Criminal Legal News

PUBLISHED BY THE HUMAN RIGHTS DEFENSE CENTER

VOL. 7 No. 6
ISSN 2576-9987 (Print)
ISSN 2577-0004 (Online)

Dedicated to Protecting Human Rights

June 2024

Forensic Genetic Genealogy: Law Enforcement's Rapid Adoption Outpacing Adoption of Laws and Ethical Guidelines Regulating Its Use

by Matt Clarke

Millions of people have submitted oral cheek (buccal) swab samples to companies like 23andMe and Ancestry hoping to use their DNA to trace their ancestors and locate relatives in a process known as genetic genealogy. By comparing their DNA to that of other customers, the companies can determine whether, and to what degree, two customers are related. By comparing the DNA to that of known historic figures and their descendants, the companies can determine whether a customer has a famous ancestor. It is also possible to determine what geographic regions the customers' ancestors came from and susceptibility to some diseases.

More recently, law enforcement has been using the information in the same genetic genealogy companies' databases to establish the identity of unidentified human remains ("UHR") and identify suspects using DNA collected at a crime scene. This "off-label" use of genetic genealogy, known as forensic genetic genealogy ("FGG") or investigative generic genealogy, has been used to solve decades-old cold cases. FGG has also raised a red flag about the privacy of information stored in massive databases by internet-based companies

What Is DNA?

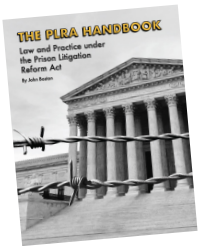
DNA is a complex molecule made up of chemical units known as nucleotides. Only four nucleotides—Adenine ("A"), Guanine ("G"), Cytosine ("C"), and Thyinine ("T")—are used in constructing the molecule of DNA. The molecule consists of two long strands that are twisted in a spiral called a double helix, somewhat like a ladder twisted into a spiral. The nucleotides along the length of the strands are strongly bonded to one another but only weakly bonded to the nucleotides across from them in the other strand. Like in real life, the legs of the ladder are much stronger than the rungs. This arrangement allows an enzyme to open up (or unzip) the DNA ladder along its rungs, separating the strands.

The nucleotides will strongly bond to any other nucleotide that is next to it in the strand (leg of the ladder), but A will only establish a weak bond with T in the other strand (across the rung of the ladder). Likewise, G will only establish a weak bond with C. Thus, an unzipped strand of DNA that is awash in a soup of nucleotides will force those nucleotides to assume a specific conformation while building a complementary strand: a T for each place that an A appears on the unzipped strand; a G for a C; an A for a T; and a C for a G. This is the exact conformation of the other unzipped strand of DNA. Thus, the two unzipped DNA strands can produce two DNA strands that are identical to the original molecule and accomplish replication.

DNA contains the basic coding for life. The number of nucleotides along with their sequence make up the genome that is unique to a species. The human genome consists of 3.2 billion nucleotides contained within 46 molecules of DNA, each wrapped around a protein core in a configuration called a chromosome. Each person inherits 23 chromosomes from each parent with similar chromosomes associating into 23 pairs of chromosomes in most cells.

It took 10 years and $3.2 billion to map the human genome, an effort that was completed in 2003. Within five years, inexpensive genotyping chips capable of determining hundreds of thousands of Single Nucleotide Polymorphisms ("SNPs," pronounced "snips") appeared on the market. The number of SNPs genetic genealogy companies identify in their propriety tests are limited to one million due to cost considerations. Most identify around 650,000 SNPs, less than 1% of the validated human SNPs. They focus on the protein-coding regions of the chromosomes, parts responsible for the attributes that make one human being different from another such as

INSIDE

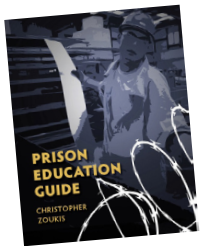


The PLRA Handbook: Law and Practice under the Prison Litigation Reform Act

John Boston ☐ ***Prisoners $84.95*** ☐ ***Lawyers/Entities $224.95***

ISBN-13: 979-8-9854138-0-9 • Paperback, 576 pages

The PLRA Handbook: Law and Practice under the Prison Litigation Reform Act 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.

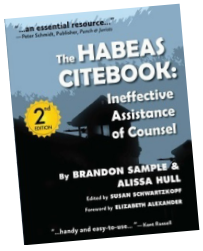


Prison Education Guide ***$24.95***

Christopher Zoukis

ISBN: 978-0-9819385-3-0 • Paperback, 269 pages

Prison Education Guide is the most comprehensive guide to correspondence programs for prisoners available today. This exceptional book provides the reader with step by step instructions to find the right educational program, enroll in courses, and complete classes to meet their academic goals. This book is an invaluable reentry tool for prisoners who seek to further their education while incarcerated and to help them prepare for life and work following their release.

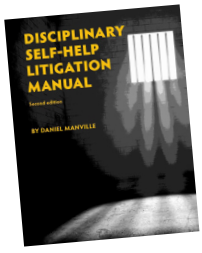


The Habeas Citebook: Ineffective Assistance of Counsel, Second Edition ***$49.95***

Brandon Sample & Alissa Hull

ISBN: 978-0-9819385-4-7 • Paperback, 275 pages

The Habeas Citebook: Ineffective Assistance of Counsel is the first in a series of books by Prison Legal News Publishing designed to help pro-se prisoner litigants identify and raise viable claims for potential habeas corpus relief. This book is an invaluable resource that identifies hundreds of cases where the federal courts have granted habeas relief to prisoners whose attorneys provided ineffective assistance of counsel.

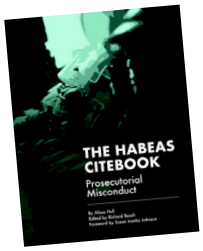


Disciplinary Self-Help Litigation Manual, Second Edition ***$49.95***

Dan Manville

ISBN: 978-0-9819385-2-3 • Paperback, 355 pages

The Disciplinary Self-Help Litigation Manual, Second Edition, by Dan Manville, is the third in a series of books by Prison Legal News Publishing. It is designed to inform prisoners of their rights when faced with the consequences of a disciplinary hearing. This authoritative and comprehensive work educates prisoners about their rights throughout this process and helps guide them at all stages, from administrative hearing through litigation. The Manual is an invaluable how-to guide that offers step-by-step information for both state and federal prisoners, and includes a 50-state analysis of relevant case law and an extensive case law citation index.



The Habeas Citebook: Prosecutorial Misconduct ***$59.95***

Alissa Hull

ISBN-13: 978-0-9819385-5-4 • Paperback, 300 pages

The Habeas Citebook: Prosecutorial Misconduct is the second in PLN Publishing's citebook series. It's designed to help pro se prisoner litigants identify and raise viable claims for potential habeas corpus relief based on prosecutorial misconduct in their cases. This invaluable title contains several hundred case citations from all 50 states and on the federal level, saving readers many hours of research in identifying winning arguments to successfully challenge their convictions.

☐ The PLRA Handbook
☐ Prison Education Guide
☐ The Habeas Citebook
☐ Disciplinary Self-Help Litigation Manual
☐ The Habeas Citebook: Prosecutorial Misconduct

Order by mail, phone, or online. Amount enclosed _____

By: ☐ check ☐ credit card ☐ money order

Name _____

DOC/BOP Number _____

Institution/Agency _____

Address _____

City _____ State _____ Zip _____

Human Rights Defense Center
Dedicated to Protecting Human Rights

PO Box 1151 • Lake Worth Beach, FL 33460 • Phone # 561-360-2523
WWW.PRISONLEGALNEWS.ORG • WWW.CRIMINALLEGALNEWS.ORG

Criminal Legal News
a publication of the
Human Rights Defense Center
www.humanrightsdefensecenter.org

EDITOR
Paul Wright

SENIOR MANAGING EDITOR
Richard Resch, JD

ASSISTANT EDITOR
Jordan Arizmendi

COLUMNIST
Dale Chapelle

CONTRIBUTING WRITERS
Anthony Accurso, Douglas Ankney, Casey Bastian, Matthew Clarke, Jo Ellen Nott, David Reutter, Sam Rutherford, Michael Dean Thompson

ADVERTISING COORDINATOR
Patricia Lamarca

HRDC LITIGATION PROJECT
Jay Hurst - Litigation Director
Josh Martin - Staff Attorney

***CLN* is a monthly publication.**

A one year subscription is $48 for prisoners and individuals, and $96 for professionals and institutions. Subscriptions will be pro-rated at $4 each; do not send less than $24 at a time; pro-rated subscriptions are only available to prisoners. All foreign subscriptions are $100 sent via airmail. *CLN* accepts credit card orders by phone. New subscribers please allow four to six weeks for the delivery of your first issue. Confirmation of receipt of donations cannot be made without an SASE. HRDC is a section 501 (c)(3) non-profit organization. Donations are tax deductible. Send contributions to:

Criminal Legal News
PO Box 1151
Lake Worth Beach, FL 33460
561-360-2523
info@criminallegalnews.org
www.criminallegalnews.org

CLN reports on state and federal appellate court decisions and news stories related to substantive criminal law, criminal procedure, official misconduct and constitutional rights within the criminal justice system, and the police state. *CLN* welcomes all news clippings, legal summaries, and leads on people to contact related to the foregoing issues.

Article submissions should be sent to - The Editor - at the above address. We cannot return submissions without an SASE. Check our website or send an SASE for writer guidelines.

Advertising offers are void where prohibited by law and constitutional detention facility rules.

hair color, eye color, skin tone, and many other differences that may not be readily visible.

Looking at SNPs is simply a way of focusing on the places where DNA tends to be different between different people. Since any of the four nucleotides can appear at those single points along the strand, it can take on many polymorphic different appearances morphisms. That makes those locations, which might, for instance, determine the shape of an eye or a hairline or how the immune system recognizes something as belonging in the body, unique among people who are not identical twins.

Since our DNA is a fairly random mixture of the DNA belonging to our parents, we share a lot of similar SNPs with them and with anyone else we are closely related to. The more distant the relationship, the fewer SNPs we have in common.

First Law Enforcement Use of DNA

In 1984, scientist Alec Jeffreys developed methods of using enzymes to cut DNA into fragments and gel electroporsis to separate the fragments according to weight and electrical charge, yielding a unique DNA pattern somewhat similar to a bar code. It was often, and somewhat misleadingly, labeled a "DNA fingerprint." That early method, restriction fragment length polymorphism ("RFLPJ"), required large sample sizes and relatively uncontaminated samples, limiting its usefulness to law enforcement, which often deals with small, contaminated samples collected from a crime scene. It could sometimes be used to find the perpetrator among a group of suspects, but it could not identify someone who was not already in the suspect pool.

Despite its limitations, the DNA fingerprinting method was soon used by police in the U.K. to identify the perpetrator of two rape-murders. However, it required police to request that the male population between 17 and 34 years of age in Narborough to submit to "voluntary" DNA fingerprinting, so they could either identify the perpetrator outright or focus their attention on those who refused to be tested. Social pressure led over 4,500 men to cooperate.

The perpetrator had convinced a coworker to provide a blood sample in his place. Police learned of the deception, and their investigation led to his arrest and conviction. The testing also cleared the former prime suspect whom police had badgered into giving an impassioned false confession.

It is doubtful whether such a "DNA dragnet" could pass constitutional muster in the U.S. Nonetheless, DNA fingerprinting using the RFLP method was used to identify suspects and gain convictions in many U.S. courts, becoming the "gold standard" for forensic evidence for a decade.

The Beginnings of DNA Databases

In 1987, Jeffreys developed a DNA profile that could be derived from smaller samples than were required for a DNA fingerprint and could be coded as a series of numbers, making it possible to create DNA profile databases.

Over time, scientists developed methods to amplify small samples, the polymerase chain reaction ("PCR"), and clean up contaminated and mixed samples to a degree, increasing the usefulness of DNA to law enforcement. However, several different commercial DNA laboratories had competing PCR-based systems looking at different parts of the human genome that were not necessarily compatible with one another.

CODIS Arrives

To increase the usefulness of DNA identification, it was necessary to standardize which parts of the DNA strand was being examined so that one lab's results could be compared to that of another. Optimally for such purposes (but certainly not so for privacy and civil rights considerations), the government would collect the DNA profiles of everyone in the country and put them into a database that could be used to compare them to DNA from crime scenes and unidentified bodies. This is unlikely to happen in the U.S. due to privacy concerns constitutional safeguards, but standardization of DNA profiles is clearly possible and only requires that a national organization take the lead and set the standards.

In 1990, the FBI began a pilot software program that, in 1994, Congress authorized its implementation as the Combined DNA Index System ("CODIS"), a national database of standardized DNA profiles from people who have been arrested or convicted of crimes created by unifying the federal database with those of the states. 42 U.S.C. § 14132(a) (1994) (later transferred to 34 U.S.C. § 12592). Currently, CODIS contains the profiles of 14.7 million convicted persons, 4.4 million arrestees, and 1.1 million forensic subjects. However, despite its collection of

millions of profiles, CODIS cannot identify a person whose profile is not in its database of well under 10% of the U.S. adult population.

The DNA testing method used for CODIS profiles was PCR-amplified Short Tandem Repeat ("STR") analysis. A CODIS profile was created using PCR and gel electrophoresis to examine 20 highly-variable STR locations ("loci") in non-protein-coding sections of the DNA, yielding 40 datapoints.

The effectiveness of CODIS was limited by the small percentage of the population in the database. Further, CODIS profiles could not be used to identify persons genetically related to the donor of the unknown DNA sample from a crime scene or UHR unless the relationship was as close as a father and son. Further, the perpetrators of the type of crime most likely to leave DNA samples behind—sex offenses and murders—were also among the least likely to have previously been convicted of a crime and thus be in the CODIS database. What was needed was a larger database and testing that could identify people genetically related to the donor of the unknown sample. Surprisingly, the private sector would soon provide just that.

Beginnings of Forensic Familial DNA Testing

Despite its limitations, the first forensic familial DNA search was accidentally conducted by British police on an STR database when a submitted sample from a decades-old cold case partially matched an STR profile in 2002. The profile on the database turned out to be that of the son of the perpetrator of multiple rapes.

Familial searches require different software from standard CODIS-matching searches. In 2008, California became the first state to implement familial DNA searching on its STR DNA databases. In 2010, Lonnie Franklin, Jr. was identified via a familial DNA search on a California government database as the "Grim Sleeper," who was responsible for at least 10 murders of young women in Los Angeles. Franklin's son's DNA had recently been added to the database because of a weapons charge. The closeness of his DNA to that of the Grim Sleeper led police to initiate surveillance on his father. A discarded piece of pizza provided the sample necessary to prove he was the murder and rapist who had eluded law enforcement for decades.

Genetic Genealogy Comes Along

With the advent of cheap genetic profiling, several companies sprang up with the goal of tracing ancestry (and possible risk of genetic disease) via direct-to-consumer ("DTC") DNA profiling in which a customer submits an oral swab for SNPs DNA profiling and placement of the DNA profile on the company's database. 23andMe and Ancestry are the best-known genetic genealogy companies. Both maintain "closed" databases, only allowing profiles developed by the company on their respective database. While both also stated that they would never share the information they obtained from their customers' samples with third-parties, other companies made no such promise. Further, recent events have shown both companies to be vulnerable to hacking and manipulation of their systems to gain access to, or the ability to infer, SNPs profiles of customers.

GEDmatch is a type of non-DTC genetic genealogy company with an "open" database. Its customers get a DNA profile from a DTC company then upload it into the GEDmatch database without charge. GEDmatch algorithms allow comparisons of profiles developed by different companies, making it more likely that useful information is discovered.

FamilyTreeDNA is another company that is both DTC and has an open database. Customers can submit DNA buccal swabs to FamilyTreeDNA and have them develop a profile or upload a profile developed by another company.

The Genealogy Component of Genetic Genealogy

Whereas genetics is a relatively new science with the ability to profile DNA being newer still, genealogy itself is a centuries-old study that evolved from "a sleepy, prim discipline of aristocratic origins" into a field primarily practiced by self-educated hobbyists who are interested in tracking down their own ancestors by building out a family tree. Perhaps the lack of professional genealogist can be explained by the requirement of traditional genealogy.

Genealogists spend many hours poring over records that might mention ancestors of the target person. These traditionally include government records such as birth and death certificates, marriage licenses, newspaper articles and obituaries, and school and church records. The advent of the Internet and search engines sped up the processing of those records while adding additional sources of information such as social media accounts. One can only speculate how the emergence of artificial intelligence will affect the future of genealogy. However, the labor intensity of genealogy as it currently stands makes it an expensive undertaking and makes doing it yourself attractive. Hence, the skew toward hobbyist genealogists.

Law Enforcement Shocks Companies by Secretly Using FGG

In April 2018, California law enforcement submitted a DNA sample collected from the victim of a cold case rape/murder to GEDmatch and used the results to identify the Golden State Killer, a serial killer who committed 13 murders, at least 50 rapes, and over 100 burglaries in California between 1974 and 1986. The killer was identified as retired police officer Joseph James DeAngelo, Jr., who pleaded guilty to the murders in exchange for a life sentence.

The law enforcement officials did not identify the submitted DNA profile as coming from a murder case or being in any way related to crime solving. They did not identify themselves as law enforcement to GEDmatch. This "off-label" use of FGG shocked the FGG companies, which had repeatedly assured users that their privacy would be respected. Intense media attention about the Golden State Killer case put that claim in doubt. More importantly, none of the FGG companies had a policy regarding law enforcement use of their databases. However, the public's response to finding a serial killer using FGG was overwhelmingly positive. New entries in the GEDmatch database surged.

In May 2019, GEDmatch modified its policies to allow law enforcement to use its database to identify perpetrators of sexual assaults and murders. Less than a year later, it violated that policy by allowing law enforcement to use its database in a case that was neither a sexual assault nor murder. This led the company to again modify its policy to permit law enforcement to use its database to solve other violent crimes, such as robbery and aggravated assault, provided they fell within the FBI's definition of "violent crime." It also allows authorized organizations to use its database to identify human remains. This has made GEDmatch the go-to FGG database for law enforcement.

In May 2019, GEDmatch instituted an opt-in for its users to allow law enforcement

to use their DNA profile. The company set the default as "opt-out" for all current and new users, but between 75% and 80% of new users opted in (compared to less than 25% of prior users). Further, after all of the publicity GEDmatch received as a result of the Golden State Killer case, the number of new users uploading a DNA profile daily grew from 1,500 to 5,000.

In 2018, FamilyTreeDNA adopted a policy permitting law enforcement to use its database to identify violent criminals and human remains. It is the only major DTC company to do so. Although it has an opt-out option, FamilyTreeDNA set all user settings and default settings to opt-in, permitting law enforcement unfettered access to virtually its entire database.

The Contribution of Citizen Scientists

Hobbyist or "citizen-scientist" genealogists have been crucial and necessary components to many cases using FGG, but the path to clearing a case has not always been smooth. In one of the earliest cases, in 2011, physicist and former NASA contractor Colleen Fitzpatrick worked with detectives in Washington State to help identify the killer of a high school girl using Y-DNA. She concluded the killer was a descendent of Robert Fuller. That tip led police to suspect a neighbor and family friend who was eventually proven innocent.

In 2018, Idaho Falls detectives secured a warrant compelling Ancestry to allow access to its database in an attempt to identify the person who raped and murdered 18-year-old Angie Dodge. They wanted to know the name of a man who had submitted his Y-DNA profile because it showed a close genetic relationship with DNA recovered from the crime scene. The disclosure led them to Michael Usry, who was subsequently proven innocent using STR DNA profiling.

Ancestry closed its open database because of the Usry incident and adopted a closed database model.

Even the much-celebrated case of the Golden State Killer was not without its hiccups. According to Barbara Rae-Venter, she had been pursuing genetic genealogy as a postretirement hobby in March 2015, when Deputy Peter Headley contacted her. He wanted her to help with the identification of Lisa Jensen, a woman who had been abducted as a child and whose identity was then unknown. Solving the Jensen case led Headley and Rae-Venter to discover that whoever had abducted Jensen was a prolific serial killer.

The success in the Jensen case prompted Paul Holes, the lead criminal investigator in the Golden State Killer case, to ask Rae-Venter to work on the case. Rae-Venter's only qualifications were that, since retiring from being a patent attorney, she had been assisting a newfound cousin with genealogy. She had also been volunteering as "search angel" who uses DNA matches to help build family trees and solve genealogy issues.

Cynthia "CeCe" Moore is perhaps the most famous FGG genealogist. Moore began her career helping people use DTC genetic databases to solve maternity ward mix-ups, help adoptees and foundlings find birth parents, and identify unknown fathers. She is known for her "outside-the-box" thinking when tracking down genetic ancestors, earning her the nickname, "Miss Marple of Genealogy."

In 2013, Moore established DNA Detectives, a group designed to bring together parentage seekers and those who could either solve their cases or train them to solve it themselves. It has more than 170,000 members on Facebook.

For years, Moore was wary of applying her techniques to criminal cases. Then FGG was used to solve the Golden State Killer case. The story's widespread exposure and

overwhelmingly positive reception calmed her qualms about the database users' consent and, within days, she was working on her first murder case.

Moore is known for the first FGG-based exoneration of an innocent man and the first jury conviction resulting from FGG. She was featured on *60 Minutes* in October 2018. The segment focused on cold-case breakthroughs. This resulted in a deluge of requests for assistance.

Moore also co-founded the Investigative Genetic Genealogy Accreditation Board in an attempt to develop standards and bring some order into the unorganized and underregulated FGG field, which has been described as "the wild west" by FGG experts. Moore is personally involved in closing over 200 FGG cases and is currently the chief genealogist for Parabon Labs, a new type of FGG company that specializes in helping law enforcement identify suspects and UHRs using FGG.

What Are the Privacy Concerns?

The problem with unfettered access to genetic genealogy databases is that they contain a wealth of information about the profiled individuals, well beyond just their relatives. The companies claim they can determine the propensity for certain medical conditions, personality traits, food preferences, athletic abilities, and other personal characteristics from their SNPs profiles. One company claims it can determine a person's facial appearance, including "skin color, eye color, hair color, freckles, [geographic] ancestry and face shape."

To conduct an FGG search, law enforcement must necessarily search the records of many individuals who are not involved in crime. They may also be led to the wrong person, as was the case with Michael Usry. Even in the seminal case of the Golden State Killer, two other men were asked by police to submit DNA samples before the actual perpetrator was identified. Whether they were considered suspects by police or merely being used to attempt to eliminate branches of the family tree is disputed, but it is likely that they, like Usry, were quite nervous after having been approached by police and asked for a DNA sample in connection with a murder. It must have been a profound relief when, weeks later, the test results eliminated them as suspects.

In this vein, FGG searches come very close to the general search warrants prohibited by the Fourth Amendment to the U.S. Constitution. The U.S. Supreme Court has yet to rule on privacy concerns connected to FGG searches. The closest case to date was its approval of taking buccal swab DNA samples from persons arrested for or convicted of a crime for the purpose of a entering a profile in CODIS. *Maryland v. King*, 569 U.S. 435 (2013).

King predated FGG by several years and differed in that it involved CODIS profiles, which contain only a tiny fraction of the information contained in SNPs profiles, and people arrested by police, not ordinary people participating in genetic genealogy. Even so, in a dissenting opinion, Justice Scalia rather presciently questioned the practice of taking DNA from arrestees for purposes other than identification in the crime they were charged with and creating a database of the DNA profiles derived from them.

"Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection," wrote Scalia, referencing the Utilitarianist John Stewart Mill's 19th-century design for a prison in which guards could see into the isolated prisoners' cells at all times that had to be abandoned because it drove the prisoners "quite mad." University of Maryland Carey School of Law professor Natalie Ram, who is an expert on genetic privacy, calls FGG "a giant fishing expedition that fails the particularity requirement of the Fourth Amendment: that law enforcement searches be targeted and based on reasonable individualized suspicion." According to Ram, FGG "is fundamentally a search of all of us every time they do it." The panopticon is currently synonymous with both an idea that sounds great but fails in its execution and also a total lack of privacy.

Privacy Concerns in Forensic Genetic Genealogy

The largest DTC companies, 23andMe and Ancestry—which combined have 32 million profiles in their databases—have policies prohibiting law enforcement use of their databases without a court order. The problem with that is there may not be a way to tell that a sample was submitted by law enforcement since both companies allow customers to use pseudonyms. This is exactly what happened in June 2021 when the Riverside Cold Case Homicide team identified the victim of a 1996 homicide using MyHeritage without a court order—an explicit violation of company policy requiring a court order for any law enforcement use of its database.

"The case presents an example of 'noble cause bias,' in which the investigators seem to feel that their objective is so worthy that they can break the rules in place to protect others," wrote veteran genetic genealogist and privacy advocate Leah Larkin.

23andMe has repeatedly been the target of successful computer hacks that exposed customer information. Also, 23andMe has recently come under economic pressure as the early adopter market for DTC genetic genealogy dried up, and despite corporate statements claiming it would never make customers' DNA profiles available to third parties, it listed the possibility of selling the profiles among its assets. This emphasizes the fact that corporate policy is a poor substitute for constitutional protection when it comes to privacy. Corporate policies are subject to change at any time due to economic pressures, changes in corporate leadership, or acquisition by another company. This is exactly what happened when, in January 2021, GEDmatch changed its policy to opt in all of its profiles for UHR identification searches without notification to or input from its customers.

All of the companies maintaining databases claim that customers' genetic data is not at risk of exposure because they do not provide law enforcement or anyone else raw SNPs profile data. However, it was recently revealed that there were tools in the databases that allowed users to infer the SNPs profile of the match being examined and a "loophole" in the GEDmatch software that allowed law enforcement to access and use the profiles of users who had opted out.

The loophole came to light when Cairenn Binder, a genealogist who heads up the Investigative Genetic Genealogy Center's certificate program, was involved in simulated trial testimony for a presentation by attorney and DNA expert Tiffany Roy called "In The Hot Seat." The idea was to acclimate genealogists to giving trial testimony, and the single instruction Roy had given was "do not lie."

Roy, playing the part of defense counsel during cross-examination, asked Binder if she was aware of a loophole in the GEDmatch software that allowed access to opted-out profiles. Binder not only "testified" that she was aware of the loophole but admitted having used it around a dozen times herself. The DNA Doe Project and even such FGG luminaries as Moore have also admitted to having used the loophole. Some even admitted covering up their use of the loophole.

"If we can't trust these practitioners, we certainly cannot trust law enforcement. These investigations have serious consequences; they involve people who have never been suspected of a crime," said Roy, who believes a search warrant should be required for an FGG search. "Anything less is a serious violation of privacy."

Networked Privacy

Uploading your SNPs profile to a genetic genealogy database also uploads 50% of the DNA profile of your parents, siblings, and children and a lower percentage for more distant relatives. If only a few close relatives upload their profiles, your entire profile will be in the database, albeit distributed among the relatives' profiles. This raises a question of whether you have any privacy rights or interests when a relative, especially a close relative, uploads their DNA profile.

Moore first ran into this question when she attended a genetics conference in 2012 and asked two Native American women who were on a panel whether they had taken a DTC test. "The women explained they wouldn't take a test without consulting everybody else in the tribe, because they'd be making the decision for everybody," said Moore.

It was an eye-opening moment for Moore, who had previously not considered the fact that people who were uploading their profiles to SNPs databases were effectively making the decision for other people to have their profiles in the database. This now applies to the entire country, Moore noted.

"It all happened under the radar, and it doesn't really matter if you're opposed: It's a collective decision that's already been made. A lot of what the privacy advocates have said I agree with. But 30 million people made that choice for everybody else."

