As my term as chair of the American Bar Association's Criminal Justice Section (CJS) comes to a close, this is my final column. I assumed the chair's position with the firm belief that working together, as academics, defense attorneys, judges, and prosecutors, we could do great things. I leave with the knowledge that as a Section, we have done great things for which we should all be proud and excited.

This year, the Criminal Justice Section focused on our youth through programming and policy. I am proud to say we have made tremendous strides in the effort to raise awareness about child abuse and exploitation. Our hardworking Section tackled this issue in an effort to give a voice to millions of virtually voiceless child victims. Our Juvenile Justice and Victims Committee co-chairs and members worked tirelessly to develop our highly successful Spring CLE “Bridging the Systems: Stakeholders Working Together to Fight Child Abuse and Exploitation.” Withelma “T” Ortiz Walker Pettigrew, a child trafficking survivor and representative of the Human Rights Project for Girls, shed light on the harsh realities of life as a child victim, and provided practical guidance to legal professionals on effective ways to interact with young victims. Teresa Huizar, executive director of the National Children’s Alliance, addressed the legal complexities of working with child victims and the importance of collaboration with the other professionals in a Children’s Advocacy Center. Sherri Bevan Walsh, the prosecuting attorney for Ohio’s Summit County (Akron), with assistance from Avery II, the county’s facility dog, provided valuable insight on ways dogs can be used to calm child victims and witnesses (and lawyers!).

I am fortunate to be part of a Section whose policies shape the national discourse and standard for criminal justice issues and, in turn, improve the lives of our youth. During the 2014 Midyear Meeting in Chicago, we advocated for the adoption by the ABA House of Delegates several resolutions geared toward improving justice for juveniles. The House approved all of our recommendations, including Resolution 103A that called for juveniles to receive effective appellate representation. In addition, we cosponsored a resolution championed by the ABA Business Law Section, Resolution 102B, which called on businesses to create and implement strategies to fight child labor and trafficking.

For the third year in a row, the Criminal Justice Section won the Overall Member Value category from the ABA Center for Professional Development. Our programs continue to be among the best in the ABA, with the highest percentage of entity members attending live CLE programs, providing approximately 19 minutes of programming per Section member.

Our excellent programming this bar year included the Sixth Annual Fall Institute, featuring keynote addresses by James M. Cole, US Deputy Attorney General, and Cathy L. Lanier, police chief of the D.C. Metropolitan Police Department. We also hosted a plenary session on “Fixing a Broken System: An Update on the Work of the Bipartisan House Judiciary Task Force on Over-Criminalization.”

In addition, our 28th Annual National White Collar Crime Institute drew over 1,100 attendees to Miami Beach, and focused on such topics as the Foreign Corrupt Practices Act, women in white-collar law, money laundering and asset forfeiture, cybercrime, social media law, and ethics.

The ABA Criminal Justice Section continued to expand its reach across international borders and provided its first-ever CLE programming in Amsterdam. Rob Wainwright, director of Europol, provided remarks on international white-collar crime, and

For the third year, CJS won the Overall Member Value category.

MATHIAS H. HECK JR. has been the elected prosecuting attorney for Dayton, Montgomery County, Ohio, since 1992 and is the 2013–2014 chair of the Criminal Justice Section.
DOJ and IRS Use “Carrot ‘n Stick” to Enforce Global Tax Laws
By Justin A. Thornton and Jay R. Nanavati
The Offshore Voluntary Disclosure Program is the Internal Revenue Service’s best inducement to US citizens who have failed to pay taxes on overseas bank accounts. It allows them to avoid criminal prosecution while paying a structured settlement on back taxes, penalties, and interest. It also elicits the names of those foreign bankers and institutions that assisted in the deception. At the same time, the Department of Justice has stepped up its prosecution of those individuals and institutions that aid and abet US tax evaders. And in this two-prong approach of punishment and reward, the United States has realized billions of dollars in recovered revenue and set the standard for prosecution of those who flaunt US tax laws.

