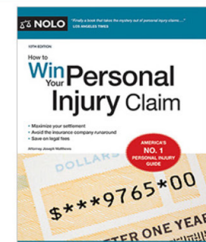
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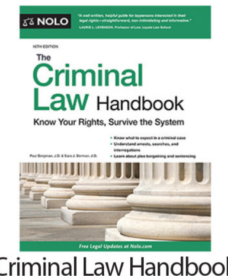
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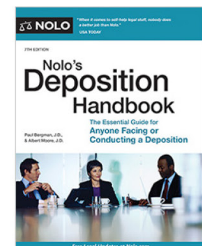
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Daily, 436 U.S. 547 (1978) (holding that the Fourth Amendment does not prohibit the issuance of search warrants merely because the possessor of the property is not suspected of criminal involvement). The Court explained that in situations where the government is not seeking to seize "persons" but rather "things" for which there is probable cause to believe are located at the place to be searched, "there is no apparent basis in the language of the [Fourth] Amendment for also imposing the requirements for a valid arrest – probable cause to believe that the third party is implicated in the crime." *Id.*

Consequently, the sole focus of the inquiry was whether probable cause existed to believe that a crime had been committed in connection with the shed fire to serve as the basis for issuing the DVR warrant. The Court stated that establishing probable cause for a search warrant requires the affidavit to show two things: "first, that the items sought are 'seizable' by virtue of being connected with criminal activity; and second, 'that the items will be found in the place to be searched.'" *United States v. Abernathy*, 843 F.3d 243 (6th Cir 2016) (quoting *United States v. Church*, 823 F.3d 351 (6th Cir. 2016)).

"The only information contained in the warrant affidavit that is proffered to support a finding of probable cause," wrote the Court, "is the statement of an unidentified person made to the unidentified property owner, and then communicated second-hand to O'Bryan, regarding an unknown person entering the property and removing items from the shed around the unspecified time of the fire."

"In the absence of any indicia of the informants' reliability, courts insist that the affidavit contains substantial independent police corroboration." *United States v. Frazier*, 423 F.3d 526 (6th Cir 2005).

The affidavit O'Bryan used to obtain the warrant contained "a minimum of two levels of hearsay" and failed to present "evidence that [O'Bryan] corroborated – or even attempted to corroborate – the information that the informants provided," wrote the Court.

The Court noted that the Supreme Court has been unequivocal in its insistence that "to secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred." *Michigan v. Tyler*, 436 US 499 (1978).

Courts are required to suppress evidence that is directly or indirectly "the tainted fruit of unlawful government conduct." *Nix v. Williams*, 467 US 431 (1984).

The Government argued that Waide admitted to criminal conduct before the unlawful warrant was executed, but the Court rejected this argument, stating "we see no reason why the fruit-of-the-poisonous-tree doctrine should not also serve to exclude evidence obtained by an official declaring his intent to act upon an unlawful warrant." That is because, "when a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."

The Government claimed several other exceptions to the warrant requirement, but the Court summarily rejected them. First, the Court explained that the attenuation doctrine did not apply because the development of evidence to enter the apartment – Waide's admission to possessing marijuana – only occurred immediately after Curtsinger announced the officers' intention to enter the residence regardless of Waide's consent.

Similarly, there was nothing inevitable about the discovery of evidence in the apartment, according to the Court. "[A]lthough the narcotics unit might have previously shown interest in Waide, the unit's participation in the execution of the DVR warrant meant that its investigation was neither independent nor untainted by that warrant," the Court reasoned.

Finally, the Court stated that the good faith exception did not apply because the "affidavit [was] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 US 897 (1984).

Thus, the Court concluded that the DVR warrant was unlawful, and all evidence obtained after police arrived to execute it was obtained in violation of Waide's substantial rights.

Accordingly, the Court ordered his convictions reversed and the suppression of the unlawfully collected evidence. See: *United States v. Waide*, 60 F.4th 327 (6th Cir. 2023).

Arizona Blowfly Database Develops Empirical Support for Time of Death Estimation

by Anthony W. Accurso

A research project in Arizona seeks to develop support for a method of determining time of death by cataloging information about blowfly species.

The gases emitted by a corpse can attract nearby blowflies to colonize and help break down a body. While blowflies will get to a body within minutes, the life cycle of the flies will vary depending on the specific species, making the process of determining the time of death imprecise.

"Species identification is the most critical step," said Jonathan Parrott, an assistant professor of forensic science at Arizona State University. "If you identify the species wrong, you're going to be applying incorrect data to your estimated time of death."

According to *Forensic Magazine*, "a blowfly species found on an abandoned body during summer in Chandler, Arizona, may have a different life cycle than a blowfly in the winter just 30 miles north."

Parrott's project has been using DNA to identify distinct blowfly species, then subjecting each to specific temperature and humidity environments to obtain information about how these affect the timing of a fly's life cycle.

"What makes our research unique is that there has not been any developmental or DNA data available prior to our project," said Parrott. "We are cataloging both morphological and genetic data."

Knowing that certain environmental conditions can alter biological periods – like how long it takes eggs to hatch into maggots – can make the difference between suspicion and exoneration if a suspect can establish an alibi for the actual time of death instead of an inaccurate one based on rough estimates which fail to account for species differences.

Parrott's work will contribute to standard operating procedures for law enforcement investigations in Arizona. Eventually, this work will need to be done elsewhere to bolster this method of time-of-death analysis in other states.

Source: *forensicmag.com*

California Court of Appeal Reverses Felony Murder Conviction Because Evidence Insufficient to Support Underlying Predicate Felony of Attempted Robbery

by Douglas Ankney

The California Court of Appeal, Third Appellate District, reversed Dwayne Lamont Burgess' felony murder conviction because the evidence was insufficient to support the underlying predicate felony of attempted robbery.

In December 1990, Burgess was a participant in a crime that ended in the death of a drug dealer. The plan was to cheat the victim by giving him some real money wrapped around a wad of fake bills in exchange for marijuana. But after Burgess handed the fake money to the victim, the victim called the deal off. Burgess fired his gun into the air to scare him and then ran off. Burgess heard another gunshot when his cousin shot and killed the victim.

Burgess was convicted by a jury of attempted robbery and first-degree felony murder. The jury also found he personally used a firearm in the commission of each offense. He was sentenced to prison for a term of 29 years to life on the murder and its enhancement while the sentence for the attempted robbery and its enhancement was stayed.

Burgess subsequently petitioned for resentencing under California Penal Code § 1172.6 and was granted a hearing under subdivision (d)(3). (Note: All statutory references are to the California Penal Code.) The Court of Appeal summarized the trial court's findings at that hearing as follows:

"The trial court's factual findings were that defendant was an accomplice with his cousin to a 'plan to meet the victim in order to purchase marijuana,' but with different intentions 'to extract revenge by shortchanging the victim on this deal. To further that revenge, it was the defendant who would use fake money wrapped in real money as his payment.' Further, while defendant was 'prepared to use' a gun, defendant 'intended to rip off a known drug dealer who had shorted him in the past.' As for the purpose of defendant's gun possession, the trial court found 'defendant anticipated that the victim could be armed ... [and r]ecognizing this risk, the defendant prepared himself for the potential for danger by arming himself with a loaded firearm.' Additionally, the trial court found defendant's use of the gun only evidenced his 'fail[ure] to take reasonable steps to minimize the inherent risks of ripping off a known drug dealer ...' and that, after firing the gun, the defendant ran away."

The trial court found Burgess was ineligible for resentencing because he was a major participant in an attempted robbery who acted with reckless indifference to human life. Burgess appealed.

The Court observed that § 1172.6(d)(3) provides in pertinent part: "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to § 188 or 189 made effective January 1, 2019."

Section 188(a)(3) reads: "Except as stated in subdivision (e) of § 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." Section 189(e) "allows for a murder conviction only when '[a] participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs' was the actual killer, aided and abetted with the intent to kill, or acted as a major participant with reckless indifference to human life when committing the underlying felony enumerated in subdivision (a)."

In the present case, the parties agreed that the underlying felony listed in § 189(a) was attempted robbery. Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." § 211. "An attempted robbery consists of two elements: (1) the specific intent to rob; and (2) a direct, unequivocal, but ineffectual, overt act towards the commission of the intended robbery." *People v. Vizcarra*, 110 Cal. App. 3d 858 (1980).

In *People v. Williams*, 305 P.3d 1241 (Cal. 2013), "the defendant contended his robbery conviction should be reversed because robbery requires theft by larceny, not by false pretenses." The defendant in *Williams* purchased gift cards with an altered and invalid credit card, supporting his argument that the theft was by false pretenses. The California Supreme Court agreed with the defendant, explaining that robbery requires a trespassory taking, which is absent in a theft by false pretenses. "[T]heft by false pretenses involves the consensual transfer of possession as well as title of property; therefore, it cannot be committed by trespass...." *Id.*

In turning to the present case, the Court stated that the evidence was insufficient to show that Burgess attempted to rob the victim. At most, he attempted to obtain the marijuana by false pretenses – tricking the victim into consenting to give him the marijuana in exchange for fake money like in *Williams* where the defendant tricked the cashier into giving him gift cards based on payment with a fake credit card, the Court reasoned. Theft by false pretenses is not one of the enumerated felonies in § 189(a).

Thus, the Court ruled that because theft by false pretenses is insufficient to support a felony murder conviction under current law – that is, there is no felony to predicate Burgess' felony murder conviction upon – the prosecution failed to prove beyond a reasonable doubt that Burgess is guilty of murder.

Accordingly, the Court reversed the trial court's order. See: *People v. Burgess*, 2023 Cal. App. LEXIS 119 (2023).

Writer's note: This opinion also explains the doctrines of collateral estoppel and issue preclusion and why neither applies in the context of a § 1172 proceeding.

Biased Algorithms Are Still a Problem

by Michael Dean Thompson

The reduction of biases in criminal justice is an ongoing problem that does not lend itself to easy solutions. Artificial Intelligence ("AI") may one day be that solution, though Boston University associate professor of law and assistant professor of computing and data sciences Ngozi Okidegbi points out that day is not here yet. The problem, as it is in all of criminal justice, is how pervasive and pernicious the issue of race can be. According to the Bureau of Justice Statistics, for every 100,000 adults within the U.S., there were 1,186 Black incarcerated adults in 2021. Similarly, there were 1,004 American Indians and Alaskan Natives per 100,000 that same year. In contrast, only 221 incarcerated per 100,000 that same year identified as white. Those extraordinary numbers highlight the severity of the problem but say little about underlying causations.

There has long been a call to increase the use of algorithms in all aspects of criminal justice, from policing to parole and everything in between, with the hope that a purely data-driven solution would eliminate human prejudice. Unfortunately, the systems put into place are often "black boxes" that its users have no real understanding of how the systems came to their recommendations. For example, in *Flores v. Stanford*, 2021 U.S. Dist. LEXIS 185700 (S.D.N.Y. 2021), Northpointe, Inc. filed an application in which they sought a court order preventing materials they produced from being disclosed to an expert witness hired by plaintiffs who had been denied parole.

The New York State Board of Parole ("BOP") uses Northpointe's COMPAS to score potential parolees as an aid to board members. However, the plaintiffs, all of whom were juveniles and one of whom was only 13 years old when they were convicted, are concerned that the BOP relies on COMPAS "without knowing how or whether COMPAS considers the diminished culpability of juveniles and the hallmark features of youth." Northpointe specifically sought to prevent the data set they used to create the scores as well as their general scores and regression models because expert access to the information would "threaten [their] very existence."

It is impossible to know how a decision might be made without having access to the data used to generate that decision. And, in the case of AI, even knowing the underlying data does not tell how the system came to its conclusions. When black boxes are used to determine where police are placed, to assist a judge on sentencing, and to determine when a prisoner should be given parole, the only means available to see the inequalities of the systemic injustice is through gross measures like the statistics above.

The organization ProPublica found that one system used in many states across the country "guessed" wrong twice as often for Black people than for white people as to whether or not they would reoffend. Nevertheless, criminal justice prior to the advent of algorithmic certainly fared no better.

Professor Okidegbi points to "a three-pronged input problem." The first issue is that jurisdictions intentionally withhold whether or not they use systems like pre-trial algorithms, and, when they do adopt them, they give very little, if any, consideration to the concerns of the marginalized communities affected by them. The second issue is what Kate Crawford of Microsoft called AI's "White Guy Problem," which is the overrepresentation of white men in the creation and training of AI, which can lead to biased data and output. And, finally, even when marginalized communities are given a chance to opine on the use of the tools, it does not tend to change the outcome.

AI, as any other algorithmic approach to criminal justice, is only as good as the data on which it was trained. Yet, even that is not complete. Racial equity, as well as economic equity, in criminal justice requires that all phases of the algorithmic approaches be transparent and open for comment, even from the traditionally voiceless incarcerated persons and the communities to which they belong. Additionally, the conversation should include metrics that compare and contrast how the efforts of the humans in authoritative positions (e.g., parole officers and judges) and the algorithms compare with each other regarding prediction and outcomes. As Okidegbi says, "It means actually accounting for the knowledge from marginalized and politically oppressed communities, and having it inform how the algorithm is constructed."

Sources: *futurity.org; Criminal Justice Algorithms Still Discriminate*

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Probation Sentences Capped in Minnesota

by Jordan Arizmendi

Part of an omnibus bill, Minnesota recently placed a five-year cap on probation. Any Minnesotan serving probation sentences longer than five years is now eligible for resentencing. Before this legislation, Minnesota law allowed probation sentences to be as long as the maximum sentence one could get for the crime.

For example, in 2013, Jennifer Schroeder got a year in jail for a drug offense. However, under Minnesota law, the maximum she could have gotten for the crime was 40 years. Hence, she received 40 years of probation.

Many individuals who go through the justice system will agree that the probation period is more burdensome than the incarceration. After all, probation requires someone to pay pricey fees, attend classes, and adhere to other judge-appointed conditions. Nationwide, the average length of probation is a little under two years.

Sources: *reason.com; pewtrust.org*

The Two Faces of the FBI and DOD Facial Recognition Program

by Carlos Difundo

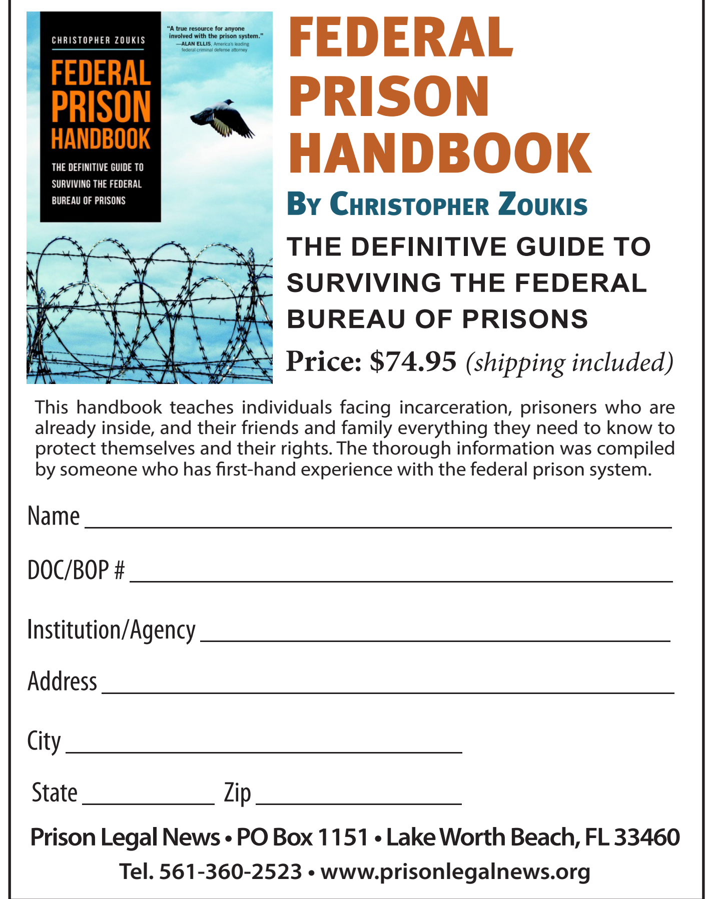
It is a trope of the modern spy thriller. A drone flies overhead and captures a fleeting glimpse of some person of interest. The image begins as a pixelated blur from far above. Someone yells, "Enhance the image," and it resolves into a high-quality profile that is run through a facial recognition program, which identifies the suspect every time. In the spy thriller, civil rights, accuracy, and verisimilitude are rarely top considerations. Despite being aware of the technical and legal limitations, the FBI and Department of Defense have joined forces in an effort to make that trope a reality.

Their wish list includes the ability to identify people captured by low-level street cameras to high-flying drones while also being able to follow people from camera to camera even as the angle of cameras differ. It seems the tool also needs to be capable of working in real-time while being indexable for future searches.

It is not clear how successful they have been in light of the significant technical challenges. Even using the high-resolution images found in jail bookings where suspects face the camera in strong lighting, extant best-in-class facial recognition systems, like those developed by Microsoft and Amazon, misidentify or fail to identify faces. Change the resolution to the grainy sort common with closed circuit cameras and doorbell cameras, and facial recognition success rates falter significantly. Add lighting challenges, different camera angles, or distances up to a half-mile away, and their success rates drop even more. Furthermore, if you define accuracy as being able to identify a single positive match or one at all, even those best-in-class systems struggle to accurately identify women of color under any condition in comparison.

The FBI and Department of Defense does not want the American public to know about the project. Fortunately, the ACLU filed Freedom of Information Act lawsuits demanding the information. Yet, it is unclear just how successful the government agencies were. What is clear is that after testing the facial recognition in environments simulating outdoor markets, hospitals, and schools, the system codenamed Janus (for the two- and sometimes four-faced Roman god) was integrated with an existing search tool codenamed Horus (for the Egyptian god of silence and secrecy). Once integrated, it was shipped out to six other federal agencies, including the Department of Homeland Security. To assuage the fears of people like Senator Edward Markey, the FBI declared its commitment to responsible use of the technology. With names like Janus and Horus identifying tools developed and deployed in secret to surveil American activities, Senator Makey and the American public might be justified if they maintain some degree of incredulity.

Source: *Techdirt.com*



No Discipline for NYPD Officers Who Deface License Plates in Apparent Attempt to Evade Tickets

by Douglas Ankney

Gersh Kuntzman, editor of *Streetsblog*, spent the first quarter of 2023 documenting New York Police Department ("NYPD") officers who defaced their license plates, making the plates unreadable to the city's speed, red-light, and bus-lane violation cameras. The results of the investigations into his complaints reveal none of the offending officers were disciplined.