This represents what tech anthropologists call "networked privacy," which really means lack of privacy as the term describes how you are exposed and your choices diminished or undone when others share things about you that you did not want to make public. Thus, the problem of privacy, or lack thereof, in FGG searches has become one that is as much a question of philosophy as it is one of law.

Law Enforcement Secrecy About Using FGG

As noted above, in a successful case involving a FGG search for a perpetrator, the last step is typically police obtaining a discarded item containing DNA that they use to confirm the perpetrator's identity using a CODIS profile. It is well established that police can retrieve discarded items and test them without a warrant, *California v. Greenwood*, 486 U.S. 35 (1988), and the admissibility of CODIS

profiles is well established, *Maryland v. King*, 569 U.S. 435 (2013). So, those aspects of the identification are rarely challenged.

The problem is that police usually start their narratives, and the documents which prosecutors turn over to the defense, with the successful CODIS search, omitting the use of FGG altogether. Thus, FGG has not been the subject of much in the way of court challenges, and little is known about how the investigations actually proceed.

"We don't actually know how many people who have placed their data in these online databases are subject to forensic uses," said Stephanie Malia Fullerton of the University of Washington School of Medicine's Department of Bioethics. "We also don't know how these partial genetic matches are used, and we can speculate about the possible harms, but we don't know what exactly is involved or who is contacted."

In a few cases, including the celebrated Golden State Killer case, it is known that police or the FGG company or genealogists working with them have approached people genetically related to the suspect and asked them to submit a DNA sample or, in some cases, even mailed a SNPs DNA sampling kit under the false pretense of being a gift from a relative. Police claim this is a part of narrowing down the genealogy search by eliminating branches of a family tree. However, due to the aforementioned secrecy, none of these methods have been subject to court scrutiny.

A recent court decision reinforced the secrecy surrounding law enforcement use of FGG. In *Buzzfeed, Inc. v. United States Department of Justice*, 2023 U.S. Dist. LEXIS 185893 (U.S.D.C. 2023), the court ruled that the U.S. Department of Justice could exempt much of the information requested by *Buzzfeed* relating to its communications and contracts with companies involved in FGG. The court concluded that the documents were exempted from FOIA disclosure because the information was "confidential," and its release could cause harm to the company and might be used in future criminal prosecutions.

Court Challenges to FGG Searches

In one of the rare published cases involving a defendant challenging the use of a FGG search based on privacy, the Court of Appeals of Washington upheld the trial court's denial of a criminal defendant's motion to suppress FGG search results because the defendant, who was convicted of felony murder in connection with the 1993 rape and murder of a 12-year-old girl, had "no privacy interest in commonly held DNA that a relative voluntarily uploaded to a public database that openly allowed law enforcement access." *State v. Hartman*, 534 P.3d 423 (Wash. App. 2023). The court also ruled that the defendant had no privacy interest in DNA abandoned at the crime scene.

In *State v. Boretree*, 2021 Ohio App. LEXIS 2828, the court upheld the trial court's denial of a general challenge to the admissibility of a FGG search performed by AdvanceDNA under contract with police that was used to identify him as the perpetrator of a 1993 attempted murder in connection with kidnapping and rape. However, the conviction was later reversed by the Supreme Court of Ohio on statute of limitations grounds. *State v. Bortree*, 212 N.E.3d 874 (Ohio 2022).

In an interesting and related civil case, *Leslie v. City of New York*, 2023 U.S. Dist. LEXIS 49775 (S.D.N.Y. 2023), residents of New York City are challenging, on Fourth Amendment grounds, the NYPD's warrantless practice of covertly collecting DNA from a person's discarded trash, using it to obtain a CODIS or FGG profile, then maintaining that profile on the city's database for years regardless of whether a person is charged with (or even suspected of) committing a crime. The targeted person could, for instance, merely be suspected of being a gang member or associated with a gang. If successful, this lawsuit may chart a path for challenging similar DNA collection in criminal cases.

The initial cases make it seem unlikely that courts will require warrants for FGG searches. But the higher courts have yet to weigh in on the matter.

What Standard to Use?

A major question in future court decisions regarding privacy and FGG searches will be what the appropriate standard is. The courts will likely use one of two existing standards in analyzing FGG privacy interests. The first is the "reasonable expectation of privacy" standard of *Katz v. United States*, 389 U.S. 347 (1967). In deciding whether a telephone booth could be bugged without a search warrant, the *Katz* Court determined that, to have a legitimate Fourth Amendment claim, a person

must have "an actual (subjective) expectation of privacy" that "society is prepared to recognize as reasonable [objective]," such as one has when using a phone booth. This "reasonable expectation of privacy" test was thought to replace the previous test based on whether the intrusion was a common-law "trespass" and became the standard for analysis of Fourth Amendment issues for the next 34 years.

Technology forced the Court to re-examine *Katz*'s declaration that the Fourth Amendment protected people, not places, when faced with police using thermal imaging to detect relative amounts of heat within a house. The Court in *Kylo v. United States*, 533 U.S. 27 (2001), held that the imaging constituted an intrusion into a constitutionally-protected space, the home.

Then, in a case that took many legal experts by surprise, in *United States v. Jones*, 565 U.S. 400 (2012), the Court clarified that "the *Katz* reasonable-expectation-of-privacy test had been added to, not substituted for, the common-law trespassory test" when it held that placing a GPS tacking device on a car was a search in that it was a trespass upon *Jones*' property. Thus, challenged police conduct must pass both the *Katz* and *Jones* tests in order to be constitutional.

Since *Jones*, the *Katz* test has been applied to a collection of cellphone location and cell-site location information. *See Carpenter v. United States*, 585 U.S. 296 (2018). It seems likely that, since there is no physical intrusion upon constitutionally protected places involved in a FGG search, the *Katz* test will be applied to a privacy-based challenge to FGG searches. That seems to be what the *Hartman* Court did without specifically stating it. However, Hartman's SNPs profile revealed that he was bald and likely had bipolar or substance abuse disorder, which constitutes sensitive medical information for which it could be argued one has a reasonable expectation of privacy. Only time will tell whether such an approach will be successful.

How Defense Attorneys Can Challenge FGG Searches

Besides the aforementioned privacy issues, defense attorneys could challenge FGG searches on a number of issues. One of which is the lack of certification of genealogists and the lack of validation of both their methods and the scientific methods used in FGG. Therefore, a defense attorney contemplating a challenge to how FGG was used in a specific case must use the tools of discovery to determine who played what role in the FGG investigation and what methods were used as well as any validation studies that have been performed to determine the accuracy and limitations of those methods.

It is also important to determine whether the samples used were degraded or mixtures, both of which can increase the likelihood of lab errors. Further, mixtures can implicate another suspect. Thus, it is important to determine how many profiles were generated by the sample.

The similarity of two SNPs profiles is measured in centiMorgans ("cMs"), a measure of how likely it is for a longer DNA segment to be passed on to a descendent intact. The closer the relationship, the longer segments are shared. Parents, children, and siblings typically share 2,000 to 3,600 cMs of their DNA. First cousins share only 425 to 1,100, but that is also in the range shared by grandparents/children, great-grandparents/children, half-siblings, and great uncles/aunts. Therefore, it is essential that defense attorneys discover the cMs of each profile used to trace the alleged family tree of a suspect profile and the logic used to assign an identity to the profile based on the cMs.

Other Complicating Factors for FGG Searches

The very sensitivity of DNA collection may yet be its worst enemy. As shown in the Amanda Knox case, small amounts of DNA can be easily transferred to another person (brush transfer) and from that person to an object never touched by the DNA donor (secondary transfer), leading to a wrongful conviction. Something similar happened in Germany when a contaminated cotton swab had police erroneously looking for a murderer in the Romani ("Gypsy") community for two years.

Scientists seeking better ways to track sea turtles discovered human DNA in all kinds of unexpected places—creek water, snow, honey, and even floating around in the air in "surprising" levels. The DNA was of high enough quality to derive CODIS or SNPs profiles. Further, DNA testing has already been in use to monitor disease levels in waste water, and the identifiable DNA of 40 different humans were found on a dog's head fur. Thus, there are many potential sources of DNA contamination in everyone's daily environment.

The scientists who have been seeking to further explore the origin and content of human DNA in the environment ("eDNA") have run into the roadblock of ethics panels rejecting research proposals based on medical and scientific ethics. Ironically, law enforcement operates under no such constraints.

"There's an imbalance in almost all systems of the world between what law enforcement is allowed to do, versus publicly funded research, versus private companies," said University of Vienna professor Barbara Prainsack, who studies the regulation of DNA technology in medicine and forensics.

"It's a total wild west, a free for all," said New York University School of Law professor Erin Murphy, who specializes in the use of new technologies in the criminal legal system. "The understanding is police can sort of do whatever they want unless it is explicitly prohibited."

What to Expect in the Future

Police estimate there are over 200,000 unsolved major criminal cases involving DNA evidence in the U.S. The enormous power of FGG to solve even decades-old cases makes it unlikely that the courts will subject it to any meaningful restraints. It is possible that a search warrant will be required, but such a requirement is unlikely to come from the courts. Instead, it is more likely that legislative bodies enact regulations concerning FGG searches. Two have already done so.

Montana requires that a search warrant be issued before performing any kind of DNA database search. Mont. Code 44-6-104 (2021). Maryland's regulations are more comprehensive, requiring judicial authorization for FGG searches and for covert DNA collection, limiting the types of crimes FGG searches may be used to investigate, and requiring law enforcement to first pursue all reasonable leads and use government DNA databases before seeking FGG authorization. Md. Code Crim, Proc. § 17-101 (2022).

The U.S. Department of Justice has also issued interim rules limiting FGG searches to violent crimes and prohibiting FGG results from being the sole basis for an arrest. However, the rules have not been finalized or formalized and only apply to federal agencies and other agencies that receive federal funding. Also, the FBI has already ignored the DOJ interim rules in at least one case.

FGG searches may also be affected by questions regarding the "informed consent" being given by customers to use their SNPs profiles for law enforcement purposes. Bio-

ethicists have noted that few people actually change default settings or read the terms of service, although they become binding under the DTC companies' so-called "wrap contracts" (basically, if you use the service, you are accepting the terms of service).

There is support for the bioethicists' claim. When GEDmatch changed all users' settings to opt-out of law enforcement use but allowed them to change the setting to opt-in, fewer than one in five did so. Yet, three out of four new GEDmatch users, whose default setting is opt-in, keep the setting at opt-in. Perhaps this is why the EU General Data Protection Regulation required FamilyTreeDNA to change its default to opt-out for its European users. The default for U.S. users remains opt-in.

State legislatures will be the most likely source of privacy protection with respect to FGG searches in the future. Hopefully, Maryland's clearly written and comprehensive statute will serve as a template for similar statutes in other states. Congress could enact similar legislation. This is unlikely to happen in the near future given its near inability to pass meaningful legislation due to the strong partisan divide in Congress.

Examples of Cases Cleared and Bodies Identified Using FGG

The power of FGG is hard to overstate given the astonishing and growing number of cases cleared using the method. Some notable cases include the use of FGG to match DNA found on the button of a knife sheath at the scene of a quadruple murder to the father of the person charged with the murders. The victims, all students at the University of Idaho, were murdered during the night at an off-campus house in late 2022. Police had no suspects until FGG identified the DNA from the knife sheath. They covertly took items from Bryan Kohlberger's father's trash and confirmed the FGG results using CODIS-style testing.

Critics say police had enough evidence from other sources to arrest Kohlberger without using FGG. Kohlberger is one of the few criminal defendants to find out about police use of FGG prior to trial. He is contesting its use in what may be a precedent-setting case.

In what may have been the first use of FGG to identify UHRs, on April 10, 2018, about two weeks before the announcement that the Golden State Killer had been identified, GEDmatch was used to identify the body of a young woman who had been found strangled and beaten along a roadside in Miami, Ohio, on April 28, 1981. She had formerly been known only as "Buckskin Girl" because of a buckskin poncho she had been wearing.

In 2022, FGG was used to solve the sexual assaults of two Rhode Island girls, ages 11 and 13, in 1987. The FGG investigation began in 2019, following the publicity of the Golden State Killer case. It led to the arrest of Frank Thies, 66, of Terre Haute, Indiana. He was charged with one count of first-degree sexual assault and two counts of first-degree child molestation.

In October 2021, FGG accomplished the identification of the body of a woman found raped and strangled near a Woodlawn, Maryland, cemetery in 1976. Previously known as "Woodlawn Jane," she is now known to be Margaret Fetterolf, who was 16 and a serial runaway when she was murdered. The identification became possible after Fetterolf's cousin, Shannon McAdoo, a hobby genealogist, uploaded her SNPs profile to an open genetic genealogy database.

In an unusual twist, the victim of a 1987 rape in Dallas read about FGG in 2021 and contacted cold case detectives and prosecutors in Dallas, urging them to use it to solve her case. A previous search on CODIS did not identify the perpetrator but did show that the same man had committed three other rapes in Dallas and two in Shreveport. The 2021 FGG search would reveal more.

"I got an email from a woman telling me about this incredible case about an unsolved serial rapist in Dallas," said Dallas County cold case prosecutor Leighton D'Antoni, who took the case to the FBI to run a FGG profile. "We identified our suspect within 24 hours." A STR profile from discarded trash confirmed that David Thomas Hawkins committed the rapes.

New Hampshire began a FGG investigation of the 1981 murder of Laura Kempton, 23. They soon publicly identified the perpetrator as Ronnie James Lee, who died of acute cocaine intoxication at the age of 45 in 2005.

Ozark, Alabama, police worked with Parabon Nanolabs to identify the man who killed two 17-year-old girls in 1999. In 2019, they arrested Coley Mccraney, a truck-driving preacher who had lived a crime-free life since then.

The Sheriff's Department in Douglas County, Colorado, was able to clear the 1980 abduction, rape, and murder of 21-year-old Helene Pruszynski using FGG. The break came when a distant cousin of suspect James Clayton put her 23andMe profile on GEDmatch after reading about the Golden State Killer case.

A cursory search on LEXIS legal news yielded some recent FGG cases:

According to the October 5, 2023, *Palm Coast Observer*, FGG was used to identify Roberta "Bobbie" Lynn Weber as the body of a woman found murdered in Daytona Beach, Florida, in 1990.

The October 6, 2023, *Cincinnati Enquirer* reported that FGG was used to identify Robert Stewart who was then indicted for the February 2003 murder of Herman Brown, 46.

According to an episode of *48 Hours* aired on CBS, on November 18, 2023, FGG was used to identify Patrick Nicholas as the killer of Sarah Yarborough, 16, in King County, Washington, on December 13, 1991.

The December 7, 2023, *Orlando Sentinel* reported that the body of Eileen Trooper, who was 41 when she was murdered in South Florida in 1998, was identified using FGG. It also showed her to have been a victim of Florida serial killer Lucious Boyd, who currently resides on the state's death row.

The *Miami Herald* on January 8, 2024, reported that FGG showed William Taylor, who died on May 19, 2022, to have been the perpetrator in the May 15, 1982, stabbing murder of Kevin McBride, 47.

The January 15, 2024, *Galaxy Gazette* reported that Othram, Inc. used FGG to identify the skeletal remains found in September 2022 as a five-year-old boy who had been missing since 2003 named Logan Bowman.

UPI.com reported on January 24, 2024, that the last unidentified remains of the "Green River Killer," Gary Ridgeway, had been identified by Orthram, Inc. using FGG. Tammie Liles was a 16-year-old Seattle prostitute when she became one of Ridgeway's 49 known victims.

On January 31, 2024, *Noticais Finaciers* reported that FGG resulted in the identification of Kevin Konther, who was 58 when he was sentenced in February 2023. Konther was arrested in 2019 along with his twin, whom he tried to frame-for the rape of a 9-year-old girl in 1995 and a 32-year-old woman in 1998.

The February 2, 2024, *Lansing State Journal* reported that FGG had been used to identify Douglas Laming, 70, as the person who raped and murdered Karen Umphrey in 1980. It reported that Othram, Inc. and its DNA Solves database—which were started by the husband-and-wife team of David and Kristen Mittelman in 2018 with the explicit goal of assisting law enforcement—were used to close the case.

On February 21, 2024, the *Madison Courier* in Indiana reported that the body of a pregnant woman discovered in May 1992 in a flooded Fort Wayne basement had been identified as Tabetha Ann Muslin using FGG. The identification was simplified by the presence of the profiles of her father, late mother, and two aunts in the database.

Conclusion

Those examples, taken from a few months of media reports, show the speed at which FGG is being used to close cold cases and put a name to UHRs. In 2022, Swedish police used FGG to identify the perpetrator of a double homicide, a first such use in the EU. Police in the Philippines are using FGG to identify the fathers of underage sex workers' babies, showing the spread of FGG around the world. This spread can be expected to continue.

It may also drastically expand in the U.S. if other universities follow the lead of the University of North Texas Health Science Center's Center for Human Identification Laboratory. The laboratory will soon be fully accredited to perform forensic genealogy, and law enforcement agencies will be able to use that resource without cost. This effectively eliminates the biggest restraint on law enforcement's use of FGG—its high cost.

Even without universities providing free FGG, we can expect the use of the method to increase as law enforcement agencies become accustomed to it. We can also expect that police will favor using it in more and different kinds of cases unless prevented from doing so be laws or court rulings. After all, it is much easier to turn the investigative work over to the scientists, technicians, and genealogist than to do it yourself.

Sources: *nytimes.com, familytreemagazine.com, nib.gov, academic.oup.com, science.org, reuters.com, crime-scene-investigator.net, hudsonalpha.org, theintercept.com, eff.org, sagepub.com, apnews.com, northeastern.edu, washingtonpost.com, wfaa.com, abcnews.com, al.com, uncovered.com, llalive.com*

HRDC Files Civil Rights Action on Behalf of Wrongly Convicted Florida Man Who Spent 45 Years in Prison

by Sam Rutherford

On April 17, 2024, the Human Rights Defense Center ("HRDC"), *CLN*'s non-profit publisher, and the civil rights law firm of Loevy and Loevy filed suit in the U.S. District Court for the Middle District of Florida on behalf of a Jacksonville man who spent nearly 45 years in prison for a crime he did not commit.

The Crime

On October 8, 1975, Alfred Mitchell walked into a Jacksonville produce store and shot Kathrina Farah and David Phillips three times each after demanding their money. Willie Williams was sitting in the passenger seat of his car outside and had no idea what Mitchell had done. Mitchell jumped in the vehicle and sped off as police began pursuing them. When Willie asked Mitchell why they were fleeing, he responded, "I just killed two people. Don't you be the third one." Willie managed to escape the vehicle when it crashed into a parked car. He was apprehended without resistance by police and taken to the Jacksonville Sheriff's Office ("JSO"). Meanwhile, Mitchell fled into a nearby house and shot himself in the head, dying immediately.

Neither Farah nor Phillips died as a result of their gunshot wounds, but both were severely injured. Farah's eyesight was permanently damaged by a gunshot wound to her head. Similarly, Phillips had little memory of the robbery after being shot in the back of his head.

The Investigation

JSO Detectives Charles David Ritchey and W.J. Mooneyham were assigned to investigate the case. They quickly determined that Mitchell was solely responsible for the shooting. The detectives located a witness whose office was across the street from the produce store. That witness confirmed that only Mitchell entered and exited the store and further observed Mitchell place something under the driver's seat of the vehicle before speeding off.

Ritchey and Mooneyham also spoke with officers involved in the police chase who confirmed that Mitchell was the driver and that Willie leaped from the passenger side of the vehicle and did not resist capture. Officers also confirmed that the weapon used to shoot Farah and Phillips, a chrome-plated revolver, was recovered from underneath the driver's seat of the getaway car. They found a second gun, a black revolver, on Mitchell's person—the one he used to kill himself to avoid apprehension.

Ritchey and Mooneyham also interviewed Farah and Phillips while they were recovering from their wounds. Farah described the shooter as someone matching Mitchell's description. Phillips, however, was unable to provide any description beyond saying the shooter was a Black man carrying a chrome-plated pistol.

Meanwhile, another JSO detective, James Geisenburg, interviewed Willie at the Sheriff's Office. Willie gave a written statement saying he had no knowledge of the crime until Mitchell threatened him. Willie's statement was entirely consistent with all the evidence Ritchey and Mooneyham gathered indicating that Mitchell was the sole perpetrator of the robbery and attempted murders.

JSO Detective J.R. Starling was also able to connect Mitchell to a murder two weeks prior to the produce store robbery. Starling closed the case after determining that Mitchell, acting alone, had shot and killed a man during a robbery using the same chrome-plated revolver recovered from under the driver's seat.

The Frame Up

Despite clear evidence that Willie was an unwitting bystander to Mitchell's crimes, JSO detectives decided to pin the robbery and attempted murder on him by coaxing an identification out of Phillips. Just two days after the shooting, detectives visited Phillips in the hospital. They showed him a photo line-up including pictures of both Mitchell and Willie. Phillips could not make an identification, stating he didn't remember anything after being shot.

After Phillips was released from the hospital, the detectives asked him to come to the station. JSO Detective Lt. Bryant Randolph Mickler hypnotized Phillips to "help" him remember more details. After the hypnosis session, detectives again showed Phillips the photo line-up, and this time, he identified Willie as the shooter. Phillips also identified Willie during an in-person line-up.

Based solely on Phillips' identification, Willie was tried and convicted of attempted murder and robbery. The detectives never disclosed their notes from an audio recording of the hypnosis session. The detectives also manipulated police reports and gave perjured testimony at Willie's trial to conceal the true nature of the identification procedure.

Willie's Imprisonment

On February 16, 1976, Willie was sentenced to life in prison with the chance for parole and shipped off to serve his sentence in the Florida Department of Corrections ("FDOC"). Frequent readers of *Prison Legal News* ("*PLN*"), *CLN*'s sister publication, know that FDOC is one of the most dangerous penal systems in the U.S., both in terms of prisoner-on-prisoner violence and systemically poor conditions of confinement. [*See, e.g.*, *PLN*, February, 2016, pg. 14; *PLN*, May, 2000, pg. 16]. Willie would spend nearly 45 years confined within this system for a crime he did not commit.

According to Willie, "I suffered a lot of mental anguish, a lot of hardship from the environment that I was in. It was a prison." Willie endured solitary confinement, forced labor on a chain gang, and was required to work in a prison infirmary without pay or access to personal protective equipment where he contracted illnesses from exposure to infected blood.

Throughout his imprisonment, Willie continued to maintain his innocence and repeatedly sought relief from the Florida courts. Each time, his requests were rebuffed, oftentimes with judges citing to Phillips' supposed "identification" as justification for affirming the convictions. Finally, on June 30, 2020, Willie was released from prison on "early" parole. He was 75 years old. He had been continuously incarcerated since he was 31.

The Exoneration

Even after his release, Willie did not give up on his quest for justice. With help from the Innocence Project of Florida, Willie convinced the Conviction Integrity Review Division of the Fourth Judicial Circuit State Attorney's Office ("CIR") to review his case in 2021. The CIR discovered the fact that JSO detectives hypnotized Phillips in order to secure an identification of Willie as the shooter and then suppressed evidence of the hypnosis prior to trial. Detective Ritchey admitted as much during a CIR interview.

On October 19, 2023, Willie's defense team filed for post-conviction relief based on this previously undisclosed, exculpatory evidence. The State Attorney's Office joined the request a few months later, and nearly 48 years after his arrest, Willie's conviction was finally set aside.

The Lawsuit

HRDC and the prominent Chicago-based civil rights firm of Loevy and Loevy then took up Willie's case by filing suit in federal court under 42 U.S.C. § 1983 against the JSO detectives who framed him, the City of Jacksonville, and Duval County. The complaint alleges the detectives violated Willie's right to due process of law under the Fourteenth Amendment by suppressing exculpatory evidence when they failed to disclose the hypnosis to defense attorneys prior to trial, by offering perjured testimony at that trial concerning Phillips' purported "identification" of Willie as the shooter, and by doctoring police reports to hide the fact that they induced the identification with hypnosis thereby framing Willie for a crime he did not commit.

"As we allege in the complaint, members of the Jacksonville Sheriff's Office worked together to frame Willie for crimes he did not commit," Lauren Carbajal, one of Willie's attorneys, said. "We allege that these officers hypnotized one of the key witnesses in Willie's case into identifying Willie as the perpetrator of the crime."

The Complaint further alleges that both the City of Jacksonville and Duval County are liable because their official policies and practices at the time of Willie's arrest, trial, and conviction encouraged officers to use "unconstitutional measures … to falsely implicate criminal suspects, including by withholding or suppressing exculpatory evidence, fabricating evidence, feeding information to or manipulating witnesses, and engaging in unduly suggestive identification and lineup procedures." Additionally, the Complaint alleges that both the city and the county also failed to adequately train officers to not engage in these unconstitutional practices or to take steps to prevent such misconduct and are therefore liable for Willie's wrongful conviction and incarceration.

L to R: Paul Wright, Willie Williams, and Lauren Carbajal

Willie's lawsuit seeks damages in an amount to be proven at trial. "Money will never replace the time and the anguish and the emotional thing that I went through, but it will give me some confidence with my family and my wife to try to live the rest of our lives," Willie said at a news conference the day the civil rights suit was filed. Paul Wright, HRDC's Executive Director, also told reporters, "I think the time is to call on the folks of the city government of Jacksonville to right this wrong and ensure that Mr. Williams receives the compensation he's entitled to. He's had 45 years of his life, almost half a century stolen from him."

"We're looking forward to helping get Willie a measure of justice," wrote Jon Loevy, the lead attorney in the lawsuit, in an emailed statement following the press conference.

Willie is represented by Loevy and Loevy attorneys Jon Loevy and Lauren Carbajal, as well as HRDC attorneys Joshua Martin and E.J. Hurst. *CLN* will report further developments in the case as they become available.

Sources: *Williams v. Ritchey, et al., USDC (M.D. Fla.), Case No. 3:24-cv-00367; News4JAX.com*

California Supreme Court: Defendant Has Due Process Right to Notice of Prosecution's Election to Seek Enhanced Sentence in Order to Make Key Decisions About Defense

by Douglas Ankney

Resolving a split among the Courts of Appeal, the Supreme Court of California ruled that a defendant has a due process right to notice of a prosecutor's election to seek an enhanced sentence under Penal Code § 667.61(j)(2). (Note: Undesignated statutory references are to the California Penal Code.)

Oscar Manuel Vaquera was charged by information with two separate counts of committing "a lewd and lascivious act upon and with the body" of "a child under the age of fourteen (14) years" in violation of § 288. Vaquera's information read as to count 2: "it is further alleged pursuant to Penal Code sections 667.61(b)/(e)(4), that in the commission of the above offense, defendant OSCAR MANUEL VAQUERA committed an offense specified in Penal Code section 667.61(c) against more than one victim."

California's "One Strike" law, § 667.61, "is an alternative sentencing scheme that applies when the prosecution pleads and proves specific aggravating circumstances in connection with certain sex offenses," the Court stated. Without the One Strike allegation, Vaquera faced a sentence of 3, 6, or 8 years. § 288(a).

But under § 667.61(b), the One Strike law provides for a mandatory sentence of 15 years to life for a conviction of any sexual offense enumerated in § 667.61(c) (which includes § 288) and the jury finds true (or the defendant admits) one of the circumstances specified in § 667.61(e). Vaquera's information cited 667.61(e)(4), which states the qualifying circumstance is that the offense was committed "against more than one victim."