The Basics of Litigating a Fourth Amendment Suppression
By Michael D. Dean
A former public defender and current prosecutor, author Michael Dean knows the power and importance of a suppression motion to both sides in a criminal trial. Here he addresses what is covered under the Fourth Amendment; how to spot violations; warrant exceptions; the scope of the exclusionary rule; litigation procedures; the hearing; and the ruling.

Money Laundering: Is the Anti-Structuring Statute Netting the Small Fry with the Big Fish?
By Michael J. Deblis III
“Structuring”—the practice of breaking down large financial transactions into smaller ones so as not to trigger bank reporting requirements—is a favorite tool of drug cartels and other large-scale criminals looking to launder lots of “dirty” cash through US banks in a short period of time. It’s also illegal, and convictions carry long prison sentences and hefty fines. But, in its efforts to net the major players, has Congress gone too far and swept up the innocent and the small-time wrong-doer as well?
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CJS INTERNATIONAL CLE IN AMSTERDAM
DOJ and IRS Use "Carrot ‘n Stick" to Enforce Global Tax Laws

BY JAY R. NANAVATI AND JUSTIN A. THORNTON
The US government continues to hammer away at the use by US taxpayers of foreign secrecy jurisdictions to evade taxes. Beginning with its highly publicized takedown of UBS in 2008 and continuing through the current Offshore Voluntary Disclosure Program (OVDP), the Department of Justice (DOJ) and the Internal Revenue Service (IRS) are using both carrots and sticks to coax taxpayers to bring their money back into the “system.” The government’s fiscal difficulties of the last five years have only added urgency to the crackdown.

The collection of income taxes in the United States is based on voluntary compliance and self-assessment by taxpayers. The federal government reinforces the integrity of its system of voluntary compliance and self-assessment through vigorous and uniform enforcement of its tax laws, thereby exposing tax cheaters and deterring other potential tax violators.

The IRS Criminal Investigation (IRS-CI) is responsible for investigating tax fraud cases. The DOJ Tax Division in Washington, D.C., ultimately determines which criminal tax cases will be authorized for prosecution. A centralized review process and prosecution oversight by “Main Justice” is intended to ensure nationwide uniformity in the enforcement of the tax laws.

The head of the DOJ Tax Division is Assistant Attorney General Kathryn Keneally. [Note: DOJ recently announced that following her two years of service with the Tax Division, Keneally would step down effective June 5, 2014, and return to private practice.] The chief of IRS-CI is Richard Weber. The two of them are primarily responsible for setting the direction of the federal government’s criminal tax enforcement efforts. Through both public pronouncements and recent enforcement actions by their agencies, they have made clear that one of the country’s top tax enforcement priorities is putting an end to offshore tax evasion.

**Offshore Voluntary Disclosure Program**

The OVDP, currently in its third iteration, is the closest thing to a “carrot” that the government has offered taxpayers to induce compliance. The first OVDP was available for a limited time in 2009 and allowed taxpayers with unreported foreign bank accounts to escape criminal prosecution and annual civil penalties of 50 percent of their highest annual account balance. They simply had to fully disclose their accounts and pay, with some minor additions, 20 percent of their highest account balance during an eight-year look-back period. The second OVDP was available in 2011 and provided the same benefits for a higher price—25 percent of the taxpayer’s highest account balance. Finally, in 2012 the IRS opened the current OVDP. Although the price increased to 27.5 percent of the taxpayer’s highest account balance, the program will remain open indefinitely.

To date, the disclosure programs have induced 43,000 taxpayers to report their foreign bank accounts and to pay taxes, penalties, and interest to the IRS of approximately $6 billion. Taxpayers who enter the program must not only declare their accounts and pay the penalty, but must also frequently submit to detailed questioning regarding the names of the bankers, lawyers, and other professionals who assisted them in opening and maintaining their secret accounts. This, in turn, has led to the prosecution of several bankers and lawyers. The cooperation of the bankers and lawyers with the DOJ has led to the investigation and prosecution of additional banks and taxpayers. This feedback loop has helped the government sustain its momentum for the more than six years since the UBS story first broke. It has also allowed the government to reach into such areas as the Bahamas, Barbados, British Virgin Islands, Cayman Islands, Costa Rica, Guernsey, Hong Kong, India, Israel, Liechtenstein, Malta, and Nevis in search of noncompliant US taxpayers and the banks that assist them. Assistant Attorney General Keneally, discussing Switzerland in September 2013, made the government’s broader point forcefully:

> If someone had an account in Switzerland, it is beyond foolish to think that that account is going to remain secret. . . . In the last five years, we’ve seen a remarkable change in our ability to get information concerning Swiss bank accounts. It’s extraordinary. Switzerland is no longer a good place to hide assets for tax reasons. (David Voreacos, Secret Swiss Accounts Said No Longer Safe for Tax Dodging, BLOOMBERG (Sept. 8, 2013), http://tinyurl.com/m2aztw.)

**John Doe Summons**

In its arsenal, the IRS has a civil means of obtaining information on US taxpayers with unreported foreign bank accounts. It goes by the cloak-and-dagger name “John Doe summons.” The IRS typically issues summonses for information pertaining to specified taxpayers. The John Doe summons allows the IRS to seek information on an entire class of taxpayers whose identities it does not know. For example, the IRS might issue a John Doe summons to a bank in which it seeks information on all account holders who provided the bank a US address and whose accounts had more than $50,000 in them at any time in the last three years.

The John Doe summons allows the IRS to overcome the chicken-and-egg problem that it would otherwise face: It needs a summons to discover which taxpayers are hiding funds, but first it must specify the identity of the taxpayers to be able to issue a lawful summons.

Foreign financial institutions present a problem for the IRS, in spite of its ability to issue John Doe summonses.
The IRS cannot serve a summons outside of the United States. Luckily for the IRS, virtually every major financial institution in the world that has US customers has an Achilles heel: correspondent bank accounts.

American taxpayers who have foreign bank accounts need a convenient way to access their money. Short of having branches in the United States, foreign banks need a way to provide this access. They do this by opening bank accounts at banks in the United States. The foreign bank then is a customer of the US bank. Once the IRS finds out which US bank hosts the foreign bank’s correspondent account, the IRS can simply issue the US bank a John Doe summons for information on the account. This account will have documentation of checks written to US taxpayers, wires sent to US taxpayers’ accounts at other US banks, and the like.

How does the IRS find out which US bank hosts a foreign bank’s correspondent account? One likely source is the OVDP’s feedback loop. Taxpayers in the OVDP identify their bankers. Bankers who cooperate with the government reveal the location of their banks’ correspondent accounts.

On November 12, 2013, the government announced that it had obtained a court order authorizing the IRS to issue John Doe summonses for information on US account holders at the US correspondent banks of Zürcher Kantonalbank (ZKB) in Switzerland and the Bank of N.T. Butterfield & Son Ltd. (Butterfield) in the Bahamas, Barbados, Cayman Islands, Guernsey, Hong Kong, Malta, Switzerland, and the United Kingdom. The US banks that will receive the John Doe summonses are Bank of New York Mellon, Citibank NA, JPMorgan Chase Bank NA, HSBC Bank USA NA, and Bank of America NA. The government appears to have been empowered to seek the John Doe summonses by information that the IRS received from US taxpayers, wires sent to US taxpayers’ accounts at other US banks, and the like.

Criminal Prosecution of Banks and Bankers
Beginning with UBS, the DOJ has typically entered into deferred prosecution agreements (DPAs), and sometimes nonprosecution agreements, with foreign financial institutions instead of indicting them. This is because of the DOJ’s post-Arthur Andersen policy of taking into account the collateral harm to innocent employees and shareholders when deciding whether to indict business entities. For example, on July 30, 2013, the DOJ, through the US Attorney’s Office for the Southern District of New York, announced that it had reached a nonprosecution agreement with Liechtensteinische Landesbank AG, a bank based in Vaduz, Liechtenstein. The bank forfeited $16,316,000, representing a disgorgement of its earnings from maintaining Americans’ undeclared accounts, and paid another $7,525,542 in restitution to the IRS, representing the approximate resulting unpaid taxes. (Press Release, DOJ, Department of Justice Announces Agreement with Liechtenstein Bank to Pay $23.8 Million to Resolve Criminal Tax Investigation (July 30, 2013), http://tinyurl.com/oys5gpv.)