Sergeant Ronald Paulin earned more than $228,000 in 2022. Kuntzman photographed Paulin's new Tesla that had no front license plate or registration. But the investigator who interviewed Paulin stated Paulin no longer owned the vehicle. However, the investigator indicated that the vehicle Paulin no longer owned was a 2019 Nissan Altima. There was no follow-up investigation concerning the new Tesla displaying Paulin's license plate in the rear but no front plate.

Detective Christopher McGuinness – who was paid $177,773 last year – had a license plate with the "D" and "V" scratched off, rendering the plate illegible. Lt. Juan Solla reported that he informed McGuinness that the plate had some peeled paint, and should it deteriorate further, it would need to be replaced.

Lieutenant Craig Baco, who was paid $179,000 in 2022, scraped off the last four digits of his front plate. According to the investigator assigned to the case "[Baco] contacted DMV in my presence and he ordered a replacement plate. It will take approximately four to six weeks for the new plates to arrive. The subject was unaware of the damage to his front plate until he was inforemed [sic]."

Detective Louis Dambrosio's front and back plates were severely defaced. Even though Dambrosio was paid $186,695 last year, Kuntzman repainted all the digits on both plates at no cost. NYPD Inspector Brittany McCarthy decided that "the paint chipping on the license plate is not enough to determine this plate to be unrecognizable.... [Dambrosio] was advised to contact the DMV for a new license plate."

Officer Evelyn Rodriguez's vehicle was videotaped displaying Massachusetts plates. New York law prohibits cops from living outside the state. But Rodriguez allegedly retired in 2016 and no longer works for the city. However, the investigation failed to answer the question of why Rodriguez still had an NYPD placard displayed in her car.

NYPD Investigator Novaidul Neon investigated the complaint regarding Officer Michael Cronin's defaced plates. Neon decided Cronin could not possibly be accused of defacing his plate because "his intention was not to get away from tickets." (Cronin had racked up 15 speeding and five red-light tickets.)

Officer Clinton Philbert covered his rear plate with a spare tire. Neon reported that Philbert took his vehicle to a mechanic, and the plate is now visible. However, Neon concluded that Philbert had wrongly covered his plate, and the NYPD would take action by sending Philbert a letter (apparently a chiding one?).

One can only wonder whether members of the public who are not employed with the NYPD are afford similar deference when accused of similar violations.

Source: *nyc.streetsblog.org*

New York Court of Appeals: Constitutional Prohibition Against Restraining Defendant Without Explanation Remains in Force During Announcement of Verdict and Polling of Jurors

by Douglas Ankney

The New York Court of Appeals held that until the jury returns to the courtroom and publicly announces and confirms the verdict, the defendant is still presumed innocent, so the constitutional prohibition on restraining a defendant without explanation remains in force.

Oscar Sanders was tried by jury on several charges, including attempted assault in the first degree and assault in the second degree. After the jury advised the trial court it had reached a verdict but had not yet returned to the courtroom, defense counsel observed the defendant in handcuffs and made the following objection:

"I understand that it's this court's policy, I just learned this minutes ago, to keep my client in handcuffs while the jury comes out and renders their verdict. But it's my understanding that the law allows for the defense and Prosecution to poll the jury with the idea in mind that perhaps unanimity of the jury can be questioned when the foreperson announces a unanimous jury. And with that in mind, being that the defendant is in handcuffs while they announce that verdict, especially in the case of it's a verdict of guilty, lends pressure to anyone who might dissent during that polling to be influenced negatively against anyone in handcuffs, and certainly in this case, I would say that's true for [defendant]. So I'm asking you to leave him uncuffed during the reading of the verdict for that reason."

The trial court answered, "All right. The application is denied. Bring in the panel." Everyone was then directed to stand as the jury entered. After the jury had entered, Sanders was again ordered by the judge to stand as the jury read the verdict. The jury found Sanders guilty on all counts, and the judge confirmed the verdict by polling the jurors. Sanders was subsequently sentenced as a persistent felony offender to an aggregate term of 15 years to life in prison.

Massachusetts Supreme Judicial Court Casts Nearly 30,000 DUI Convictions in Doubt Due to 'Egregious Government Misconduct'

by Jordan Arizmendi

The Supreme Judicial Court of Massachusetts upheld a ruling concluding that between 2011 and 2019, breathalyzers used by the government were improperly calibrated and maintained. *Commonwealth v. Hallinan*, 207 N.E.3d 465 (Mass. 2023). More astonishingly, according to the opinion, because of government misconduct, an estimated 27,000 people found guilty of DUI can either withdraw their guilty pleas or have their convictions revisited.

The biggest Massachusetts' mistake since trading away The Babe in 1920, all started with Lindsay Hallinan's case. Back in 2013, Hallinan got pulled over, and when she blew into the Draeger Alcotest 9510 breathalyzer, her blood alcohol level registered at .23. She knew the reading was not correct, though she figured she had no other course of action than to admit to sufficient facts the next month.

After her plea, authorities discovered that some of the breathalyzer machines had not been properly calibrated to ensure accuracy. An investigation by the state Executive Office of Public Safety and Security ("EOPSS") found that the state Office for Alcohol Testing ("OAT") covered the machine's inaccuracies and claimed the rate of failure was actually a lot lower than it really was.

The Supreme Judicial Court in *Hallinan* stated that the breathalyzer coverup "undermined the criminal justice system in the Commonwealth, compromised thousands of prosecutions for OUI offenses, and potentially resulted in inaccurate convictions."

The 46-page decision chronicles the myriad instances that the state police lab withheld records from defendants in direct violation of court orders. The opinion also makes clear that the violations were encouraged by those running the lab.

The 2019 EOPSS report found that the Massachusetts State Police had a history of intentionally withholding exculpatory evidence, disregarding court orders, and other blatant misconduct. Here is an excerpt from that report: "[T]he EOPSS report highlighted that OAT scientists responding to discovery requests were instructed not to provide failed worksheets. If a scientist included such a worksheet in the discovery package, O'Meara would insist that the failed worksheet be removed, because she considered it to be nonresponsive."

Melissa O'Meara was the head of the state OAT. She was fired from her position the very day, back in 2017, that the scathing report came to light. Before her firing, O'Meara was doing everything humanly possible to keep the magnitude of her department's failure from getting out – and with good reason as the *Hallinan* Court noted: "The scathing EOPSS report highlights OAT's disturbing pattern of intentionally withholding exculpatory evidence year after year, dating back at least as early as June 2011. The report characterizes OAT's discovery practices as 'dysfunctional,' guided by 'serious errors of judgment,' and 'enabled by a longstanding and insular institutional culture that was reflexively guarded….' [T]he conclusion that OAT's behavior was egregiously impermissible is 'inescapable.'"

In conclusion, the *Hallinan* Court cast doubt on approximately 27,000 DUI convictions as a result of the government misconduct, instructing: "defendants who were convicted after trial or pleaded guilty to an OUI offense, where a breath test had been conducted using an Alcotest 9510 breathalyzer last calibrated and certified prior to April 18, 2019, are entitled to a conclusive presumption that the first prong of the *Scott-Ferrara* test [collateral attack on sentence based on claim guilty plea was not knowing or voluntary because of evidence not available to defendant at time of plea] is satisfied, and the existence of egregious government misconduct that antedated the defendant's plea has been established. *See Scott*, 467 Mass. at 346. By extension, any breath test conducted using an Alcotest 9510 device last calibrated and certified during that time period must be excluded in any pending or future prosecutions. Where a defendant successfully moves for a new trial due to OAT's misconduct, and thereafter is convicted, so long as the defendant's original sentence was legal, the new sentence will be capped at no more than the original sentence. If the defendant's original sentence was illegal, the new sentence will not be limited to the initial disposition."

Sources: *techdirt.com; salemnews.com*

New York City's DNA Gun Crimes Unit Reduces Turnaround Times for Gun Crimes by Half

by Jordan Arizmendi

On June 30, 2022, New York City Mayor Eric Adams and New York City Chief Medical Examiner Dr. Jason Graham announced the creation of the specialized Office of the Chief Medical Examiner's ("OCME") DNA Gun Crimes Unit. One year later, it became the fastest big city lab for testing and analyzing gun crime evidence.

With an investment of $2.5 million, the OCME DNA Gun Crimes Unit will hire and train 24 forensic scientists dedicated to testing and analyzing gun crime evidence throughout the five boroughs of New York City.

OCME handles the largest public DNA crime laboratory in the country. The lab tests about 50,000 pieces of evidence every year. A year ago, the lab's turnaround testing time for gun crimes was 60 days or less, which is faster than almost any other jurisdiction in the country. On June 27, 2023, the city announced that, thanks to the new city lab, that time has dropped to an unprecedented 30 days or less.

Sources: *NYC.gov; forensicmag.com*

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By John Boston

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John Boston is best known to prisoners around the country as the author, with Daniel E. Manville, of the *Prisoners' Self-Help Litigation Manual* – commonly known as the "bible" for jailhouse lawyers and lawyers who litigate prison and jail cases. He is widely regarded as the foremost authority on the PLRA in the nation.

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The Serious Threat of Cell-Site Simulators

by Michael Dean Thompson

Within the past several decades, police have acquired a new tool so secretive that prosecutors were told to either plea out cases or repress evidence rather than permit the public to know about them. Much to the chagrin of the courts, that secrecy extended even unto them. "It is time for Stingray to come out of the shadows so that its use can be subject to the same kind of scrutiny as other mechanisms." Chief Judge Wood wrote those words in his 2016 dissent in *United States v. Patrick*, 842 F. 3d 540 (7th Cir. 2016) (Wood, J., dissenting), when the issue of cell-site simulators came before the Seventh Circuit. Nevertheless, little more is known about them seven years later, and various court references to their capabilities seem to conflict with each other. Fortunately, thanks to critical courts, the work of groups like the Electronic Frontiers Foundation ("EFF"), and the American Civil Liberties Union ("ACLU"), as well the emergence of competitors to the maker of Stingray who advertise their product capabilities, more information is being revealed about them.

The super-secret system in question is at least conceptually tied to a humble device. Years ago, corporations realized their massive buildings wreaked havoc on cell phone reception. The solution was to place boxes called femtocells (and their ilk) throughout their building. These boxes, which attach to the corporate network, act as tiny (hence femto-, which is smaller than nano-) cell towers. All local cellular traffic then passes through the corporate network and out to the cellular provider. The presence of so much cellular data (such as emails, SMS (text) messages, recordable voice conversations, etc.) made these boxes, or devices that shared those capabilities, extraordinarily attractive to police surveillance teams. The result was the IMSI Catcher or cell-site simulator ("CSS").

Stingray is only one of the CSS products produced by Harris, the apparent market leader, which also includes but maybe not limited to Hailstorm, Arrowhead, AmberJack, and KingFish. Boeing, through its Digital Receiver Technology division, also produces its own CSS products, often called dirt boxes. The secrecy over CSS devices is instigated by the FBI and enforced by the Federal Communications Commission ("FCC"). Companies like Harris require that law enforcement agencies sign a nondisclosure agreement ("NDA"). The NDAs can vary in their language, but they insist that agencies must immediately notify the FBI if they receive a request motion or court order that either seeks or orders disclosure of the technology so that they can block the disclosure of the devices, operations, or use.

NDAs have slowly been coming to light. As recently as last year, an NDA for the city of San Francisco was disclosed to the public. In order to keep the devices secret, police departments in Florida have even gone so far as referring to CSSs as "confidential informants" in an effort to conceal their use of CSS devices and avoid court sanction. One state judge in Florida even allowed U.S. Marshals to seize the records from a local police department and transfer them out of state in order to shield them. As for Harris, it proudly displays on its website its myriad products for police and the military, but past searches for "IMSI Catcher" and "Stingray" turned up nothing.

The apparent plethora of products as well as intentional misdirection/deception by law enforcement embedded within enforced secrecy by the FBI and FCC has created significant confusion as to what exactly the CSSs can do. So, even if the police do not intentionally obfuscate, it remains possible that officers from different agencies could report wildly different capabilities solely because they are using different products.

All of this assumes that in its due diligence law enforcement reports its use of CSS technologies. A recent report by the Department of Homeland Security ("DHS") Office of the Inspector General ("OIG") has shown even that assumption to be misguided. As it turns out, Immigration and Customs Enforcement ("ICE") and the Secret Service have both failed to acquire the appropriate authorization to use the tools in violation of the law and DHS standards. Likewise, the *Texas Observer* revealed that the Texas National Guard had been using airborne CSSs over the state.

Cell-site simulators work because cell phones are little more than handheld radio transmitters. Each cell phone possesses a unique series of digits known as an International Mobile Subscriber Indemnification ("IMSI") that it uses to announce itself even when not in use. While the cellular device is on, and not in airplane mode, it will broadcast its IMSI inside communications attempts, such as pings. Any nearby cell towers can respond to that ping, establishing their relative signal strengths as well as other connection-specific data and possibly even a rough location using longitude and latitude and the degree of uncertainty (distance in meters). The cell phone in turn develops an affinity for the tower with the strongest signal, at least until the pings return some other stronger signal (as would happen fairly often if the cellular device were travelling down the freeway). Cell-site simulators, then, work much like a cell tower and its smaller siblings such as the femtocell by acting as if they were themselves a cell tower but without the connection to the cellular networks (though in the age of broadband wireless communications, there is no real technical reason that should still be true).

There are two primary modes for a CSS. The first is passive and is often called an IMSI Catcher. In the passive mode, the CSS transmits no signals and is completely undetectable. Instead, it captures and records the emissions from consumer cellular devices. As to exactly which of those emissions are overheard and/or recorded may be dependent on the product in use, that product's configuration, and police willingness to limit themselves to the bounds of the law. As we have seen from Florida, ICE, and Secret Service examples, the latter expectation is rather idealistic. Because cellular communications are transmitted over the air, it is entirely possible for such devices to intercept the contents of phone calls, emails, and more while leaving the device in question oblivious to its presence.

In the active mode, a CSS representing itself as a cell tower tricks the target devices into connecting to it by producing a stronger signal than the tower. The target devices transmit their identifiers to the CSS and develop an affinity for it. In *United States v. Temple*, 2017 U.S. Dist. LEXIS 218638 (E.D. Mo. 2017), using the testimony of a special agent, the court found that when a CSS "locks-on" to a target device, that device "is not able to place or receive calls because the Cell-Site Simulator interrupts normal service." Once the affinity is established, the CSS, usually in conjunction with a second handheld CSS device, can be used as a locator device using signal strength and at least some sense of direction (though this is disputed by law enforcement in some court filings, the capability to locate cell phones is highlighted in *Andrews v. Maryland*,

2020 Md. App. LEXIS 1086 (2020), and others, where police used Hailstorm CSS to track the defendant's phone in the defendant's pocket and the couch on which he was sitting – as was their claim when they found a gun hidden in the couch).

Some court filings separate the modes into "canvassing" and "locating," as they did in *In re Warrant Application for Use of A Canvassing Cell-Site Simulator*, 2023 U.S. Dist. LEXIS 77393 (N.D. Ill. 2023) ("Warrant"). In doing so, they divide them into conceptual frameworks. In *Warrant*, police claimed they were unable to locate their target devices when using a canvassing cell-site simulator ("CCSS"). Instead, the CCSS is used as an analog for a broad geofence where all IMSIs from all nearby devices are drawn into the device. Bear in mind the IMSI is far from the quasi-anonymous device people use by Google and others to track mobile devices. Rather, armed with an IMSI, the police only need a subpoena to access the business records of the associated phone number, including the name and address of the account holder (though not necessarily phone user).

In the geofencing case *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022), police were looking back in time at a bank robbery. They drew a circle 300 meters wide, covering about 17 acres, and asked Google to identify every phone they could in the area. Google found 19 devices in the first step and returned them with their quasi-anonymous device IDs. It was not until the third step of the single warrant that the police were able to acquire identifying information on a single device. Yet, the court found that to be a Fourth Amendment violation and required a warrant for each of the three steps in Google's law enforcement cell phone data retrieval process. In contrast, a CCSS can potentially identify devices over a mile away from it in a single step. In *Warrant*, the court pointed out that in a city like Chicago, with a CCSS configured to identify phones within a quarter mile (400 meters) of the device, more than 2,000 devices would be vulnerable and fully identified. In an effort to mitigate the effects of such a broad intrusion to appease the courts, the police argued that all IMSIs captured by the CCSS but were not the target devices would be deleted once the warrant terminated.

As described above, a CCSS sounds like a CSS in passive mode. That is, it need only "listen" for pings broadcast over the air, which all phones emit periodically. However, that is not how it is described in *Warrant*. Instead, it is described as actively emitting signals. "When law enforcement uses a CSS, it may interrupt cellular service of cellular devices in the CSS's immediate vicinity."

It is that understanding of the cell-site simulator that the court brought into the discussion of the CCSS. Although the government testified that it cannot "provide this Court with a precise answer regarding (a) the size of the area containing phones that would connect to the CSS, or (b) the number of subscribers in that area," the court describes the CCSS as active saying, "Because a CCSS works by attempting to emit a more attractive signal than a cell tower, it is likely that a CCSS' range would be at least similar or perhaps even greater, covering large swaths of urban neighborhoods in densely populated cities." Nevertheless, the magistrate described the capabilities of the CSS technologies are "fuzzy" and attributed that to the breadth of products and their requisite NDAs.

While a CCSS compares well to a geofence, it also shares a significant number of features with a tower dump such as in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). A tower dump can be broadly defined as a download of all IMSIs that have connected to specific towers. In other words, a tower pro-

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vides an analog to location because cell phones connecting to it must be within a mile or so of the tower. That is, any phone responding to that tower must have been within that roughly three-square mile area. A tower dump differs from a CSS because it is a records request and can be tightly controlled. A CSS, however, is a live exercise where controls are difficult to implement and differs from a full tower dump in that the police were specifically asking for the list of towers to which the defendant had connected and that cell-site location information ("CSLI") was found to be a search and require a warrant. *Carpenter*.

Locating cell-site simulators are active CSS devices that work by enticing cell phone connections by emitting stronger signals. When a phone develops an affinity for a CSS, it can be enticed to exchange data. That induced chattiness, the cell phone's signal strength, and the added possibility of GPS-like longitude and latitude location coordinates embedded within a ping, allow investigators to zero-in on that suspect phone. However, the Locating CSS must know the phone's IMSI data to lock onto it (and without it, whom are the cops locating?). Likewise, phones in the vicinity of the locating CSS, as well as the suspect phone, may not have phone service because the CSS is (presumably) unconnected to any cellular network. This will lead some investigators to intermittently turn the CSS on and off so that the suspects are not aware of their presence. However, if a phone is actively engaged in a call when the CSS pulses on, the suspect phone may not try to connect to the CSS, disincentivizing the investigator from pulsing the device.