The jury found Vaquera guilty of the underlying offenses and found true the One Strike allegations. Initially, the prosecutor sought consecutive sentences of 15 years to life for Counts 1 and 2 for an aggregate sentence of 30 years to life. But just four days before Vaquera's sentencing hearing, the prosecutor sought a sentence of 25 years to life for Count 2 under § 667.61(j)(2) and requested consecutive sentences for an aggregate sentence of 40 years to life. Section 667.61(j)(2) provides for a sentence of 25 years to life where the victim "is a child under age 14." The trial court sentenced Vaquera to 15 years to life on Count 1 and 25 years to life on Count 2 (under § 667.61(j)(2)) but ran the sentences concurrently for a sentence of 25 years to life.

Ultimately, Vaquera petitioned the Court of Appeal ("COA") for a writ of habeas corpus, alleging that the "trial court unlawfully imposed the 25-year-to-life sentence for Count 2 because he did not have fair notice that he faced 25 years to life on that count." The COA summarily denied relief, so Vaquera timely

appealed to the California Supreme Court, which transferred the case back to the COA with directions to issue an order to show cause.

After hearing argument from the parties, the COA denied relief. The COA expressly rejected *People v. Jimenez*, 35 Cal. App. 5th 373 (2019) (holding due process violated where similarly situation defendant sentenced to 25 years to life under § 667.61(j)(2) because "the information only informed [the defendant] he could be sentenced to terms of 15 years to life under § 667.61 (b) and (e) for committing the alleged offenses against multiple victims"), and held that under § 667.61(j)(2), "the trial court was required to impose a 25-year-to-life sentence."

The Supreme Court granted review to resolve the split between the Courts of Appeal. The Court observed that a "defendant has a due process right to fair notice of any sentencing allegation that, if proven, will increase the punishment for a crime." *People v. Anderson*, 470 P.3d 2 (Cal. 2020). The Court explained: "In the sentencing enhancement context, the touchstone of fair notice is whether the accusatory pleading enables the defense to predict the sentence the defendant faces if convicted. To enable a defendant to make this prediction, an accusatory pleading must provide the defendant with fair notice of the factual basis on which the prosecution is seeking an increased punishment and of 'the potential sentence.'" *Id.* "When the prosecution has not alleged a particular sentencing enhancement in connection with a specific count, a 'defendant is ordinarily entitled to assume the prosecution made a discretionary choice not to pursue the enhancement … and to rely on that choice in making decisions such as whether to plead guilty or go to trial.'" *Id.* "Since an accusatory pleading that fails to inform the defendant that the prosecution is pursuing a particular sentencing enhancement in connection with a specific count does not allow the defendant to predict the potential sentence, such a pleading does not provide fair notice." *Id.*

In the present case, the prosecution had three choices regarding the prosecution of Vaquera: (1) simply prosecute the alleged § 288 offenses without enhancement, (2) prosecute under § 667.61(e)(4), seeking an enhanced sentence of 15 years to life due to multiple victims, or (3) prosecute under § 667.61(j)(2), seeking an enhanced sentence of 25-years-to-life based on the age of the victim.

The charging information expressly cited § 667.61(e)(4) and expressly stated the prosecution sought an enhanced sentence due to more than one victim. Nothing in the information alerted Vaquera that he was facing a sentence of 25 to life under § 667.61(j)(2), the Court stated. And while the COA was correct that a finding of guilty of a covered offense coupled with a finding of true of a properly pled and proven allegation under § 667.61(j)(2) requires a mandatory sentence of 25 years to life, this does not excuse the prosecutor's failure to properly plead the allegation even if the jury's findings would support the allegation. That is, the enhanced sentences under the One Strike law are mandatory only when the allegations have been properly pled and proven, the Court instructed.

Accordingly, the Court reversed the COA and remanded with instructions to grant Vaquera habeas relief and to direct the trial court to strike the 25-year-to-life sentence and resentence him to 15-years-to-life on Count 2. See: *In re Vaquera*, 542 P.3d 208 (Cal. 2024).

University of New Hampshire Designs a Simpler, Cost-Effective Test to Identify Touch DNA

by Jo Ellen Knott

DNA profiling has become the gold standard in forensic science since the first murder case was solved in England in 1987 by genetics professor Alec Jeffreys at the University of Leicester. Although Colin Pitchfork is not as notorious as Charles Manson or Jeffrey Dahmer, it is a name forensic scientists know well for being the first criminal to be convicted of murder using DNA evidence.

A recent study by researchers at the University of New Hampshire ("UNH") published in the *Journal of Forensic Sciences* continues the foundational work of Jeffreys and offers a simpler and cheaper method for identifying touch DNA. The study led by Samantha Crane, co-director of the FAIR Lab at UNH, and co-authored by anthropologist Connie Mulligan at the University of Florida will help advance the impact DNA profiling has in forensic investigations.

Traditional DNA testing can be expensive and complex, hindering the ability to distinguish between DNA left by a perpetrator (primary transfer) and DNA transferred indirectly from another source (secondary or tertiary transfer). However, a new method developed by the UNH researchers led by McCrane utilizes a more accessible and affordable technique called qPCR.

To test the method, the researchers had volunteers transfer touch DNA to various objects in a controlled setting. Male and female volunteers first touched a gun grip, then the female volunteer touched a coffee cup. The researchers swabbed the gun grip, the coffee cup, and the female volunteer's hand for DNA. The results showed a 71 percent success rate in identifying the male's DNA on the gun grip (primary transfer), a 50 percent success rate in finding the male's DNA on the female's hand (secondary transfer), and a 27 percent success rate of finding the male's DNA on the coffee cup (tertiary transfer).

"The challenge with transfer DNA is that it opens up the dangerous possibility of DNA ending up on items or victims at a crime scene that a person may not have touched," said McCrane. She warned, "This has occurred in multiple cases, leading to innocent individuals being charged for crimes they didn't commit." Crane's new method offers a more cost-effective way to analyze touch DNA, potentially preventing wrongful convictions.

The UNH study also explored how factors like age, ethnicity, and skin conditions might influence DNA transfer. The researchers found that ethnicity and age did not seem to affect the transfer of touch DNA. However, due to the limited sample size, they could not draw definitive conclusions about the impact of skin conditions.

According to McCrane, more research is needed to fully understand the variables affecting DNA transfer. This new, simpler method could lead to more extensive studies with larger sample sizes, ultimately improving our understanding of touch DNA and strengthening forensic investigations.

Source: *Chemical and Engineering News*

Kansas Supreme Court Announces Clarification of Framework for Deciding Whether Confession Is Voluntary and Overrules Precedents That Held Reliability of Confession Is Factor to Be Considered

by Douglas Ankney

The Supreme Court of Kansas clarified the framework to be used for determining whether a confession was voluntary and expressly overruled prior precedents that had held that "reliability of the confession" was a factor to be considered.

When G.O. was 16 years old, his younger stepsister was hospitalized. She revealed that G.O. had molested her. The Kansas Department for Children and Families ("DCF") was contacted. A DCF representative told G.O.'s mother ("Mother") and stepfather that G.O. had to be removed from the home and that counselling was necessary to reintegrate the family. The DCF representative told the Mother that each family member would be interviewed. The next person to contact the Mother was a detective from the Topeka Police Department ("TPD"). The Mother believed the detective's interview was orchestrated by the DCF. She told G.O. that he had to "give more details to the detective" than he had given to her in order to get their family back together.

At the police station, the detective told G.O. that he wasn't under arrest; that the purpose of the interview was only "to help G.O.'s stepsister heal, … to get the family back together," and that the interview was not "about getting people in trouble." The detective then produced a form to waive G.O.'s rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and encouraged G.O. to sign it as a "formality" because they were at the police station. The detective again assured G.O. that he wouldn't be arrested, but he also said that if G.O. didn't tell him everything or if G.O. told him things that turned out to not be true, "then that's when things start to get out of control." G.O. repeatedly stated he didn't really want to talk but eventually relented because he wanted his stepsister to get better. G.O. eventually described sexual acts with his stepsister, including oral and anal sex.

More than two years later, the State ultimately charged G.O. with 60 sex-related felonies including rape and sodomy and prosecuted him as an adult. G.O. moved to suppress his statement to the detective, arguing his waiver of rights and his confession were not knowing and voluntary. After a hearing, the trial court granted the motion. The judge concluded the confession was not voluntary, primarily based upon the detective's repeated assurances that the interview was not about getting anyone in trouble but to help the stepsister; G.O.'s comments during the interview that he was providing details because he wanted his stepsister to get better; and the Mother's instruction to G.O. that "he had to talk with the detective" because she believed the interview was motivated by DCF to help the stepsister and to reunite the family.

The State brought an interlocutory appeal, and a divided Court of Appeals ("COA") reversed the trial court. The COA's decision rested, in part, on the standard that when a defendant claims he gave a statement in response to misrepresentations of leniency, the confession may still be used as evidence unless the defendant shows that he made a false confession to obtain the leniency. *State v. Garcia*, 301 P.3d 658 (Kan. 2013).

The Kansas Supreme Court then granted both G.O.'s and the State's petitions for review. The Court observed "[t]he Fifth Amendment, which applies to the states through the Fourteenth Amendment, protects 'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty … for such silence.'" *Malloy v. Hogan*, 378 U.S. 1 (1964). "The Fifth Amendment test for voluntariness substantially tracks the voluntariness test under the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157 (1986). "Under the Due Process Clause, 'certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.'" *Miller v. Fenton*, 474 U.S. 104 (1985).

"This concept of a due process protection against involuntary confessions flows from a 'set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.'" *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). There are two paths "for applying due process protection against involuntary confessions: (1) Those that are inherently coercive and a per se violation of the Due Process Clause and (2) those where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive." *Fenton*.

Cases involving the first path of per se violations are rare and include things like extreme psychological pressure, brutal beatings, and other physical harm. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). But the second path occurs "when the interrogation techniques were improper only because, in the particular circumstances of the case, the

confession is unlikely to have been the product of a free and rational will." *Fenton*. Courts are to "assess the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation"—to determine whether a confession is a "free and unconstrained choice by its maker." *Schneckloth*. "In applying this totality-of-the-circumstances examination, 'coercive police activity is a necessary predicate to the finding that a confession is not voluntary.'" *Connelly*.

This same examination applies whether the accused is an adult or a minor. *Fare v. Michael C.*, 442 U.S. 707 (1979). The Court set forth its updated, non-exhaustive list of factors to be considered when examining the details of the interrogation includes: (1) the length of the interview, (2) the ability of the accused to communicate with the outside world, (3) delays in arraignment, (4) the length of custody, (5) the general conditions under which the statement took place, (6) the physical/psychological pressures placed on the accused, and (7) the officer's fairness in conducting the interview to include "promises of benefit, inducements, threats, methods, or strategies used to coerce or compel a response." *State v. Gilliland*, 276 P.3d 165 (Kan. 2012).

In addition, the Court expressly added to that list the presence of a *Miranda* advisory and waiver along with "whether a police officer negates, contradicts, or fails to honor the advisory." *Doody v. Schriro*, 548 F.3d 847 (9th Cir. 2008). The Court instructed that the "voluntariness" determination doesn't hinge on the "presence or absence of a single controlling criterion" but rather "a careful scrutiny of all the surrounding circumstances." Quoting *Schneckloth*.

In addition to the foregoing updated framework, the Court stated that "other factors illustrated by caselaw" should be taken into consideration by courts when deciding whether a defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment privilege against self-incrimination. Potential characteristics of the accused that courts should consider when deciding whether an officer's conduct resulted in an involuntary confession include: "accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement." *Gilleland*.

Finally, The Court instructed that "[w]hen the protections of the Fifth and Fourteenth Amendments apply, the State bears the burden of proving by a preponderance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment and voluntarily—that is based on the person's unfettered will—made a statement." *State v. Brown*, 182 P.3d 1205 (Kan. 2008).

After trial courts apply the above framework and make a voluntariness determination, if the issue is appealed, the Court explained that "Kansas appellate courts apply a standard of review that divides the voluntariness determination into questions of fact and questions of law." *State v. Sharp*, 210 P.3d 590 (Kan. 2009). The trial court's findings of "crude historical facts, the external phenomenological occurrences and events surrounding the confession" won't be disturbed unless unsupported by the record. *Culombe v. Connecticut*, 367 U.S. 568 (1961). But "the determination of how the accused reacted to the external facts and the legal significance of the reaction" is reviewed de novo. *Id.*

Turning to the present case, the Court agreed with the trial court that the conduct of the detective, combined with G.O.'s youth and inexperience, made the confession involuntary. G.O. was persuaded that his statements would not get him into trouble unless he lied or unless he failed to disclose everything, and he was persuaded that his statements were for the purpose of helping his stepsister and the reunification of his family, rather than for a criminal investigation.

The Court also explicitly instructed that whether a confession is reliable, i.e., is truthful, has no bearing on whether it is voluntary. In *State v. McCarther*, 416 P.2d 290 (Kan. 1966), the court relied on the principle that coerced confessions are inherently untrustworthy. The *McCarther* Court included a reliability test, namely: "the State's action must be such that it would likely cause the accused to make a false statement to obtain the benefit of the promise." *Garcia*. That is, to show involuntariness, the accused had to give a false statement as the result of the State's coercive conduct. This test was based on a hearsay exception that permits judges to admit out-of-court statements that are "trustworthy."

Finally, the Court explained that "*McCarther* and its progeny conflated the hearsay statute and the voluntariness test under the Due Process Clause of the Fourteenth Amendment." The Court stated that *McCarther*'s test is in direct conflict with *Rogers v. Richmond*, 365 U.S. 534 (1961), wherein the U.S. Supreme Court held that a standard that considers the probable truth or falsity of the statement is not a permissible standard. Thus, the Kansas Supreme Court expressly overruled *McCarther* and progeny.

Accordingly, the Court reversed the decision of the COA and affirmed the decision of the trial court. See: *State v. G.O.*, 543 P.3d 1096 (Kan. 2024).

Editor's note: Anyone interested in the issue of voluntariness of the waiver of one's Fifth Amendment privilege against self-incrimination is encouraged to read the Court's full opinion, which includes in-depth discussions of both Kansas and federal case law on the subject that go well beyond the scope of this summary.

Reform-Minded Prosecutors Face Backlash for Prosecuting Bad Cops

by Sam Rutherford

In the wake of the Black Lives Matter movement spurred by the police-involved killing of George Floyd, citizens across the country elected reform-minded prosecutors who ran on platforms promising accountability for police who break the law and murder defenseless citizens. Conservative politicians, police unions, and the like have responded by calling for and sometimes obtaining the removal of these duly elected representatives from office. And even when the prosecutors don't lose their jobs, these pressure campaigns have been largely effective at cowing prosecutorial efforts to hold police accountable for misconduct.

The attack upon Hennepin County, Minnesota Attorney Mary Moriarty is just one recent example. The controversy involving Moriarty began when her office charged State Patrol Trooper Ryan Londregan for shooting and killing 33-year-old Ricky Cobb II on July 31, 2023. Trooper Londregan fired two shots into Cobb's vehicle during a routine traffic stop after two other troopers at the scene determined that Cobb was wanted on an outstanding misdemeanor charge in another county. Londregan was the only trooper at the scene to pull his sidearm and fire.

Agents from the Minnesota Bureau of Criminal Investigation ("BCI") conducted an extensive investigation and determined that Londregan's use of deadly force was not only a breach of state patrol policy but also a crime. Moriarty's office then charged Londregan with three felony counts including second-degree felony murder and second-degree negligent manslaughter. Londregan was released on his own recognizance pending trial because Moriarty's office did not request bail.

The Minnesota Police and Peace Officers Association, the union that represents state troopers, wrote Minnesota Governor Tim Walz, asking that he remove Moriarty from the case and assign it to the state Attorney General. The union accused Moriarty's prosecution of being politically motivated.

Four Republican members of the U.S. Congress from Minnesota followed up in another letter to Walz, expressing "outrage" about the Londregan case. "It is time for us as a nation to stop demonizing law enforcement," the representatives wrote. And one of them, Michelle Fischbach, has called on Moriarty to resign.

Minnesota Republican state lawmakers have also called for Moriarty's resignation and demanded that the charges against Londregan be dropped. They accuse Moriarty of coddling criminals and targeting police in a "politically-motivated prosecution."

It is unclear whether any of these politicians were even familiar with the facts

underlying Moriarty's decision to file charges against Londregan or that the case had been investigated by BCI, a state-level agency completely independent of Moriarty's office. Rather than being politically motivated, Moriarty's charging decision seems based on the evidence gathered after a thorough, months-long investigation.

Conversely, the Republican lawmakers' objections to that charge appear to be nothing more than political pandering to their law-and-order base of voters. One is left wondering why if, as they claim, these lawmakers have such respect for law and order they are unwilling to let Londregan's case play out in court and instead want to cut off that truthing-finding process before it begins.

The pressure campaign against Moriarty's office appears to be working. Minnesota Governor Tim Walz, a Democrat, has questioned Moriarty's charging decision and criticized her use-of-force assessment. The Governor, however, has not yet decided whether he will hand the case over to the state Attorney General.

Moriarty's office released a statement saying that union officials and conservative politicians were seeking "special treatment" in Londregan's case and that the police union "is right about one thing—there is a crisis in confidence, but it is not because of attempts at accountability. It is because of well-documented and horrific instances where some officers abused their power and used unauthorized force."

As this political power struggle was playing out in the press, on April 17, 2024, Cobb's family filed suit in a Minnesota federal court against Londregan and another officer, Brett Seide, who initiated the traffic stop that lead to Cobb's death. The suit alleges officers violated Cobb's constitutional rights by illegally detaining and then killing him.

The pressure applied to Moriarty's handling of the Londregan prosecution is not unique. Opponents of the criminal justice reform movement that has led to the election of county prosecutors across the country who ran on prosecuting police for killing civilians, ending cash only bail, and curbing prosecution of nonviolent offenses are very explicit in their efforts to remove such prosecuting attorneys—they are prosecuting and jailing the police.

Another recent example played out in Florida, where Republican Governor Ron DeSantis unilaterally removed a prosecutor who indicted a deputy sheriff for shooting a civilian in 2020. In recent years, DeSantis has used his executive powers to remove democratically elected, reform-minded prosecutors like State Attorney Monique Worrell, who was the municipal prosecutor in Orange and Osceola counties. Worrell won a 2020 election by an overwhelming majority against a "law-and-order" opponent. DeSantis removed her from office based on his perception that she wasn't sending enough people to prison.

According to *The Intercept*, 17 other states have passed a total of 37 bills that purport to allow state-level government officials to strip power away from local-level duly elected progressive prosecutors.

Sources: *Hennepin County Attorney's Office, theintercept.com, apnews.com, kstp.com*

Decedent's End-of-Life Condition and Toxicology May Alter Time-of-Death Estimation

by Douglas Ankney

Anthropology professor Dawnie Steadman, Director of the Forensic Anthropology Center at the University of Tennessee ("University"), and her colleagues "hypothesized that drugs found in decomposing bodies could have an influence on the behaviors of decomposers and result in differential rates of decomposition." At the University's Body Farm—"a 2.5-acre wooded property where researchers have been studying decomposition in a variety of natural settings"—researchers noticed an interesting phenomenon. "Human bodies donated for study and placed in the same environment at the exact same time were decomposing at different rates." For example, there was heavy scavenging on some of the bodies while other bodies were entirely ignored. Insects colonized bodies at different times even though the bodies were in identical environments. And soil profiles revealed different chemical compounds among the individual bodies.

The varying characteristics of the bodies "appeared to enhance or disrupt decomposition." This prompted the researchers "to question the accuracy of time-since-death approximations or the postmortem interval based on human and insect evidence." Steadman and her team examined "the relationship between a donor's drug use, end-of-life diseases, and their decomposition dynamics, which are affected by the behavior and presence of scavengers, insects, and intestinal microbes." The researchers compared the toxicological drug screens of 22 cadavers with the drugs found in their associated decomposition fluid, in insect larvae, and in the surrounding soil samples.

The researchers discovered that drugs used for the treatment of neurological diseases resulted in a decrease of the diversity of microbial species found in the soil—indicating those drugs have a toxic effect on the soil microbes which may lead to a slower rate of decomposition. The same was true of decedents who had undergone treatment for cancer. However, decedents who had been treated for respiratory illness were associated with an increase in soil microbial diversity—suggesting the drugs used in treating these illnesses may lead to an increase in the rate of decomposition.

According to Danielle McLeod-Henning, a scientist with the National Institute of Justice, estimating the time of death is "one of the most important issues to address in any death investigation." The estimation of the postmortem interval aids "in identification of the remains, and in cases of foul play, identifying potential suspects and confirming alibis." While preliminary analysis of the research revealed "no statistically significant correlation between end-of-life condition, toxicology, and the accuracy of the time since death estimates," the research may eventually modify postmortem interval estimates to account for the presence of particular drugs.

Source: *forensicmag.com*

Fourth Circuit Vacates Where Instructions Failed to Inform Jury That Mens Rea of 'Knowingly or Intentionally' Applies to 'Except as Authorized' in 21 U.S.C. § 841(a)(1)

by Douglas Ankney

The U.S. Court of Appeals for the Fourth Circuit vacated the convictions of Dr. Joel Smithers because the instructions failed to inform the jury that the mens rea of "knowingly or intentionally" of 21 U.S.C. § 841(a)(1) applied to that statute's "except as authorized" provision.

Smithers was charged with 861 counts related to his opioid-prescription practices—one count of possession of a controlled substance with intent to distribute, in violation of §§ 841(a)(1) and (b)(1)(C); one count of maintaining a place for the purpose of unlawful distribution in violation of 21 U.S.C. § 856; and 859 counts of unlawful dispensing and distributing of a controlled substance in violation of § 841(a)(1).

At Smithers' trial, the parties proposed differing instructions related to § 841(a)(1). In pertinent part, the statute reads: "Except as authorized …, it [is] unlawful for any person knowingly or intentionally … to manufacture, distribute, or dispense … a controlled substance." The parties' dispute concerned the definition of "[e]xcept as authorized." The Government requested it be defined in the disjunctive—that the medications were prescribed "without a legitimate medical purpose *or* beyond the bounds of medical practice." In contrasat, Smithers requested the instruction be in the conjunctive—"without a legitimate medical purpose *and* beyond the bounds of medical practice." The District Court sided with the Government. The jury convicted Smithers on all counts. He was ultimately sentenced to an aggregate term of 480 months' imprisonment, and he timely appealed.

While Smithers' appeal was pending, the U.S. Supreme Court granted certiorari in *Kahn v. United States*, No. 21-5261 (2021), to determine whether jury instructions presenting the unlawful-dispensing charge in the disjunctive (as opposed to the conjunctive) were proper. Smithers' appeal was held in abeyance until the issue was addressed in the consolidated case of *Ruan v. United States*, 597 U.S. 450 (2022).

Ruan, while not directly addressing the disjunctive versus conjunctive issue, held that the "knowingly or intentionally" terms of § 841(a)(1) applies to that statute's "except as authorized" provision. And a prescription is only "authorized" when issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04.

The Fourth Circuit asked for supplemental briefing post-*Ruan*. Smithers then "more directly" argued that the jury "instructions improperly stated an objective mens rea standard." He objected to the disjunctive language (i.e., "without a legitimate medical purpose *or* beyond the bounds of medical practice") in Instructions 15, 19, and 20 that he argued "(1) failed to state that Smithers could only be convicted if he knew that his conduct was unauthorized and (2) created a strict liability offense by phrasing the mens rea requirements in the disjunctive."

The Court observed the "key issue is 'whether the instructions, construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.'" *Noel v. Artson*, 641 F.3d 580 (4th Cir. 2011).

The District Court had also given a "good-faith" instruction which stated, in pertinent part: "'Good faith' means that the physician acted with good intentions in the honest belief that he was attempting to act in accord with the standards of medical practice generally recognized and accepted in the medical profession. This is an objective test, and not a subjective one. In other words, a physician cannot substitute his views of what is good medical practice in place of generally accepted norms simply because he believes it proper."

The Court, quoting from *Ruan*, stated "that words like 'good faith,' 'objectively,' 'reasonable,' or 'honest effort' appear nowhere in the statute and would 'turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, rather than on the mental state of the defendant himself or herself.'" The Court explained that by stating the terms in the disjunctive it was possible for the jury to

find Smithers guilty if the jury believed he acted outside of the "objective standard" of "the bounds of medical practice." But *Ruan* held that the statute requires proof that a defendant "knowingly and intentionally" acted beyond the bounds of medical practice. In other words, the question for the jury was not whether Smithers acted beyond an objective standard but whether he so acted with the mens rea of "knowingly and intentionally." Consequently, the Court determined that the instructions, as a whole, failed to adequately inform the jury of the controlling legal principles.

The Court further determined that the error was not harmless. An error is harmless where the Court can conclude, beyond a reasonable doubt, that the "jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1 (1999). Smithers testified at trial regarding the medical histories, accidents, pain, and suffering of each patient for whom the Government had presented evidence. It was possible that a juror who had been properly instructed as to the mens rea requirement would have found that, while Smithers' conduct didn't meet an objective standard, subjectively Smithers believed his conduct was within the bounds of medical practice, the Court concluded.

Accordingly, the Court vacated Smithers' convictions and remanded to the District Court for proceedings consistent with its opinion. See: *United States v. Smithers*, 92 F.4th 237 (4th Cir. 2024).

Junk Science Convicted Innocent Sailor, DNA Exonerated Him Decades Later With Help From the Innocence Project

by Jo Ellen Knott

Keith Harward, 67, was born in Greensboro, North Carolina, a state whose motto is "To be, rather than to seem." Unfortunately for Harward, he spent 33 years seeming to be a murderer and rapist after the state of Virginia wrongfully convicted the ex-sailor of a brutal murder and rape in September 1982 and sentenced him to life in prison.

Harward's path in life took this tragic turn during his time in the U.S. Navy while stationed on the U.S.S. Carl Vinson. In 1982, a heinous crime shook Newport News, Virginia, implicating a fellow sailor, Jerry Crotty, in the rape of Teresa Perron, along with the crowbar assault on her husband that killed him. Although Crotty was the real perpetrator, Harward found himself caught in a web of wrongful accusations and faced a justice system blinded by flawed forensic evidence.

"I was wrongly convicted for 33 years," Harward recounts, reflecting on the expert witnesses who almost sealed his fate. Bitemark analysis, now labeled as "junk science," was the cornerstone of his conviction. Six forensic dentists falsely claimed that Harward's teeth matched bitemarks left on Teresa Perron's leg by Crotty. Despite initial dismissal due to lack of evidence after a dentist reviewed the dental records of Marines stationed on the Vinson at the time which excluded Harward, he eventually became a suspect six months later when his ex-girlfriend told police he had bitten her during an argument.

At trial, the prosecution based its case on the testimony of two forensic dentists, Lowell Levine and Alvin Kagey, who claimed that Harward's teeth matched photos of the bitemark left on Teresa Perron. Levine is known as one of the foremost experts in forensic bitemark analysis, for whatever that's worth, and became famous for his televised testimony in the 1979 trial of serial killer Ted Bundy.

After attorneys from the Innocence Project secured an exoneration for Harward three decades later by ordering DNA tests, Levine released a statement writing, "I certainly feel upset and quite disturbed at the result in this case." Levine claimed he and Kagey had completely followed professional guidelines and that the evidence seemed to point toward a solid match. He concluded that the Harward case "should persuade all my colleagues to agree with the need for more scientific research and investigation."