On May 19, 2014, the DOJ announced that Credit Suisse had entered a plea of guilty to the charge of conspiracy to aid and assist in the preparation and filing of false tax returns. According to a statement of facts filed in federal court, Credit Suisse had 22,000 American accounts (both declared and undeclared) worth as much as $10 billion as of 2006. As part of its guilty plea, Credit Suisse will pay a total of $2.6 billion: $1.8 billion to the Department of Justice for the US Treasury (consisting of a fine of over $1.13 billion and nearly $670 million in restitution to the IRS), $100 million to the Federal Reserve, and $715 million to the New York State Department of Financial Services. Although Credit Suisse is now a convicted felon, it will be spared the worst consequence of a felony conviction—being barred from conducting business in the United States. The Federal Reserve, the New York attorney general, and the Securities and Exchange Commission, are all said to have agreed to stand down from barring Credit Suisse from doing business in their bailiwicks. Many have noted that the plea agreement did not require Credit Suisse to turn over the names of its US account holders. This is likely not a significant issue, though, because the agreement requires Credit Suisse to turn over sufficient information about the accounts to enable the US government to make a treaty request for all of the names.

The oldest Swiss private bank, Wegelin & Co., was also an exception to the DOJ preference for such agreements. Citing what the DOJ called its egregious behavior, the US attorney for the Southern District of New York indicted Wegelin on February 2, 2012. Wegelin pleaded guilty to conspiracy to defraud the United States by impairing and impeding the IRS, and on March 4, 2013, Wegelin was sentenced to pay a fine of $58 million and agreed to a civil forfeiture of $16 million. At the same time, Wegelin

The Senate’s Permanent Subcommittee on Investigations estimates that Americans illegally evade between $40 billion and $70 billion in US taxes each year.

Some banks, however, have decided to throw in the towel before even being charged. Bank Frey & Co. AG, a Swiss private bank, announced on October 17, 2013, that it would cease operations, further fallout from the United States’ enforcement efforts against offshore banks generally and Swiss banks in particular. Bank Frey is the subject of an ongoing DOJ tax evasion investigation. The bank apparently determined that it could not continue operations, even under the terms of a DPA. (John Letzing, *Switzerland’s Bank Frey to Cease Operations*, WALL ST. J., Oct. 17, 2013.)

Bank Frey was also in the news in April 2013, when its former head of private banking, Stefan Buck, was charged along with Swiss lawyer Edgar Paltzer with conspiracy to help US clients file false tax returns and commit tax evasion. Paltzer pleaded guilty to the charges on August 16, 2013, and Buck remains at large. Additionally, UBS banker Raoul Weil, a fugitive since his indictment in 2009, was arrested on October 19, 2013, in Italy and brought to the United States to face a charge of conspiracy to defraud. He pleaded not guilty on January 7, 2014, in the US District Court for the Southern District of Florida in Ft. Lauderdale. His trial is set for October 14, 2014.

In the run-up to the Credit Suisse guilty plea, the Senate’s Permanent Subcommittee on Investigations pushed Swiss banking back into the public eye with hearings on Credit Suisse on February 26, 2014. Senators assailed both Credit Suisse for its role in helping customers evade their US taxes and the DOJ for not moving fast enough to punish Credit Suisse and to extract from the bank the names of US account holders. Senator Carl Levin, a Michigan Democrat and the chairman of the subcommittee, cited estimates that Americans have more than $1 trillion in assets offshore and illegally evade between $40 billion and $70 billion in US taxes each year through the use of offshore tax schemes. He also asserted that US corporations illegally evade another $30 billion in taxes each year through offshore maneuvers. (*Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts: Hearing Before the Permanent Subcomm. on Investigations*, 113th Cong. (2014).)