Until *Carpenter*, and often still with regard to a cell-site simulator, such attempts had been covered as a pen register and subject only to a subpoena. In fact, in a recent case, *United States v. Reeves*, 2023 U.S. Dist. LEXIS 51693 (E.D. Mo 2023), the special agent testified that the Department of Justice requires only that a CSS be treated as a pen register, a device (or software) that logs a given phone's metadata, such as the number dialed. Included in the Pen Register and Track and Trace statute 18 U.S.C. §§ 3121 - 3127, is signaling information, routing information, etc. The lower bar of a pen register subpoena was first set in 1986, before cell phones became ubiquitous. Since then, some court decisions have found the CSS too burdensome on the right of privacy for those innocently ensnared by a CSS though the decisions are inconsistent. A bill that would have banned the use of cell-site simulators except by warrant, the Cell-Site Simulator Warrant Act of 2021, 117 S. 2122, has been pending since June of 2021. Meanwhile, we wait for the courts and Congress to act to strengthen controls.

Sources: *eff.org; oig.dhs.gov; "A Hailstorm of Uncertainty: The Constitutional Quandary of Cell-Simulators," 85 U. CLN. L. Rev. 665; "If the Tree Falls: Bulk Surveillance, the Exclusionary Rule, and the Firewall Loophole," 13 Ohio St. J. Crim. L. 211*

Writer's note: One of the more confounding aspects of evidentiary law for this writer is the Firewall Loophole, in which "police can use [the loophole], even intentionally, to engage in illegal searches and seizures with immunity from suppression and most likely, without detection." *Ohio St. J. Crim.* For example, a "knock and announce" violation that led to the discovery of additional evidence was sufficiently "attenuated" from the discovery that the additional evidence remained admissible in *Hudson v. Michigan*, 647 U.S. 586 (2006). A police officer using a cell-site simulator, then, could use it to listen to a conversation on the phone being tracked without first obtaining a warrant. Even if the police officer cited "exigent circumstances," such as a belief the suspect was conspiring to imminently flee a warrant for arrest, but that was found to be in violation of the suspect's rights, VA confession based upon the cop's knowledge derived from the call might still be admissible because the arrest was not the result of the evidence. For this reason, Congress should also mandate that cell-site simulators must not be able to both extract content and operate as a canvassing or locating CSS. The features must be exclusive and each require a warrant. Content-extracting CSSs should only be used by highly trained personnel under very specific conditions.

Second Circuit Vacates § 924 Convictions Predicated on Attempted Hobbs Act Robbery

by Douglas Ankney

The U.S. Court of Appeals for the Second Circuit vacated two 18 U.S.C. § 924 convictions that were predicated on attempted Hobbs Act robbery because attempted Hobbs Act robbery is not categorically a crime of violence.

In 2018, Dwaine Collymore pleaded guilty to four counts, viz., conspiracy to commit Hobbs Act robbery (Count 1); attempted Hobbs Act robbery (Count 2); using, brandishing, and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i), (ii), (iii), and (2) (Count 3); and murdering a person with a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(j)(1) and (2) (Count 4). The predicate "crime of violence" sustaining the convictions of Counts 3 and 4 was the attempted Hobbs Act robbery of Count 2. The U.S. District Court for the Southern District of New York sentenced Collymore to 525 months in prison, and he timely appealed.

The Second Circuit affirmed, but in 2022, the U.S. Supreme Court vacated the judgment and remanded to the Second Circuit for further consideration in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022).

Collymore argued that Counts 3 and 4 "must be vacated because they derive from his conviction for attempted Hobbs Act robbery, which he argued is not a crime of violence." The Second Circuit determined that "[a]fter *Taylor*, Collymore is correct. Attempted Hobbs Act robbery no longer qualifies as a crime of violence under § 924(c)(3)(A), and therefore cannot serve as a predicate for Collymore's conviction under 924(c)(1)(A)." *See United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023). Additionally, since an element of Collymore's offense under § 924(j)(1) is that he was "in the course of a violation of [§ 924(c)]," Collymore's attempted Hobbs Act robbery could not serve as a predicate for his conviction under § 924(j)(1). *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018).

Accordingly, the Court vacated Collymore's convictions on Count 3 and Count 4, affirmed his convictions in all other respects, and remanded to the District Court for resentencing in light of the partial vacatur. See: *United States v. Collymore*, 61 F.4th 295 (2d Cir. 2023).

Law Enforcement Using Technology That Accesses Live Video From Any Camera Connected to the Internet

by Jordan Arizmendi

Last February, WDTN reported that Dayton, Ohio, City Commission members, voted to approve installation of the Fusus network. When the system is set up, a 911 call will automatically identify cameras in the area that have a live feed. As a result, police officers could get a real-time view of what is going on around that 911 call. Atlanta, Memphis, Orlando, and countless other police forces across the country are imploring the public to invest in the Fusus surveillance system.

Essentially, the Fusus technology allows law enforcement to spy on people who do not know that they are being watched, as well as target protestors, political dissidents, or even harass people of color. Unrestricted police surveillance allows law enforcement to spy on people without any probable cause.

Now that so much of the world is accessible through video footage, besides hiding under a bed or maybe down in the basement, there are not many places to hide from the Watchful Eye. Fusus is such an effective police surveillance tool because it extends police access to surveillance cameras and then integrates these cameras with private and public networks of other surveillance services.

On the Fusus Q&A page, one question, "How does conditional camera access work through policy-based sharing?," provides a very revealing answer.

"Conditional camera access means the camera network's owners have the ability to choose how and when their cameras are accessible to FususONE. For example, the local police department may choose to have access to street, public building and transit cameras streaming live 24/7 based on the department's policy. However, private businesses and schools may choose to only have their cameras accessible to the police department when an emergency situation arises, and they activate the live streaming capability via a panic button. Other locations such as private residents and neighborhoods may choose to never establish a live stream from their cameras, and only register them via FususREGISTRY, providing valuable intelligence to local law enforcement agencies for forensic purposes."

The word "Fusus" comes from the ancient Greek word for spindle. Like a spindle weaves threads together to construct a single powerful strand, the Fusus technology weaves video and data streams into a single all-seeing surveillance system.

The possibilities are truly endless (and unsettling). Of course, the more cameras added to the network, the more effective it becomes. In June 2022, the Interim Chief of Police in Atlanta told 11 Alive, an NBC affiliate, that the Connect Atlanta network has more than 5,700 integrated cameras and 3,000 registered cameras.

The goal of Fusus, is to incorporate as many surveillance systems into one instrument for police. By partnering with other surveillance companies such as ShotSpotter, which alerts police to gunfire; Geolitica, which provides patrol guidance and measures officers in real-time; and Vigilant Solutions, which provides license plate recognition capability, a single police officer can become a one-person mass-surveillance system.

Sources: *eff.org; police1.com; fusus.com*

New Study Proposes Biological Reasons May Cause Sudden Infant Death Syndrome

by Jordan Arizmendi

Few events are more horrific than sudden infant death syndrome ("SIDS"). A boisterous and healthy baby, before their first birthday, goes to sleep in their crib and is found dead the next day. To compound the tragedy, parents and caretakers are sometimes criminally charged for the death.

A new study, published in the *Journal of Neuropathology & Experimental Neurology*, examined dried blood samples from babies who died from SIDS. The study revealed decreased levels of blood enzyme butryryl-cholinesterase activity in the ones who died from SIDS versus the infants who died as a result of something else versus infants who did not die at all.

Before this study, SIDS was a perplexing mystery, resulting in countless wrongful convictions. While the study seems to have discovered a possible medical reason, more research is still required.

Sources: *forensicmag.com; nationwidechildrens.org*

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New Service Highlights Cellphone Privacy Issues

by Michael Dean Thompson

Corporations have turned cellphones into mobile snooping devices that monetize consumer habits and daily activity. A new service, Pretty Good Phone Privacy ("PGPP"), addresses some of the privacy concerns built into the cellular system.

The problem comes down to the architecture of the cellular networks, which were not designed with privacy in mind. Buried within the SIM card is an Internal Mobile Subscriber Identifier ("IMSI"), a globally unique code. The IMSI is used for many things, especially payment status. Essentially, the IMSI ties the device to the person.

Just about every second or so, your phone "pings" the nearby towers to discover which has the strongest signal, as well as which receives its signal best. Those pings carry the phone's IMSI and generate a record that can be used to provide a rough triangulation of the phone's location. While not as accurate as a GPS signal, it has found significant use by police who wish to establish the phone owner's presence. The tower information is used by the carriers to route calls to and from the phone, as well as data requests. The carrier can tie the phone to a location when phone calls and text messages were sent and received, as well as plaintext data such as web searches and email, much of which are logged. Location data can reveal things about a user that corporations have no need to know, including political associations, habits, and religion. Far too much can all be extracted by drilling into cell tower affiliations and the IMSI.

Just as new technologies such as cellphones stepped forward to strip away any real sense of privacy, another set of technologies has come forward to guard it. Many of these tools have been around for ages, others are only just starting to mature. Secure tunneling, which is also known as a Virtual Private Network ("VPN"), allows a user to tunnel their data through an encrypted network connection. All the primary service provider sees is the device connecting to the VPN provider. At the endpoint of the VPN, however, the user is still susceptible to the VPN provider's logging as well as the data the apps loaded on the device have collected and shared.

A newer privacy technology is the blind signature. When an author of an email or document wishes to state unequivocally that its contents are authentic, they can cryptographically sign the document while leaving it legible to anyone who wishes to read it. Should anyone alter the document, the signature would fail to authenticate. Unlike previous signature systems, blind signatures perform the same function but without the signatory's identity embedded. Likewise, a zero-knowledge proof allows two people to communicate encrypted private data without needing to share their identities.

PGPP brings together some of these new and old privacy tools to sequester data transmissions. While PGPP can randomize the IMSI, traditional voice calls remain vulnerable to snooping. Nevertheless, with PGPP, a user can browse the web or send messages without PGPP knowing anything about the communication's contents. For this reason, the tower operator cannot build information on the user. Neither can anyone demand information PGPP does not have. There is simply no way to consistently tie a user to the phone. As the ACLU said, "It cannot be sold, leaked, or hacked, let alone offered to overreaching law enforcement." Unfortunately, PGPP will not work on iPhones, though Apple could fix that if they desired to do so.

There is a constant battle for your private data. In an age when predictive analytics can choose the song you want to hear next or the words you are most likely to type in your web search or text, and when advertisers can hyper-target 150 people from billions of users based on their specific preferences, we have to demand more privacy from the corporations who build our devices and provide the services upon which those devices rely. PGPP is a giant step in that direction, though still incomplete because privacy was ignored by those who designed the architecture all cellphones must use.

Source: *ACLU.org*

Mississippi Ends 'Dead Zone'

by Jordan Arizmendi

In April 2023, the Mississippi Supreme Court unanimously amended the state's Rules of Criminal Procedure to eliminate the "dead zone." Essentially, Rule 7.2 of Mississippi declares that counsel must be provided to an indigent defendant after they have been indicted. *In re Miss. Rules of Crim. Procedure*, 2023 Miss. LEXIS 103 (2023).

Previously, a defendant in Mississippi was not guaranteed counsel "at the critical pretrial stage between arrest and arraignment following indictment." The time could be prolonged, without the ability to pay for legal assistance. Time spent in the Mississippi "dead zone" averaged from two months to more than a year.

The Mississippi public defender system has been criticized for years. Under Mississippi state law, a defendant's constitutional right to an attorney does not exist until the defendant is indicted. To make matters worse, attorneys in counties without public-defender offices are not able to do much regarding their client's case because they only start working once their client is charged. For example, Duane Lake had to wait almost three years in the Coahoma County jail without a lawyer, before being indicted.

Cliff Johnson, the director of the Roderick and Solange MacArthur Justice Center at the University of Mississippi School of Law, said, "You do get a lawyer, but you just get them for a very brief period of time. That lawyer disappears. You wait in jail without a lawyer until you get indicted."

After all, the purpose of a lawyer is to weigh the strength of the evidence in the case and to possibly argue for a reduction or dismissal of charges. On the other hand, if the evidence is tough to beat, a lawyer could negotiate a plea bargain so that the client spends far less time in jail.

The rule change is certainly admirable, though some critics question its efficacy. Without a statewide public defender system, there is no way to ensure each Mississippi defendant is provided the counsel to which they are entitled.

Sources: *Mississippitoday.com, oxfordeagle.com*

The Appellate Division affirmed, reasoning, in relevant part, "'[a]ny error in defendant being handcuffed, without any explanation on the record, during the rendition of the verdict and the polling of the jury was harmless' because the jury had already reached its verdict and 'Defendant's suggestion that jurors may have been inclined to repudiate their verdicts during polling, but were influenced to refrain from doing so by the sight of defendant in handcuffs, is highly speculative.'" Sanders was granted leave to appeal to the New York Court of Appeals.

The Court observed "[t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits States from physically restraining a defendant during a criminal trial without an on-the-record, individualized assessment of the 'state interest specific to a particular trial.'" *Deck v. Missouri*, 544 U.S. 622 (2005). Consequently, trial courts have a constitutional obligation to engage in "close judicial scrutiny" prior to ordering a defendant to be restrained, the Court stated.

Turning to the present case, the Court observed that it is "undisputed that no such scrutiny occurred … and therefore the trial judge committed constitutional error by ordering defendant handcuffed without placing the special need for such restraints on the record." *See Deck*.

The Court flatly rejected the prosecution's argument that the constitutional prohibition against restraint articulated in *Deck* is inapplicable during the reading of the verdict and polling of the jurors. "First, *Deck* involved the application of the prohibition against restraint during the punishment phase of a capital case, which necessarily occurred after the guilty verdict had been entered," the Court explained. "Second, the reading of the verdict is an integral part of the guilt-determination phase.... a verdict reported by the jury is not final unless properly recorded and accepted by the court," the Court further explained. *People v. Salemmo*, 342 N.E.2d 579 (N.Y. 1976). Thus, the Court held that "until the jury returns to the courtroom, publicly announces the verdict, and, if polled, confirms the verdict, there's no finding of guilt, defendant is still presumed innocent, and the constitutional prohibition on restraining a defendant without explanation remains in full force."

Accordingly, the Court reversed the order of the Appellate Division and ordered a new trial. See: *People v. Sanders*, 205 N.E.3d 423 (N.Y. 2023).

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'Lab in a Box' Provides DNA Results in Minutes

by Jordan Arizmendi

The method that law-enforcement agencies use to test a suspect's DNA is currently undergoing the most significant transformation in the science's history. New Rapid DNA technology can develop an individual's DNA profile in one to two hours. The machine can test skin, hair, DNA swabs, blood, saliva, cigarette butts, and anything that potentially contains DNA.

According to the FBI website, coupled with Combined DNA Index System ("CODIS"), a DNA profile can be searched against all unsolved crimes within 24 hours. By using Rapid DNA with DNA Index of Special Concern ("DISC"), a DNA profile can be searched against all unsolved homicides, sexual assaults, kidnappings, and terrorism events. Plus, a match to a DISC profile will notify the booking department, arresting department, and investigating department all instantaneously. Rapid DNA technology can find the results while the arrestee is still in custody.

The Rapid DNA Act of 2017 allows the machines to connect to CODIS. The first Rapid DNA machine was installed at the East Baton Rouge Paris jail in August 2022. In 2020, the FBI started the two-month Rapid DNA pilot in Louisiana, Florida, Arizona, and Texas. After that, Louisiana was chosen to be the location of the first actual program.

The first thing the FBI had to consider when choosing the states to try its Rapid DNA testing in were which states allowed immediate DNA collection of arrestees at booking. Most states require a probable cause hearing in order for police to collect and test DNA. Thus, such states would not be good candidates for the program.

Last June, the Lee County Sheriff's Office in Florida used the machine to reveal the identity of a homicide victim. Rapid DNA technology was also used to identify Lee County residents killed during Hurricane Ian.

Of course, whenever a new technology arrives, there are generally serious problems attached to it. In the case of Rapid DNA, privacy advocates as well as some forensic scientists contend that the technology will allow police to test people without their consent or to mishandle evidence that could affect prosecutions.

Lynn Garcia, the general counsel of the Texas Forensic Science Commission says, "There is no question that getting faster DNA results is good for everyone in the criminal justice system. But we have to be sure that any technology is ready for prime time and is reliable and that the people who are using it are trained."

Training is another paramount concern regarding Rapid DNA testing. Before Rapid DNA testing, a DNA swab would be sent to a laboratory, where technicians who possess the education, training, and experience requirements of the Quality Assurance Standards for Forensic DNA Testing Laboratories or DNA Databasing Laboratories will analyze the sample.

Vincent A. Figarelli, the superintendent of Arizona's Crime Laboratory Systems says that problems could arise when the DNA sample contains a mixture from several people. DNA from a single person should be simple enough to test, but a sample from multiple individuals would require a trained forensic scientist to properly interpret it.

Another concern is that if police are not properly trained on how to handle DNA samples, they could easily destroy an entire genetic sample.

In Houston, police were using Rapid DNA on crime scene evidence, without notifying the Houston science center. As soon as the Texas forensics commission found out, prosecutors told defense lawyers that roughly 80 cases involved DNA results determined outside of a laboratory.

Rapid DNA testing can be a massive game changer in law enforcement. However, without providing proper training to the officials who will be using the equipment, Rapid DNA testing can potentially cause more harm than good.

Sources: *PBS.org; fbi.gov; news-press.com; latimes.com*

Report Finds Older Prisoners in Maryland Are Less Likely to Be Paroled

by Jordan Arizmendi

Upon reading the Justice Policy Institute report entitled "Safe at Home: Improving Maryland's Parole Release Decision Making," the first look at Maryland's parole system in excess of 80 years, one disturbing trend is that the rate at which the Maryland Parole Commission approves parole sharply declines for people once they turn 40. Even though research shows that people are less likely to commit crimes as they get older, the Maryland Parole Commission is more likely to grant parole to a young defendant than an older one.

The report faults the system for this unnerving injustice in which the players who decide which defendants gain freedom and which must return to their cells for another 10 years are more focused on the details of the crime than recidivism. Maryland law, for example, dictates that parole commission members are to consider certain factors when determining whether or not to grant parole.

According to the Maryland Department of Public Safety & Correctional Services website: *We look at multiple factores [sic] when conducting a parole grant (initial) hearing. These include, but are not limited to: the nature and circumstance of the offense; victim input; history and pattern offenses; prior major incarcerations; institutional adjustment; rehabilitation; programming needs; home plans and employment readiness.*

However, according to the Justice Policy Institute, many of the Maryland Parole Commission members have backgrounds in law enforcement, and thus, it may be difficult for these members not to give more consideration to the circumstances of the crime than to other more important factors in terms of granting parole, such as a defendant's disciplinary record or their personal growth while incarcerated.