One of Levine's fellow forensic odontologists has done precisely just that. Mary Bush, forensic dentist at the University of Buffalo School of Dental Medicine, published a study in the Journal of the California Dental Association in May 2023, warning that bitemark analysis is a flawed science that has led to wrongful convictions. The associate professor began her study by mentioning that flawed bitemark analysis has led to at least 26 confirmed wrongful convictions, including that of Keith Harward.

Bush and her researchers were able to disprove the assumptions that the arrangement of the human teeth in a mouth is unique and that those unique features transfer to the skin. To prove her point, she and a student took a mold of her teeth in 2006 and made bitemarks on 23 cadavers. None of the bitemarks were measurably identical. The National Institute of Standards and Technology agreed with Dr. Bush's research and concluded in its 2022 report that "forensic bitemark analysis lacks a sufficient scientific foundation."

Eight years after his exoneration in 2016, Harward advocates for the wrongfully convicted. He travels around the country visiting law classes at major universities, speaking about the importance of truth and the process of finding it. "I have a unique life story, and by telling it, I can, maybe, change the course of other innocent people's lives." Harward also advocates for fair compensation for exonerees and calls for systemic reforms within the justice system.

Harward is the subject of episode three of the Netflix series *The Innocence Files* and has been interviewed by NBC. In 2017, *The Washington Post* reported on Harward's compensation. "In Virginia, 33 years of wrongful incarceration will get you a lump sum equivalent to $9,384 per year served, taxable annuity payments (the purchasing power of which significantly declines over time) and a small education grant insufficient to cover even the tuition and fees of most two-year degrees."

Sources: *Bladen Journal, Forensic, Innocence Project, New York Times, The Washington Post*

Third Circuit Denies Prosecutor's Claim of Absolute Immunity Where Wrongfully Convicted Man's Complaint Alleged Facts Sufficient to Support Finding That Prosecutor's Actions Served 'Investigatory Function'

by Douglas Ankney

The U.S. Court of Appeals for the Third Circuit affirmed the U.S. District Court for the Middle District of Pennsylvania's denial of absolute immunity to a prosecutor where the complaint alleged facts sufficient to support a finding that the prosecutor's acts served an investigatory function.

Larry Trent Roberts served 13 years in prison for the murder of Duwan Stern—a murder Roberts did not commit. After a new trial wherein Roberts was acquitted, he filed suit pursuant to 42 U.S.C. § 1983, alleging six claims related to his wrongful conviction. He named several state actors as defendants.

In Count II of the complaint, Roberts alleged Assistant District Attorney John C. Baer "fabricated evidence by way of knowingly influencing, enticing, and coercing an inculpatory statement from Layton Potter: a jailhouse snitch, who lacked any credibility, whose statement could not be corroborated, and was only concerned with benefitting himself."

In Count IV, Roberts alleged that Detective David Lau "and Baer conspired to fabricate evidence for the purpose of convicting an actually innocent man" when Lau and Baer "knowingly sought out, influenced, and coerced an inculpatory statement from Potter." According to Roberts' complaint, a hole developed in the prosecution's already weak case after Detective David Lau's attempt to persuade another witness to fabricate evidence of a conflict between Roberts and the victim failed.

Baer then took matters into his own hands and joined Lau's investigation. Roberts alleged that Baer "began affirmatively seeking a jailhouse snitch who would testify as to motive. [O]ne month before trial … Baer and … Lau's investigation led them to … [Layton] Potter, a known jailhouse snitch." Baer was aware that Potter "lacked any credibility because he had been convicted of making false reports to law enforcement in the past. But Baer 'approached … Potter' anyway; 'asked [Potter] if he wanted a piece of the case against … Roberts;' and 'knowingly … influenced, enticed, and coerced' Potter to provide false testimony establishing motive."

Baer moved to dismiss the counts against him on grounds that, as a prosecutor, he has absolute immunity. The District Court determined that Baer's alleged conduct served an investigative function and denied the motion to dismiss. Baer timely appealed.

The Third Circuit observed "[o]ur analysis of whether a prosecutor is entitled to absolute immunity 'has two basic steps, though they tend to overlap.'" *Fogle v. Sokol*, 957 F.3d 148 (3d Cir. 2020). "First, we ascertain just what conduct forms the basis for the plaintiff's cause of action. Then, we determine what function (prosecutorial, administrative, investigative, or something else entirely) that act served…." *Id.* "To earn the protections of absolute immunity at the motion-to-dismiss stage, a [prosecutor] must show that the conduct triggering absolute immunity clearly appears on the face of the complaint." *Id.* "When deciding whether absolute immunity applies, [the Court] 'examine[s] the nature of the function performed, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118 (1997). Consequently, "prosecutors are not entitled to absolute immunity when they perform the investigative functions normally performed by a detective or police officer." *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

However, prosecutors "are absolutely immune from liability under § 1983 for engaging in conduct that serves a quasi-judicial function." *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992).

In the present case, the Court stated the "allegations that Baer went looking for a new witness to provide false testimony describe an investigator's work 'seeking to generate evidence in support of a prosecution,' not an advocate's work 'interviewing witnesses as he prepare[s] for trial.'" *Fogle*.

Baer, relying on *Buckley*, argued for a bright-line rule that a prosecutor's alleged search for a new witness that occurs post-charge and is designed to produce inculpatory evidence for trial serves a prosecutorial function. The Court was not persuaded. While *Buckley* held that a prosecutor's conduct pre-charge is evidence that he was not acting as an advocate for the government (i.e., there is no case to "prosecute" before anyone is charged), the inverse is not true, the Court stated. Merely because a prosecutor's acts occurred after charges were filed does not automatically mean those acts are quasi-judicial. Indeed, detectives may continue investigating a crime and generating evidence after charges are filed. And the fact that the evidence was generated for use at trial does not help the argument. The Court reasoned that "[d]etectives generate inculpatory evidence for trial. But they are not quasi-judicial advocates entitled to absolute immunity." *Buckley*.

Baer also argued that his conduct served a prosecutorial function because it "occurred only one month prior to trial and for the purpose of getting Potter to testify at trial." Baer supported his argument with *Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006), "which held that prosecutors were entitled to absolute immunity for allegedly using 'stick and carrot treatment to elicit … false testimony' from a jailhouse informant." Roberts countered that *Fogle* held that prosecutors are not entitled to absolute immunity when "solicit[ing] false statements from jailhouse informants" and "deliberately encourag[ing] … State Troopers to do the same." The Court, expressing that it was a "close call," determined Roberts had the better argument. The Court observed that Baer's alleged conduct of identifying Potter to solicit false testimony was "nearly identical to the prosecutors' alleged conduct in *Fogle*, recruiting jailhouse informants."

"Second, like the plaintiff in *Fogle*, Roberts provided detailed allegations describing the actions that Baer took to find a new jailhouse informant and coerce him to provide false testimony." In contrast, the plaintiff in *Yarris* "vaguely alleged that prosecutors used 'stick and carrot treatment to elicit … false testimony' and 'did not describe in detail when or how the prosecutors obtained a false statement from a jailhouse informant."

The Court stated that the detailed allegations helped to "reduce the risk of vexatious litigation, as it is more difficult for a plaintiff

with a frivolous claim to provide in a complaint detailed allegations of prosecutorial misconduct than vague ones." *Van de Kamp v Goldstein*, 555 U.S. 335 (2009) (explaining that one of the reasons the U.S. Supreme Court extended absolute immunity to prosecutors was "the general common-law concern that harassment by unfounded litigation could both cause a deflection of the prosecutor's energies from his public duties and also lead the prosecutor to shade his decisions instead of exercising the independence of judgment required by his public trust").

Finally, the Court determined that Baer "place[d] too much weight on the allegation from *Fogle* that prosecutors participated in 'a long chain of investigative events' stretching back before there was probable cause to bring charges." While *Fogle* did refer to the long chain of investigative events, it only did so to explain why the prosecutors sought out jailhouse informants to obtain fabricated testimony. The Court explained that merely explaining the prosecutors' motive had no bearing on the *Fogle* Court's conclusion that their acts served an investigative function.

The Court stated that Baer "'played the detective's role to search for … clues and corroboration' when he went looking for a new jailhouse informant, found Potter, approached Potter, and knowingly influenced, enticed, and coerced Potter to provide false testimony." *Fogle*. "[W]hen the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Buckley*.

The Court concluded that Baer was "not entitled to absolute immunity because his alleged conduct served an investigative function." However, the Court cautioned that it reached this conclusion because, at the motion-to-dismiss stage, the Court accepts as true the factual allegations in the complaint. It may be the case that during discovery, evidence may come to light that the events transpired in such a manner as to show that Baer was acting as an advocate or in a "quasi-judicial" function, and he could reassert his claim for absolute immunity, the Court explained.

Accordingly, the Court affirmed the District Court's order denying Baer's motion to dismiss. See: *Roberts v. Lau*, 90 F.4th 618 (3d Cir. 2024).

New York Court of Appeals: Dismissal Required Where Prosecution Failed to Explain Repeated Requests for Post-Readiness Adjournment

by Sam Rutherford

The Court of Appeals of New York, the state's highest court, held that the People violated a defendant's statutory right to a speedy trial by filing a certificate of readiness and then appearing at several court dates to request a post-readiness adjournment (continuance) without any explanation for the delay.

Patrick Labate crashed into a parked police car in December 2017, and, as a result, was charged with reckless driving and related offenses. The People filed a certificate of readiness for trial shortly after his arraignment and reaffirmed their readiness for trial in a series of hearings leading up to a trial date set for September 5, 2018. However, on that day, the parties appeared in court, and the People stated that they were not ready to proceed to trial without explanation.

The trial court subsequently adjourned the case on three separate occasions, each time based on the People's unexplained statement that they were not ready for trial. Labate moved to dismiss the charges against him, but the trial court denied the motion. He was subsequently convicted and appealed.

New York state law requires that defendants be brought to trial within certain periods of time based on the seriousness of the charged offense. N.Y. Crim. Proc. Law § 30.30. Because he was charged with a class A misdemeanor, Labate should have been tried within 90 days of his arraignment. N.Y. Crim. Proc. Law § 30.30[1][b]. Once the People file a certificate of readiness stating that they are prepared for trial, any subsequent request for adjournment must be explained. Otherwise, that period of delay is chargeable to the People and counts against the speedy trial clock. *People v Brown*, 68 N.E.3d 45 (N.Y. 2016).

In this case, the People filed a certificate of readiness and then appeared at three successive trial dates stating they were not ready for trial. No explanation was given at those hearings or at any point thereafter, despite invitation from the trial court to do so. As the Court of Appeals explained, "the People must, at some point, provide an explanation for their postreadiness adjournments and delay so that the Court can determine what portion of the delay is properly attributable to them."

Because the People failed to comply with this requirement in Labate's case, the Court held that the delay was attributable to the People, and Labate was therefore not bought to trial within the statutorily required time limit.

Accordingly, the Court reversed his conviction and dismissed the underlying indictment dismissed with prejudice. See: *People v. Labate*, 2024 N.Y. LEXIS 407 (2024).

Writer's note: In 2019, New York enacted changes to N.Y. Crim. Proc. Law § 30.30. Although these amendments did not apply to Labate's case, the Court of Appeals nonetheless noted that the amendments require the same result it reached in his case. According to the Court, "those amendments, restate in part, the same rule from *Brown* that we reaffirm today. As relevant here, the legislature amended portions of subdivision (4), which governs the periods of time to be excluded when calculating chargeable time to the People (*see* L 2019, ch 59, part KKK, § 4). Section 30.30 now provides that '[a]ny such exclusion when a statement of unreadiness has followed a statement of readiness made by the [P]eople must be evaluated by the court after inquiry on the record as to the reasons for the [P]eople's unreadiness and shall only be approved upon a showing of sufficient supporting facts' (CPL 30.30 [4] [g])." Thus, the *Labate* decision remains good law even after the amendments.

Delaware Supreme Court: Warrant That Authorized Search of 'Any and All' Data of Named Files on Cellphone Is Invalid General Warrant That Also Failed to Include Temporal Limitation

by Douglas Ankney

The Supreme Court of Delaware ruled that a warrant authorizing a search and seizure of "any and all" data of named files of a cellphone was an invalid "general warrant," and the warrant was also invalid because it did not include a temporal limitation.

Andrea Casillas-Ceja's four-year-old daughter J.S. told her that Jose Terreros had licked her vagina. Casillas made Terreros leave the home and called police. Days later, Casillas observed on the internet search history of Terreros's cellphone several web searches related to J.S.'s accusations. Casillas reported her discovery to the police. Officer Jay Davidson's application for a warrant included the following pertinent portion from his affidavit:

"Your affiant was advised by [Casillas] that she responded to [her front yard] where she located [Terreros cell phone]. [Casillas] advised that she proceeded to check the search history and found pornography, a search of how to detect if a little girl has been raped, how long saliva stays on the body, and a search of how long fingerprints stay on clothes/sheets/blankets."

The application and affidavit sought authorization to search "[a]ny and all messages, any and all messaging apps, all search history, all photographs, videos, GPS coordinates, incoming and outgoing calls from November 18, 2019, to November 23, 2019." On November 23, 2019, the Justice of the Peace Court ("JP Court") approved a warrant to search as described in the above application but failed to include the temporal limitation dates "from November 18, 2019, to November 23, 2019."

In December 2019, Detective Steven Burse of the New Castle County Police Department used Cellebrite software to extract and download 29 gigabytes of videos, pictures, audio files, search history, and GPS coordinates (including more than 3,000 videos and 60,000 pictures).

In March 2021, Terreros moved pretrial to suppress the fruits of the search, arguing that "the warrant lacked sufficient particularity as to the types of data it authorized police to search and that it lacked any temporal limitation." The superior court held a hearing on the motion and ultimately denied the motion, finding that "the warrant was not a general warrant because" based on representations from the State at the hearing, the warrant "limited the search to specific categories, [and] did not allow a search of contacts, e-mails,

Facebook, Instagram, or any financial information, and Cellebrite limited the extraction temporally."

Evidence of Terreros's search history was admitted at trial to corroborate Casillas' testimony of what she had observed on the cellphone. Terreros was convicted by a jury of sexually abusing J.S., and he timely appealed, arguing, inter alia, the superior court erred in denying the motion and in failing to suppress the evidence.

The Delaware Supreme Court observed that both the Fourth Amendment to the U.S. Constitution and Article I, Section 6 of the Delaware Constitution require warrants before the government may search "persons, houses, papers, and possessions," and those warrants must "be supported by probable cause and describe the places and things to be searched with particularity." *Fink v. State*, 817 A.2d 781 (Del. 2003).

"The probable cause requirement mandates that the 'affidavit in support of the search warrant must, within the four corners of the affidavit, set forth facts adequate for a judicial officer to form a reasonable belief that an offense has been committed and the property to be seized will be found in a particular place.'" *LeGrande v. State*, 947 A.2d 1103 (Del. 2008). "In its most basic form, an affidavit must point not only to the evidence to be seized and the place to be searched, but also the reason why the affiant believes such evidence will be found in the place to be searched." 11 Del. C. § 2306.

The warrant "must satisfy the particularity requirement, which is fundamental and performs its own work in protecting against unreasonable searches and seizures." *Berger v. New York*, 388 U.S. 41 (1967). "To pass constitutional muster, the warrant itself must describe the things to be seized and the places to be searched with particularity such that 'nothing is left to the discretion of the officer executing the warrant.'" *Marron v. United States* 275 U.S. 192 (1927). "A warrant that fails to conform with the particularity requirement is unconstitutional." *Stanford v. Texas*, 379 U.S. 476 (1965).

Warrants that fail the particularity requirement are either "general warrants" or "overbroad warrants." *Wheeler v. State*, 135 A.3d 282 (Del. 2016). General warrants permit law enforcement to conduct indiscriminate searches likened to "exploratory rummaging." *Andresen v. Maryland*, 427 U.S. 463 (1976). Overbroad warrants "allow police to search in specified places or for specified items more broadly than the articulated probable cause." *United States v. Yusuf*, 461 F.3d 374 (3d Cir. 2006). The distinction matters because the remedy for general warrants is the complete suppression of the fruits of the search; whereas, an overbroad warrant "can be redacted as to the portions of the search for which no probable cause exists." *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982). These principles apply when the "place" to be searched and/or the "evidence to be seized" is digital in nature. *Riley v. California*, 573 U.S. 373 (2014).

In *Wheeler*, the warrant allowed for a search of "any and all data" stored on "any personal computer." The *Wheeler* Court ruled that the "warrant failed the particularity requirement because it did not contain sufficient probable cause to support the authorized searches of all digital content. In other words, the warrant lacked a sufficient nexus between the types of digital media to be searched and the investigation's current evidence of criminal activity."

In the present case, the Court explained that the detective's evidence and affidavit provided probable cause for the JP Court to authorize only a search of Terreros' search history over the course of a few days. There was not a sufficient nexus between the types of media the warrant authorized to be searched and Davidson's proffered "search history" evidence in his affidavit.

Furthermore, the Court determined that the warrant issued was a "general warrant" because it authorized a search of virtually the entire contents of the phone. The superior court erred in finding that because the warrant identified specific categories of data, it did not authorize a search of "any and all" data as prohibited by *Wheeler*, according to the Court. Thus, the Court agreed with Terreros that naming nearly every specific category of data on the phone and then permitting a search of "any and all data" of those specific categories was the same as searching "any and all data."

Additionally, the Court was troubled by the superior court's reliance on misrepresentations made by the State at the suppression hearing. First, "the State consistently represented to the [superior] court that Cellebrite, a company that produces software to perform cellphone extractions, was a neutral third-party that could limit the search's temporal scope to the dates contained in the application." That was "manifestly incorrect; the extraction and search were conducted by law enforcement using Cellebrite software." The record did "not show that law enforcement applied any temporal limitation during the search."

Second, the superior court's finding that Terreros's email, social media, Instagram, and Facebook accounts were not searched was based on the State's representations at the hearing. But that finding could not be sustained because the issue was what the warrant's "four corners" authorized, i.e., the warrant's scope and not the search's results were what must be evaluated under the Fourth Amendment. And the warrant clearly authorized a search of those categories of data. (Also, contrary to the State's representations, the extraction report included data from Facebook, Instagram, and WhatsApp.)

The Court concluded that the warrant was a general warrant, and it was also invalid because it did not include any temporal limitation. Thus, the Court held that the superior court erred in denying the suppression motion.

Accordingly, the Court reversed Terreros' convictions and remanded to the superior court for further proceedings consistent with its opinion. See: *Terreros v. State*, 2024 Del. LEXIS 20 (2024).

Editor's note: Anyone interested in the particularity requirement and general warrants is encouraged to read the Court's full opinion, which contains a detailed review of both Delaware and federal law on the topics.

Colorado Supreme Court Announces Parole Board Not Statutorily Required to Consider 'Demonstrated Maturity and Rehabilitation' When Deciding Whether to Release Sex Offenders Who Received Adult Sentences for Crimes Committed as Juveniles

by Sam Rutherford

In a case of first impression, the Supreme Court of Colorado held that the parole board is not statutorily required to consider a juvenile sex offender's "maturity," though is permitted to do so, but is required to consider the offender's "rehabilitation" when making release decisions where the offender was sentenced as an adult to a maximum term of life in prison.

The Court made this pronouncement on certification of a question of state law from the U.S. Court of Appeals for the Tenth Circuit in a case challenging the constitutionality of Colorado's sentencing scheme for juvenile sex offenders sentenced as adults to indeterminate life sentences.

Background

In 2011, when Omar Ricardo Godinez was 15 years old, he and three accomplices kidnapped and raped two women within a week of each other. Godinez was charged, tried, and convicted as an adult of six offenses related to these crimes. He was sentenced under Colorado's Sex Offender Lifetime Supervision Act ("SOLSA"), §§ 18-1.3-1001 to -1012, C.R.S. (2023). SOLSA requires courts to sentence convicted sex offenders to an indeterminate term of at least the minimum of the statutorily prescribed presumptive range for the level of offense committed and a maximum of the sex offender's natural life. Godinez received an aggregate sentence of 32 years to life in prison.

Prior to sentencing, Godinez argued that sentencing him as an adult under the SOLSA would violate the Eight Amendment's prohibition against cruel and unusual punishment because the Act does not require the parole board to take into consideration the demonstrated "maturity and rehabilitation" of juvenile offenders sentenced as adults for non-homicide offenses when making parole decisions, as required by the U.S. Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010). The trial court rejected this argument, reasoning that the *Graham* factors are subsumed within the SOLSA's provisions that guide parole determinations.

Godinez timely appealed, and the state Court of Appeals affirmed, concluding that the long-term aggregate sentence he received is not the functional equivalent of a life without parole sentence and that *Graham* therefore does not apply. The Colorado Supreme Court denied review, and the U.S. District Court for the District of Colorado denied Godinez's subsequent petition for writ of habeas corpus.

Godinez timely appealed to the U.S. Court of Appeals for the Tenth Circuit. That court had previously rejected the state appellate court's determination that aggregate sentences under the SOLSA do not implicate *Graham* when imposed on juvenile sex offenders sentenced as adults. Under Tenth Circuit precedent, Colorado "may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole." *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017).

However, the question remained whether Godinez's sentence actually violates the Eight Amendment. Resolution of this issue turns on the proper interpretation of the SOLSA, so the Tenth Circuit certified the following question of state law to the Colorado Supreme Court: "whether SOLSA requires, permits, or prohibits parole boards from considering maturity and rehabilitation." The Colorado Supreme Court accepted review of the certified question as a matter of first impression under state law.

Analysis

The Colorado Supreme Court began its review by noting that the Eighth Amendment requires states to give juvenile prisoners like Godinez who were sentenced as adults to a maximum term of life imprisonment for non-homicide offenses "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*. Whether the SOLSA satisfies this constitutional requirement is a matter of statutory interpretation. The SOLSA, like all statutory provisions, must be interpreted based on its plain and ordinary meaning, the primary purpose being to effectuate the Legislature's intent in enacting the provision. *McCoy v. People*, 442 P.3d 379 (Colo. 2019).

The SOLSA states that the parole board "shall" consider the following factors when making release decisions: "[1] whether the sex offender has successfully progressed in treatment and [2] would not pose an undue threat to the community if released under appropriate treatment and monitoring requirements and [3] whether there is a strong and reasonable probability that the person will not thereafter violate the law." § 18-1.3-1006(1)(a). Godinez argued that the use of the word "shall" in the statute prevents the parole board from considering any factors other than the three mentioned therein, and thus, it violates the Eighth Amendment as per *Graham*.

The Court rejected this interpretation. The Court reasoned that use of the word "shall" does require the parole board to consider the three statutory factors, but that does not bar the parole board from considering additional factors. The SOLSA, "at the very least, permits a parole board to consider maturity and rehabilitation when determining whether to parole a sex offender," according to the Court.

The question remained, however, whether the SOLSA mandates consideration of a juvenile prisoner's maturity and rehabilitation during parole hearings. The State argued that consideration of a juvenile's maturity and rehabilitation are necessarily part of the considerations mandated by the three-factor test set forth in the SOLSA regarding treatment progress, community safety, and likelihood

of law-abiding behavior. Assessing whether this is so first required the Court to define the words "maturity" and "rehabilitation."

Relying on dictionary definitions and case law from lower courts, the Court determined that "maturity involves, at the very least, the process of developing a stronger sense of responsibility, better judgment, more self-control, and the ability to resist negative outside influences." Again, turning to the dictionary definition, the Court determined that "rehabilitation" refers to the "process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes."

The Court concluded that a prisoner's satisfactory progress through sex-offender treatment to the point where the parole board determines he or she is eligible for release does not, in and of itself, encompass the maturity considerations mandated by the Eighth Amendment under *Graham*. "Although, to be sure, some of the traits of a person who successfully completes a treatment program or who poses a low risk of reoffending when re-entering society may correlate, to a degree, with the characteristics of a mature person, sex offender treatment programs and sex offender risk assessments are not designed to measure developmental maturity," the Court stated. This is so because the concept of maturity "is broader than merely recognizing and addressing problematic behavior." Thus, the Court ruled that the SOLSA's three-factor test does not require "parole boards to consider demonstrated maturity."

The three-factor test required by the SOLSA for release decisions does, however, encompass considerations of a juvenile's rehabilitation as required by *Graham*. "[S]ex offender treatment programs are rehabilitative by design because the purpose of requiring sex offenders to undergo treatment is precisely to rehabilitate them so that they can re-enter society with a low risk of reoffending." Thus, the Court ruled that the plain language of the SOLSA mandates parole board consideration of a juvenile's rehabilitation in connection with release decisions as required by *Graham*.

The Court rejected the State's argument that Colorado's general parole provisions, which are arguably incorporated into the SOLSA and require parole boards to consider the "totality of the circumstances" when making release decisions, also encompass the maturity and rehabilitation considerations mandated by *Graham*. Because this standard affords parole boards broad discretion to "consider any and all of the factors that it deems pertinent to the specific case," it cannot be considered as mandating consideration of a juvenile's maturity or rehabilitation, according to the Court.

Conclusion

Accordingly, the Court answered the Tenth Circuit's certified question of state law "by concluding that SOLSA permits consideration of maturity and requires consideration of rehabilitation." See: *Godinez v. Williams*, 544 P.3d 1233 (Colo. 2024) (*en banc*).

Writer's note: This case was returned to the Tenth Circuit, which will determine whether Godinez is entitled to a writ of habeas corpus because his sentence violates the Eighth Amendment as interpreted in *Graham*. *CLN* will monitor the case and report any future developments.

Massachusetts Supreme Judicial Court Affirms Trial Court's Exclusion of Expert Testimony on iPhone's Frequent Location History Data as Not Sufficiently Reliable Under *Daubert-Lanigan* Standard

by Douglas Ankney

In a case of first impression, the Massachusetts Supreme Judicial Court affirmed a trial court's exclusion of expert testimony regarding an iPhone's frequent location history data ("FLH") evidence.

Victor Arrington was charged with first degree murder and other offenses related to the home invasion and killing of Richard Long at Long's residence on Harvard Street in the Dorchester section of Boston. The Commonwealth moved in limine to admit the FLH data from Arrington's iPhone and corresponding expert testimony explaining that the FLH data placed the iPhone "within a 143-foot radius" of the crime scene at the time of the crime.

The trial court conducted a series of *Daubert-Lanigan* hearings (from *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994)), to evaluate the reliability of the proposed expert testimony about the FLH data. The Commonwealth's forensic analyst testified that:

1) he did not have access to the proprietary algorithm that generated the FLH data;
2) he performed a series of tests with an iPhone similar to Arrington's but not identical and that there were "likely differences" between the algorithms used in the two phones that he "believed would be insignificant" but he "couldn't say for sure";
3) based on his experiments with the similar iPhone, the expert believed he was able to interpret the FLH data on Arrington's iPhone; and
4) he interpreted the FLH data from Arrington's iPhone to show that he entered a frequent location no. 58 at 10:38 a.m. on March 31, 2015, and exited the area at 11:22 a.m. and that the "uncertainty radius" of frequent location no. 58 was 143 feet, which encompassed the crime scene.

The trial court denied the Commonwealth's motion, and the Commonwealth timely appealed.

As a preliminary matter, the Court explained that when an iPhone is turned on, it "generates location data points from sources such as global positioning system (GPS) data, nearby wireless computer network (Wi-Fi) access points, short-range wireless Bluetooth connections, and cell site location information (CSLI)." These location data points remain in

the iPhone's "Encrypted B" cache for 24 to 48 hours. Apple's proprietary algorithm converts this data to FLH data based upon the address travelled to, when the iPhone user travelled there, when the user left the location, how long it took to commute to the location, the method used to arrive at the location, and the total number of times the user visited that location.

The FLH data "consists of longitude and latitude coordinate point and a circle around it, representing an amalgamation of the location data points. The radius of the circle, labeled the 'uncertainty' in the FLH data, represents the approximate area in which the cell phone was located. The uncertainty radius can change from visit to visit to a frequent location, as can the coordinate point representing the center of the frequent location." While the FLH data remains on the iPhone, the data in the Encrypted B cache used to produce the FLH data does not.

The Court observed "[a]dmission of scientific or technological evidence is governed by what has come to be known as the *Daubert-Lanigan* standard." It explained: "Under the *Daubert-Lanigan* standard, 'the judge, acting as gatekeeper, is responsible for making a preliminary assessment whether the theory or methodology underlying the proposed testimony is sufficiently reliable to reach the trier of fact.'" *Commonwealth v. Camblin*, 86 N.E.3d 464 (Mass. 2017). Under *Daubert-Lanigan*, courts consider five nonexclusive factors when determining the reliability of proposed scientific evidence: "whether the scientific theory or process (1) has been generally accepted in the relevant scientific community; (2) has been, or can be, subjected to testing; (3) has been subjected to peer review and publication; (4) has an unacceptably high known or potential rate of error; and (5) is governed by recognized standards." *Commonwealth v. Powell*, 877 N.E.2d 589 (Mass. 2007).

The Court stated that "[b]ecause no court in the Commonwealth ha[d] previously deemed FLH data to be reliable, the Commonwealth bore the burden of establishing the reliability of FLH data under *Daubert-Lanigan* by a preponderance of the evidence." *See Camblin*. The Court noted that it "review[s] a trial judge's decision on a motion in limine to qualify or reject an expert on *Daubert-Lanigan* grounds for an abuse of discretion." *Canavan's Case*, 733 N.E.2d 1042 (Mass. 2000). An abuse of discretion occurs where "the judge made a clear error in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." *L.L. v. Commonwealth*, 20 N.E.3d 930 (Mass. 2014).

In the present case, the trial judge concluded with regard to the first *Daubert-Lanigan* factor that "there was little evidence that the process of obtaining and analyzing FLH data has been generally accepted in the scientific community." The articles submitted by the Commonwealth in support of general acceptance discussed the technology that produced the location data points that the algorithm converts to FLH data but did not address the reliability of the FLH data themselves, the Court stated.

With regard to the second factor of *Daubert-Lanigan*, the trial court concluded that there had been insufficient testing to establish the reliability of the FLH data. The Commonwealth's expert visited only five locations two or three times, for a total of 12 experiments to determine whether the FLH data accurately reflected the locations. But despite this testing, the expert "did not know how various factors were weighed to create FLH data outputs. The analyst also could not explain how the uncertainty radius for a frequent location was determined." And while the FLH data for some locations included a confidence level, the analyst "could not explain what the confidence level meant, why some locations had a confidence level and others did not, or how the confidence level was calculated."

As to the third factor, it was undisputed that the analyst's testing of the FLH data was neither peer reviewed nor published. The trial court also concluded that the Commonwealth failed to meet its burden with respect to the fourth factor, particularly because the analyst could not explain various characteristics of the FLH data. The trial court concluded that the fifth factor was satisfied "by the existence and admission into evidence of Federal regulations setting standards for analyzing cell phone location information generally." Thus, because the trial court's ruling was supported by the record, the Court did not find an abuse of discretion.

Accordingly, the Court affirmed the trial court's order denying the proffered expert testimony regarding FLH data and remanded for further proceedings consistent with its opinion. See: *Commonwealth v. Arrington*, 226 N.E.3d 851 (Mass. 2024).

Editor's note: The Court noted that, to its knowledge, FLH data has never been admitted as evidence in any court in the country.

DOJ Creates Database to Track Federal Law Enforcement Officers Accused of Misconduct

by Sam Rutherford

As reported by the *Associated Press*, the Department of Justice ("DOJ") announced the creation of a database designed to track serious misconduct complaints against federal law enforcement officers. The purpose of the database is to ensure that other agencies do not unknowingly hire officers who have been fired or resigned in response to allegations of serious misconduct.

The database, known as the National Law Enforcement Accountability Database, includes only former and current officers of federal law enforcement agencies with records of serious misconduct over the past seven years. The database is not publicly available and does not include misconduct reports against local or state law enforcement officers, as many police reform groups have advocated for, but it is a step in the right direction.

The database was created in response to an Executive Order issued by President Biden in May 2022, which included dozens of measures aimed at increasing accountability for federal law enforcement officers. "This database will ensure that records of serious misconduct by federal law enforcement officers are readily available to agencies considering hiring those officers," Biden said in a statement.

Source: apnews.com

Misuse of Facial Recognition Technology Threatens Everyone

by Michael Dean Thompson

Facial recognition technology ("FRT") and the policing agencies that use them continue to jeopardize American civil liberties. While their advocates point to a National Institute of Standards and Technology ("NIST") study that reported the best systems managed a high degree of accuracy using high quality images, they ignore that when comparing thousands of "probe" images against millions or more database images, the real number of failures (both false matches and missed matches) grows to a very large number. Moreover, they fail to mention how the largest provider of FRT to cops, ClearView AI, remains an unproven technology—its failure rate has yet to be tested outside the company.

What we do see, however, is that among the first seven people known to be wrongfully accused, six were Black. This includes Robert Williams who was arrested based on grainy surveillance video, against which they matched an expired driver's license photo. The very best algorithms for FRT have a significantly greater failure rate for Black and Asian people. They perform their worst with Black women. Add the element of low-quality images, and the odds of a correct match spiral downward. Nevertheless, cops continue to use the systems to make arrests, often without further investigation. And, because many states do not require cops to report that FRT was used to identify the suspect, the actual number of false arrests is unknowable and, therefore, likely much higher than reported.

The Innocence Project's director of strategic litigation as well as the author of *Junk Science and the Criminal Justice System*, Chris Fabricant, points out, "The technology that was just supposed to be for investigation is now being proffered at trial as direct evidence of guilt. Often without ever having been subject to any kind of scrutiny."

Among the NIST-tested algorithms, the failure rate for those systems that were not among the very best jumped rapidly even when both the probe and database photos were of high quality. Troublingly, when a detective tells a jury that AI recognized the suspect from a poor surveillance image based on a Facebook photo match—as might happen with ClearView's database of images scraped from the internet—the claim seems to enjoy the credibility of science. The detective likely will not mention that the analyst who ran the photo against an untested algorithm manipulated the image to get a match and skipped the first nine matches, preferring instead the subject with a history of driving infractions.

"Corporations are making claims about the abilities of these techniques that are only supported by self-funded literature," Mr. Fabricant said, adding, "Politicians and law enforcement that spend [a lot of money] acquiring them, then are encouraged to tout their efficacy and the use of their technology."

Facial recognition technology cannot identify a suspect to the same degree of certainty as a single source DNA sample. It should never be used as the primary source of identification. Mitha Nandagopalan of the Innocence Project's strategic litigation department agrees, "Many of these cases … are just as susceptible to the same risks and factors that we've seen produce wrongful conviction in the past."

Source: *InnocentProject.org*

Idaho Supreme Court Admitting Video of Child-Witness Interviews at Trial Violates Confrontation Clause

by Sam Rutherford

The Supreme Court of Idaho held that a trial court violated a defendant's Confrontation Clause rights by admitting video recorded interviews of a child witness at his trial on charges that he sexually assaulted the child where the child did not testify, thereby depriving the defendant of an opportunity to cross-examine the witness.

Background

William Parsons was charged with sexually abusing his live-in girlfriend's four-year-old daughter. The child was taken to the hospital for a sexual assault examination on the day the allegations arose. Police subsequently scheduled an appointment to interview the child at a local hospital specializing in providing care to child victims and conducting forensic interviews. The interview was conducted by a medical social worker 24 days after the allegations arose. The purpose of the interview was to "fully understand" the child's allegations. The interview was supervised by law enforcement via a closed-circuit TV. It was also recorded. A second recorded interview was conducted about three months later.

The child did not testify at trial because the State did not want to put her "through more trauma and mak[e] her recount sexual abuse in a room full of 12 strangers[.]" Instead, the State moved to admit the video interviews at trial over Parsons' Confrontation Clause objection. The trial court admitted the evidence ruling that while the videos were hearsay, they were nonetheless admissible under Idaho Rule of Evidence 803(4) as statements made for the purpose of medical diagnosis and treatment. The trial court further determined that such admission did not violate Parsons' constitutional rights because the hearsay statements were not testimonial in nature. Parsons was convicted and sentenced to 40 years in prison.

Analysis

Parsons timey appealed to the Idaho Supreme Court, arguing that admission of the video interviews violated the Confrontation Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at

trial unless he was unavailable to testify, and the defendant has had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36 (2004).

The Court stated that the question presented in Parsons' case was whether the videos of the child-witness interviews conducted by a social worker and observed by police were "testimonial" and therefore inadmissible at trial.

The Court noted that the *Crawford* Court "did not provide an exhaustive definition or list of 'testimonial' statements, but left formulating a comprehensive definition for 'another day.'" However, the *Crawford* Court did provide a "core class" of statements that are testimonial, and the U.S. Supreme Court "has continued to build on this list over the years," according to the Court. *See Ohio v. Clark*, 576 U.S. 237 (2015). (Note: See the opinion for full list of statements that are testimonial in nature, according to the U.S. Supreme Court.)

Statements by a witness who does not appear at trial are testimonial where "in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony." *Clark* (internal quotation marks and citations omitted). Stated differently, statements are testimonial "when the circumstances objectively indicate … that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813 (2006).

This is an objective test that turns on "matters of objective fact[;]" a reviewing court should not delve into the subjective purpose or motives of the individuals involved in the interrogation but should instead determine "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Michigan v. Bryant*, 562 U.S. 344, 360 (2011).

Relying primarily on its previous decision in *State v. Hooper*, 176 P.3d 911 (Idaho 2007) (instructing that videotaped statements made by child during forensic interview at sexual abuse center can have two-fold purpose of both "medical treatment and forensic use" but concluding the statements in the case were testimonial and thus erroneously admitted), the Court determined that admission of the video interviews violated Parsons' rights under the Confrontation Clause. The videos contained testimonial hearsay because they were conducted by a forensic evaluator well after the child initially reported the abuse and received medical treatment, the Court reasoned.

Moreover, the police scheduled and then observed the interviews via a closed-circuit TV. While acknowledging that the interviews did serve the "dual purpose" of "both medical and forensic needs," the Court nonetheless concluded that the primary purpose of the interviews "was to establish or prove past events potentially relevant to later criminal prosecution rather than to provide medical care[.]"

The Court also acknowledged that the video interviews unquestionably contained hearsay that was admissible under Evidence Rule 803(4) as statements made for the purpose of medical diagnosis and treatment. In fact, the Court had previously determined that nearly identical videos were admissible hearsay in a similar case, but there was no Confrontation Clause issue in that case because the child witnesses testified at trial. *See State v. Christensen*, 458 P.3d 951 (Idaho 2020). In the present case, however, the Confrontation Clause issue was present because the child witness did not testify, explained the Court. Her out-of-court statements, as memorialized in the video interviews and presented to the jury at trial, were "admissible only if she were unavailable and only if Parsons had a prior opportunity to cross-examine the witness." *See Bryant*. Because neither of these factors was present, the Court ruled that the admission of the video interviews violated the Sixth Amendment.

Conclusion

Accordingly, the Court reversed Parsons' convictions and remanded the case for a new trial. See: *State v. Parsons*, 543 P.3d 465 (Idaho 2024).

Editor's note: The Idaho Constitution does not contain a confrontation clause, so the Court analyzed the question at issue in the case solely under the U.S. Constitution's Confrontation Clause. Accordingly, anyone interested in Confrontation Clause issues is encouraged to read the Court's full opinion, which contains a more detailed analysis of the Confrontation Clause than is possible in this brief summary of the Court's opinion.

Bluetooth Surveillance Tool Added to List of Known Cache of DHS' Surveillance Technology

by Douglas Ankney

The Department of Homeland Security ("DHS") has an impressive cache of surveillance technology that includes, inter alia, automated license plate readers ("ALPR") and cell-site simulators ("CSS"). The latest tracking and surveillance revelation is that DHS and other law enforcement agencies have been using TraffiCatch since 2019.

Deployed in Texas, TraffiCatch detects WiFi and Bluetooth signals in moving cars for tracking purposes. Bluetooth devices consistently broadcast a Bluetooth Device Address that is either a public address or a random address. Over the lifetime of the device, public addresses do not change and are the easiest to track.

But more common are the random addresses that have multiple levels of privacy. These addresses change regularly. Unless a Bluetooth device with a random address has paired with a device that has a public address, it is hard to track. However, Jenoptik, the manufacturer of TraffiCatch, reports that data derived from Bluetooth is combined with ALPR, permitting law enforcement to track individuals who switch vehicles and change license plates.

Immigration and Customs Enforcement ("ICE") is already notoriously known for using CSS in violation of the law. CSS are devices that masquerade as legitimate cellphone towers, prompting cellphones within a certain radius to connect to the CSS instead of legitimate phone towers. The subterfuge allows law enforcement to track the user and his or her device. According to a report from DHS's Inspector General, ICE and other agencies conduct surveillance using CSS without proper authorization and in violation of the law.

Source: *EFF.org*

California Court of Appeal: Statistical Evidence Showing Racial Disparity Combined With Evidence Showing Non-Minority Defendants Charged With Lesser Crimes Establishes Prima Facie Case Under California Racial Justice Act

by Douglas Ankney

The Court of Appeal of California, Fourth Appellate District, held that "if a defendant provides statistical evidence showing a racial disparity in the charging of non-minority defendants and African-American defendants, and provides evidence of non-minority defendants who engage in similar conduct and are similarly situated but were charged with lesser crimes than the charged African-American defendant, this is sufficient to show there was more than a mere possibility that a violation of [California Penal Code § 745(a)] has occurred. As such, a defendant has met his burden of establishing a prima facie case." (Note: All statutory references are to the California Penal Code.)

Michael Earl Mosby, III, was charged by the Riverside County District Attorney's Office ("DA") with murder in connection with the drive-by shooting of Darryl King-Divens and a gun enhancement of discharging a firearm causing great bodily injury or death, along with three special circumstances—including having committed multiple murders. (Mosby had been involved in three additional shootings that resulted in two murders.) On March 15, 2019, the DA notified Mosby of the People's intent to seek the death penalty.

In July 2022, defense counsel filed a motion alleging that the DA's decision to seek the death penalty violated the California Racial Justice Act ("CRJA") (Assem. Bill No. 2542) (2019-2020 Reg. Sess.); (Stats. 2020, ch. 317, § 1), which added § 745 to the Penal Code. Mosby requested an evidentiary hearing. In support, he provided statistical evidence in his petition showing that in Riverside County:

- African-Americans were charged with special circumstances in their murder cases at a rate of 64.86 per 100,000 of the adult population ("AP") compared to a rate of 5.00 per 100,000 AP for Caucasians;
- a notice of intent to seek the death penalty was filed in 6.05 per 100,000 AP where defendants were African-American compared with 0.29 per 100,000 AP for Caucasian defendants;
- only 20% of all murder defendants were African-American, but they comprised 26% of all those charged with special circumstances, 39% of those who received death penalty notices, and 36% were sentenced to death;
- 25% of all murder defendants were Caucasian, but only 18% received special-circumstances charges, only 9% received death penalty notices, and only 4% were sentenced to death;
- when variables such as multiple victims, use of a firearm, and crime location were factored, African-American defendants were 1.71 times more likely to be charged with special circumstances, 9.06 times more likely to receive a death penalty notice, and 14.09 times more likely to receive a death sentence than Caucasian defendants.

In October 2022, the trial court found that Mosby had presented statistical evidence showing "a historical pattern of racism," but in order to obtain a hearing, Mosby had to show that he himself "was being discriminated against as shown by non-minority defendants who are similarly situated but charged with lesser crimes." The trial court denied the CRJA motion.

In December 2022, Mosby filed a second "Motion for a Hearing & Relief Pursuant to the Racial Justice Act" ("Second Motion"). In the Second Motion, Mosby incorporated the statistical evidence of his previous motion, arguing it was sufficient to make a prima facie case under § 745. Nevertheless, Mosby also included evidence showing that in Riverside County:

- Caucasian Ronald Ricks drove up to a house, fired several shots at persons standing in front of the house, and killed one. Ricks had numerous prior convictions, including a murder conviction in 2017. The DA did not seek the death penalty against Ricks;
- Caucasian Noy Boukes had several prior convictions, including a conviction for murder in 2016, when he shot and killed a fellow member of a white supremacist group. The DA did not seek the death penalty against Boukes;
- Caucasian Robert Lars Pape killed and burned three people, but the DA did not seek the death penalty;
- Caucasian Jared Bischoff killed a man who flirted with his girlfriend then stabbed his girlfriend to death, yet the DA did not seek the death penalty.

The trial court concluded that Mosby failed to show that factors other than race were why the DA did not seek the death penalty against those other defendants. The trial court denied the Second Motion, and Mosby timely appealed.

The Court of Appeal observed that § 745(a) provides that the "state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." A defendant may establish a CRJA violation during the charging stage of the prosecution if the "defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained." § 745(a)(3).

"'Similarly situated' means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical. A defendant's conviction history may be a relevant factor to the severity of the charges, convictions, or sentences. If it is a relevant factor and the defense produces evidence that the conviction history may have been impacted by

racial profiling or historical patterns of racially biased policing, the court shall consider the evidence." § 745(h)(6).

The Court explained that it did not need to address the open question of whether "statistics alone could meet the prima facie burden" because Mosby presented "factual evidence … to establish similar conduct" in the Second Motion.

"'More frequently sought or obtained' or 'more frequently imposed' means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or non-statistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias on race, ethnicity, or national origin." § 745(h)(1).

"If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation … the trial court shall hold a hearing." § 745(c). "A prima facie showing means 'that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred. For purposes of this section, a substantial likelihood requires more than a mere possibility, but less than a standard of more likely than not.'" § 745 (c)(1). "If an evidentiary hearing is ordered, 'evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses.'" *Id*. "The defendant shall have the burden of proving a violation of subdivision (a) by a preponderance of the evidence. The defendant does not need to prove intentional discrimination." § 745 (c)(2).

The Court stated that while the statute is clear as to the evidence that may be presented at an evidentiary hearing, it is not clear what type of evidence is necessary to establish a prima facie case. Nor does the statute's legislative history provide any insight. However, the Court approvingly cited *Finley v. Superior Court*, 95 Cal. App. 5th 12 (2023), as instructive in determining the standard for making a prima facie case.

In *Finley*, an African-American defendant alleged a violation of the CRJA. The *Finley* Court observed that since there were no cases interpreting § 745, it looked to the prima facie standard in habeas corpus proceedings, viz: "a petitioner should (i) state fully and with particularity the facts on which relief is sought as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts or declarations." The *Finley* Court added: "The court should accept the truth of the defendant's allegations, including expert evidence and statistics, unless the allegations are conclusory, unsupported by the evidence presented in support of the claim, or demonstrably contradicted by the court's own records." And finally, the *Finley* Court instructed: "[T]he court should not make credibility determinations at the prima facie stage."

After discussing *Finley*, the Court concluded that "*Finley*'s analysis provides a reasonable standard based on long-standing habeas corpus law."

The Court concluded that Mosby had presented sufficient evidence to show more than a mere possibility that § 745(a) had been violated—meaning he had made a prima facie case that warranted an evidentiary hearing. The statistical evidence alone was sufficient to establish a prima facie case, the Court stated. Nevertheless, Mosby also provided supporting factual evidence demonstrating that nonminority, similarly-situated defendants were charged with lesser crimes.

Accordingly, the Court issued a writ of mandate "directing the Superior Court of Riverside County to vacate its order denying Petitioner's request for a hearing, and to conduct an evidentiary hearing as set forth in this opinion." See: *Mosby v. Superior Court*, 99 Cal. App. 5th 106 (2024).

Editor's note: Anyone interested in the issue of disparate treatment of defendants under the California Racial Justice Act is encouraged to read the Court's full opinion, in which the Court makes it clear that there are open questions regarding the Act.

AC Units and DNA

by Douglas Ankney

Australian researchers at Flinders University have employed a promising new technique to collect and record forensic DNA evidence from crime scenes. A new study appearing in *Electrophoresis* focused on the DNA retrieved from air conditioning ("AC") units that circulate a room's air, including different types of filters at alternate periods.

While a crime scene may be wiped clean of fingerprints, Mariya Goray, senior lecturer in forensic science at Flinders and author of the study, said "it is very unlikely that an average offender, even with forensic awareness, could totally prevent their DNA from being released into the environment.

Samples of Environmental DNA ("eDNA") from AC units in four offices and four houses were collected at different times following cleaning. Samples were also collected from the air. The eDNA collected on the surfaces of AC units tended to be from previous room occupants while eDNA detected in the air represented more recent occupants. Goray said "[w]e now know that eDNA shed from sources, such as skin or saliva, can be detected in the environment, including soil, ice, air and water. We may be able to use this evidence to prove if someone has been in the room, even if they wore gloves or wiped surfaces clean."

Collection of trace DNA is growing ever more important in criminal investigations. In Australia, for example, 62% of all samples processed by Forensic Science SA were trace or touch DNA. But success rates with this type of evidence remains poor.

Source: *forensicmag.com*

Indiana Supreme Court Clarifies Framework for Determining When Courts May Apply Cash Bail to Public-Defender Costs and to Fines, Costs, and Fees

by Douglas Ankney

The Supreme Court of Indiana clarified the framework for determining when a court may apply a cash bail toward payment of public-defender costs and toward payment of fines, costs, and fees.

Tailar L. Spells was arrested on charges related to her altercation with Officer Lynnford Parker of the Indianapolis Metropolitan Police Department. The trial court set a $250 cash bond, which was deposited in full by a third party—Diane Rolle. Both Spells and Rolle signed a cash-bond agreement pursuant to Indiana Code § 35-33-8-3.2 that permitted the trial court, "upon full satisfaction of all bond conditions, to 'retain all or part of the cash to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted.'" (Note: All further statutory references are to the Indiana Code.)

The trial court subsequently appointed a public defender and imposed a $100 supplemental public-defender fee. Spells was ultimately convicted at a bench trial of felony battery on Parker. Pertinent to this review, the trial court imposed probation, a $20 fine, and $185 in various fees and costs with the probation terminating upon, inter alia, payment of all fines and costs. Weeks later, the trial court granted the probation department's request that the cash bond be applied to Spells' fines, fees, and costs. The remaining outstanding balance of $60 was paid in full. (Note: While the bond was $250, only $245 was applied to the supplemental public-defender fee and the fines, fees, and costs—presumably because $5 was automatically deducted as a bail-deposit fee under § 35-33-8-3.2(d)(1) (2023).)

Spells timely appealed, arguing "the trial court had failed to adequately inquire into her ability to pay her fine, costs, and fees." The Court of Appeals ("COA") affirmed, relying on *Wright v. State*, 949 N.E.2d 411 (Ind. Ct. App. 2011). The COA also determined that Spells' payment of the $60 mooted her appeal as to that money. The Indiana Supreme Court transferred the appeal, vacating the COA's decision.

The Court observed that resolution of the appeal required interpretation of the cash bail statute, reading the "words in their plain and ordinary meaning, taking into account the structure of the statute as a whole." *Town of Linden v. Birge*, 204 N.E.3d 229 (Ind. 2023). The Court stated: "The term 'publicly paid

costs of representation' refers to 'the portion of all attorney's fees, expenses, or wages incurred by the county' that are 'directly attributable to the defendant's defense.'" § 35-33-8-1.5(1). "A criminal defendant who 'requests assigned counsel' is entitled to a determination of indigency under … section[s] 35-33-7-6.5 and 35-33-7-6(a)." Additionally, "'The court must consider the defendant's 'assets,' 'income,' and 'necessary expenses' in determining their ability to pay for representation.'" § 35-33-7-6.5(a).

If a defendant is found indigent, counsel must be appointed, but if the court determines that the defendant "is able to pay part of the cost of representation by assigned counsel," the court "'shall order' a supplemental public-defender fee of $100 in a felony case and $50 in a misdemeanor case." § 35-33-7-6(c). The Court in the present case concluded that the trial court made the necessary indigency finding and "ability-to-pay" determination when applying $100 from the cash bond to the public-defender fee.

But the fines, costs, and fees "that a court may order the defendant to pay if the defendant is convicted" were another matter. "[T]he imposition of a fine usually requires an indigency hearing. By statute, 'whenever the court imposes a fine, it shall conduct a hearing to determine whether the convicted person is indigent' and it may order the payment of a fine only '[i]f the person is not indigent.'" § 35-38-1-18(a) (2007). The same is true regarding any costs. § 33-37-2-3(a). And broadly speaking, "fees" are considered "costs," also requiring the indigency hearing with the same prohibition against collection from indigent defendants, according to the Court. § 33-37-4-1. In the present case, the Court determined that all of Spells' fees (except the $2 jury fee not imposed pursuant to § 33-37-4-1) were "costs" that required an indigency hearing before they could be collected.

Pursuant to the General Assembly's amendments of 2020 regarding indigency determinations, "a trial court 'shall' consider a defendant's 'assets,' 'income,' and 'necessary expenses.'" § 35-33-7-6.5(a). "The court 'may consider' a defendant's eligibility for SNAP, TANF, or 'another need based public assistance program' as sufficient evidence of indigency." § 35-33-7-6.5(b). "The court may make an 'initial indigency determination' pending receipt of evidence." § 35-33-7-6.5(c). "[L]astly, the court may 'prorate' fines, fees, and costs to what a defendant 'can reasonably afford.'" § 35-33-7-6.5(d). "[A] defendant may be deemed unable to pay one cost, yet able to pay another." *Meeker v. State*, 395 N.E.2d 301 (Ind. Ct. App. 1979).

In the present case, the Court concluded that the trial court failed, with regard to the fines, costs, and fees, to hold an adequate indigency hearing or make appropriate findings as to Spells' ability to pay none, some, or all of the fines, costs, and fees.

Furthermore, the COA's "mootness" determination regarding the $60 was in error. "[W]hen the controversy at issue has been ended, settled, or otherwise disposed of so that the court can give the parties no effective relief," the case becomes moot. *E.F. v. St. Vincent Hosp. & Health Care Ctr.*, 188 N.E.3d 464 (Ind. 2022). Because a remedy in the present case remained available, i.e., reimbursement of the $60 to Spells, the issue was not moot, the Court concluded. *De La Cruz v. State*, 80 N.E.3d 210 (Ind. Ct. App. 2017).

Accordingly, the Court affirmed the trial court's retention of $100 of Spells' cash bail to cover the supplemental public-defender fee but vacated the $20 fine and the $183 in other fees and costs and remanded to the trial court for further proceedings consistent with its opinion. See: *Spells v. State*, 225 N.E.3d 767 (Ind. 2024).

Changes to Appeals of Pretrial Detention Decisions Prompts Illinois Supreme Court to Adopt Changes to Appellate Rules

by Douglas Ankney

Due to the monumental increase in the number of appeals of bond decisions, the Illinois Supreme Court adopted new appellate rules recommended by a five-person taskforce ("Taskforce"). The Pretrial Fairness Act ("PFA"), implemented in April of 2023, allows pretrial detainees to appeal district courts' decisions regarding conditions for release. Under the PFA, whether a person remains detained prior to trial is based on, inter alia, whether the person is a flight risk, a danger to the community, and the charges faced by the person. Each of these determinations by the judge may now be appealed.