Leigh Goodmark, the founder and director of the Gender Prison and Trauma Clinic at the University of Maryland Francis King

Carey School of Law, said "I thought parole was supposed to be about someone's growth and rehabilitation. If that's true, continuing to disproportionally focus on the circumstances surrounding the crime is fundamentally at odds with that view."

In addition, the number of cases that the Maryland Parole Commission even hears has declined. Starting in 2018, the commission heard 5,002 cases. The following years, the number of hearings were 4,813 and 4,101, and then in 2021, there were only 2,023 hearings. One significant change that could be the cause of such a sharp reduction is that in 2021, the Maryland state Senate passed a bill that removed the Governor from the parole process, giving the Maryland Parole Commission the final determination on whether a prisoner serving life should be released. The bill also increased the minimum time that a prisoner must serve to qualify for release from 15 to 20 years.

The report makes several recommendations for the Maryland Parole Commission to consider when making parole decisions. First, members need to presume that punishment has already been satisfied at the time of the parole commission meeting. Also, the parole commission should allow defendants to have access to counsel as well as all of the information that parole commission will use. Lastly, for every denial issued by a parole commission, they should provide a decision in writing and allow individuals to appeal it.

Source: *thebaltimorebanner.com*

New Robotic Cops Patrolling in NYC

by Jordan Arizmendi

Move over Terminator, the newest crop of law enforcement agents are New York City's futuristic robots that have been given the beat of Times Square as well as the city subways.

This is not the first time that NYPD has allowed robots to perform gritty police work. In 2021, the Boston Dynamic DigiDog, galloped around the city on its four metallic legs in pursuit of criminal violations. However, back then, the DigiDog really creeped out a lot of New Yorkers, so the robotic canines were suspended from duty.

The latest robotic cops on the beat are the K5 Autonomous Security Robot that is built by Knightscope. This egg-shaped robot, nicknamed "SnitchBOT" is packed with a dozen microphones, a 360-degree camera, and a license-plate reader.

Anyone brazen enough to defile, destroy, or damage the robots will be charged with assaulting an officer. The technology comes at a hefty price – "SnitchBOT" costs $12,250 for a seven-month rental. The money will be paid with NYPD forfeiture funds.

Those that may be nervous about machine's destruction of man will breathe a sigh of relief once they learn that these new additions to the NYPD do not carry weapons. Their sole responsibility is to record their surroundings and then send these recordings to "real" police officers. They truly earned their "SnitchBOT" street name.

Sources: *Nymag.com*, *Nypost.com*

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Supreme Court of California: After Amendments to Three Strikes Law, Courts Retain Concurrent Sentencing Discretion for Qualifying Offenses Committed on Same Occasion or Arising From Same Operative Facts

by Douglas Ankney

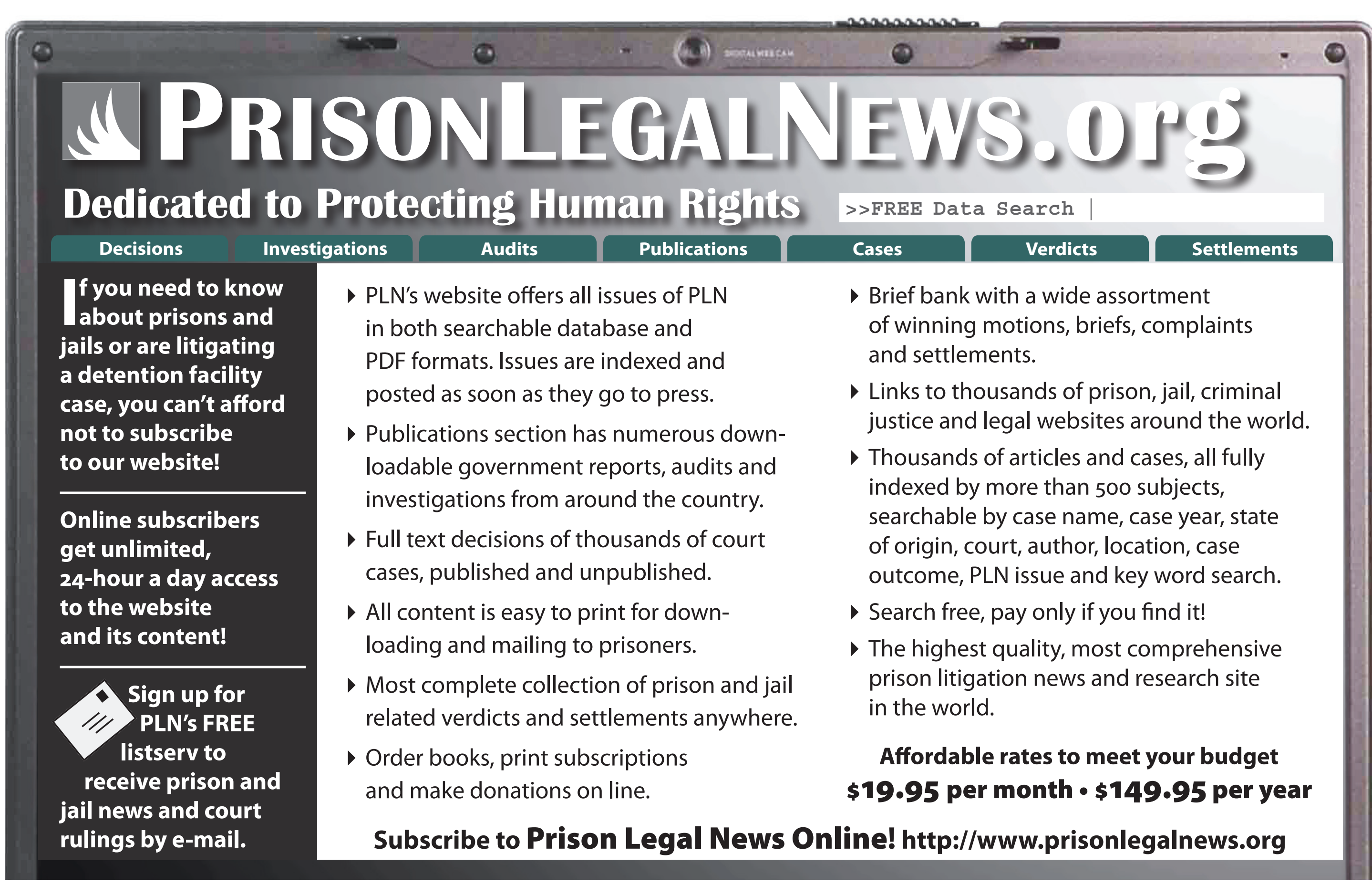
The Supreme Court of California held that after amendments to the Three Strikes law, trial courts retain the concurrent sentencing discretion that was first enunciated in *People v. Hendrix*, 941 P.2d 64 (Cal. 1997), when sentencing on qualifying offenses committed on the same occasion or arising from the same set of facts.

Level Omega Henderson hit Daniel Tillett in the head with the butt of his gun and punched him with his other hand. Henderson then pointed his gun at Tillett's girlfriend and at William Aguilar. Police were summoned, and officers saw Henderson strike Tillett several times.

Henderson was charged with assault by means of force likely to produce great bodily injury, possession of a firearm by a felon, and two counts of assaulting Tillett and Aguilar with a semiautomatic firearm. Additionally, the information alleged Henderson had received four prior strikes and two prior serious felony convictions and that he had served four prior prison terms. The jury found him guilty as charged, and in a bifurcated proceeding, the judge found true the prior conviction allegations. The trial court struck all of the prior conviction allegations, except for one strike and one prior serious felony conviction. The trial court sentenced Henderson to an aggregate term of 27 years. The trial court stated: "[T]he Three Strikes law requires that on serious or violent felonies, two or more, that they be sentenced consecutively."

Henderson argued on appeal that "the trial court erroneously believed it had no discretion to impose concurrent terms for the assaults on Aguilar and Tillett, even though they occurred on the same occasion." The Court of Appeal affirmed, holding that the trial court lacked discretion to impose concurrent terms on multiple serious or violent felonies after passage of the Reform Act of Proposition 36. Because Courts of Appeal of California were divided on the issue of whether courts have discretion to impose concurrent terms on multiple serious or violent felonies after passage of the Reform Act, the California Supreme Court granted review.

The Court stated that the "Three Strikes law 'consists of two, nearly identical statutory schemes.'" *People v. Conley*, 373 P.3d 435 (Cal. 2016). In March 1994, the Legislature codified its version of the Three Strikes law in Penal Code §§ 667(b) - (j)." (Note: all statutory references are to the California Penal Code.) A ballot initiative that year added § 1170.12,



which is almost identical to § 667.

The Court provided the following explanation of the Three Strikes law framework: "The Three Strikes scheme comes into play when a defendant is charged with new felony offenses but has previously been convicted of designated serious or violent felonies. Although these prior convictions are sometimes referred to as 'strikes,' the Three Strikes law itself does not use that term, instead defining 'serious' or 'violent' felonies with specificity. Serious felonies are defined in § 1192.7, subdivision (c), while the violent felony definition appears in § 667.5, subdivision (c).... The previously suffered convictions that subject a defendant to the Three Strikes scheme are often referred to as prior convictions, and are distinguished from newly filed charges, referred to as current felonies."

"When the Three Strikes scheme applies, sentences for current qualifying offenses must be ordered to run consecutively to each other if the current offenses occur on separate occasions and do not arise from the same set of operative facts." §§ 667(c)(6), 1170.12(a)(6). For purposes of § 667(c)(6), "felonies are committed 'on the same occasion' if they were committed within 'close temporal and spacial proximity' of one another." *People v. Lawrence*, 6 P.3d 228 (Cal. 2000). "Offenses arise 'from the same set of operative facts' when they 'shar[e] common acts or criminal conduct that serves to establish the elements of the current felony offenses of which the defendant stands convicted.'" *Id.* In *Hendrix*, the Court explained that, "by its terms, subdivision (c)(6) required the imposition of consecutive sentences for each current felony not committed on the same occasion and not arising from the same set of operative facts.... Conversely, '[b]y implication, consecutive sentences are not mandatory under subdivision (c)(6) if the multiple current felony convictions are committed on the same occasion or arise from the same set of operative facts.'" *Hendrix*. This is known as "the *Hendrix* rule," the Court advised.

However, former § 667(c)(7) provided: "If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." The Court explained that "the qualifying felony 'described in paragraph (6)' is one that occurred on a separate occasion and did not arise from the same set of facts." *Hendrix*.

Applying the foregoing principles, the trial court in the present case had the discretion to impose concurrent sentences against Henderson because his offenses occurred on the same occasion, the Court stated. Notably, however, the Reform Act amended § 1170.12(a)(7), which is identical to § 667(c)(7), by replacing the words "as described in paragraph (6)" with "as described in subdivision (b)." And subdivision (b) merely describes the qualifying felonies.

This opened the door for the argument and conclusion that the *Hendrix* rule was abrogated by the amendment because § 1170.12(a)(7) now requires consecutive sentences for all current violent or serious felonies under the Three Strikes law. The change in the language of § 1170(a)(7), the People argued, meant that § 1170.12(b)(6)'s limitation of consecutive sentences to only current serious or violent felonies not committed on the same occasion or arising from the same set of facts no longer applies.

The Court observed "[w]hen the language of a statute is ambiguous – that is, when the words of the statute are susceptible to more than one reasonable meaning, given their usual and ordinary meaning and considered in the context of the statute as a whole – we consult other indicia of the Legislature's [or electorate's] intent, including such extrinsic aids as legislative history and public policy." *Union of Medical Marijuana Patients, Inc., v. City of San Diego*, 446 P.3d 317 (Cal. 2019).

The Court concluded that the statute is ambiguous because the word "conviction" is colloquially understood to refer to a finding of guilt on a single count but the statute uses the word "as a collective term describing multiple, relevant counts for which the defendant has been convicted." *See* §§ 1170.12(a)(6), (a)(7). As such, § 1170.12(a)(7)'s phrase "If there is a current conviction for more than one serious or violent felony as described in paragraph (6)" could mean each count of conviction (as in Henderson's case), or it could mean separate groups of multiple counts that occurred on separate occasions (and would be inapplicable to Henderson's case).

Because the statute is ambiguous, the Court "look[ed] to the overall context of the initiative, tak[ing] into account that it was adopted to reform an existing scheme, and look[ing] to the ballot materials as a tool to deduce voter intent." *People v. Arroyo*, 364 P.3d 168 (Cal. 2016). After doing so, the Court concluded that the voters did not specifically address the issue of concurrent sentencing in this context. However, the Court presumed that the drafters of Proposition 36 and the voters "were aware of the longstanding *Hendrix* rule." And "Proposition 36 neither refers to *Hendrix* nor states its express intent to overrule longstanding Supreme Court precedent." *People v. Marcus*, 45 Cal. App. 5th 201 (2020). The Court stated that it could "not presume that ... the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet." *People v. Valencia*, 397 P.3d 936 (Cal. 2017).

Thus, the Court held that, "after the Reform Act, a trial court retains the *Hendrix* concurrent sentencing discretion when sentencing on qualifying offenses committed on the same occasion or arising from the same set of operative facts."

Accordingly, the Court remanded for a new sentencing hearing with instructions that Henderson, pursuant to *People v. Hanson*, 1 P.3d 650 (Cal. 2000), may not be sentenced to an aggregate term greater than he had initially received. See: *People v. Henderson*, 520 P.3d 116 (Cal. 2023), *as modified by People v. Henderson*, 2020 Cal. LEXIS 492 (2023).

Stop Prison Profiteering: Seeking Debit Card Plaintiffs

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New York Court of Appeals: Call Intercepted on Wiretap Not Exempt From Statutory Notice Requirements Simply Because Same Call Captured on Separate, Consensual Recording by Jail

by Anthony W. Accurso

The Court of Appeals of New York ordered the suppression of a jail recording where it was derived from a wiretap and the People failed to provide the required statutory notice to the defendant under CPL 700.70.

Syracuse police were investigating a fatal hit-and-run automobile accident that occurred in October 2015. Around the same time in a separate investigation, the New York Attorney General's Office obtained authorization for a wiretap on the phone of A.C.

A.J, a prisoner at the Onondaga County Justice Center ("OCJC") called A.C., who later handed the phone to Michael Myers, who then made self-incriminating statements regarding the hit-and-run. An officer listening to the wiretap recording recognized Myers' voice and obtained a copy of the OCJC phone recording.

Myers was indicted for the hit-and-run based on the jail phone recording. He filed a suppression motion for the recording but was denied under a long-standing policy that prisoners have no reasonable expectation of privacy in jail phone calls. Meyers timely appealed.

The Court noted that CPL 700 governs wiretaps in the state of New York and that the Court of Appeals "require[s] strict – indeed, scrupulous – compliance with the provisions of the statute, and the prosecution has the burden of establishing such compliance." *People v. Capolongo*, 647 N.E.2d 1286 (N.Y. 1995). This is because "the insidiousness of electronic surveillance threatens the right to be free from unjustifiable governmental intrusion into one's individual privacy to a far greater extent than the writs of assistance and general warrants so dreaded by those who successfully battled for the adoption of the Bill of Rights." *People v. Schulz*, 492 N.E.2d 120 (N.Y. 1986).

CPL 700.70 states the "contents of any intercepted communication, or evidence derived therefrom[,]" cannot be used at trial unless the People, "within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant, and accompanying application, under which the interception was authorized or approved."

The Appellate Division agreed with the People's argument that the wiretap was not an "intercepted communication" because A.J. consented to the call being recorded by OCJC. But the Court of Appeals disagreed.

The Court stated that a call made from a jail, where everyone is on notice that calls are recorded, and admitted into evidence is not itself an "intercepted communication" under CPL 700.05 because detainees "impliedly consent" to the taping of conversations and thus have no expectation of privacy in the calls. *See People v. Williams*, 147 N.E.3d 1131 (N.Y. 2020); *see also People v. Diaz*, 122 N.E.3d 61 (N.Y. 2019). An "intercepted communication" is defined as "a telephonic … communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof," without the consent of either. CPL 700.05(a)(a).

The recording in this case was made with A.J.'s consent, the sender, and thus, it was not an "intercepted communication." *See* CPL 700.05. As a result, OCJC was free to share the recording with law enforcement officials without violating the Fourth Amendment, according to the Court. *Diaz*.

However, the Court stated that does not end the examination because the "issue here is whether the recorded conversation obtained from OCJC was 'derived' from an 'intercepted communication,'" because the wiretap was an "intercepted communication." That is, the statute requires an independent consent inquiry for the eavesdropping done pursuant to the warrant because the "wiretap and the recording made by OCJC are separate and distinct pieces of potential evidence, and the fact that they captured the same information does not affect the analysis," explained the Court. It stated that a wiretap doesn't convert a jail recording into an "intercepted communication," just as consent provided to OCJC doesn't convert a wiretap into a consensual recording impairing the protections of CPL 700.

Applying the foregoing rules to the current case, the Court stated that the Attorney General's Office was allowed to share recordings from the wiretap with other law enforcement officials under CPL 700.65; however, any use of the intercepted call or any evidence "derived therefrom" at trial was governed by the notice requirement of CPL 700.70. The Court concluded that the OCJC call was clearly derived from the wiretap, i.e., an "intercepted communication." The People failed to timely provide the statutory notice to the defendant. Thus, the Court held that the failure to furnish timely notice "precluded the admission of the wiretap recording and any evidence derived therefrom – namely, the jail recording – into evidence at trial. CPL 700.70.

Accordingly, the Court reversed the defendant's conviction, ordered the recording of the call suppressed, and ordered a new trial. See: *People v. Myers*, 204 N.E.3d 447 (N.Y. 2023).

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We receive numerous letters from prisoners every month. If you contact us, please note that we are unable to respond to the vast majority of letters we receive.

In almost all cases we cannot help find an attorney, intervene in criminal or civil cases, contact prison officials regarding grievances or disciplinary issues, etc. We cannot assist with wrongful convictions, and recommend contacting organizations that specialize in such cases, such as the Innocence Project (though we can help obtain compensation after a wrongful conviction has been reversed based on innocence claims).

Please do not send us documents that you need to have returned. Although we welcome copies of verdicts and settlements, do not send copies of complaints or lawsuits that have not yet resulted in a favorable outcome.

Also, if you contact us, please ensure letters are legible and to the point – we regularly receive 10- to 15-page letters, and do not have the staff time or resources to review lengthy correspondence. If we need more information, we will write back.

While we wish we could respond to everyone who contacts us, we are unable to do so; please do not be disappointed if you do not receive a reply.

Fourth Circuit Denies Defendant Faced 'Classic Penalty Situation' During Polygraph Questioning While on Supervised Release

by Anthony W. Accurso

The U.S. Court of Appeals for the Fourth Circuit upheld the denial of a defendant's suppression motion where he failed to invoke his Fifth Amendment protections while on post-release supervision and instead provided statements which led to a new charge.

Eugene Reid Linville was on supervised release for a child pornography conviction. He had conditions of supervision which included: (1) that he not possess adult or child pornography; (2) that he is subject to warrantless searches of his home upon reasonable suspicion of unlawful conduct; (3) that he truthfully answer questions from his probation officer; and (4) that he participate in a sex offender treatment program, which includes periodic polygraph testing.

After a year on supervision, Linville submitted to a polygraph exam, during which he admitted that he possessed Playboy magazines. During a subsequent interview with his probation officer, James Long, Linville was asked – without being informed of his *Miranda* rights – whether he possessed adult or child pornography. He admitted he possessed both and, during a trip to his home, surrendered "8 to 10 cardboard boxes containing numerous magazines, photos and video tapes, as well as notebook-type binders containing compact discs and digital video discs." The North Carolina State Bureau of Investigation later discovered amongst these items "415 images and 1,352 videos depicting children engaged in sexual acts."

In addition to revoking Linville's supervision, the court processed a new indictment for possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(b).

Linville moved to suppress his statements made during the polygraph and to his probation officer – which would also have excluded the evidence obtained from his home – on the ground that the questioning placed him in "the classic penalty situation" because it forced him to choose "between refusing to answer the [probation] officer's question and risk revocation of his supervision, or answering and risk criminal prosecution[]."

The U.S. District Court for the Middle District of North Carolina denied Linville's motion, including a finding that Long did not threaten Linville with a revocation for failing to answer questions. Linville entered a conditional guilty plea, was sentenced, and then proceeded on appeal.

The Fourth Circuit stated that the present case requires it to "consider whether a standard condition of supervised release that requires truthful answers to all questions from probation creates a penalty situation when a probation officer asks a defendant on supervised release questions that, if answered, might incriminate him or lead to incriminating evidence."

The Court began its analysis by explaining what is known as a "classic penalty situation." Ordinarily, a suspect seeking the protections of the Fifth Amendment privilege against self-incrimination must invoke his rights and then remain silent, not answer questions that could result in the discovery of incriminating evidence. However, in a "classic penalty situation," the suspect's Fifth Amendment rights are self-executing, i.e., they apply regardless of whether the suspect expressly invoked them. *Minnesota v. Murphy*, 465 U.S. 420 (1984). Such a situation exists when invoking one's Fifth Amendment rights presents a "nearly certain" risk of criminal penalty. *United States v. Lara*, 850 F.3d 686 (4th Cir. 2017).

The *Murphy* Court ruled that the Fifth Amendment right, where no man "shall be compelled in any criminal case to be a witness against himself," also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings." It also ruled that, "[a] defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled[,] they are inadmissible in a subsequent trial."

The Court summarized *Murphy*'s two-step framework for courts faced with classic penalty situation arguments in the context of supervised release conditions as follows: "First, do the conditions actually require a choice between asserting the Fifth Amendment and revocation of supervised release? Second, even if they do not, is there a reasonable basis for a defendant to believe they do?"

Turning to the present case, the Court determined that Linville "had no reasonable basis for believing that he risked revocation of his supervised release if he invoked the Fifth Amendment." The Court based its conclusion on two reasons.

First, Long never threatened Linville with revocation for failing to answer. *See Lara* ("There is no evidence that [the probation officer] told [the defendant] that his probation would be revoked if he did not admit to the uncharged [crimes]").

Second, "the application note to the standard condition requiring those released under supervision to truthfully answer questions from their probation officers provides that despite 'the condition … to answer truthfully the questions asked by the probation officer, a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.'" Quoting U.S.S.G. § 5D1.3 cmt. n.

The Court observed that, since the Sentencing Commission promulgated this amendment in 2016, "no supervised releasee who chose or chooses to answer questions after that date could demonstrate that he reasonably believed or believes he was or is faced with the classic penalty situation." *McKathan v. United States*, 969 F.3d 1213 (11th Cir 2020).

Consequently, Linville should have invoked his Fifth Amendment privilege every time he was asked a possibly incriminating question while on supervision, according to the Court. Furthermore, the Court concluded that the Government "did not expressly or implicitly assert that it would revoke Linville's supervised release if he invoked his Fifth Amendment right to remain silent."

Accordingly, the Court affirmed the denial of Linville's suppression motion and judgment of the District Court. See: *United States v. Linville*, 60 F.4th 890 (4th Cir. 2023).

Seventh Circuit: Whether Right to Counsel 'Attaches' Is Not Dependent on Defendant's Appearance at Probable Cause Hearing

by Anthony W Accurso

The U.S. Court of Appeals for the Seventh Circuit ruled that Wisconsin courts denied a defendant his Sixth Amendment right to counsel by failing to appoint counsel until after he had been ordered detained by a magistrate and required to participate in an in-person lineup – that is, after his right to counsel had "attached."

Nelson Garcia, Jr. was picked up for a parole violation on January 2, 2012, by Milwaukee Police. They received several anonymous tips identifying Garcia as the person who had robbed a Milwaukee bank the previous month.

Two days after his arrest, Detective Ralph Spano appeared in court to submit a form CR-215 to a court commissioner in Milwaukee County. This form requested the continued detention of Garcia on the basis of police having probable cause to believe he robbed the bank in question, and it included Spano's description of the bank's surveillance footage and the subsequent hotline tips. The court commissioner approved the request, setting bail at $50,000. Garcia was not present at this hearing, nor was there any record that he received the completed form.

A few hours after the form was processed, police conducted an in-person lineup with Garcia and two bank tellers. Garcia was made to participate without the benefit of a defense attorney. One of the two tellers made a positive identification of Garcia.

By January 7, the State filed formal charges against Garcia. He refused to plead guilty, and the bank teller's identification of him was featured at trial. Garcia was convicted and sentenced to 15 years of imprisonment.

Garcia appealed, claiming the State violated his Sixth Amendment right by failing to provide counsel at critical stages of his prosecution. Both the Court of Appeals and the Supreme Court of Wisconsin affirmed his conviction. Citing *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the Court of Appeals said that Garcia's right to counsel did not attach during the CR-215 hearing because Garcia was not present at the proceeding. It claimed he had no right to counsel until he was formally charged. An evenly divided Wisconsin Supreme Court affirmed without explanation.

Garcia then filed a habeas petition in the U.S. District Court for the Eastern District of Wisconsin, invoking 28 U.S.C. § 2254(d)(1) and arguing that the Wisconsin Court of Appeal's decision was an unreasonable application of clearly establish law with respect to his Sixth Amendment rights. The District Court granted his writ, ruling that the state court unreasonably applied *Rothgery* in affirming Garcia's conviction. The State timely appealed.

The Court noted that the decisions of state courts are due deference unless they are "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86 (2011). Congress intentionally set the bar high for federal habeas petitioners by requiring that federal courts "shall not" grant relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1).

The Court stated that § 2254(d)(1)'s two clauses have "independent meaning." *See Williams v. Taylor*, 529 U.S. 362 (2000). First, the "contrary to" clause mandates that a state court decision is not entitled to any deference if it "applies a rule that contradicts the governing law set forth in" the Supreme Court's cases or "confronts a set of fact that is materially indistinguishable from a decision of [the Supreme Court] but reaches a different result." *Brown v. Payton*, 544 U.S. 133 (2005). Second, the "unreasonable application" clause requires that federal courts afford no deference to a state court decision when "the state court applies [the Supreme Court's] precedents to the facts in an objectively unreasonable manner." *Id.*

In order to conduct the required analysis under § 2254(d)(1), a court must first identify the "clearly establish Federal law" to be applied. § 2254(d)(1). This phrase refers to the governing case law of the Supreme Court at the time of the state court decision. *Williams*. The Court explained that "clearly established" case law means more than a single case; instead, courts must consider all cases that "provide a body of clearly established law" applicable to the issue. *Sims v. Hyatte*, 914 F.3d 1078 (7th Cir. 2019).

The Sixth Amendment guarantees a defendant's access to counsel, but "only at or after the time that adversary judicial proceedings have been initiated against" the accused. *Kirby v. Illinois*, 406 U.S. 682 (1972) (plurality opinion). This is distinguished from a "routine police investigation," during which persons do not have a right to counsel. *Id.* There is no "bright line" distinguishing between the two, as the process can vary from state to state.

The Court explained that Sixth Amendment analysis consists of two separate inquiries: (1) attachment and (2) critical stages. Although the "critical stages" analysis is generally the second step, the Court stated that it would briefly discuss it first because it's not an issue in this case. In *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court held that the defendant's post-indictment, pretrial lineup constituted a "critical stage" that required counsel. The parties to the present case agree that Garcia's in-person lineup was a "critical stage" under *Wade*.

However, the parties disagree on the issue of "attachment," according to the Court. Prior to concluding that a defendant is entitled to counsel under the Sixth Amendment, a court must first determine that a criminal prosecution has commenced. *See Kirby*. The right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated." *Id.* The Court explained that the Supreme Court has repeatedly instructed that "the focus of the Sixth Amendment attachment inquiry is on the actions of the state, not the accused." *See Brewer v. Williams*, 430 U.S. 387 (1977).

In *Rothgery*, the Supreme Court rejected the Fifth Circuit's position that adversary judicial proceedings had not commenced, and thus the defendant's Sixth Amendment rights had not yet attached, because no prosecutor was involved in the arrest or appearance before the magistrate. The *Rothgery* Court explained that such a narrow focus on a particular state official's activities, instead of the broader examination of the initiation of adversarial judicial proceedings, is not the test for the attachment inquiry. Rather, the inquiry focuses on the familiar indicators of the government's "commitment to prosecute," the *Rothgery* Court stated.

The Court determined that Garcia's Sixth Amendment right to counsel attached when

the county court commissioner appeared in court and executed the CR-215 form. It faulted the Wisconsin Court of Appeals for relying too narrowly on *Rothgery* in its denial of Garcia's appeal, rather than "engaging with the clearly established body of Sixth Amendment law of which *Rothgery* is a part." It observed that the Texas procedure at issue in *Rothgery* is "identical" to the procedure used by Milwaukee County in this case, "except that Walter Rothgery was present in the courtroom for his hearing and Nelson Garcia was not."

The Court explained that the state court incorrectly focused on a "mere factual distinction while overlooking the clearly establish legal rule directed at other aspects of the CR-215 proceeding." But this distinction by itself is not enough to conclude that Garcia's Sixth Amendment rights didn't attach, stated the Court, adding that nothing in *Rothgery* or the Supreme Court's case law involving the issue of attachment indicates that the defendant's physical presence at the probable cause proceeding is dispositive of whether attachment occurred. In fact, a concise restatement of the Supreme Court's rule on attachment establishes that defendant's physical presence at such a proceeding is not relevant for attachment: "Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer* and *Jackson*." *Rothgery*. The Court concluded that it "is of no Sixth Amendment consequence that Garcia never appeared in court during the CR-215 proceeding."

In affirming the District Court's decision, the Court agreed that the CR-215 hearing was the turning point at which "the government's role … shifted from investigation to accusation." *Moran v. Burbine*, 475 U.S. 412 (1986). It stated that, "from that point on, Garcia found himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby*. Thus, the Court ruled that the "state's failure to appoint counsel for the lineup therefore violated Garcia's Sixth Amendment rights."

The Court admonished the State, writing it "cannot escape the Sixth Amendment's requirements by keeping arrestees in jail while taking formal actions toward prosecution."

Accordingly, the Circuit affirmed the District Court's order granting Garcia's writ of habeas corpus. See: *Garcia v. Hepp*, 65 F.4th 945 (7th Cir. 2023).

Sixth Circuit Holds Bump Stocks Not Regulated Under Machinegun Statute

by Anthony W. Accurso

The U.S. Court of Appeals for the Sixth Circuit weighed in on the ongoing Circuit split of whether a "bump stock" – placement of which on a semiautomatic rifle enables it to function essentially like a machinegun the possession of which is a criminal offense – is a machinegun "part" under the National Firearms Act of 1934, concluding that the rule of lenity requires the Court to construe the ambiguous statute in question in favor of the defendant.

Section 922(o)(1) regulates "machinegun[s], and any combination of parts from which a machine gun can be assembled" and defines the term "machinegun" via incorporating by reference the definition contained in 26 U.S.C. § 5845(b), which defines it as any "weapon" that can shoot "automatically more than one shot, without manual reloading, by a single function of the trigger" as well as any "part" that's "designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun…."

Up until December 26, 2018, the ATF's position was that bump stocks are not a machine gun part. However, after the 2018 mass shooting in Las Vegas, Nevada, in which a gunman used bump stocks attached to semiautomatic rifles to kill 58 people and injure roughly 500 more in only 10 minutes, the ATF reversed its decade-long position on bump stocks and promulgated a new agency interpretation of 18 U.S.C. § 922(o)(1), which makes it unlawful to "transfer or possess a machinegun," classifying bump stocks as a machinegun part. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) ("Rule").

Scott Hardin, an owner of several bump stocks, challenged the ATF's authority to regulate bump stocks in this manner, arguing that the statutory definition of machinegun clearly excludes bump stocks. In contrast, the ATF argued that the best interpretation of the statute results in the opposite conclusion. The U.S. District Court for the Western District of Kentucky ruled in the ATF's favor. Hardin timely appealed.

The Court noted that the Courts of Appeals that have addressed this issue are split on the answer, with the Tenth and D.C. Circuits concluding that a bump stock is included within the definition of a machinegun. *See Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (per curiam). The Fifth Circuit is on the other side of the divide. *See Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023). The Sixth Circuit itself was internally divided, with eight judges concluding that the ATF's Rule should be upheld and eight judges voting to strike it down. *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021) (en banc). In total, there have been 22 opinions examining this issue, the Court observed, yet, many reasonable minds disagree on the answer.

The Sixth Circuit's ruling came by way of three steps. First, the statute was declared ambiguous because it is "subject to more than one reasonable interpretation." *Donovan v. FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020). The Court based its conclusion on the division amongst the Courts of Appeals, "the ATF's own flip-flop in its position," and the arguments by the parties to the case. "Although both parties argue the statutory language is plain and unambiguous, both also argue that the plain meaning supports their interpretation. This indicates ambiguity. Furthermore, the existence of divergent Court opinions also suggests ambiguity." Quoting *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299 (11th Cir. 2008).

Second, when a statute is ambiguous and an agency's rule is a "permissible construction of the statute," the agency's rule is generally given deference under *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984). However, the ATF declined to invoke the so-called "*Chevron* deference," believing that deference analysis was unnecessary presumably because, in its view, the statute is not ambiguous.

Further, the Court explained that the Supreme Court's dicta from two more recent cases suggest *Chevron* deference should not be applied to criminal statutes. "The court has

never held that the government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359 (2014). And, "criminal laws are for courts, not for the government, to construe." *Abramski v. United States*, 573 U.S. 169 (2014).

A knowing violation of 18 U.S.C. § 922(o)(1) is punishable by up to 10 years of imprisonment. § 924(a)(2). Comparing that criminal sanction to the statute's only civil requirement – registration of the weapon – and it is clear that the statute "has a predominantly criminal scope," according to the Court.

Chevron deference was created to defer to an agency's personnel with expertise "in a complex field of regulation with nuances perhaps unfamiliar to the federal courts." *Dolfi v. Pontesso*, 156 F. 3d 696 (6th Cir. 1998). This is appropriate for "highly technical and complex securities, tax, workplace safety, and environmental law regimes" but less appropriate for "the distribution of dangerous drugs, the commission of violent acts, or, as relevant here, the possession of deadly weapons," the Court explained, adding that these "are areas in which the courts are well-equipped to operate, and we see no reason why we should abdicate our interpretive responsibility in such instances." Therefore, the Court concluded that *Chevron* deference does not apply to the ATF's Rule because the underlying statute is "predominantly" criminal in scope.

After deciding the statute's definition of machinegun parts is ambiguous and that the ATF's Rule is owed no deference, the Court's third step was to apply the "rule of lenity."

"When *Chevron* difference is not warranted and standard principles of statutory interpretation 'fail to establish that the government's position is unambiguously correct, we apply the rule of lenity and resolve the ambiguity in [the criminal defendant's] favor.'" Quoting *United States v. Granderson*, 511 U.S. 39 (1994).

Based on the foregoing reasons, the Court ruled in Hardin's favor, deregulating bump stocks in its jurisdiction. It then closed with a quote from the Fifth Circuit: "Bump stocks may well be indistinguishable from automatic weapons for all practical purposes. But … it would be dangerous … to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (en banc) (Ho, J., concurring).

Thus, because the statutory scheme at issue "does not clearly and unambiguously prohibit bump stocks," the Court held that the rule of lenity requires it to construe the statute in Hardin's favor.

Accordingly, the Court reversed the judgment of the District Court and remanded for further proceedings consistent with its opinion. See: *Hardin v. BATFE*, 65 F.4th 895 (6th Cir. 2023).

New Jersey Supreme Court: Third-Party's Apparent Authority to Consent to Search Premises Does Not Extend to Defendant's Personal Property Located on Premises

by Anthony W Accurso

The Supreme Court of New Jersey held that a third party, with property in a storage trailer shared with the defendant, had apparent authority to authorize a search of the trailer but not a search of a bag belonging to the defendant in which the third party has no property.

N.D. and her adult daughter contacted Borough of Highlands police on the morning of July 27, 2019. N.D. showed text messages to officers supporting the claim that her boyfriend of four years, Anthony Miranda, had threatened her and her children. She then showed them fresh bruises claiming Miranda had assaulted her. She also stated that Miranda possessed two handguns and kept them in a black bag in a residential trailer they shared.

Officers engaged the Domestic Violence Response Team and contacted a local magistrate. The magistrate authorized a restraining order, arrest warrant, and a search warrant for the trailer in which Miranda and N.D. lived.

Just before 11:00 a.m., officers arrived at the trailer and arrested Miranda, whereupon he was transported to the police station for processing into the county jail. Miranda remained in police custody during the events that transpired afterwards at the residential trailer and nearby storage trailer.

Once Miranda was taken away, Captain George Roxby began searching for the "black drawstring-type bag" described by N.D. She arrived a little later, and Roxby notified her that he was unable to locate the bag or any firearms.

N.D., her two adult children, and another female family member (unidentified in court documents) speculated that the weapons could be in a nearby storage trailer. Roxby asked whether N.D. had access to that location and whether she kept property in it, and she answered affirmatively.

The storage trailer was located nearby on the same street as the trailer home. When Roxby approached it, he noted only an unlocked screen door prevented access to the inside. N.D. again affirmed she kept property there along with Miranda.