Prior to enactment of the PFA, a bond was set by the judge. Infrequently, about 17 times each year according to the Taskforce, an appeal of the bond decision was sought. But under the PFA, the number of appeals was projected to total 4,557 annually. And in the five months following the PFA's enactment, about 1,900 appeals have already been filed.

"That's just too much of a change in too short of a time," said Justice Eugene Doherty of the Fourth District Appellate Court and Taskforce member. Among the Taskforce's recommendations adopted by the Supreme Court are:

- Issues with the detention decision must be raised in a motion at the trial court level before going to the court of appeals;
- Only those issues raised in the motion are permitted for appeal;
- Removal of the 14-day deadline to file an appeal;
- In cases of multiple detention decisions, only one appeal at a time is permitted.

Doherty explained that the "previous process made it easy to appeal in name, but in function, it was falling short of effectively representing defendants. What we want is to make it as easy as possible for an attorney to appeal for their client, but to make it a true appeal."

He added, "appellate courts are supposed to be the ones that slow it down, take a deep dive, explore the law with greater time and resources than a trial judge ever could. It was changing our mode of operations because instead of having that deep dive opportunity, it's like you're swatting these cases—you get a case done and there's three more that come in the door."

Source: *Wglt.org*

First Circuit: Defendant Did Not Understand Consequences of Guilty Plea Because District Court and Counsel Led Him to Reasonably Believed Plea Agreement Would Result in Sentence Below Applicable Mandatory Minimum

by David M. Reutter

The U.S. Court of Appeals for the First Circuit vacated a defendant's guilty plea because it was entered without an understanding of the consequences. The basis for the Court's ruling rested upon the U.S. District Court for the District of Puerto Rico and plea agreement indicating an award for prison credit on a state charge for which the defendant could not, and did not, receive due to mandatory sentencing provisions.

Before the Court was the appeal of Samuel Arce-Ayala, who pleaded guilty to federal charges for conspiring to possess with the intent to distribute controlled substances and possessing a firearm in furtherance of a drug trafficking crime. "Arce-Ayala was a leader, drug point owner, and enforcer for 'Los Menores,' a violent drug trafficking organization in Puerto Rico," the Court wrote.

Five years before his 2017 federal indictment, Arce-Ayala was convicted in the Commonwealth of Puerto Rico on two counts of attempted second-degree murder and three firearm offenses that involved Los Menores activities. Arce-Ayala was sentenced to eight years imprisonment for those convictions. Under the federal plea agreement, Arce-Ayala agreed to plead guilty to the two charged offenses in return for a sentence both parties would recommend.

The drug trafficking conspiracy charge carried a minimum term of 120 months imprisonment with a maximum term of life in prison. 21 U.S.C. §§ 841(b)(1)(A), 860. The firearms charge carried a minimum sentence of 60 months with a maximum term of life. 18 U.S.C. § 924(c)(1)(A). The parties agreed to recommend on Count I the statutory minimum sentence of 120 months and as to Count II, the statutory minimum of 60 months was agreed upon. It was further agreed that the Commonwealth convictions constituted "relevant conduct to the case of reference and that in the instant case, the sentence of imprisonment shall be imposed pursuant to U.S.S.G § 5G1.3 and § 5K2.23."

At the plea hearing, the prosecutor explained to the District Court the plea agreement upon which the parties agreed. A colloquy conducted by the court asked Arce-Ayala if he understood "that whatever time you spent in the State Court will be—you will be given credit for that time when I sentence you in this case." The court accepted the guilty pleas and scheduled a sentencing hearing.

Subsequent to the plea acceptance, Arce-Ayala's defense attorney learned the "relevant conduct" provision could not provide Arce-Ayala with credit for time served in Commonwealth custody. Generally, "sentencing guidelines cannot be employed to impose a sentence below an applicable statutory mandatory minimum." *United States v. Ramirez*, 252 F.3d 516 (1st Cir. 2001) (citing *Melendez v. United States*, 518 U.S. 120 (1996)). Only two ways exist to reduce a mandatory minimum sentence: (1) providing substantial assistance under 18 U.S.C. § 3553(e) or Federal Rule of Criminal Procedure 35(b) or (2) conviction of a drug trafficking offense that meets the requirements of the "safety valve" provision in 18 U.S.C. § 3553(f). *See United States v. Candelario-Ramos*, 45 F.4th 521 (1st Cir. 2022).

Arce-Ayala did not qualify under either of those provisions. In a footnote, the Court noted that the *Ramirez* Court ruled that credit for time served on a non-discharged sentence can be given so long as the total of the credit and "reduced federal sentence equals or exceeds the statutory mandatory minimum period." At the time Arce-Ayala was federally sentenced, he was ineligible because he was discharged from the Commonwealth sentence.

Attempts to withdraw the plea failed in the District Court, and the prosecutor rejected overtures to make concessions to satisfy the spirit of the agreement. The District Court sentenced Arce-Ayala to 120 months on the drug trafficking conspiracy offense and 60 months on the firearms offense to be served consecutively. Arce-Ayala timely appealed his conviction.

The Court began its analysis by noting that a defendant may withdraw a guilty plea prior to sentencing if he can demonstrate "a fair and just reason for requesting the withdrawal." *See* Fed. R. Crim. P. 11(d)(2)(B). The standard for withdrawal is "liberal," *United States v. Kobrosky*, 711 F.2d 449 (1st Cir. 1983), and "permissive." *United States v. Merritt*, 755 F.3d 6 (1st Cir. 2014). But there is no "unfettered right to retract a guilty plea." *United States v. Flete-Garcia*, 925 F.3d 17 (1st Cir. 2019).

In determining whether a defendant has demonstrated a "fair and just reason" to withdraw a guilty plea, courts consider: "(1) whether the original plea was knowing, intelligent, and voluntary and in compliance with Rule 11, (2) the strength of the reason for withdrawal, (3) the timing of the motion to withdraw, (4) whether the defendant has a serious claim of actual innocence, (5) whether the parties had reached (or breached) a plea agreement, and (6) whether the government would suffer prejudice if withdrawal is permitted." *United States v. Gardner*, 5 F.4th 110 (1st Cir. 2021).

The Court distilled the plea-withdrawal inquiry down to three "core concerns" of Rule 11: (1) "a lack of coercion," (2) "the defendant's understanding of the charges against him," and (3) "the defendant's knowledge of the consequences of the guilty plea." *United States v. Williams*, 48 F.4th 1 (1st Cir. 2022). Failure to satisfy any of the three concerns "requires the guilty plea be set aside." *United States v. Isom*, 85 F.3d 831 (1st Cir. 1996). The plea-withdrawal inquiry is fact-intensive. *See United States v. Caramadre*, 807 F.3d 359 (1st Cir. 2015).

Turning to the present case, the Court stated that Arce-Ayala's case implicated the third concern. The Court determined that both the District Court's statements and defense counsel's advice reasonably led Arce-Ayala to understand that his federal sentence would be reduced by his state sentence, regardless of the applicable mandatory minimum terms, pursuant to the "relevant conduct" provision in the plea agreement.

During the change-of-plea hearing, the District Court explained to Arce-Ayala that the "relevant conduct" provision meant that he

"will be given credit" for "whatever time [he] spent in the State Court" when sentenced in the federal case. The Court concluded that Arce-Ayala could reasonably interpret the District Court's explanation "as a guarantee that he would receive credit for this time served in state custody" because it didn't contain any "conditions or reservations." (See full opinion for the extended dialogue between the District Court judge and Arce-Ayala that convinced the Court that Arce-Ayala did not meaningfully understand the consequences of his plea.)

Additionally, the Court stated that he was "particularly susceptible" to understanding the District Court's explanation as a guarantee because his lawyer had provided him with incorrect legal advice earlier regarding the effect of the "relevant conduct" provision. Thus, the Court ruled that he lacked sufficient knowledge of the consequences of his guilty plea and that his plea violated a "core concern" of Rule 11.

Accordingly, the Court vacated the judgment and remanded for further proceedings that permit Arce-Ayala to withdraw his guilty plea. See: *Untied States v. Arce-Ayala*, 91 F.4th 28 (1st Cir. 2024).

U.S. Sentencing Commission Votes Unanimously to Restrict Use of Acquitted Conduct at Sentencing

by Sam Rutherford

On April 17, 2024, the U.S. Sentencing Commission voted unanimously to limit consideration of conduct for which a person was acquitted in federal court from being used in calculating the sentence range under the federal guidelines for a related conviction.

The U.S. Sentencing Commission Guidelines Manual ("USSG") does not specifically state whether a federal district court may consider conduct for which a defendant has been acquitted when sentencing on related offenses for which he or she has been convicted. However, in *United States v. Watts*, 519 U.S. 148 (1997), the U.S. Supreme Court ruled that the USSG does "not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." This practice is known as acquitted-conduct sentencing.

The Court determined that acquitted-conduct sentencing is permitted under several sections of the USSG. Specifically, Section 1B1.3 instructs district courts to consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." USSG § 1B1.3(a)(1) (2023). Section 6A1.3 similarly states that district courts "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." USSG § 6A1.3(a) (2023).

Acquitted-conduct sentencing has been controversial for many years. The federal prosecution of Dayonta McClinton is a prime example. The Government in that case charged McClinton, then only 17 years old, with shooting and killing a friend during a dispute over the proceeds of a pharmacy robbery. A jury, however, acquitted him of the murder but convicted him of robbing the pharmacy. The district court at sentencing nonetheless considered facts underlying the killing to increase McClinton's guideline range and imposed a sentence of 19 years in prison. Absent such consideration, McClinton's sentencing range would have been approximately five to six years.

McClinton's case reached the Supreme Court, and his petition for writ of certiorari was denied. However, the denial was not because the Justices did not believe his case raised serious issues. In fact, in a statement accompanying the denial of certiorari, Justice Sonia Sotomayor wrote that acquitted-conduct sentencing "raises important questions that go to the fairness and perceived fairness of the criminal justice system." Justices Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett also said the practice "raises important questions" but noted the Court was declining review because the Sentencing Commission was in the process of reconsidering the issue. *McClinton v. United States*, 143 S. Ct. 2400 (2023).

Following completion of its review, the Sentencing Commission issued preliminary amendments to the USSG in an effort to curb the practice of acquitted-conduct sentencing. The Commission added a new subsection to Section 1B1.3, stating that "[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction." USSG § 1B1.3(c) (2024) (proposed amendment).

This amendment will become effective on November 1, 2024, unless Congress intervenes to change or eliminate the proposal. The amendment is not retroactive, although a majority of the Sentencing Commission voted to give notice of the possibility of retroactivity in the future and to prepare a retroactivity impact analysis. U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines (Preliminary)* (April 17, 2024).

Sources: *U.S. Sentencing Commission, law360.com, reason.com*

Writer's note: It is important to understand that this change does not completely prohibit consideration of acquitted conduct at sentencing. The commentary accompanying the amendment to Section 1B1.3 notes that "[t]here may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct." USSG § 1B1.3, comment, n.10 (2024) (proposed commentary).

Report Finds Inaccurate Field Drug Tests Major Cause of Wrongful Convictions

by Matthew T. Clarke

A report published in January 2024 by the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania's Carey School of Law revealed that false positives in presumptive field test used in drug arrests are one of the most common, and possibly the most common, cause of wrongful arrests and convictions. The report, entitled "Guilty Until Proven Innocent: Field Drug Tests and Wrongful Convictions," utilized a nationwide survey of law enforcement agencies and forensic drug labs to make its determinations.

Using data from the survey and national estimates of drug arrests, the report estimates the impact of (1) false positives in field drug tests on wrongful arrests, (2) racial inequity in arrests, (3) the subsequent prosecutions, and (4) criminal convictions. It reported that approximately 773,000 of the over 1.5 million annual U.S. drug arrests involve the use of color-based presumptive field tests. Although the exact error rate for the tests is unknown because they require a subjective determination by the arresting officer, available data suggest around 30,000 people are arrested in the U.S. each year due to false positives of the field tests.

"Presumptive field drug test kits are known to produce false positive errors and were never designed or intended to provide conclusive evidence of the presence of drugs," according to Quattrone Center Assistant Director Ross Miller, the lead author of the report. "But in our criminal legal system, where pleas bargaining is the norm and actual fact-finding by trial is exceedingly rare, these error-prone tests have become the de facto determinants of guilt in a substantial share of criminal cases in the United States and, as a result, a significant cause of wrongful convictions."

The tests were designed to be used as a preliminary screening tool because of their unreliability. Yet, nearly 90% of prosecutors responding to the survey reported that guilty pleas are accepted in their jurisdictions without verification of the field test by an accredited laboratory. Sixty-seven percent of labs reported not being required to review samples in cases resolved by plea agreements. Twenty-four percent of the labs did not even receive samples when field test results were available. Forty-six percent reported that no confirmatory test would be performed if a guilty plea had already been entered.

"Every year, tens of thousands of innocent Americans are arrested on the basis of $2.00 roadside drug test kits that are known to give false positives," said Des Walsh, Founder of the Roadside Drug Test Innocence Alliance. "Now, this landmark study by the Quattrone Center demonstrates the scope of the harm done by these inaccurate test kits…."

The report recommends reducing reliance on field drug tests, regular blind audits to establish the field test error rate for specific officers, issuing a citation only until the results of the field drug test are confirmed by a certified drug lab, and requiring lab confirmation even when a guilty plea is entered alongside a right to withdraw the plea should the lab results show the sample is not a controlled substance. Ultimately, the report recommends limiting or banning the use of the current, inaccurate field drug tests.

Source: *forensicmag.com*

New Research on Predictive Models for Pediatric Head Injuries

by Jo Ellen Knott

Differentiating accidental falls from child abuse in young children poses a significant challenge for professionals who work these cases. Child abuse cases are some of the most challenging for prosecutors, law enforcement professionals, and child protection advocates tasked with finding the truth about what happened to the injured or deceased child.

In most cases, no one other than the accused was present to witness the event, and children (especially infants) are too young to communicate what the circumstances were that led to their injuries. As pointed out by a research team from the University of Utah, the task of uncovering the truth "is complicated even more because there are very few scientifically based and validated tools or datasets available to help distinguish between accidental and abusive trauma in infants."

More than 600,000 children were victims of abuse in 2021, according to the Department of Health and Human Services Administration for Children and Families. Of that number, 1,820 children died due to their injuries, and most were younger than three years old. For more than a decade, the National Institute of Justice ("NIJ") has awarded grants for research to help physicians and law enforcement distinguish accident from abuse cases when presented with an injured child.

Two recent studies resulting from an NIJ award offer promising advancements in this critical area. In the first study from University of Utah, scientists predict skull fracture patterns. The second study from the University of Louisville provides statistical models for injuries resulting from falls.

The first study, led by University of Utah bioengineer Brittany Coats, focuses on the biomechanics of skull fractures in infants and toddlers. Researchers examined real human skull specimens from deceased children under three years old, subjecting them to various impact forces and stresses. By analyzing the resulting fracture patterns, the team is building a computer model that can predict the type and severity of skull fractures based on the circumstances in which the child suffered a head blow. This tool has the potential to significantly improve case evaluation, reduce diagnostic uncertainties, and aid expert testimony during legal proceedings.

The second study, led by bioengineer

Gina Bertocci (University of Louisville) and Dr. Mary Clyde Pierce (Lurie Children's Hospital), aims to develop a statistical model for predicting head injury risk in young falls. Their research builds on data collected through a previous NIJ grant that monitored children's falls in a childcare setting using head accelerometers. This data, combined with real-world injury information from emergency room cases, formed the foundation for a comprehensive database used to create the LCAST tool. LCAST stands for Lurie Children's (name of hospital) Child Injury Plausibility Assessment Support Tool.

LCAST, currently in use at its namesake Chicago hospital, assists medical professionals in identifying potential child abuse cases. While the model offers valuable information, the researchers emphasize its limitations. The LCAST website clearly states that the system is "strictly a screening tool" to aid abuse recognition, not a definitive diagnostic tool.

The research done by the two universities' bioengineers has made significant progress in differentiating accidental falls from child abuse. By harnessing biomechanical principles and statistical analysis, Coats and Bertocci are equipping medical professionals with new tools to improve child safety and providing lawyers with data to argue for justice.

Source: *Forensic*

Medical Examiners' Biased Manner of Death Determinations Sending Innocent People to Prison and Exonerating Bad Cops

by Douglas Ankney

Bias influencing medical examiners' manner of death determinations is sending innocent people to prison and exonerating guilty cops. In Mississippi, Rankin County Deputy Hunter Elward pleaded guilty in 2023 to federal charges related to his role in the horrific torture of two Black men by a gang of deputies calling itself the "Goon Squad." The deputies broke into the men's home, tortured and sexually humiliated them, and fired a gun inside the mouth of one of the men, leaving him with permanent disfiguring injuries. And in 2021, Elward was one of two deputies who witnesses saw kneeling on 29-year-old Damien Cameron for more than 10 minutes. Cameron died from the encounter. His face was swollen and bloodied, and there was bleeding in his neck.

Nevertheless, State Medical Examiner Staci Turner determined Cameron's manner of death to be "undetermined." But in the aftermath of the torture cases, Cameron's manner of death was reviewed by three separate medical examiners. Each of them concluded that Turner erred in classifying Cameron's manner of death as undetermined—each concluding that Cameron's death was clearly a homicide. But because Turner had failed to classify the death as homicide, there was no ensuing investigation, and Elward was able to continue his criminal conduct under the guise of law enforcement.

Medical examiners are called upon to make two determinations when performing an autopsy after a suspicious death: (1) the cause of death and (2) the manner of death. The cause of death, well rooted in medicine, generally is not disputed. Examples include blood loss (exsanguination), cardiac arrest, asphyxiation, blunt-force trauma, etc. But manner of death—the mechanism by which the death occurred—is a subjective determination that is much more consequential. Manner of death determinations include suicide, homicide, accident, natural causes, and undetermined. Generally, only when the manner of death is determined to be a homicide is there an ensuing investigation that may lead to a criminal prosecution.

Innocent parents, grandparents, siblings, and other caretakers have been sent to prison because a medical examiner determined a child's death to be a homicide when it was not. The best example of this is the theory of "shaken baby syndrome." Medical examiners routinely testified that particular symptoms observed during the autopsies of small children could be caused only by violent shaking, sending hundreds of innocent people to prison. Scientists outside the criminal justice system have proven that those same symptoms are caused by falls and illness. ProPublica and the Medill Justice Project have conducted studies that revealed child deaths are much more frequently classified as crimes in particular states and counties than others, suggesting the determining factor in those classifications is not science but the biased predilections of the medical examiners.

Conversely, guilty police officers have gone free because medical examiners failed to correctly determine the manner of death to be a homicide. The death in Colorado of 23-year-old Elijah McClain is a well-known example. McClain, a healthy Black man, was thrown to the ground by police and restrained. Police officers claimed McClain was suffering from "excited delirium," and paramedics forcibly injected him with ketamine. The county coroner first consulted with police and then classified McClain's manner of death as "undetermined," speculating he "may have died of excited delirium brought on by an undiagnosed mental health condition."

But after the killing of George Floyd, Colorado Governor Jared Polis appointed a special prosecutor to investigate McClain's death anew. After a grand jury found that the police officers had no probable cause to stop McClain, the autopsy was changed to read that McClain died of "complications of ketamine administration following forcible restraint." One officer was later convicted of manslaughter. According to Joye Carter, who was named director of the Washington, D.C., medical examiner's office in 1992, there is "a pattern with in-custody deaths. There's a knee-jerk desire to quickly clear these police officers. Some medical examiners bend over backwards to blame these deaths on race-based conditions like 'sickle-cell trait' or excited delirium."

The U.S. is the last remaining country in the developed world where medical examiners testify about the manner of death. Like felony murder, it's a holdover we inherited from England. Peter Neufeld, cofounder of the Innocence Project, explains: "Manner of death is not a medical determination. It's a

legal determination that necessarily involves processing nonmedical information. Why is a doctor in a better position to evaluate the veracity of a suicide note, the truthfulness of a police report, or the reliability of a witness identification? They aren't. Medical examiners simply don't have the training to make those calls."

Adding to the problem, medical examiners frequently work within systems designed to make them biased. In many jurisdictions around the nation, the medical examiner's office comes under the control of a law enforcement agency. The medical examiners and coroners report to police and/or prosecutors who often have invested interests in the outcomes of the autopsies, especially when the death occurred at the hands of the police.

In other jurisdictions, autopsies are contracted out to private pathologists. The financial arrangements create a strong incentive for the pathologists to fill the ears of law enforcement with what the officers want to hear in order to keep the referrals coming. Shockingly, in some jurisdictions, crime labs receive additional funding when someone is convicted.

And even in those jurisdictions where medical examiners are not directly connected or dependent upon law enforcement, they are generally viewed to be a component of the "prosecutor's team." And they often consult with the prosecution before beginning an autopsy. This contact opens the door to cognitive bias.

Neurologist Itiel Dror has published three studies in the *Journal of Forensic Sciences* on the cognitive bias of medical examiners. In his second study, medical examiners received identical autopsy reports. Half of them were accompanied by a police report suggesting suicide, and the other half accompanied by a police report suggesting homicide. The results revealed that the medical examiners were far more likely to make a manner of death determination that coincided with the police reports even though the information in all of the autopsy reports was the same.

The third study, published in September 2023, revealed that when medical examiners are given one theory of the crime, they are most likely to agree with that theory. But providing more than one theory changed their analysis. But it was Dror's first study that brought the onslaught of backlash from medical examiners. Dror and a team of six researchers—four of whom were medical examiners themselves—asked 133 medical examiners to review an autopsy report of a child's death and to make a determination of accidental death, homicide, or insufficient information to make a determination. The 133 participants were given identical autopsy reports. But half of the participants were told the deceased child was Black and died while in the custody of the mother's boyfriend. The other half were told the child was white and died while in the care of his grandmother. Statistically, Black children are more likely to die from homicide, and grandmothers are less likely to kill a child than a mother's boyfriend. But those facts should have no bearing in determining the manner of death in a particular case. Yet, the medical examiners given the scenario with the Black child ruled the death a homicide at a rate five times greater than those who were told the child was white.

Predictability is fundamental to the scientific method. A group of scientists applying established scientific principles to the same set of facts should reach the same conclusion. This failure among the medical examiners revealed the subjective nature of manner of death determinations.

One would think the medical examiners would be ecstatic at learning how cognitive bias affects their determinations, enabling them to take precautions to eliminate it from future autopsies. Instead, forensic pathologists from around the nation attacked Dror and his team.

"It was an extremely disturbing experience to be openly attacked by my colleagues, some of whom I thought were friends," said Dr. Jonathan Arden, one of the study's authors and former president of the National Association of Medical Examiners ("NAME") as well as the former head of the crime lab in Washington, D.C. "We were attacked baselessly, inappropriately, in a public forum. I had to retain counsel, and ended up spending a substantial amount of time, money, and effort responding to these accusations."

Dror said "we expected people to disagree with the study. But these are supposed to be scientists. You write a letter to the editor. These doctors make decisions that send people to prison. You'd think they'd welcome feedback that will help them minimize mistakes. Instead, they sent a clear message: Don't criticize us. We'll go after you. We'll go after your career." Dror and his six co-authors were attacked with personal vitriol. NAME's President sent an official complaint to Dror's employer at the time, University College of London, alleging improprieties in the manner the study was conducted. A subsequent investigation found that Dror had done nothing wrong. The attacks upon the researchers from the medical examiners were so bizarre that the Editor of the *Journal of Forensic Sciences* took the rare action of publishing a note chastising the critics for their "lack of decorum and collegiality."

Carter said, "I was disappointed by the reaction, but I wasn't surprised. I've seen medical examiners say things like, because of the color of the decedent's skin, they couldn't tell if there were bruises. Which is just incredible. When I'd tell that story to explain why representation of nonwhite people is important, they would just shut down. They didn't want to hear it. They just hear that as you calling them racist. So now you have a study finding that racial stereotypes can influence the manner of death determinations. I can't say I'm surprised that they don't want to hear that, either." Though, to be fair, race wasn't the sole difference between the two groups in the study. The relationship of the caregiver to the victim (grandmother versus mother's boyfriend) was also a difference, but just like race, that should not have any bearing on the manner of death determination in a specific case.

Perhaps another factor is the caliber of the people entering the medical examiner profession. Medical students are not beating down the doors to get careers in forensic pathology. Most medical schools don't even teach it. The majority of medical examiners work in the public sector and earn significantly less money than physicians who work with living patients. State legislatures underfund medical examiners' offices. As a result, the field has come to be viewed as a professional dumping ground for those who didn't excel in medical school.

After a police-involved killing of a Black man in 1954, a young Black woman told journalist John Howard Griffith: "We couldn't even count the number of bullet holes in my brother's head. But they called it heart failure." It appears that in the succeeding 70 years, little progress has been made in the medical examiner's community.

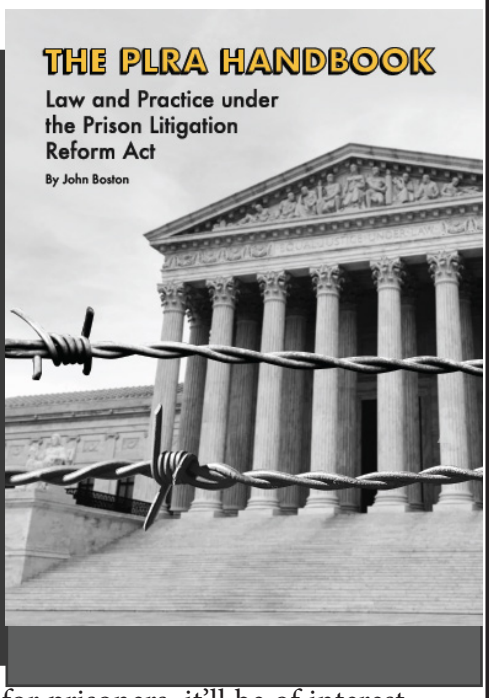
Sources: *The New Republic*; *Journal of Forensic Sciences*

THE PLRA HANDBOOK

Law and Practice under the Prison Litigation Reform Act

By John Boston

Edited by Richard Resch



The PLRA Handbook is the best and most thorough guide to the PLRA in existence and provides an invaluable 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.

Anyone involved in federal court prison and jail litigation needs *the PLRA Handbook* – lawyers, judges, court staff, academics, and especially, pro se litigants.

Although *the PLRA Handbook* is intended primarily for litigators contending with the barriers the PLRA throws up to obtaining justice for prisoners, it'll be of interest and informative for anyone wishing to learn how the PLRA has been applied by the courts and how it has impacted the administration of justice for prisoners. It is based primarily on an exhaustive review of PLRA case law and contains extensive citations.

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.

"If prisoners will review The PLRA Handbook prior to filing their lawsuits, it is likely that numerous cases that are routinely dismissed will survive dismissal for failure to exhaust."