Inside the trailer, visible in plain sight on a counter was the bag N.D. identified as belonging solely to Miranda, in which he allegedly kept the weapons. Roxby emptied the contents of the bag, removing a police badge, a .38 caliber pistol, a .25 caliber pistol, and a box of ammo. He then removed the magazines and chambered rounds from each weapon to prepare them for transport to the police station, where they were secured as evidence.

Miranda was indicted for terroristic threats, N.J.S.A. 2C:12-3(a); receiving stolen property, N.J.S.A. 2C-20-7(a); and certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1).

He filed a motion to suppress the items seized during the search of the storage trailer and his black bag. The trial court held a two-day hearing during which Roxby testified and his bodycam footage was entered into evidence.

The trial court denied Miranda's motion on the ground that N.D. had authority to authorize the search of the trailer because she had access to it, stored property there, and the bag was in plain view.

Miranda accepted a plea deal in which he agreed to the weapons charge in exchange for dismissal of the others while allowing him to appeal the outcome of the suppression motion. He was sentenced to five years in prison, and he filed a timely appeal.

The Appellate Division affirmed the

judgment of the trial court, concluding "N.D.'s apparent authority to consent to the search of the storage trailer extended to the black bag found in that trailer."

On appeal to the state Supreme Court, Miranda challenged the search of the trailer and his bag, arguing N.D. lacked apparent authority to authorize the searches, and even if N.D. had apparent authority to consent to the search of the storage trailer, that authority did not extend to the search of his black bag. The American Civil Liberties Union of New Jersey and the Association of Criminal Defense Lawyers of New Jersey also submitted amici briefs pertaining to the searches.

The State argued that N.D. had apparent authority to authorize the searches, or alternatively, the exigent circumstances exception to the warrant requirement justified the search of Miranda's black bag.

The Court began its analysis by noting that both the U.S. Constitution and New Jersey Constitution provide guarantees against unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7; *see also State v. Cushing*, 140 A.3d 1281 (N.J. 2016) (discussing federal and state constitutional safeguards). In order for a search to be constitutional, officers "must obtain a warrant or show that a recognized exception to the warrant requirement applies." *State v. Wright*, 114 A.3d 340 (N.J. 2015). The State bears the burden of proving that a recognized exception applies to a warrantless search. *Cushing*.

One of the most frequently relied upon recognized exceptions to the warrant requirement is "a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Domicz*, 907 A.2d 395 (N.J. 2006). Furthermore, a third party may consent to a search, but consent is "not to be implied from the mere property interest a third-party has in the property … but rests rather on mutual use of the property by persons generally having joint access or control for most purposes." *United States v. Matlock*, 415 U.S. 164 (1974).

New Jersey also recognizes "apparent authority," which "arises when a third party (1) does not possess actual authority to consent but appears to have such authority and (2) the law enforcement officer reasonably relied, from an objective perspective, on that appearance of authority." *Cushing; see also Illinois v. Rodriguez*, 497 U.S. 177 (1990).

Referring to facts available from the suppression hearing, the Court noted N.D. repeated assertions that she had a property interest in the storage trailer. Further, it concluded she had access because, "when Roxby approached the storage trailer, the main door was open and the screen door was unlocked, either because the doors had been left open or because N.D. or a family member had unlocked them for Roxby."

"Considered in tandem," wrote the Court, "those factors support an objectively reasonable conclusion … that N.D. had apparent authority to consent to the search of the trailer." *See State v. Coles*, 95 A.3d 136 (N.J. 2014).

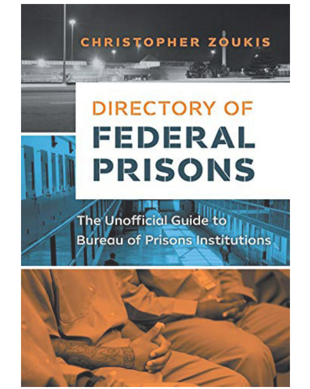
However, the Court stated that N.D.'s apparent authority did not extend to Miranda's bag inside the trailer. "Even where a third party has authority to consent to a search of the premises, that authority does not extend to a container in which the third party denies ownership, because the police are left with no misapprehension as to the limit of [the third party's] authority to consent." *State v. Allen*, 603 A.2d 71 (App. Div. 1992).

Conceding that N.D. lacked apparent authority to consent to a search of Miranda's black bag, the State invoked the exigent circumstances exception to the warrant requirement. *See State v. DeLuca*, 775 A.2d 1284 (N.J. 2001). This exception applies when officers have an "objectively reasonable basis to believe that prompt action is needed to meet an imminent danger." *State v. Hemenway*, 216 A.3d 118 (N.J. 2019). Exigency is often found where courts determine "there was an objectively reasonable basis to believe that lives might be endangered or evidence destroyed by the delay necessary to secure a warrant." *State v. Manning*, 222 A.3d 662 (N.J. 2020). The *Manning* Court enumerated six non-exclusive factors courts can use to determine when exigent circumstances exist.

However, the Court determined that the dispositive factor in the present case was the fact that Miranda was "unarmed and in custody and would not be immediately released" at the time police entered and searched the storage trailer and Miranda's black bag. "He was therefore not in a position," wrote to the Court, "to retrieve, use, or conceal the weapons pending the issuance of a warrant to search the black bag, and there is no evidence in the record that he could have secured the assistance of a third party who had a key to the storage trailer." Thus, there wasn't any exigent circumstance justifying application of that exception to the warrant requirement, the Court concluded.

Therefore, neither the exception of apparent authority nor exigent circumstances applied to justify the warrantless search of Miranda's bag, and so, the Court held that Miranda's motion to suppress should have been granted.

Accordingly, the Court vacated Miranda's conviction and remanded the case with an order to grant his suppression motion. See: *State v. Miranda*, 292 A.3d 473 (N.J. 2023).



DIRECTORY OF FEDERAL PRISONS

The Unofficial Guide to Bureau of Prisons Institutions

BY CHRISTOPHER ZOUKIS

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Travis County, Texas, Efforts to Keep Mentally Ill Individuals Out of Jail Face Funding, Infrastructure, and Information Management Challenges

by Jo Ellen Nott

Travis County is in Central Texas, 150 miles inland from the Gulf of Mexico. The city of Austin, the state capital and county seat, sits at the intersection of three major highways. Its population in 2021 was 1.305 million. The Travis County Jail shares a problem with jails nationwide: They have become first responders for individuals suffering from mental health crises, a task they are not equipped to handle and, like most jails, warehouse individuals who are in dire need of treatment, not punishment.

Danny Smith is the Travis County Jail's director of mental health services. Over the last 10 years, Smith has seen the number of people with mental health issues held in the jail climb from 15 to 40%. Travis County Judge Andy Brown says the jail is the largest mental health facility in Travis County, and in this regard, the county is not unique. Its numbers are consistent with the rest of the country's jails according to the Bureau of Justice Statistics.

Looking at booking data from 2018-2022, most charges this population had against them were for nonviolent misdemeanors like criminal trespassing, and only 7% were for assault. The key component to keeping these mostly non-violent individuals out of jail, where they often sit for months while their mental health worsens significantly, is diverting them from ever being booked in the first place.

In March 2023, the Travis County Commissioners Court voted to begin planning a new booking facility and diversion center after seeing the results of a report from the Dell Medical School at the University of Texas, Austin, about the county's forensic mental health system. The new booking facility and diversion center will expand the existing and inadequate framework of help now used by Travis County – The Expanded Mobile Crisis Outreach Team and Project Engage for teenagers.

The first diversion option Travis County has for 911 is the Expanded Mobile Crisis Outreach Team ("EMCOT") operated by Integral Care, the county's mental health authority. EMCOT can connect the person with local hospitals or crisis residential services before police are involved, but there are only 87 total beds in the system.

A quick glance at the Travis County Jail's interactive website on May 17, 2023, showed 2,159 people in the lockup. If 40% suffer from mental health issues, at least 860 probably qualify for diversion if EMCOT were up to speed. Admission restrictions and understaffing problems plague the team, making the 87 beds hard to access. Understaffing also handicaps EMCOT from delivering on its promise of 90 days of follow-up. Even the Austin 911 Call Center is only half-staffed, making it difficult for people to even start the process of being referred to EMCOT.

Two other problems make it difficult for the mentally ill in Travis County to get the help they need. First, county departments do not collaborate in sharing data, slowing the process of connecting an individual with services. When the process breaks down, individuals suffering a mental health crisis or an ongoing battle with their illness frequently return to the streets or are criminally charged. And, if the individual is charged, there is no guarantee that a defense lawyer will be present. Without legal counsel, the odds are the person will take a plea or face the wrong charge.

Harris County is on the upper Gulf Coast in Southeast Texas. The city of Houston is its county seat and is the largest city in Texas and the fourth largest in the U.S. Its population in 2021 was 4.728 million, making it at least three times more populous than Travis County.

Harris County, unlike Travis County, has one of the largest diversion programs in the state, the Harris Center. The Harris Center focuses its efforts mostly on pre-arrest diversion, which Travis County officials and advocates say is preferable to sending someone to a diversion center with an arrest record. The Harris Center has full-time 911 call center counselors, plus law enforcement and clinician co-response teams that make a diversion evaluation in real time.

The Harris Center is voluntary, and the average length of stay is four to five days. Wayne Young, CEO of the Center, reports that only 15 percent of those they have helped have had repeat visits. An external study of the Harris Center found that those who completed a stay were "1.4 times less likely to be arrested again. Less than five percent of the cases where law enforcement and clinicians co-responded saw an arrest at all."

According to *The Texas Observer*, the biggest problem Travis County faces in being able to operate a pre-booking diversion system like the Harris Center is its outdated system with a lack of data sharing. The executive director of the legal service which represents most of the adult indigent clients in the county says, "The booking process has a whole lot of paperwork flying, not a lot of electronics, and where there is electronic data, it's very siloed."

Without that centralized source of information on an individual, public defenders and private attorneys must function as that hub. A data use agreement is needed among courts, jails, law enforcement, mental health providers, housing providers, and local hospitals and clinics. If data were centralized, connecting a person with services could happen immediately, instead of after weeks or months needlessly spent in a lockup.

Travis County Judge Andy Brown wants the county's diversion program to move to a pre-arrest model as its end game but realizes the first step will be to provide individuals the therapy and stabilization they need post-arrest. To that end, Brown wants to use the diversion program that Nashville has. In Tennessee, the "patients are incentivized to complete a 14-day stay at the diversion center with the promise of their arrest expunged at the end." Brown added that of course the county or district attorney should have the final say about whether the arrest would be expunged. Another positive of the two-week stay is that it gives the program more time and opportunity to find that individual supportive housing.

Travis County Attorney Delia Garza says promising expungement as an incentive to enter a diversion center program might be something the county could not guarantee. The best-case scenario, she believes, is dismissing the charge as soon as possible. Garza points out: "Once the magistrate has determined there was probable cause, it's always kind of held over their head, and a complaint could be filed anytime within a two-year statute of limitations."

Garza is involved in a diversion program for 17- to 19-year-olds in Travis County called Project Engage, which offers programming for youthful offenders to better themselves and address root causes of crime. Charges are dismissed in exchange for participating in the program. Teenagers who enter Project Engage do community service, receive mentorship and counseling, and get help in résumé-building and job-finding.

Garza has recently expanded the program, adding the services of the nonprofit Life Anew, whose mission is "to guide young people through a process of restorative justice – one in which the defendant and the person whom they harmed both receive counseling and eventually meet so young defendants can make amends (if the victim is willing)."

With the Life Anew expansion, young participants will get free assistance from attorneys with Volunteer Legal Services of Central Texas to help them expunge their criminal charges. Expungement is important to Garza because dismissed cases follow a young person into his or her future, affecting job and housing searches, whereas expungements are a permanent removal of involvement in the criminal legal system.

Another problem the Travis County Jail faces in diverting people away from incarceration is the lack of physical space and adequate staffing for a lawyer to be present at the time of booking. Counsel at first appearance ("CAFA") is a crucial piece to reducing the amount of people booked unnecessarily, but a 2022 CAFA pilot program lasted only nine days due to Central Booking's physical design.

Grant funding from the pilot is still available, and the estimated cost for 24/7 representation is $4 million. The county can choose to do renovations at Central Booking or develop an alternative plan to run the CAFA program. All diversion center proponents agree that CAFA must be available to mentally ill individuals who have been picked up by law enforcement.

Judge Brown emphasized: "The more that we can do at the front end to divert people away, to make sure that they're not being charged with a greater crime, all the benefits that come with having a lawyer advising you, will help reduce our jail population." The diversion center in Travis County could cost $30 million to build and $5 million to operate – Brown has suggested the city of Austin or Central Health share the operating costs.

At the April 13, 2023, Austin City Council meeting, "the Council approved a resolution directing the City Manager to explore the feasibility of an interlocal agreement for the development of an Austin/Travis County Diversion Center, identify financial resources necessary to partner in developing a pilot for mental health diversion services and a bridge housing program, and provide updates to the Public Health Committee and a report to Council."

Judge Brown spoke to *The Texas Observer* about the urgent need to get the Austin/Travis County Diversion up and running: "If we don't do it now, I am afraid it will be another five or ten years." Kathy Mitchell, a longtime justice advocate in Austin, also told *The Observer*: "We have virtually no alternative to police simply taking you to jail because there's nowhere else to take you. Would I like to see all the care provided out of the criminal justice system? Yes, I would. Are we doing that? If we're not, as long as we're not putting people in jail, [diversion is] a big step up."

It remains to be seen if the Austin City Manager and Council can marshal the resources and have the political will to make mental health diversion services a reality and keep the mentally ill of Travis County out of the criminal justice system.

Sources: *Austin Chronicle, Austin Texas.gov, Texas Almanac, The Texas Observer*

Third Circuit: Pennsylvania Second-Degree Aggravated Assault of a Protected Individual Not a 'Violent Felony' Under ACCA, Court Acknowledges 'Bizarre Result'

by Anthony W. Accurso

The U.S. Court of Appeals for the Third Circuit held that second-degree aggravated assault of a protected individual in violation of 18 Pa. Cons. Stat. § 2702(a)(3) is not a "violent felony," for purposes of the Armed Career Criminal Act ("ACCA"), reversing a defendant's sentence enhanced thereunder.

In 2008, Samuel Jenkins pleaded guilty to a violation of 18 U.S.C. §§ 922(g)(1) and 924(3) for possessing a firearm as a convicted felon. He also had two prior drug convictions and a conviction in Pennsylvania for second-degree aggravated assault of a protected individual under § 2702(a)(3). His sentence was enhanced under the ACCA and sentenced to 15 years in prison with five years of supervision.

In 2015, the U.S. Supreme Court issued its ruling in *Johnson v. United States*, 576 U.S. 591 (2015), declaring the residual clause of the ACCA unconstitutional, which was made retroactive in *Welch v. United States*, 578 U.S. 120 (2016).

Jenkins submitted a habeas motion under 28 U.S.C. § 2255, claiming that, under *Johnson*, § 2702(a)(3) is not a "violent felony" upon which an ACCA enhancement can stand because the statute of conviction can be violated without the use, attempted use, or threatened use of physical force, so it does not constitute a "violent felony" under the elements clause of the ACCA. The U.S. District Court for the Eastern District of Pennsylvania denied his motion but issued a certificate of appealability.

On appeal, the Third Circuit noted that § 2702(a)(3) does not meet the common definition of "burglary, arson, or extortion" under the enumerated offenses clause of the ACCA, so it must determine if the statute fits the elements clause. *See United States v. Abdullah*, 905 F.3d 739 (3d Cir. 2018). To qualify, an offense must have "as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(I). "Physical force" in this context means violent force – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133 (2010).

In determining whether the statute fits the elements clause, courts apply the categorical approach, looking only at the elements of the offense, not the defendant's actual conduct. *See Descamps v. United States*, 570 U.S. 254 (2013). Courts focus on the "minimum" conduct criminalized by the statute. *Abdullah*. The state law must not criminalize a wider swath of conduct than the ACCA intended. *United States v. Ramos*, 892 F.3d 599 (3d Cir. 2018). In short, "[I]f the state-law statute

sweeps more broadly than the federal comparator – that is, if § 2702(a)(3) criminalizes any conduct that is not a violent felony under ACCA – no conviction under the statute is a predicate offense, regardless of the underlying facts." *Id*.

In support of his argument, Jenkins cited *United States v. Harris*, 289 A.3d 1060 (Pa. 2023), in which the Pennsylvania Supreme Court ruled that § 2702(a)(1) can be violated by a "failure to act, like withholding food or medical care." If this ruling can be similarly applied to subsection (a)(3), it would not be a violent felony for ACCA purposes. *See United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) (considering subsection (a)(1), holding "the use of physical force required by the ACCA cannot be satisfied by a failure to act").

The *Harris* Court contrasted subsection (a)(1) with two other subsections of § 2702 that do "codify the manner causing a particular bodily injury as an element of the crime," i.e., subsections (a)(4) ("with a deadly weapon") and (a)(6) ("by physical menace"). It noted that, "[I]f the legislature wanted to similarly limit the way subsection (a)(1) can be violated, it would have done so explicitly." It was from this lack of "manner of causing a particular bodily injury" that the court inferred the legislature intended subsection (a)(1) to have a broad scope, including "failure to act."

Following the logic of *Harris*, the Third Circuit concluded that, "subsection (a)(3) is similar to subsection (a)(1) in the relevant aspects, and different only in ways immaterial to ACCA's elements clause" such that "injury under Section 2702(a)(3) can be inflicted by forcible or non-forcible means, including by a failure to act." Thus, the Court ruled that § 2702(a)(3) covers more conduct than the ACCA intended and is thus not a violent felony for purposes of the sentence enhancement.

In reaching this conclusion, the Court acknowledged "the bizarre result in this case. We've now held that a type of first-degree aggravated assault in Pennsylvania and one type of second-degree aggravated assault *are not* violent felonies under ACCA even though a second-degree aggravated assault *is* a violent felony." *See Ramos* (holding second-degree aggravated assault under § 2702(a)(4) is a crime of violence). The Court continued its commentary as follows: "It is possible, perhaps even likely, that no defendant will ever be convicted under Section 2702(a)(3) for an act of omission. But since the legislature drafted the statute in a way that does not foreclose that possibility, we are constrained to hold that every Section 2702(a)(3) violator – individuals convicted of assaulting teachers, nurses, and police officers – did not commit a violent felony under ACCA."

Accordingly, the Court vacated Jenkins' conviction and remanded with instructions to grant him a resentencing without the ACCA enhancement. See *United States v. Jenkins*, 68 F.4th 148 (3d Cir. 2023).

From the Sad but True Files: Police Oppose Laws Prohibiting Cops From Lying to Juveniles During Interrogations

by Douglas Ankney

Vehement opposition by law enforcement stopped the passage of a 2022 Colorado bill that would have banned police from lying to juvenile suspects while attempting to extract confessions. Lawmakers projecting a "tough on crime" image called the bill "anti-law enforcement" and "pro-criminal." But mounting evidence proves that minors are highly susceptible to giving false confessions.

Wrongful convictions have revealed that teenagers are less likely to understand their *Miranda* rights than adults are and that teenagers tend to focus more on immediate rewards instead of long-term consequences. The Innocence Project reports that nearly 30 percent of DNA exonerations involved false confessions and roughly one-third of the defendants in those cases were 18 or younger when they falsely confessed.

Lorenzo Montoya testified in favor of the now thwarted Colorado bill. Montoya was 14 years old when he confessed to being at the scene of a murder after two Denver police detectives had badgered him for two hours. Although Montoya's mother was present for the initial portion of the interrogation, she eventually left him alone with detectives. Montoya, without any physical evidence linking him to the scene, was convicted of first-degree felony murder and served 13 years in prison before prosecutors agreed to release him.

Unbelievably but not surprisingly, law enforcement in several states have also opposed bills that require minors to have access to legal counsel before police interviews. The New York City Police Department ("NYPD") recently opposed such a bill. An NYPD spokesperson told the City in December 2022: "Parents and guardians are in the best position to make decisions for their children, and this bill, while well-intentioned, supplants the judgment of parents and guardians with an attorney who may have never met the individual."

But criminal defense attorney and blogger Ken White counters: "Cops asking questions do not have your best interests at heart. And note that cops consistently demand union rules protecting them from being questioned without counsel when they are investigated." Obviously, cops prefer juveniles consult with their parents instead of a lawyer who is actually capable of meaningfully protecting a juvenile suspect's interests, unlike most parents – despite the best intentions of protecting their child, they simply aren't capable of doing so in this situation.

Of course, police know the highly-effective interrogation tactics used by investigators to elicit inculpatory statements and confessions (both false and genuine) from the unwary and unsophisticated. That's the reason even adults who are trained law enforcement professionals insist on not facing police interrogators without the protection of defense counsel, yet those same police officers also insist that juveniles face seasoned interrogators on their own.

The states of Maryland and Washington require minors have access to legal counsel prior to police interviews. And in 2021, Illinois and Oregon became the first two states to ban police from lying to minors during interrogations. But generally speaking, in America, cops can lie to suspects with impunity, but if suspects lie to cops, they may be charged with obstruction of justice or other crimes. History has shown that people have the kind of government for which they are willing to fight. We must fight for something better than lying cops extracting false confessions.

Source: *reason.com*

Colorado Supreme Court Clarifies There Is No *Per Se* Rule Excluding Self-Serving Hearsay

by Matt Clarke

The Supreme Court of Colorado clarified that there is no per se rule excluding self-serving hearsay by a criminal defendant, holding that "like any other hearsay statement, a defendant's self-serving hearsay statement may be admissible if it satisfies a hearsay-rule exception in the Colorado Rules of Evidence [("CRE")]."

College student L.S. went out drinking with friends. Jacob Vanderpauye, with whom she had taken a class, joined the group. The two flirted with one another and then left together to join his friends at another bar. "There, she told him she was drunk and very tired. Vanderpauye told her she could stay at his apartment if she wished, and she agreed to spend the night there."

As they "walked to his apartment, she told him that she was not going to have sex with him." He "appeared offended by this statement and told her that he didn't want her to think of him that way. L.S. apologized."

They sat on the bed, watched TV, and "engaged in affectionate kissing for a while, but she eventually told him she was drunk and tired and needed to get some sleep. And he responded that she should get some sleep."

"L.S. fell asleep on her side with her clothes on. After sleeping for a while, she woke up on her back and discovered Vanderpauye on top of her. Her shirt and bra were off, her skirt was up, her underwear was pulled down, and she could feel Vanderpauye's penis penetrating her vagina. She yelled, 'What are you doing? You're raping me! I was passed out! What are you doing?' He immediately responded, 'I thought you said I could do anything to you.' According to Vanderpauye, while she was capable of apprising the nature of her conduct, she consented to have sexual intercourse with him."

Vanderpauye was tried for sexual assault by intrusion or penetration: (1) while L.S. was incapable of appraising the nature of her conduct and (2) while she was physically helpless, in violation of Colorado Revised Statutes §§ 18-402(1)(b) and (1)(h), respectively. The defense argued that Vanderpauye "had not formed the requisite mental state (knowingly) because he believed L.S. had consented to having sexual intercourse with him, and L.S.'s conduct and the physical evidence corroborated his belief; L.S. had exaggerated her level of intoxication; and L.S. had pursued these charges because of her longstanding preoccupation with sexual assault." He asserted that she "was angry that multiple friends had failed to report that they had been raped; she'd publicly confronted two of the alleged rapists; she regularly binge-watched the television show *Law and Order: SVU*; she'd watched many crime documentaries and had recently watched one about sexual assault on college campuses; her aunt is a rape counselor; [and] she purportedly had a 'secret obsession with the criminal justice system.'"

Vanderpauye filed a pretrial motion to have his statement to L.S., "I thought you told me I could do anything to you," admitted into evidence. He argued that, although it was hearsay, it was admissible as an excited utterance under CRE 803(2) and to show the then-existing state of mind under CRE 803(3). The trial court ruled that the statement was inadmissible because it was self-serving hearsay.

At trial, L.S. testified that Vanderpauye "seemed very startled when she accused him of raping her." Defense counsel renewed his request to introduce Vanderpauye's response as an excited utterance without success.

The jury convicted Vanderpauye on the physically helpless count and hung on the other count. He was sentenced to sex offender intensive supervision probation for at least 20 years and up to life. He timely appealed.

The Court of Appeals reversed after holding that neither the CRE nor state Supreme Court decisions could support "a per se rule prohibiting the admission of self-serving hearsay by a criminal defendant" and "that Vanderpauye's statement was admissible under the excited utterance exception in CRE 803(2)." The prosecution successfully petitioned for a writ of certiorari. Vanderpauye was represented by Public Defender Megan A. Ring and Deputy Public Defender River B. Sedaka before the Colorado Supreme Court.

The Court noted that the practice of excluding self-serving hearsay had its "genesis" in the historical English common law which "prohibited anyone with a 'direct pecuniary or proprietary interest' in the outcome of a case, including a party, from testifying.... This drastic doctrine remained in effect in England as late as the middle of the 19th century [and] it was several decades later before the United States could shake it off." The doctrine also precluded a party's self-serving hearsay.

"So, when the direct-interest doctrine was abrogated by statute throughout this country, any sweeping practice regarding the inadmissibility of self-serving hearsay statements 'should have been abandoned by implication,'" explained the Court. However, it was not, breeding confusion.

The Court then clarified "that Colorado law has no per se rule excluding a self-serving hearsay statement by a defendant." It held "that, like any other hearsay statement, a defendant's self-serving hearsay statement may be admissible if it satisfies a hearsay exception rule in the" CRE. The Court noted that its position is in accordance with "two well-respected treatises" and appellate court decisions in California, Connecticut, Georgia, Illinois, Oklahoma, and Tennessee. (See full opinion for citations.)

The prosecution relied on *People v. Cunningham*, 570 P.2d 1086 (Colo. 1977), which was decided before the state Supreme Court promulgated the CRE and did not actually address the same issue. Consequently, the Court overruled *Cunningham*; *People v. Abeyta*, 728 P.2d 327 (Colo. Ct. App. 1986); and *People v. Avery*, 736 P.2d 1233 (Colo. Ct. App. 1986), to the extent they suggested *Cunningham* erected a per se barrier to self-serving hearsay statements.

The Court then determined that the statement was admissible as an excited utterance, one "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," pursuant to CRE 803(2). It rejected the prosecution's position that the startling event was of his own making, being caught allegedly raping L.S., because that interpretation eliminates the presumption of innocence.

The Court ruled that the statement was "highly probative" and the prosecution's presentation had misleadingly made it seem as if he had failed to respond to L.S.'s accusation. Thus, the Court held that it was admissible. Further, its exclusion was not harmless.

Accordingly, the Court affirmed the judgment of the Court of Appeals. See: *People v. Vanderpauye*, 530 P.3d 1214 (Colo. 2023).

Collaborative Project Between Innocence Project and National Registry of Exonerations Produces Interim Report Reconciling Data Coding Discrepancies

by Casey J. Bastian

The Innocence Project ("IP") and the National Registry of Exonerations ("NRE") each keep track of and list wrongful convictions. Each also works to identify the causes of those wrongful convictions and how forensic science-related errors is considered an "influential factor" in many of these injustices. When a study revealed a discrepancy in the contribution coding data between the IP and NRE lists, a five-year reconciliation process commenced. The result was an interim report entitled: "The Contribution of Forensic and Expert Evidence to DNA Exoneration Cases."

In 2017, researcher Gerald LaPorte ("LaPorte") published his findings on the relationship of forensic science to wrongful convictions. LaPorte observed that the coding of forensic science as a factor in 342 DNA exoneration cases did not match between the IP and NRE lists. The IP had identified forensic science as having a contributory role in 157 of those cases. Yet the NRE had identified forensic science as a factor in only 133 of the same cases.

LaPorte was raising important questions about the accuracy of the data pertaining to the alleged role forensic science actually plays in contributing to wrongful convictions. The questions in LaPorte's report concerned "which disciplines were responsible, temporal trends, and the co-occurrence of forensic science with other contributing factors." LaPorte was essentially arguing that any contributory role is "overstated." John M. Collins and Jay Jarvis had previously made similar but more explicit allegations concerning this view.

The two organizations assert that the larger overall process will offer a "more accurate accounting of the role of forensic science in DNA exoneration cases." The goal is to publish a comprehensive report on each of the more than 3,200 exonerations cases identified by the NRE since 1989. One of the first things revealed in the reconciliation process was that LaPorte had actually "understated the problem" of discrepancies in the organizations' coding processes.

Research into wrongful convictions and the compilation of such lists in the U.S. originated in the 1940s. These lists have served several purposes: they serve as proof that wrongful convictions do occur; researchers are provided the means to count various categories of cases; and measures on issues of interest like contributing factors and their prevalence in wrongful convictions are more readily developed.

Another reason for wrongful conviction list compilation and research is the naming and counting of frequent factors that contribute to, and cause, many wrongful convictions. Over the decades, a "general consensus has emerged around a familiar list of factors." The IP and NRE each list specific contributing factors. For the IP, it's eyewitness misidentifications, false confessions or admissions, informants, and misapplication of forensic science. The NRE categories list includes mistaken eyewitness identification, false confession, perjury or false accusation, false or misleading forensic evidence, official misconduct, and inadequate legal defense. These distinctions matter when examining how the coding discrepancies occurred.

The IP originated as a litigation organization purposed to exonerating the wrongfully convicted "using the power of forensic DNA profiling." The organization enjoyed early success. So much so that the IP joined with the National Institute of Justice ("NIJ") to collaborate on wrongful conviction list-making and factor-counting. In 1996, the NIJ published "Convicted by Juries, Exonerated by Science," in which 28 "DNA exonerations" (a person exonerated by post-conviction DNA testing) were first listed.

That publication undermined the skepticism of those who viewed wrongful convictions lists as implausible examples of true innocence. DNA exonerations left little to no room for such challenges. The listing of these DNA exonerations shifted to the book *Actual Innocence*, written by one of the IP's co-founders, and eventually to the IP website. For nearly 10 years, this list was considered the "canonical" reference for wrongful convictions in the U.S. Courts, scholars, journalists, and the public relied on this information concerning the risk of producing wrongful convictions.

The problem of only listing DNA exonerations is that it was restrictive. Long before DNA testing of preserved evidence, wrongful convictions were discovered through other means. While highly determinative, DNA testing is only one crucial means for identifying and rectifying miscarriages of justice and freeing innocent people. Exonerations by other means than DNA forensic testing continues still.

To be considered a true DNA exoneration, it requires a very specific set of conditions, and only a small set of wrongful convictions meet them according to IP standards. These include that a perpetrator must leave an "analyzable quantity" of DNA evidence at the scene; there must be consensus that the genetic material was the result of the criminal act and not left for innocent reasons; either inadequate or no testing occurred prior to trial; the person must actually have been convicted; the DNA evidence preserved; and post-conviction testing occurs and produces "probative results." These stringent criteria mean that a "DNA exoneration" is unlikely in many cases that might still be considered exonerations.

The NRE has been keeping its list since about 1989. In 2012, the NRE began its endeavor to provide "a comprehensive archive of all known exonerations in the United States." The NRE became responsible for consolidating and rationalizing numerous list-making activities that had occurred during the prior 20-year period. The activities included the works of the IP, the Center on Wrongful Convictions, and various scholars and researchers. The NRE also worked with the authors of the *Encyclopedia of Wrongful Convictions* and the creator of the website Justice Denied.

The major difference between the NRE and IP lists is that the NRE does not confine its cases to those of DNA exonerations but instead includes all exonerations. And that is why the NRE has become the "authoritative list" of all U.S. exonerations. The primary purpose of discussing the backgrounds of the IP and the NRE is that each group has its own standards for list creation and maintenance, and that led to coding discrepancies.

The NRE definition of exoneration pertaining to a formerly convicted person is intentionally conservative. The definition requires that a person be convicted; be relieved of all consequences of that conviction or any related convictions; that the relief be

premised on new evidence of innocence; and there cannot be any "unexplained physical evidence of guilt."

The focus of the interim report was the 342 listed by each organization as of 2017. It was not just within the 24 cases identified by LaPorte that coding discrepancies were found. The IP and the NRE identified five more exonerations that the IP had "coded with a forensic evidence contribution," but the NRE hadn't.

The IP and the NRE researchers also found 13 DNA exonerations in which the NRE reported forensic evidence contribution, but the IP hadn't. In addition, both organizations consulted with the Convicting the Innocent's DNA exoneration archive and found four additional cases that neither the IP nor the NRE had mentioned as having a forensic contribution used in the exoneration. This created a total of 46 cases for data coding to be reconciled.

The reconciliation process began on October 14, 2017, and by then, there were 351 total DNA exonerations recognized by both the IP and the NRE. An initial discrepancy that needed to be addressed for coding purposes was the agreement of the definitions before forensic science or forensic evidence could be coded as a contributing factor in the 46 cases being reconciled.

In 2017, the IP definition of "Misapplication of Forensic Science" ("MFS") was to mean a case when it was known that "forensic evidence was used to associate, identify, or implicate someone who was later conclusively proven innocent with post-conviction DNA testing," which would typically demonstrate the incorrectness of the original forensic evidence.

The NRE definition of "false or misleading Forensic Evidence" ("F/MFE") meant an "exoneree's conviction was based at least in part on forensic information that was (1) caused by errors in forensic testing, (2) based on unreliable or unproven methods, (3) expressed with exaggerated and misleading confidence, or (4) fraudulent."

The two groups understood that first reconciling the definitions might not be easy or even possible. This process itself led to in-depth discussions and the creation of a "Forensic Advisory Group consisting of 14 experts" with divergent viewpoints on forensic evidence. These discussions led to the revision of the NRE's F/MFE definition.

The revised F/MFE definition became "faulty of misleading expert or forensic evidence may have led to a factually erroneous conclusion, at any stage of the investigation or adjudication, that contributed to the false conviction." The revised mutual definition that was created is identified under the heading "Forensic Contributing Factor" ("FCF") as a blanket term referring to both MFSs and F/MFEs. In the end, all 46 cases were reconciled. Of those, 39 had an FCF, and the other seven did not.

The interim report also identified other difficulties in wrongful conviction research. There are substantial informational deficits. Although the two groups have access to large data pools, there is "incomplete information about every case." And the NRE is a "living archive" that is constantly adding new cases. The NRE adds about one case per business day per year. New information about the 3,200 cases is added frequently as well. During the five-year reconciliation period, 24 new exonerations meeting the IP's definition of DNA exoneration were added to that list alone. Six of these cases were found to have F/MFE as a contributing factor. The IP's more specialized list had risen to 375 total DNA exonerations by April 28, 2022.

What the groups did find was that the coding changes trended toward identifying more problems with forensic evidence previously not known. The researchers believe that there is much more information about forensic contributions that wrongful conviction researchers simply aren't aware of yet. Researchers discovered that rape or rape-murder convictions account for almost three-quarters of all DNA exonerations.

The awareness of flaws in forensic analysis is having a positive impact though. In the 1980s, there were 215 such wrongful convictions. But since 2000, there have been only 27 such convictions identified, and none of those has occurred in the past 12 years. DNA testing has "greatly increased" since 2000, and the proper use of this testing pretrial, or oftentimes even pre-arrest, explains why "the share of exonerations that include DNA evidence has declined substantially." The interim report describes this trend as the "singular accomplishment of forensic science."

Beyond that accomplishment, very little of the interim report discusses the state of forensic science or how it can be improved for use in the legal system. What its authors do strive for is directing readers to information like LaPorte's research article and the validity of his concluding statements. These statements provide common beliefs about forensic science and wrongful convictions.

These statements consist of the following beliefs: (1) forensic misconduct is wholly unacceptable, (2) the use of ambiguous terminology in reports and testimonies should be avoided by forensic scientists, (3) forensic scientists should always strive for objectivity and impartiality, (4) inevitable forensic errors should be occasions for learning, not diminished or hidden, (5) and the limitations of scientific analysis methods should be respected by forensic scientists. A report concerning the role of forensic evidence in all exonerations is being prepared by the groups.

Source: *n2t.net*

New Montana Law Bans Warrantless Facial Recognition Surveillance

by Jordan Arizmendi

At the end of June 2023, Montana Governor Greg Gianforte signed a bill, Senate Bill 397 ("SB397") that will ban warrantless facial recognition surveillance, generally. According to the law, the exceptions that would permit a law enforcement agency to perform a facial recognition search include: if probable cause exists that an unknown individual in an image has committed a crime, is a victim of a crime, or is a witness to a serious crime; might be a local missing person; or if law enforcement needs to identify a corpse.

SB397 bans "the monitoring of public places or third-party image sets using facial recognition technology for facial identification to match faces with a prepopulated list of face images. The term includes but is not limited to scanning stored video footage to identify faces in the stored data, real-time scanning of video surveillance to identify passing by the cameras, and passively monitoring video footage using facial recognition technology for general surveillance purposes without a particularized suspicion of a specific target."

As a result of SB397, law enforcement will need to get a warrant, before requesting a facial recognition search in the investigation of a serious crime. The lone exception to this requirement is if there is an imminent threat posed to an individual.