— Daniel E. Manville, Director, Civil Rights Clinic

THE PLRA HANDBOOK

Paperback, 576 pages

Prisoners: $84.95

Professionals: $224.95

(includes shipping)

Order by mail, phone, or online. Amount enclosed _____

By: ☐ check ☐ credit card ☐ money order

Name _____

DOC/BOP Number _____

Institution/Agency _____

Address _____

City _____ State _____ Zip _____

Human Rights Defense Center
Dedicated to Protecting Human Rights

PO Box 1151 • Lake Worth Beach, FL 33460
Tel 561-360-2523 • www.prisonlegalnews.org

Government Accountability Office Issues Report Regarding Troubling Lack of Training on Use of Facial Recognition Technology by Federal Law Enforcement Agencies

by Michael Dean Thompson

Considering all the bad press surrounding Facial Recognition Technology ("FRT") and its high-profile failures, a recent report from the Government Accountability Office ("GAO") titled "Facial Recognition Services: Federal Law Enforcement Agencies Should Take Actions to Implement Training and Policies for Civil Liberties" found that the seven agencies believed to be the largest consumers of commercial facial recognition services are doing so without training, accountability, or transparency. Strangely, while all seven agencies surveyed each have their own policies regarding personally identifiable information ("PII"), such as facial images, all seven of the agencies failed to fully comply with them. The report sadly did nothing to alleviate the justifiable fears of Americans concerned about civil rights abuses.

Historical Background

Facial Recognition Technology provides yet another dimension to identifying people. It can be thought of as operating in two modes. The first is verification, where companies like Apple use FRT to verify that a user is authorized to access a system or place. For verification, the software only needs to check a provided facial image against a known, authorized image. In that sense, verification is a one-to-one comparison. In contrast, an FRT running in identification mode must compare a given image (a "probe" image) to a vast number of database images that could number in the billions. Obviously then, a 0.1% failure rate in identification would result in very different outcomes for the two modes.

Humans are worse at recognizing faces than they realize, so FRT holds some real promise. Effective facial recognition systems can assist cops in eliminating large swaths of potential suspects, but they should never be used alone to identify a specific suspect and issue a warrant.

The National Institute of Science and Technology ("NIST") tested a list of FRT providers and issued a report in 2019 that found Microsoft and Amazon's products to be among the very best available. Yet, in 2018, the American Civil Liberties Union ("ACLU") passed the members of Congress through Amazon's "Rekognition" system. It falsely matched 28 members of Congress to a database of mugshots. While Congress is about 20% BIPOC, members with darker skin made up 40% of the false matches. This aligns closely with a study by Joy Buolamwini (then a Microsoft researcher) and Timmit Gebru. The two researchers examined three products from Microsoft, Face++, and Amazon. They found that the products misclassified women with darker skin between 20.8% and 34.7% of the time.

Despite the high failure rates, it appears that most states do not require cops to reveal that FRT was used to identify a suspect. As of this writing, at least nine people have been arrested or detained due to false matches of FRT systems. That number is likely to be far higher, however, as the suspects are often not told exactly how they were selected from the crowd. And, since the cops are treating FRT identification as being as reliable as a fingerprint, what the cases we are seeing of misidentification tend to have in common is that the cops arrested the suspects before verifying the identification.

Meanwhile, the largest provider of commercial FRT to cops is ClearView AI, with more than 2,000 law enforcement customers in 2020. Despite proclaiming to possess a massive gallery of more than three-billion images that they have pulled from the internet, their system has yet to be tested under controlled conditions, as were Microsoft and Amazon's systems. Nevertheless, while ClearView AI brazenly provides free trials to untrained cops—without requiring departmental approval—Microsoft and Amazon at least temporarily stepped back from providing FRT services to law enforcement agencies during the pandemic. Likewise, the same week Amazon announced its moratorium, IBM announced that it would halt research into facial recognition technology altogether citing the risk it poses to civil rights.

In 2021, the GAO presented a report to Congress that found 14 federal agencies employing law enforcement officers made use of FRT. Of those, 13 did not know—or have complete information about—which commercial systems were being used, who was using them, or how they were being used. This included agencies within the Department of Justice ("DOJ") and Department of Homeland Security ("DHS"). Given the danger poorly trained agents armed with faulty, untested technology can present to citizens, more information was certainly necessary.

Facial Recognition Technology and Federal Agencies Today

Given that historical context, Congress tasked the GAO with reviewing the use of FRT for law enforcement purposes as well as "its effects on privacy, civil rights, and civil liberties." The GAO took on four objectives to achieve that goal. First, they would look solely into FRT use for criminal investigations between October 2019 and March 2022. Second, they would try to determine which agencies require training to use FRT and enforce compliance. Third, they would ask about what steps were taken to address privacy concerns for citizens subjected to facial recognition probes. Then as a final step, they wanted to know about the policies put into place to protect civil liberties and civil rights.

Although their previous report found 13 of 14 agencies had problems, the GAO decided to focus on just seven of the DOJ and DHS agencies that reported using FRT in the previous report. That left out recent agencies that had failed to report their FRT use. It likewise left out agencies in other departments that were using facial recognition technology. Yet, what they found within the restricted scope of the report is alarming enough.

The GAO was only interested in the use of commercial FRT systems. So, while the FBI makes use of the Next Generation Identification ("NGI") system, an in-house technology that includes FRT features, that system's use was not examined for the report. Instead, they looked at how the FBI and others make use of tools like ClearView AI. That they were apparently uninterested in the efficacy of facial recognition solutions probably helps to

explain why NGI was not included. They appear to have been less concerned with privacy and PII for internal systems.

It is important to note that in May 2022—between the two GAO reports on facial recognition—President Biden issued an Executive Order that directed the two departments at issue here to work with the National Academy of Sciences to study privacy, civil rights, and civil liberties with regard to FRT. In addition, the order dictated that the White House Office of Science and Technology will work with the DOJ and DHS to additionally generate a set of best practices.

7 Agencies and 4 Facial Recognition Systems

Of the seven agencies examined, two used more than one commercial system. To some degree, that is due to the focus of those systems. One FRT provider is IntelCenter, which provides an interactional "open-source" terrorist database of nearly 2.5 million faces. It is used solely by Customs and Border Patrol ("CBP"). Marinus Analytics's Traffic Jam analyzes images from the online sex market to identify victims of human trafficking. It is used by both CBP and the FBI.

The FBI also uses Thorn's Spotlight to search the online sex market to locate children and their traffickers. Finally, ClearView AI's system is used by all agencies in the report except the CBP. That list includes the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), Drug Enforcement Agency ("DEA"), U.S. Marshals Service, Homeland Security Investigations ("HSI"), U.S. Secret Service, and the FBI. Officially, although HSI is part of Immigration and Customs Enforcement ("ICE"), only HSI has used ClearView AI. Nevertheless, it is possible that CBP or ICE could seek assistance from another agency such as the FBI to perform lookups of suspect images.

The agencies involved were surprisingly bad at tracking how they used the various FRT services, considering the potential ramifications for the rights of the people they were probing. For Marinus Analytics, neither the company nor the FBI tracked search data like who performed a search, for what reason, or of what image. An agent could submit a probe of his latest romantic partner, and there would be no record of the privacy invasion.

Thorn has the rather odd-seeming feature of tracking only the last time a specific probe photo (a photo submitted by the client that is then matched against the database) was searched. If the image has numerous searches against the database, only the most recent search will be shown. That means that a count of the number of probe images used is not an accurate representation of the number of searches. The CBP, in fact, could not track the searches in which it had engaged on either service—Marinus Analytics or IntelCenter.

With neither Marinus Analytics nor IntelCenter tracking searches and Thorn tracking only the most recent search of an image, the agencies performed at least 63,000 searches (a clear undercount) between October 2019 and March 2022. A note within the report indicates "in 2021, we found that some agencies did not track what systems staff used, and not all agencies have taken actions to address this issue." Systems that were used outside the investigatory period also were not counted. Even so, they tracked an average of 69 FRT searches per day.

Facial Recognition Technology Training

The seven agencies combined had a known 63,000 probe photo searches during that two-and-a-half-year window. A shocking 60,000 of those were undertaken without any training requirements. The sole agency to implement training requirements during the investigation period was Homeland Security Investigations. Despite HSI having implemented it on March 4, 2021, of the 106 HSI staff who since accessed ClearView AI's service, 15 did so prior to training, and four remained untrained as of the end of the survey window. HSI told GAO that it was unaware of anyone using the system without training and that it had engaged in a single review but did not conduct periodic reviews.

The FBI is the largest consumer of FRT services at nearly 35,000 searches on commercial systems during the investigation period. Almost half of the known searches were on ClearView AI, though with Thorn being known for undercounting, it may have been significantly more. As Marinus Analytics has no log, its count cannot be known. Likewise, NGI was not included. That frequency of use makes the FBI's no training requirement all the more surprising and troubling. There is a recommended 24-hour training course for using ClearView's features, such as image manipulation to enable more matches.

Customs and Border Patrol does not have any requirements for accessing facial recognition features on either of the two systems they use. GAO states that part of the reason is CBP does not believe its staff makes use of the facial recognition features of those products (and without logging they will be free to continue believing that).

Personally Identifiable Information

One massive concern about FRT is what happens to PII. In 2020, *New York Times* reporter Kashmir Hill was looking into ClearView AI. As part of his efforts, he had some cop friends submit his photo to see what was shown. Those cops soon began receiving calls from ClearView representatives (who were avoiding talking to Hill), asking if the cops were talking to the media. The takeaway from this example is that ClearView was monitoring who was being probed, a significant concern for people who may be a close match for a criminal but are in fact innocent.

DOJ and DHS both have requirements that should reduce privacy concerns. Those policies include reviewing a tool for privacy issues prior to acquisition. They should also conduct a privacy impact assessing ("PIA") and determine privacy needs before purchasing the product. Finally, they are to oversee privacy controls for the service with regard to contractor access.

All seven agencies failed to address all privacy requirements. Both the CBP and FBI determined a PIA was necessary but failed to complete the PIAs all the way through April of 2023, despite using the systems for years. Only HSI determined if "certain privacy requirements applied to their use of facial recognition services." Even when the HSI, CBP, and FBI did work toward addressing a specific privacy requirement, they did not do so according to policy requirements.

The program officials of the seven agencies told the GAO that they did not address the privacy requirements for reasons that included not understanding that the probed photos were submitted to the vendors, and they failed to coordinate with the privacy officials in their departments. Disturbingly, one excuse was that they were not aware the photo they were submitting in an effort to identify a subject qualified as PII.

Civil Rights and Civil Liberties Policies

As the largest apparent user of FRT, the FBI joins with the CBP, ATF, and DEA as having

no specific policies regarding how FRT is used. The FBI and CBP seemingly attempted to deflect the GAO by pointing to more general guidance to protect civil liberties. CBP officials did at least reference a DHS memorandum that covered First Amendment protections as a "source of guidance for staff using facial recognition technology." The ATF and DEA both halted their use of FRT, making direct policies less relevant.

HSI, the Marshals Service, and the Secret Service did implement policies or guidance specific to civil rights and civil liberties. Both HSI and the Marshals Service have limited FRT use to active criminal investigations. HSI does also allow for FRT use for "ongoing investigation relating to HSI's statutory authorities" or as part of some other program or task force where the impacts have been assessed. In addition, they explicitly limit how probe photos may be collected during First Amendment activities like protests. Much like the DEA and ATF, the Secret Service has halted its use of FRT. Even so, they did generate guidance on its usage and limits in April of 2023.

It seems no agency investigated for the GAO report was unscathed. HSI seemed to fare the best, but it was a very low bar compared to how the FBI performed. Meanwhile, the DOJ lacks a policy indicating whether a facial recognition match can result in a warrant. Anyone familiar with the challenges of individual identification via FRT should find the lack of such a policy position that prevents the issuance of a warrant based on a FRT match alarming.

Sources: *nytimes.com, EFF.org, GAO.gov, techdirt.com*

Oregon Supreme Court Rules Police Questioning of Probationer in Probation Officer's Secure Office Absent *Miranda* Warning Constitute 'Compelling Circumstances' and Suppresses Statements

by Anthony W. Accurso

The Supreme Court of Oregon suppressed statements made by a defendant on probation to police who interrupted a meeting between her and her probation officer to interrogate her regarding new crimes, ruling that this environment constituted "compelling circumstances" under state law and thus required a *Miranda* warning prior to the interrogation.

Deborah Lynn Reed was on probation for a drug offense when, during a meeting with her probation officer at his office, two police officers interrupted the meeting. "One of the police officers stood in the doorway, and the other slid past him and sat down in the room," and they began to confront Reed with statements such as, "they knew she was selling drugs again" and that "they had information that she had sold drugs earlier that day." They "also accused her of possessing drugs as they spoke."

Under the terms of her probation, the meeting with her probation officer was mandatory, and she could leave it only with the probation officer's permission, which he did not give at any time either prior to or during her interaction with the police. Additionally, the probation officer's office was located in a secure building, so Reed was not free to enter or leave it as she saw fit. Finally, the police officers never provided her with a *Miranda* warning prior to questioning her.

One officer requested the keys to Reed's car, and before he left to search it, Reed made incriminating statements. The officer with the keys left, searched her car, and located evidence of drug-related crimes.

The officer who remained elicited further incriminating statements from Reed and discovered evidence of drug-related crimes in her purse and cellphone. Reed was then arrested and subsequently charged with possession, delivering, and manufacturing both heroin and methamphetamine.

She filed a motion to suppress the incriminating statements and the searches that derived from them, arguing that the officers were required to give her a *Miranda* warning but failed to do so. The trial court suppressed only the statements she gave after the first officer left to search her car but allowed everything before that to remain in evidence.

After she waived her right to a jury trial, the trial court convicted her on four of the six counts, and the State revoked her probation based on the statement she made and the convictions for committing a new offense. She timely appealed on the suppression issue. The Court of Appeals affirmed, and she timely appealed to the state Supreme Court.

The Court noted that, similar to the Fifth Amendment to the U.S. Constitution, Oregon's Constitution prohibits "compelled statements" under Article 1, section 12. The U.S. Supreme Court has recognized that there are "coercive effects inherent in custodial interrogations" and that a notification of a person's substantial rights, known as *Miranda* warnings, "serve to counteract 'the potentiality for compulsion' and ensure that if an individual makes a statement during a custodial interrogation the statement is 'the product of free choice.'" Quoting *Miranda v. Arizona*, 384 U.S. 436 (1966).

However, the Court explained that the "Article 1, section 12, requirement that police officers inform individuals of their rights prior to certain interrogations is similar to, but broader than, the requirements under the federal constitution established in [*Miranda*]." *See State v. McAnulty*, 338 P.3d 653 (Ore. 2014); *State v. Roble-Baker*, 136 P.3d 22 (Ore. 2006); *State v. Magee*, 744 P.2d 250 (Ore. 1987). "Before questioning, police must give *Miranda* warnings to a person who is in full custody or in circumstances that create a setting which judges would and officers should recognize to be compelling," the Court stated. *See McAnulty*.

In determining whether an encounter constitutes "compelling circumstances," if not custodial, the Court stated that Oregon courts consider several non-exclusive factors, including: "(1) the length of the encounter, (2) the location of the encounter, (3) the defendant's ability to terminate the encounter, and (4) the

amount of pressure exerted on the defendant." *Roble-Baker*. This can "include whether the defendant could face administrative sanctions or other consequences if they did not cooperate," according to the Court. *See State v. Shelby*, 497 P.3d 772 (Ore. Ct. App. 2021) (concluding that defendant, an inmate, was in compelling circumstances during a jail disciplinary hearing because defendant was not adequately informed that he did not have to attend the hearing and because defendant could have faced administrative sanctions as a result of the hearing).

The Court summed up the governing law as follows: "under Oregon law, *Miranda* warnings are required when there is a significant risk that conditions created by the state could undermine a person's ability and willingness to assert their constitutional rights to remain silent and have counsel present during a police interrogation."

Turning to the present case, the Court determined that three factors were determinative of whether Reed faced compelling circumstances during the police interrogation. First, she was in a police-dominated environment—a small room with police officers and a probation officer. *See Miranda* (describing manuals that advise investigators to conduct interrogations in their offices because the location "suggests the invincibility of the forces of law").

Second, Reed was not free to leave without permission from the probation officer, both because her probation conditions required her compliance and because the probation office was a secure environment, so "she could not move around the probation office alone."

Third, the Court wrote, "the pressure exerted on defendant was significant." The police officers "displayed an air of confidence in her guilt and posited her guilt as a fact."

"A reasonable person in defendant's position," the Court reasoned, "would have recognized that (1) if she did not answer the police officers' questions, her probation officer could repeat the questions; (2) if she did not answer her probation officer, he could arrest her for violating a condition of her probation; and (3) if a court found that she had violated her probation, it could send her to prison for up to 20 months."

The Court also noted that, even under federal law, probationers cannot be compelled to incriminate themselves. *See Minnesota v. Murphy*, 465 U.S. 420 (1984) (where the "invocation of the privilege [against compelled self-incrimination] would lead to revocation of probation, the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution"); *United States v. Saechao*, 418 F.3d 1073 (9th Cir. 2005).

Thus, the Court concluded that Reed's entire encounter with the police—not just the latter half—was an environment where she was compelled to provide a statement absent a *Miranda* warning.

Accordingly, the Court reversed her conviction and remanded the case to the trial court to grant her suppression motion in whole. See: *Oregon v. Read*, 538 P.3d 195 (Ore. 2023).

Editor's note: Anyone with an interest in the issue of "compelled circumstances" under Oregon law is encouraged to read the Court's full opinion.

Landmark Drug Possession Reform Reversed in Oregon

by Jo Ellen Knott

Oregon legislators passed H.B. 4002 on March 1, 2024, with support from both Democrats and Republicans on a 21-8 vote. Gov. Tina Kotek signed the bill into law on April 1, 2024. H.B. 4002 undoes important drug possession reform brought about by Measure 110 in 2020.

Measure 110 reclassified drug possession as a Class E violation with a $100 fine, coupled with voluntary health assessments and access to treatment. Oregonians who supported Measure 110 argued against coercive treatment (entering treatment to avoid incarceration), saying it was ineffective and ethically questionable. They supported treating drug abuse as a health issue rather than a criminal one.

Public dissatisfaction with Measure 110 grew during its three years of existence because of ongoing opioid-related deaths and public nuisances such as "discarded needles, human feces, and oral sex," according to *The New York Times*, that are associated with drug use. Despite its intentions, Measure 110 did not address the root issues of black-market drug quality and potency, made worse by prohibition.

Critics argued that decriminalization alone would not curb overdose deaths, especially with the influx of potent drugs like fentanyl. While some studies suggested an increase in overdose deaths following decriminalization, others found no direct correlation. *Reason* underscored the fact that "the numbers from Oregon are instead consistent with a fentanyl-fueled rise in fatal overdoses that has played out in different parts of the country at different times."

Opponents of Measure 110 claimed it encouraged drug use, but data showed minimal new drug users post-decriminalization. RTI International, an independent, nonprofit research institute dedicated to improving the human condition, studied 468 drug users in eight Oregon counties and discovered that just 1.5 percent of them had begun using drugs since Measure 110 took effect. The fact that the focus needed to shift to systemic issues like underfunded addiction services and healthcare delivery rather than blaming the policy itself is lost on many supporters of H.B. 4002.

Senator Michael Dembrow, (D-Portland), voted against H.B. 4002 and said Oregon made a mistake when it implemented Measure 110 by not providing addiction treatment programs quickly enough: "The fundamental flaw with Ballot Measure 110 was that it decriminalized first and only slowly funded, designed and implemented the needed treatment programs."

Under H.B. 4002, drug possession is once again a misdemeanor punishable by up to six months in jail, with the option to avoid incarceration by enrolling in a treatment program. The passing of H.B. 4002 reflects a return to punishing addiction and drug use rather than addressing underlying societal problems. Critics argue that Oregon lawmakers did not give decriminalization and harm reduction a fair chance to work, choosing to fall back instead on outdated tactics that have failed in the past.

The non-profit Drug Policy Alliance ("DPA") works to "end the war on drugs, repair its harms, and build a non-punitive, equitable, and regulated drug market." DPA called the passage of H.B. 4002 "an intense disinformation campaign by drug war defenders and by Oregon leaders who scapegoated Measure 110 for every issue in the state."

Ultimately, the debate revolves around whether drug use, a victimless act, warrants criminalization. Measure 110 challenged the notion that drug possession should be treated as a crime, yet its opponents have yet to provide a compelling moral argument for returning to punitive measures.

Sources: *Drug Policy Alliance, Oregon Public Broadcasting, Reason*

Push Notifications Pull to the Forefront

by Michael Dean Thompson

The convergence of web technologies with handheld computing devices and high-capacity, inexpensive storage has led to a remarkable new era of corporate data collection most people would find shockingly invasive. *Criminal Legal News* has covered how, in the process of plumbing the depths of available corporate data, cops have exposed innocent Americans to precisely the kinds of general warrant dragnets the framers of the Constitution sought to prevent. And as the number of devices tracking consumer behavior increases alongside their functionality, the number of potential surveillance vectors goes up as well. *Criminal Legal News* previously covered the potential of push notifications providing fodder for general searches. Thanks to Senator Wyden (D., Ore.), we now know how cops are doing just that.

Our insight into the issue began when Sen. Wyden wrote a letter to the Department of Justice ("DOJ") about the ways foreign governments were demanding Google and Apple handover user data. In addition to collecting data that describes communications such as keyword searches and app use (a.k.a. metadata) as well as location data, these foreign governments were demanding information about push notifications.

Much like location data, push notifications are passive events from a user's perspective. By virtue of having downloaded an app, the users can find themselves receiving notifications the app provider believes to be of interest to the user. For example, a news app may issue push notifications regarding political news, or a music app may push notices of a recent upload by a particular artist. As a result, the governments could learn which apps a person uses, the devices the person uses to access the app, and that user's interests. The actual content of the push notification may not be known but can be easily obtained from the app developer as a simple next step. *Wired* has discovered the FBI used a search warrant

in 2021 to request details of two accounts at Facebook, including a specific mention of push notifications.

It appears DOJ policies have prevented companies like Apple and Google from openly discussing how governments have been using push notification data. In his letter to the DOJ, Sen. Wyden said, "Apple and Google should be permitted to be transparent about the demands they receive." He went on to state that unless a court imposes a temporary gag order on the companies, they should be allowed "to notify specific customers about demands for their data. I would ask that the DOJ repeal or modify any policies that impede this transparency."

As a result, Apple has issued a statement confirming that DOJ policies were in the way. "In this case, the federal government prohibited us from sharing information," according to Apple. The company went on to add, "Now that this method has become public, we are updating our transparency reporting to detail these kinds of requests."

Google concurred, with a spokesperson claiming to *Wired* that it had been releasing the data all along. "We were the first major company to publish a public transparency report sharing the number and types of government requests for user data we receive, including the requests referred to by Sen. Wyden." It turns out that Google had been aggregating the requests with others into a more generic category. That category, Google Cloud Platform data, revealed 175 requests by the U.S. government from December 2019 to December 2022. Among those, 13 requests were accompanied by a search warrant. Yet, due to the aggregation, we cannot be clear how many of those were actually push notification queries.

Tim Harwick says on Macrumors.com that the government is reported to have been using push notification queries to tie user accounts to messaging apps. That makes sense, especially with regard to encrypted messaging apps. Even if the app developers comply with Apple's recommendations, for example, and encrypts the push notification message before submitting, the metadata of the message is still available. Apple likewise suggests that push notification payloads not include personal or private information. Yet, such feature usage is not enforced and may render the entire message accessible in a single step by a government agency.

These continued invasions of privacy highlight how the hording habits of corporations with regard to consumer data generate unnecessary risks to consumer privacy and civil liberties. Federal laws require that these same corporations make public disclosures when nefarious actors raid their systems. However, federal policies apparently prevent the open discussion of how government agencies raid the very same data stashes. Senator Wyden is correct to demand change in federal policies toward transparency. Unfortunately, that seems to go against the very nature of our secretive policing agencies, especially since corporations seem to be such compliant bedfellows.

Unless there is a radical change in data collection behavior, the best bet will always be to maintain your own data hygiene, starting with minimizing the number of apps installed on your device.

Sources: *techdirt.com, wired.com, macrumors.com*

Second Chances: California Clears Criminal Records, Including Violent Crimes

by Jo Ellen Nott

California is at the forefront of change in criminal justice reform with a new law, Senate Bill 731, allowing people with felony convictions, even violent ones, to petition to have their records sealed. This reform offers a fresh start for many Golden Staters who have served their time and are committed to rebuilding their lives.

Senate Bill 731 went into effect in mid-2023 providing Californians with most kinds of felony convictions, including violent crimes, the opportunity to ask for their records to be cleared. Applicants must have fully served their sentences, including probation, and have gone two years without being re-arrested to be eligible. Sex offenders are not included.

Senate Bill 731 is a turning point for many ex-felons, affording them opportunity after incarceration. Nick C. exemplifies the transformative potential of this law. Thirteen years ago, he sat in an Alameda County jail facing decades in prison and the grim reality of perhaps never seeing his children again. Having been charged with attempted murder after a "bar fight went sideways," Nick pleaded guilty to assault with a deadly weapon.

After paying his debt to society, Nick took anger management classes, earned a GED, and scored an apprenticeship with an electrician's union that was not put off by his record. He works nights, got his children back, and recently bought a house. His criminal record, however, has continued to hold him back, particularly from higher-paying opportunities. The chance to clear his record provides hope for a brighter future, both professionally and personally.

Because Nick has stayed out of trouble since the bar fight that landed him in prison, he is eligible to ask a judge to dismiss the case and seal it from public view. He began that process by getting his fingerprints scanned at a local church where the Anti-Recidivism Coalition held a clinic to answer questions from former justice-involved individuals and help them begin the process of clearing their criminal record.

Nick is eager to clear his record since it blocks him from certain job sites such as government construction projects, which are much better paid. He hopes an expungement will open more professional doors. He also wants the expungement to "show my kids that my past is my past, and that's where it's going to stay."

Expanding expungement offers a broader path to reintegration and for more people. Before 2022, California only allowed expungement for misdemeanors and some non-violent felonies. Senate Bill 731 significantly expands eligibility by allowing people with most felony convictions and aligns with the growing national movement for "clean slate" laws that aim to remove the burden of a criminal record for those who have demonstrably turned their lives around.

Senate Bill 731 also includes a groundbreaking automatic sealing provision. Starting in July 2024, non-serious, non-violent, and non-sexual felony convictions will be automatically sealed from public view for those who have completed their sentences and remained crime-free for four years. This eliminates the need for legal representation and streamlines the process for many Californians.

The impact of expungement extends far beyond enhanced employment opportunities. Sealed records allow individuals to participate more fully in life after prison, from chaperoning their children's field trips to holding positions in community organizations or running for political office. While the benefits of record clearing are significant, concerns have been raised.

Prosecutors and police associations have been vocally opposed, saying in 2022 that it would pose public safety risks. Prosecutors argue that automatic expungement could hinder public safety by limiting access to an offender's complete criminal history.

Additionally, some employers, particularly those in regulated industries, express concern about the ability to conduct thorough background checks. California's law attempts to address these concerns. Judges retain discretion to deny expungement petitions for violent crimes, and certain employers can still access sealed records.

Automatic expungement is not a green light for a discrimination-free application process, either. Shawn Bushway with the RAND Corporation studies ex-offenders' employment rates. He believes that a judge's approval for an expungement works in the individual's favor, proving that he or she has been rehabilitated.

Bushway points to research done after some states passed "Ban the Box" laws that blocked employers from asking job seekers if they had a criminal record. The research shows that some businesses will discriminate based on race or other grounds if they cannot do so by criminal convictions.

The long-term impact of California's record-clearing law is unknown. It is crucial to monitor its effectiveness in reducing recidivism and increasing employment opportunities. Addressing administrative hurdles, such as ensuring defendants are notified of expungements, also remains important.

California will be well served to evaluate the success of Senate Bill 731 and address the challenges in implementing it. Research suggests that expungement improves public safety by facilitating reintegration and reducing recidivism rates.