Sources: *tenthamendmentcenter.org*

'Silos' Can Keep Police Departments From Knowledge of Extent of Police Abuse and Consequences of That Abuse

by Matt Clarke

Around two decades ago, UCLA law professor Joanna Stewart was a civil rights attorney working on a large class-action lawsuit against the New York City Department of Corrections. While interviewing guards, she was surprised to learn that they did not know how many times they had been sued. Later, she discovered that this situation was common among police and correctional officers. The reason is that lawyers representing the officers intentionally withhold information from the departments, believing knowledge of previous misconduct will increase liability.

Frequently, "the information from the lawsuits goes back and forth from the city attorney's offices, but that information doesn't make its way over to the police department, officers and officials." Thus, information about lawsuits is kept closely within the city attorney's office in an information "silo."

In her new book, "Shielded: How the Police Became Untouchable," she explains how silos and legal protections such as qualified immunity and no-knock warrants have shielded officers from the consequences of their abusive actions. She argues that true reform will require local police departments to collect and analyze information from the lawsuits in which they are defendants and pay the costs of any settlements out of their own budgets.

"If departments knew that they would have extra resources if they decreased the size of their settlements and judgments in these cases, they might have an incentive to take better care and account of what their officers are doing," giving them a financial incentive to reform, said Schwartz.

Schwartz noted that the origins of policing in the United States differ according to geography, but its antecedents in all regions had something in common – "subjugation and violence against disempowered groups."

In the South, policing had its origins in the state-sponsored slave patrols that focused on the subjugation of Black people. This subjugation was continued after the Civil War by unofficial but influential groups like the Ku Klux Klan. This severe oppression led to the belief that the North was a kinder place for Blacks and sparked the Great Migration. But the reality was that Blacks in the North were also subject to abuse by police.

The historical model for policing in the North was the London police force, according to Schwartz. Initially, its focus was on the subjugation and oppression of immigrant groups. But, by the 20th century, "police in the North had plenty of their own problems as well, and were using unconstitutional force, arresting people and assaulting people, particularly those Black Americans who came from the South to the North."

In the Southwest and some of the South, the Texas Rangers were the model for the initial law enforcement entity. But the Rangers had a bloody history of violent oppression, killing thousands of Mexicans, Mexican-Americans, and indigenous people. There were no consequences for these excesses.

The Fourth Amendment protection against unreasonable searches and seizures is examined in the book. It explains how "the way in which the Supreme Court interprets 'reasonableness' under the Fourth Amendment is focused far more on what the police officer was thinking at the time," not the behavior of the suspect. "And the Supreme Court, in multiple opinions, has authorized, allowed, condoned officers to use force or arrest or search someone who has done nothing wrong. So long as they thought what they were doing was reasonable in the moment, that officer has not violated the Constitution."

Schwartz notes that the race of the officer is irrelevant to who is the target of abuse. Black police officers tend to commit misconduct toward Blacks and other minority groups at the same elevated rate as white police officers. This calls into question the concept of reducing police abuses by hiring more minorities and shows the problem of abuse to be caused by a toxic police culture.

Source: *NPR*

News in Brief

California: Reported by *KHSL* in Chico/Redding, Nicholas Lee Rush, 49, a Chico Police Officer, has been charged with providing marijuana to an underage family member, 17, and also encouraging the teen to share the stash with his girlfriend. In 2022, an investigation into whether Rush was growing pot in his backyard began. He faces up to five years in state prison on felony charges of furnishing marijuana and a misdemeanor for contributing to the delinquency of a minor. Butte County District Attorney Mike Ramsey said Rush is not currently an active officer with the Chico Police Department. Rush was expected in court for arraignment on August 3, 2023.

Colorado: *KDVR* reported that on May 18, 2023, Samuel Rose, 18, pled guilty to possession of a handgun by a juvenile and two counts of attempted first-degree murder, second-degree assault, and aggravated juvenile offender, and was sentenced to five years in state custody. His father is Denver Police Department Detective Asher Rose. Samuel was able to obtain the firearm because of his father's failure to properly store it. An internal affairs investigation concluded on July 12, 2023, that Asher Rose will not face charges, although he clearly violated police department policies. When asked how Samuel was able to access his gun safe, Rose said, "I believe he searched the room when he was home alone. There were times in the past when he would steal money and credit cards for his drug habit." On May 13, 2022, Samuel took his father's gun and fired into a teen's house and just two days later fired into Jessica Edgar's Littleton townhome. Jessica Edgar told *KDVR* that the bullet soared through her son's room, almost hit him in the head and then pierced several walls. Snapchat conversations and surveillance video led investigating detectives to the then-17-year-old whom they arrested at traffic stop. They also found two guns in the car with the teen.

Georgia: *Appen Media* reported on July 11, 2023, that in a July 6 hearing, ex-police officer Austin Handle won an unemployment appeal for more than $10,000. Handle had been fired from the Dunwoody Police Department in April 2020 for "police violation,

due to dishonesty", during an investigation into determining whether he used his patrol lights and sirens to speed through the streets. Dunwoody is a northern Atlanta suburb known for restaurants, coffee shops and parks. According to Handle, he was fired in retaliation for revealing the sexual misconduct and assault occurring with senior officers within his department. A report created because of Handle's accusations led to the resignation of former lieutenant Fidel Espinoza who left his position before the probe ended in July 2020. Handle is the vice chair of the Lamplighter Project, a national organization that encourages law enforcement officers to speak out against police corruption or injustice.

Kentucky: Former Louisville Metro Police officer Bryan Wilson engaged in a sextortion scheme in which he cyberstalked 25 victims in a perverse attempt to get them to send him nude photos and videos of themselves. He did this by snatching compromising photos from their social media pages. The lawsuit states that Wilson hacked into the victims' account by posing as a Snapchat Support Team employee. Once Wilson was able to persuade the young woman to text him her password, he would extract private videos from her account. Then the woman would receive a message from Wilson that "it would go away if she would show him her boobs." The Louisville Metro Police Department's sex crimes unit did not respond to any of the young woman's more than ten calls. The messages got more deranged at that point. Wilson threatened to send these intimate images to her friends, family members, principal, school board, and even the school district's superintendent. According to *WDRB*, Wilson had used his LMPD access to a data combing software that identified computer applications that belonged to women, and he then hacked their applications, stealing intimate images. Wilson was also one of two officers who threw slushies at individuals while filming it on their phones. Eventually, Wilson pled guilty to the slushy and the sextortion cases, resulting in 30 months in federal prison. Wilson, as well as his former supervisors, are now the focus of a civil lawsuit.

Maryland: *The Baltimore Sun* reported that on June 23, 2023, the Hartford County Sheriff's Office arrested Baltimore County police officer Mitchell Tuveson, 29, and his wife, with felony child abuse because of injuries their infant son suffered. According to court documents, the couple first took their son to the hospital in April. In May, another hospital visit revealed their son had suffered a brain hemorrhage. The Hartford County State Attorney's Office believe the child was shaken. Court documents show that Tuveson has been released on home detention. According to the Baltimore County police, Tuveson has been suspended without pay and court records indicate a most recent salary of $75,000.

Maryland: Maryland State Police computer crimes investigators charged Jared Michael Lemon, 42, of Owings, Maryland, with the possession of child pornography, according to *The Bay Net*. During the investigation, it was revealed that Lemon is employed as an officer with the U.S. Capitol Police Department. On July 10, 2023, Maryland State Police arrested Lemon just before 5 a.m. and transported him to the Calvert County Detention Center where he is being held without bond. The investigation started in December 2022 when the Maryland State Police Prince Frederick Barrack started a probe into the possession of child pornography. A cyber tip from the National Center for Missing and Exploited Children revealed that an online user, who turned out to be Lemon, was uploading suspected child pornography. A search of Lemon's residence in December 2022 revealed evidence that Lemon had child pornography in his possession.

Massachusetts: According to *WBTS*, on June 30, 2023, officer Michael Morin, 38, was arrested by his own department for having an inappropriate relationship with a 17-year-old. Morin was also charged with possession of child sex images which were photographs that the young woman had sent him. Court documents show the alleged offense occurred on April 9. Despite his arrest, Morin has not yet been fired from his job. The department said that his employment status will be assessed once an investigation is complete. Morin has been on paid administrative leave since May 29.

Michigan: Matthew J. Rodriguez, 48, a former Warren Police Officer, has been charged with deprivation of rights under the color of law, according to the United States Attorney's Office, Eastern District of Michigan. On June 13, 2023, Rodriguez was working at the Warren Police Department as a jail officer. A carjacking suspect was brought into the department, and Rodriguez started to process the slight 19-year-old man. Surveillance video then shows Rodriguez striking the victim so hard that he falls backwards. Rodriguez, who is tall and solid, throws the victim against the wall, then to the floor. The beating continued with Rodriguez punching the victim in the head several times and then slamming the victim's head into the ground. The teenager, identified as Jaquwan Smith by the *Detroit Free Press*, was dragged by his hair and thrown into a cell by Rodriguez. The defendant now faces up to ten years in prison on civil rights charges. County Prosecutor Peter J. Lucido initially charged Rodriguez with misdemeanor charges of assault and battery and willful neglect of duty. As of July 10, 2023, Lucido planned to drop the Macomb County charges to allow the federal felony charges against Rodriguez to proceed.

Minnesota: Former Cloquet Police Officer Laci Marie Silgjord, 35, went above and beyond for a vulnerable woman in her community. The two met when Silgjord performed a welfare check on the 78-year-old woman in May 2020. Silgjord would regularly check up on her new "friend." Four months after they met, Silgjord showed up at the elder woman's bank and assumed the role of the woman's fiduciary thus gaining access to the victim's bank accounts. In late October 2020 the victim died, and Silgjord tried to inherit the victim's entire estate. The two problems with such a harebrained scheme were that Silgjord did not have a written estate plan from the victim and the deceased woman had surviving family members who alerted authorities quickly. Silgjord's relationship with the Cloquet police department ended in June 2022. *WDIO*, an ABC affiliate, reported that on July 21, 2023, Minnesota Attorney General Keith Ellison announced charges against Silgjord. The case was investigated and prosecuted by the Medicaid Fraud Control Unit.

Missouri: According to the Office of Public Affairs, U.S. Department of Justice, Rogeric Hankins, 37, a former private prisoner transport officer, was sentenced to nine years in federal prison by the Western District of Missouri on July 11, 2023. Hankins violated a female pretrial detainee's civil rights by sexually assaulting her in a public restroom. As an employee of Inmate Services Corporation, Hankins' duty was to pick up individuals who had been arrested on out-of-state warrants and take them to the state that had issued the warrant. On March 31, 2020, Hankins picked up a female pretrial detainee from a jail in Olympia, Washington. On April 3, before arriving at their destination of St. Paul, Minnesota, Hankins stopped at a rest stop and took the victim with him to use the bathroom. Once inside the bathroom, Hankins tried to remove the female's shirt. After forcing the

victim to perform carnal activities on him, he then bent her over the toilet and raped her.

Nevada: Caleb Rogers, 35, a Las Vegas police officer, was convicted on July 14, 2023, on every count of stealing close to $165,000 during three casino heists, as reported by the *Associated Press*. During one of those robberies, Rogers was armed with a department-issued loaded weapon. Because he displayed the weapon during the heist in February 2022, Rogers faces life in prison. Rogers has been on unpaid leave without police powers since his arrest. The Las Vegas Metropolitan Police Department said that his future with the department "will be determined at the conclusion" of an investigation. During the trial, Rogers was portrayed as a gambling addict, desperate to pay off massive debt. As a police officer, Rogers possessed a special set of skills and knowledge about robberies that he used to his advantage.

New York: *News 12 The Bronx* reported on July 14, 2023, that Middletown Police Officer Fred Slanovic pled guilty to a drunken assault on a 14-year-old boy. A few months earlier, on May 6, Slanovic had been drinking off duty when he attended a communion party at a local restaurant. According to officials, Slanovic approached the child and told him that he "put his father in jail" and that he would be next, despite having no basis with which to make the threat. Then, Slanovic slapped the boy and pushed his face into a brick wall. "My understanding is it was not a pretty scene," said Middletown Mayor Joe DeStefano. The teen suffered minor injuries according to prosecutors. Slanovic was suspended without pay and will have to participate in one year of alcohol abuse treatment while refraining from alcohol consumption. Plus, an order of protection was issued for the child. One could only wonder what the teen's punishment would have been had he been the one to slap the police officer.

South Carolina: South Carolina's Pill Take Back program provides locations where citizens can safely dispose of expired or unused medications, thereby reducing risks of accidental exposure or abuse. According to *WHNS*, the South Carolina Law Enforcement Division said that Oconee County Sheriff's Office Captain Charles Jeffrey Underwood, 48, was charged after he was caught stealing the drugs collected during a Pill Take Back program in Walhalla. The medication that is collected in this program is stored in a secure location within the sheriff's office apart from other evidence. Within four hours of Underwood's termination, he was arrested and booked at the Oconee County Detention Center. Underwood has been charged with misconduct in office and petit larceny. The stolen pills were worth less than $2,000.

Texas: On July 12, 2023, Rigoberto Barrientos, 46, filed a lawsuit against the Zapata County Sheriff's Office after he had his left leg amputated as a result of a violent arrest. According to the *Laredo Morning Times*, on April 26, 2022, officers were dispatched to the home of Barrientos' girlfriend because of a possible domestic disturbance. Barrientos' lawsuit claims that four deputies ripped his leg almost completely off his body during an unprovoked arrest without probable cause. The lawsuit gives gruesome details from the officer's body camera footage that describe the "crunch and crack of bone and popping of burst tendon, muscle, ligament, and skin when the four large, heavily muscled deputies combined their strength and body weight to split Mr. Barrientos' leg in half as they propelled his head and upper torso with deadly force toward the concrete slab below." His attorney Kevin Green said that they have no plans to release the footage because they would prefer that Zapata County elected officials take that step. Barrientos is suing the Zapata County Sheriff's Office for nearly $500,000 in damages.

Texas: On July 24, 2023, Marcus James Alexander, 37, a Bexar County Sheriff's Office deputy, turned himself in on a warrant for a second-degree felony, indecency with a child-contact. According to *KSAT*, investigators spoke with someone that told them that Alexander had fondled a juvenile, taken inappropriate photographs and stored them on his telephone. Officials said that this took place in June. An arrest warrant affidavit revealed that Alexander was "sweating profusely" and almost fainted twice when confronted. After investigators spoke with Alexander, a warrant was filed for his arrest. Alexander was then given a proposed termination, pending the conclusion of the investigation.

Virginia: According to the *Miami Herald*, on July 12, 2023, Michael Anderson, 52, a Bureau of Prisons lieutenant, pled guilty to violating a prisoner's civil rights by showing deliberate indifference to his serious medical afflictions resulting in his death. The 47-year-old prisoner at Federal Correctional Institution at Petersburg in Virginia identified as W.W. "was not doing well and was not himself," said a concerned cellmate, according to court documents. Anderson then visited the man's cell and said that he would get W.W. the medical help he needed. Although Anderson knew the severity of W.W.'s condition, he never alerted a member of the medical staff. A day later, Anderson was told by another officer that W.W. had fallen again. Still, Anderson failed to order treatment for W.W. On January 10, 2021, W.W. lay on the floor for two hours before he died. Two other staff at FCI Petersburg were previously charged in the Eastern District of Virginia of neglecting W.W.'s medical needs.

Washington: In January of 2021, Seattle police officers were on their way to arrest a group of protestors who were writing graffiti on the precinct's exterior wall when one of officer's body cam began filming the inside of the precinct. The video was then obtained as part of a lawsuit challenging the constitutionality of Seattle's graffiti laws. As the officer was leaving, his body camera swept across the room in the SPD's East Precinct. The images unintentionally caught on that video were shocking. The large "Trump 2020" flag was the first jaw-dropper, because it could be a violation of state law and department policy — officers are not supposed to favor any one political party while on duty. But then, even more disturbing, the video scrolls past a small, fake tombstone. On the tombstone is a clenched black fist and the name Darius Butts, his age, and the date he was killed by officers. On April 20, 2017, Butts was involved in a shooting with police officers after robbing a convenience store. Three officers were injured, but Butts was killed. Devastated, his mother Ann Butts said, "I didn't think SPD could take more from me. I was wrong."

Washington, D.C.: According to the United States Attorney's Office, on July 11, 2023, a jury found Charles Johnson II, 29, a former officer of the Metropolitan Police Department, guilty of all charges for repeated acts of sexual abuse of a child. Johnson was found guilty of sexually abusing a child who was nine then ten years old between November 2019 and September 2021. Johnson lived in the same home as the child and repeatedly forced her to perform sexual acts on him while performing sexual acts on the girl, the daughter of his girlfriend. Johnson's attorney argued that the charges were a retaliation maneuver after Johnson broke up with the girl's mother and moved out to pursue a relationship with another woman. Johnson is facing life imprisonment without the opportunity of release. Johnson's father and brother are also D.C. police officers according to the *Washington Post*.

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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 Celling 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**

Represent Yourself in Court: How to Prepare & Try a Winning Case, by Attorneys Paul Bergman & Sara J. Berman-Barrett, 10th Ed, Nolo Press, 600 pages. **$39.99**. Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court. **1037**

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**

Legal Research: How to Find and Understand the Law, 19th Ed., by Stephen Elias and Susan Levinkind, 368 pages. **$49.99**. Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises. **1059**

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**

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

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

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

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

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

Win Your Case, by Gerry Spence, 287 pages. **$21.95**. Relying on the successful methods he has developed over more than 50 years, Spence, an attorney who has never lost a criminal case, describes how to win through a step-by-step process **1092**

Arrested: What to Do When Your Loved One's in Jail, by Wes Denham, 240 pages. **$16.95**. Whether a defendant is charged with misdemeanor disorderly conduct or first-degree murder, this is an indispensable guide for those who want to support family members or friends who are facing criminal charges. **1084**

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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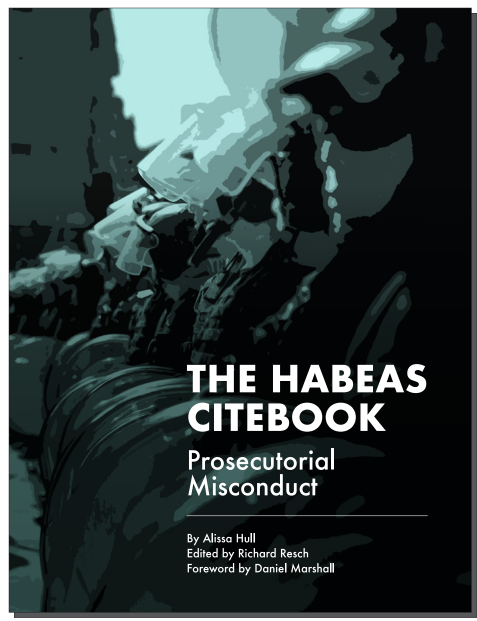

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