Sources: *Senate Bill 731, Long Beach Post*

New York Court of Appeals Overturns Harvey Weinstein's Convictions Based on Trial Court Rulings That Admitted Prejudicial 'Prior Bad Acts' Into Evidence and Violated His Right to Testify in His Own Defense

by Richard Resch

The Court of Appeals of New York reversed Harvey Weinstein's convictions for various sexual crimes because the trial court improperly admitted into evidence "irrelevant, prejudicial, and untested allegations of prior bad acts" and compounded its error by ruling Weinstein could be cross-examined about those prior bad acts.

Background

Weinstein was charged with numerous sex-related crimes against three alleged victims identified as Complainant A, Complainant B, and Complainant C. At the time of the alleged crimes, he was a prominent and powerful individual within the entertainment industry. The prosecution contended that he took advantage of his position to coerce aspiring actresses into unwanted sexual encounters. The prosecution further alleged that when his unwanted advances were rebuffed, he used force.

During pretrial proceedings, the trial court granted, over the defense's objection, the prosecution's application to admit testimony regarding uncharged crimes as an exception to the *Molineux* rule, which ordinarily prohibits this type of evidence. The testimony was intended to show Weinstein's intent and that he knew the Complainants did not consent to the sexual encounters. As a result, Complainant B could testify about uncharged sexual assaults that Weinstein allegedly committed against her, and three other women (collectively, "*Molineux* Witnesses") could testify about Weinstein's sexual misconduct towards them years before and after the charged offenses involving Complainant A and Complainant B.

Additionally, the trial court granted, over the defense's objection, the prosecution's request to cross-examine Weinstein on a wide array of uncharged prior bad acts in the event he testified in his own defense (the "*Sandoval* ruling"). The court's ruling permitted the prosecution to question Weinstein on numerous specific incidents that would portray him in an extremely poor light.

At trial, the three Complainants testified, and afterwards, the three *Molineux* Witnesses testified about their alleged unwanted sexual encounters with Weinstein. Following the testimony of the *Molineux* Witnesses, the trial court instructed the jury that their testimony "must not be considered for the purpose of proving that the defendant had a propensity or predisposition to commit the crimes charged." The court added that the testimony of the *Molineux* Witnesses was provided to the jury for consideration of the "question of whether the defendant intended to engage in the sexual acts, and whether each of the complaining witnesses consented." During the trial court's final instructions to the jury, the court reiterated that the testimony of the *Molineux* Witnesses "was offered for [its] consideration on the issues of forcible compulsion and lack of consent."

The jury acquitted Weinstein on a couple of charges but convicted him on the first-degree criminal sexual act against Complainant A charge and third-degree rape charge involving Complainant B. The trial court sentenced him to an aggregate 23 years in prison, followed by five years of post-release supervision.

Procedural History

Weinstein timely appealed to the Appellate Division, which affirmed. The appellate court ruled that the testimony of the *Molineux* Witnesses was properly admitted to show that Weinstein's sole interest in the Complainants was sexual and that their consent was irrelevant to him. A judge on the Court of Appeals granted him leave to appeal.

Discussion

The Court began its opinion by reiterating the time-honored legal principle that "the accused has a right to be held to account only for the crime charged and, thus, allegations of prior bad acts may not be admitted against them for the sole purpose of establishing their propensity for criminality." *People v. Molineux*, 61 N.E. 286 (N.Y. 1901). Similarly, the Court stated that defendants may not be convicted on the basis of "prior convictions or proof of the prior commission of specific, criminal, vicious or immoral acts" other than to impeach a defendant's credibility. *People v. Sandoval*, 314 N.E. 413 (N.Y. 1974); *see also People v. Alvino*, 519 N.E.2d 808 (N.Y. 1987).

The Court observed that *Molineux* recognized the following non-exhaustive list of exceptions to the general rule that evidence of other crimes may not be used to prove the crime charged: when such evidence "tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) identity of the person charged with the commission of the crime on trial." For so-called *Molineux* evidence to be admissible, it must "logically be connected to some specific material issue in the case" and be "directly relevant" to it. *People v. Cass*, 965 N.E.2d 918 (N.Y. 2012). The prosecution bears the burden of showing this direct relevance. *See People v. Denson*, 42 N.E.3d 676 (N.Y. 2015).

The Court explained that when an appellate court reviews a *Molineux* ruling, it engages in a two-step process. The first step is for the court to determine whether the prosecution has identified an "issue, other than mere criminal propensity, to which the evidence is relevant." *People v. Hudy*, 535 N.E.2d 250 (N.Y. 1988). This inquiry is a question of law that the court reviews de novo. *People v. Telfair*, 2023 N.Y. LEXIS 1898 (2023).

If the first step is satisfied, the court proceeds to the second step in which it determines whether the *Molineux* evidence's "probative value exceeds the potential for prejudice" to the defendant. *People v. Alvino*, 519 N.E.2d 808 (N.Y. 1987). In making this determination, the Court explained that "the trial court's decision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of discretion as a matter of law." *People v. Morris*, 999 N.E.2d 160 (N.Y. 2013). Importantly, in the event there is "any substantial doubt" in making this determination, it must be made in favor of the defendant, according to the Court. *People v. Stanard*, 297 N.E.2d 77 (N.Y. 1973). Finally, if the court concludes that the

trial court abused its discretion by admitting *Molineux* evidence, the appellate court must decide whether the error was harmless or necessitates a new trial. *See, e.g., People v. Leonard*, 73 N.E.3d 344 (N.Y. 2017).

Turning to the present case, the Court determined that the trial court's *Molineux* ruling failed the first step. The testimony of the *Molineux* Witnesses was ostensibly admitted to show the defendant's forcible intent, refute his claim on consent, and explain why the Complainants waited years to report the sexual assaults. However, the Court rejected that rationale for admitting the evidence, stating the trial court erred, as a matter of law, in ruling that the prosecution had shown the testimony was required and admissible for a non-propensity purpose.

The Court reasoned that there was nothing equivocal about the testimony of the Complainants regarding the issue of consent. Complainant A described a violent, forcible sexual assault, Complainant B described a situation in which the defendant physically blocked her attempt to leave the hotel room and grabbed her to force her to comply with his demands, and Complainant C testified that the defendant lunged at her and used his weight to pin her down while sexually assaulting her. No reasonable person would interpret any of these encounters as consensual, the Court stated. Thus, there was no need for the testimony of the *Molineux* Witnesses regarding the issue of consent because the testimony of the Complainants themselves clearly showed that there was a lack of consent, the Court concluded.

In reaching its conclusion, the Court explained: "Testimonies from three individuals about their own unwanted sexual encounters with defendant were therefore 'unnecessary.' Instead, the testimony served to persuade the jury that, if he had attempted to coerce those three witnesses into nonconsensual sex, then he did the same to the victims on the dates and under the circumstances as charged. That is pure propensity evidence, and it is inadmissible against a criminal defendant under *Molineux* and its century-old progeny."

The Court then turned to the trial court's *Sandoval* ruling, which the defendant argued violated his right to testify. The Court noted that under *Sandoval*, a trial court may "make an advance ruling as to the use by the prosecution of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility." But when evidence of other crimes and vicious conduct serves no other purpose than to show that the defendant has a propensity for criminal and immoral behavior and thus likely to have committed the charged crime, such evidence must be excluded. *People v. Schwartzman*, 247 N.E.2d 642 (N.Y. 1969).

The trial court permitted the prosecution to cross-examine the defendant, who did not have a prior criminal record, about numerous alleged incidents of "appalling, shameful, [and] repulsive conduct" involving bullying and fits of anger towards employees, restaurant staff, and business associates, according to the Court. However, the Court explained that none of these incidents were of any probative value with respect to the defendant's lack of in-court veracity, but they would certainly prejudice the jury against him. Thus, the Court concluded that the trial court abused its discretion regarding the *Sandoval* ruling.

Conclusion

The Court held that the trial court's *Molineux* and *Sandoval* rulings deprived defendant of his right to a fair trial. It explained: "The synergistic effect of these errors was not harmless. The only evidence against defendant was the complainants' testimony, and the result of the court's rulings, on the one hand, was to bolster their credibility and diminish defendant's character before the jury. On the other hand, the threat of a cross-examination highlighting these untested allegations undermined defendant's right to testify. The remedy for these egregious errors is a new trial."

Accordingly, the Court reversed the order of the Appellate Division and ordered a new trial. See: *People v. Weinstein*, 2024 N.Y. LEXIS 590 (2024).

News in Brief

Alabama: Participants in Shelby County's Drug Court are granted preferred prosecution if they can complete an intensive program. One of the steps of the program includes periodic drug testing. The Drug Court is a separate entity from the Shelby County Jail, with the sole purpose of helping those addicted to drugs complete an educational program which could then reduce or even dismiss their sentence. WBRC reported that Shelby County sheriff's deputies received a tip of possible suspicious activity in October 2023. Adrian Davis was hired by Shelby County Community Corrections as a lab technician. It was his responsibility to collect urine samples from the participants. However, investigators revealed evidence that Davis was selling clean urine to help these participants pass their drug tests. The former employee of Community Corrections turned himself in on March 22, 2024. Davis now faces two counts of bribery as a public official.

Alabama: On April 19, 2024, Chadwick Ray Crabtree, 45, and his wife Melissa Kay Crabtree, 55, were booked into the Limestone County Jail, of which Chadwick is the warden. He had been with the Alabama Department of Corrections for 20 years and had assumed his new position as warden in 2022. WHNT reported that the Crabtrees were charged with second-degree possession of marijuana, unlawful possession of a controlled substance, manufacturing of a controlled substance and possession of drug paraphernalia. Crabtree is also named in civil litigation by a deceased prisoner's family whose loved one was delivered to a funeral home without his organs intact and several broken bones after an autopsy at the University of Alabama at Birmingham. The family contacted Crabtree for help in retrieving the prisoner's organs but did not receive a response. Crabtree is now on mandatory leave without pay in connection with the drug charges.

Arkansas: On March 25, 2024, according to WREG in Memphis, Jacob Gammel, 25, was arrested for theft, extortion, and perjury. Gammel was the former chief of police of the tiny town of Wheatley. According to the 2020 census, Wheatley had a population of 279. Gammel would take money from local businesses in exchange for protection. When an owner of a convenience store was unable to pay his fees, Gammel threatened to arrest him. Gammel would collect money from this business owner every month, in exchange for protection involving the usage of gaming machines (which were legal). Details of this extortion scheme have yet to unfold with Gammel's next court appearance scheduled for June 10 in St. Francis County Circuit Court.

California: Mark DeRosia, 68, the former police chief of the Delano Police Department was dismissed in 2017 for confidential reasons. Roughly seven years later, in March 2024, DeRosia was back in California

for a wedding and went online to explore chat rooms on the internet. Meanwhile, Kern County Sheriff's Office was conducting a periodic sting investigation in which a decoy assumes the identity of a minor. The decoy that struck up a conversation with former police chief DeRosia was 15. Quickly, the conversation became sexual, and then, inevitably, the two arranged to meet in person. Early in the investigation, they discovered that the person the decoy was communicating with was the former chief of police. An arrest was made days later, on March 26. When KGET contacted the department for an explanation of DeRosia's separation from the department seven years' earlier, they were told 'no comment.' The Kern County District County Attorney's Office will decide whether to file charges after they receive the case.

Indiana: On April 19, 2024, the Whitley County Prosecutor D.J. Sigler dropped all charges against Vivian Augustus, 18. WPTA out of Fort Wayne also reported that according to a town councilman, Officer Brian Schimmel had been released from the South Whitley Police Department due to "safety concerns." The situation began on January 24, 2024, when Schimmel pulled Augustus over for speeding and one non-working headlight. Schimmel coincidentally happened to switch his body camera off before approaching her car. Luckily, the entire encounter was caught on the gas station's surveillance. Schimmel asked Augustus for her ID. It was her first time being stopped by the police and the teenager fumbled looking for it. Schimmel apparently grew impatient over the delay, opened the driver's side car door, threw her on the asphalt and cuffed her with cable ties. Augustus' initial charges were refusal to identify herself, resisting and speeding. As soon as Augustus' parents posted the gas station surveillance, the story exploded. The resisting charge was dropped in January, but as soon as the video went viral, the other charges were dropped as well. On that same day Schimmel was fired. After the video was released, the South Whitley Police Department posted a Facebook message accusing the video of being edited. Shortly afterwards, that post was deleted and then the department's Facebook page went dark.

Kansas: In January 2024, Michael Tennyson, 24, was hired as a deputy by the Allen County Sheriff's Office. Three months later, he would be fired after his arrest on charges of indecent liberties with a child. KWCH in Hutchinson reported that the Kansas Bureau of Investigations was contacted by the Hays Police Department regarding a missing 15-year-old runaway. The Hays investigators believed that Tennyson and the teen were together. After searching his home in Iola, the teen was discovered, and Hays was arrested on March 29, 2024. The former deputy is being held in the Bourbon County Jail.

Kentucky: Under Kentucky's open records law, WDRB from Louisville obtained an investigative file that provided some new details about the June 2023 termination of three guards at the Eastern Kentucky Correctional Complex, and about another who was suspended for 30 days. Boone Collins, Robert Grim, Alan Dube were terminated, and Justin Newsome was suspended. On May 9, 2023, Governor Andy Beshear received an email about sadistic guards from the mother of a prisoner prompting the investigation. The 630-page investigation by the Kentucky Justice and Public Safety Cabinet concluded that these prison guards would tase inmates who failed drug tests. However, the file conveniently left out some unseemly details that would surface in a lawsuit filed by Lexington attorneys on March 12, 2024, in U.S. District Court's Eastern District in Ashland. According to the report, prisoners who failed drug tests would be given the choice to get tased or drink urine. According to one of the prisoners, a guard said to him, "Either you get tased or take the dirty."

Massachusetts: On December 27, 2023, according to WXFT in Boston, James Anthony Feeley, 56, a former Winthrop police lieutenant, was arraigned on one count of aggravated rape of a child and two counts of indecent assault and battery on a child under 14. The arrest came just days after he confessed the heinous crimes to Winthrop Police Chief Terence M. Delehanty while standing at his parents' graves on Christmas evening. The Suffolk District Attorney said the crimes had taken place in the past year. A report obtained by WXFT stated that Feeley "did unlawfully have sexual intercourse or unnatural sexual intercourse" with the victim who was "under 12 years of age." A probable cause hearing was held on March 28, 2024. Freeley had been a member of the department for 20 years but is no longer a part of the Winthrop Police Department. He had also been a foster parent.

New York: Reuters reported that on April 8, 2024, federal court employee Dionisio Figueroa, 66, was sentenced to two years in prison, and disbarred New York lawyer Telesforo Del Valle, 65, was sentenced to one year and one day in prison for a bribery scheme. Del Valle gave tens of thousands of dollars to Figueroa, who would convince criminal defendants to hire Del Valle as opposed to using court-appointed counsel, which is free. According to prosecutors, Figueroa managed to steer at least 45 criminal defendants to Del Valle. At least 20 of these criminal defendants would wind up retaining him. In exchange, Del Valle gave Figueroa referral payments in the form of cash. Judge Mae D'Agostino also sentenced both Figueroa and Del Valle to one year of supervised release. She ordered Figueroa to forfeit $40,000 and fined Del Valle $10,000.

Ohio: According to the *Columbus Dispatch*, on March 27, 2024, former Pike County Sheriff's deputy Jeremy Mooney, 49, was sentenced to more than eight years in prison for savagely beating and pepper spraying a detainee who was already strapped in a restraint chair. Thomas Friend, 27, had been picked up on a misdemeanor charge of disorderly conduct. Mooney was convicted in August 2023 by a federal jury in Columbus of civil rights violations for the unlawful use of force against Friend. Back in November of 2019, while working an overnight shift, Mooney punched Friend eleven times in the face at

If You Write to *Criminal Legal News*

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.

three different times while wearing leather gloves. He hit Friend so hard that he broke his own hand delivering the punch. Mooney later cynically filed a workman's comp claim for the injury. The entire hour-long beating was caught on the facilities' cameras. At one point during the assault Friend was seen on videotape pushing himself in the restraint chair backwards off a curb in the loading dock and landing against the concrete with his face a bloody pulp.

Pennsylvania: WPMT in York reported that the Lykens Criminal Investigation Unit filed charges against Steven Cugini, 28, a policeman with the York City Police Department on April 16, 2024. The incident occurred a week earlier after troopers responded to the severe bruising of a 13-month-old child. The little girl was immediately transported to the hospital where the Dauphin County Abuse Team as well as the Pennsylvania State Police reviewed the child's injuries. According to the Pennsylvania State Police, the child suffered broken bones, sexual violence, and severe bruising. Court documents show that Cugini was charged with rape of a child. Charging documents also reveal that Cugini initially blamed the baby's injuries on a fall, a diaper rash, and the family dog. After the police questioned him, he admitted that the baby's injuries occurred while he was looking after the child by himself. Police Commissioner Michael Muldrow said in a statement, "Per our protocol, the individual has been immediately suspended as the investigation continues and the City looks to appropriate action."

Tennessee: Christopher Law had a lot to be proud of regarding his law enforcement service. In 2023 he was recognized as the Lenoir City Police Department Officer of the Year. According to WBIR from Knoxville, Law was also recognized for earning an Officer of the Year award in 2020. But on April 15, 2024, the model policeman got way too drunk and was asked to leave a retirement party. According to the arrest warrant, Law started arguing at the party, so someone called for Law to be picked up and taken home. When the caring family member arrived to take Law home, Law started screaming obscenities at her. The next day, Law got into another argument with this same family member and followed her into the bathroom. According to the warrant, Law punched the bathroom wall and shoved his relative before screaming in her face, daring her to hit him. Then Law smacked the cellphone out of the relative's hand, because Law thought he was being recorded. The relative continued to refuse to punch Law, so Law started punching his own face—"three or four times". According to court documents, Law has since been suspended with pay after being charged with domestic assault.

Texas: On April 17, 2024, Chief Deputy Kirk Bonsal announced that Deputy Constable Victor Solorzano of the Harris County Constable Office's Precinct 3 is on paid administrative leave while an investigation transpires for disclosure of intimate visual material. Solorzano is accused of taking pictures of a female coworker while she was taking a shower and then showing them to a sergeant. KPRC in Houston reported that Solorzano was at a Christmas party and asked the sergeant if he could keep a secret. He then showed him the photographs. Apparently, the sergeant could not keep a secret, as the female coworker would eventually confirm that the photograph was of her, and it was taken during a Facetime. She also confirmed to investigators that the screenshot was taken without her consent. The *Journal of Interpersonal Violence* published a national study in 2020 revealing that 71 percent of women who work in law enforcement face sexual harassment in their workplace.

Washington: The accident took place in August 2022. Commercial truck driver Shawn Foutch allegedly struck rookie trooper Phirawat Apisit, pushing the cruiser into a median barrier. Apisit was injured. The moment the responding state troopers arrived on the scene alarm bells went off. First, several of the troopers said they could smell alcohol on Foutch's breath. Breath and blood tests showed zero alcohol in his system. Being a diabetic, Foutch had not had a drink for years. Even after Sergeant TJ Johnson of the Washington State Patrol viewed the dash cam footage showing Apisit's vehicle shooting across several lanes directly into the path of Foutch's truck, he continued to demand that Foutch be charged with negligence. Next Johnson contacted a collision technician. But when this technician concluded that it was not Foutch's fault, he went fishing again. Eventually, Foutch would get a negligent driving ticket in the mail, potentially risking his commercial driver's license. KING 5 in Seattle did top notch investigative work that caused the prosecutor's office to close the case. The reporting also compelled the Washington State Patrol to demote Johnson to trooper rank with the corresponding lower pay. Instead of taking the cut, the 30-year veteran retired.

Washington: *Tri-City Herald* reported that in the evening of April 22, 2024, an amber alert was issued for former Yakima policeman Elias Huizar, 39. Huizar had abducted his one-year-old son after shooting and killing his ex-wife Amber Rodriguez at the school where she worked. After the shooting, and as police were searching his home in West Richland, Washington, they found yet another body, believed to be his girlfriend. Huizar's career in law enforcement came to an end when he was arrested in February 2024 after his underage girlfriend caught him assaulting her 16-year-old friend. According to court documents, the two girls immediately left his home, but Huizar followed. Once they found a cop and asked for protection, Huizar left the area. After the two teens reported the crime, the police went to Huizar's home, where he was arrested with the help of SWAT team. On February 15, Huizar entered a not-guilty plea to child rape accusations. Because he made bail, he was not in custody and attempted to flee to Mexico. *Komo News* reported that the day after an amber alert was posted, the Oregon State Police located him driving on I-5 near Eugene. Troopers chased Huizar at high speeds for 25 miles, and even exchanged gunfire with him. The pursuit came to an end when Huizar struck a car. Before the troopers could make it to the crash scene, Huizar had shot and killed himself. The one-year-old was uninjured.

Wisconsin: Paul Garchek, 51, was a cop with the Racine Police Department from 1997 to 2010. After becoming addicted to opioids, Garchek left the department. Fourteen years later, April 6, 2024, a call came into the Pleasant Prairie Police Department from a blocked number, warning of a bomb at Costco. Moments later cops rushed in, staff and customers evacuated, and according to Costco, as a result, the store suffered damages in the amount of $330,000 in lost wages and spoiled merchandise. *Kenosha News* reported that at the same time as every law enforcement agent was searching the aisles of Costco, a bank was being robbed. The robber escaped in a Toyota Camry with a little more than $7,000. In the investigation, police found out that the phone used to call in the bomb scare was not registered but was used to call Garchek a bit before the bomb scare. When police went to Garchek's home, they saw the Toyota Camry in the driveway. Garchek was arrested and charged with terrorist threats for the Costco incident and robbery of a financial institution for the alleged robbery at Chase Bank. A cash bond was set at $250,000.

Human Rights Defense Center Book Store

FREE SHIPPING on all book orders OVER $50 (effective 9-21-2022 until further notice). $6.00 S/H applies to all other book orders.

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**

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**

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**

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**

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**

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**

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**

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**

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**

Please Note: Book orders are mailed via the U.S. Postal Service with delivery confirmation. PLN does not assume responsibility to replace book orders once their delivery to the destination address (facility) is confirmed by the postal service. If you are incarcerated and placed a book order but did not receive it, please check with your facility's mailroom before checking with us. If books ordered from PLN are censored by corrections staff, please file a grievance or appeal the mail rejection, then send us a copy of the grievance and any response you received

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**

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**

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**

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**

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**

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**

*** ALL BOOKS SOLD BY PLN ARE SOFTCOVER / PAPERBACK ***

To Pay by Credit Card, Go to Our Website: www.criminallegalnews.org or Call Us at 561-360-2523

Subscription Rates

	1 Year	2 Years	3 Years	4 Years
Prisoners/Individuals	**$48**	**$96**	**$144**	**$192**
Professionals (attorneys, agencies, libraries)	**$96**	**$192**	**$288**	**$384**

Mail Payment and Order to:

Human Rights Defense Center
PO Box 1151
Lake Worth Beach, FL 33460

Please Change my Address to what is entered below: ☐

Ship Order To:

Name: _____

DOC #: _____

Suite/Cell: _____

Agency/Inst: _____

Address: _____

City/State/Zip: _____

Subscription Bonuses

2 year subscription include 2 extra issues
3 year subscription include 4 extra issues
4 year subscription include 6 extra issues

(All subscription rates and bonus offers are valid as of 1/1/2022)

Subscribe to Criminal Legal News

6 month subscription (prisoners only) - $28 _____
1 yr subscription _____
2 yr subscriptions (2 bonus issues) _____
3 yr subscriptions (4 bonus issues) _____
4 yr subscriptions (6 bonus issues) _____
Single back issue or sample copy of CLN - $6.00 _____

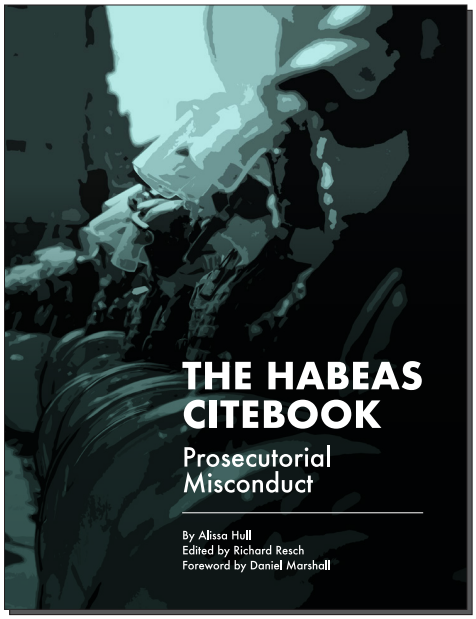
Book Orders

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Add $6.00 S/H to BOOK ORDERS under $50 _____
FL residents ONLY add 7% to Total Book Cost _____
TOTAL Amount Enclosed: _____

*** NO REFUNDS on CLN subscription or book orders after orders have been placed. ***
*** We are not responsible for incorrect addresses or address changes after orders have been placed. ***

Introducing the latest in the Citebook Series from Prison Legal News Publishing



The Habeas Citebook: Prosecutorial Misconduct

By Alissa Hull
Edited by Richard Resch

The Habeas Citebook: Prosecutorial Misconduct is part of the series of books by Prison Legal News Publishing designed to help pro se prisoner litigants and their attorneys identify, raise and litigate viable claims for potential habeas corpus relief. This easy-to-use book is an essential resource for anyone with a potential claim based upon prosecutorial misconduct. It provides citations to over 1,700 helpful and instructive cases on the topic from the federal courts, all 50 states, and Washington, D.C. It'll save litigants hundreds of hours of research in identifying relevant issues, targeting potentially successful strategies to challenge their conviction, and locating supporting case law.

> The Habeas Citebook: Prosecutorial Misconduct *is an excellent resource for anyone seriously interested in making a claim of prosecutorial misconduct to their conviction. The book explains complex procedural and substantive issues concerning prosecutorial misconduct in a way that will enable you to identify and argue potentially meritorious claims. The deck is already stacked against prisoners who represent themselves in habeas. This book will help you level the playing field in your quest for justice.*
>
> —Brandon Sample, Esq., Federal criminal defense lawyer, author, and criminal justice reform activist

The Habeas Citebook: Prosecutorial Misconduct

Paperback, 300 pages

$59.95

(includes shipping)

Order by mail, phone, or online. Amount enclosed _____

By: ☐ check ☐ credit card ☐ money order

Name: _____

DOC/BOP Number: _____

Institution/Agency: _____

Address: _____

City: _____ State: _____ Zip: _____

Human Rights Defense Center
Dedicated to Protecting Human Rights
PO Box 1151 • Lake Worth Beach, FL 33460 • Phone # 561-360-2523
WWW.PRISONLEGALNEWS.ORG • WWW.CRIMINALLEGALNEWS.ORG

Criminal Legal News
PO Box 1151
Lake Worth Beach FL 33460

CHANGE SERVICE REQUESTED

Non-Profit Org.
U.S. Postage
PAID
Portland OR
Permit No. 3142

06/24—**Subscription Renewal**
The above mailing address for CLN subscribers indicates how many issues remain on the subscription. For example, if it says "10 LEFT" just above the mailing address, there are 10 issues of CLN remaining on the subscription before it expires. IF IT SAYS "0 LEFT," THIS IS YOUR LAST ISSUE. Please renew at least 2 months before the subscription ends to avoid missing any issues.

Change of Address
If you move or are transferred, please notify CLN as soon as possible so your issues can be mailed to your new address! CLN only accepts responsibility for sending an issue to the address provided at the time an issue is mailed!