Banks outside of Switzerland are presumably also under DOJ criminal investigation. It remains to be seen whether the DOJ will offer them DPAs or will bring indictments against them.

**DOJ Program for Swiss Banks**

On August 29, 2013, the DOJ Tax Division announced an unprecedented voluntary disclosure program for Swiss banks. Only Swiss banks that are not currently under DOJ criminal investigation are eligible. This excludes the 14 Swiss banks that the DOJ has notified are under criminal investigation, which are referred to as Category 1 banks. The program is quite detailed, but its essence is that banks can seek “nonprosecution” and “nontarget” letters from the DOJ, depending on their culpability, by fully disclosing their practices regarding and information about US customers and by paying stiff penalties. Although the banks need not turn over the names of US customers, they, like Credit Suisse, must turn over sufficient information about the customers’ accounts to allow the US government to make a treaty request for the customers’ names. The program refers to banks that may have committed offenses as Category 2 banks.

In a September 2013 interview, Assistant Attorney General Keneally explained:

Those banks must pay 20 percent of the value of accounts not disclosed to the IRS on Aug. 1, 2008; 30 percent for such accounts opened between then and February 2009; and 50 percent for accounts opened after February 2009. Total penalties by banks to avoid prosecution could exceed $1 billion . . . . (Voreacos, *Secret Swiss Accounts, supra.*).

Keneally reasoned that the 50 percent maximum penalty for participating banks was appropriate in spite of the fact that Wegelin had $1.5 billion in undeclared assets and paid only $74 million, or 4.9 percent, to resolve its criminal case. “Wegelin was indicted, Wegelin pled guilty, and Wegelin suffered severe business consequences as a result of all of that . . . . These banks are getting a nonprosecution agreement. That is something of great value, I believe.” (*Id.*)

The DOJ announced that 106 of the approximately 300 Swiss banks have chosen to enter the program as Category 2 banks, a number that Assistant Attorney General Keneally confirmed on March 6, 2014, at the American Bar Association’s 28th Annual National Institute on White Collar Crime.

**Prosecutions of US Taxpayers**

Since the UBS investigation and DPA, the DOJ has been aggressively pursuing US taxpayers who have unreported foreign bank accounts. Unfortunately for the government, these taxpayers have only infrequently been sentenced to any incarceration.

On January 14, 2014, Ty Warner, the billionaire creator of Beanie Babies, received a sentence of two years’ probation after having pleaded guilty to one count of tax evasion. The US District Court for the Northern District of Illinois in Chicago sentenced Warner to no jail time in spite of his admission that he willfully concealed bank accounts at UBS and ZKB that held as much as $107 million, had $24 million in unreported income, and gave rise to a tax loss to the fisc of $5 million. The US Attorney’s Office filed a protective notice of appeal on February 13, 2014, and is seeking permission from the solicitor general to appeal the sentence. (David Voreacos & Andrew Harris, *Beanie Baby Maker Ty Warner Tax Sentence Appealed by U.S.*, BLOOMBERG (Feb. 13, 2014), http://tinyurl.com/k9cxswt.)
Although the size of Warner’s accounts was unusual, the outcome of his guilty plea and sentencing was not. In some ways more surprising than Warner’s sentence was that of Wisconsin neurosurgeon Arvind Ahuja. On February 1, 2013, he received a sentence of probation in spite of pleading not guilty and being convicted after a jury trial. The high balance of his accounts at HSBC India and HSBC Jersey was approximately $8.7 million. (David Voreacos, Doctor Spared Prison for Tax Violations Tied to HSBC Account, BLOOMBERG (Feb. 1, 2013), http://tinyurl.com/mms67cy.)

There is no way to know precisely where the IRS will focus its future enforcement efforts, but an official from the IRS Small Business/Self-Employed Division (SB/SE) recently gave a strong indication. On November 9, 2013, an SB/SE official announced that SB/SE’s special enforcement program (SEP) will soon begin examining US taxpayers suspected of holding undeclared accounts at Indian banks. The IRS called Indian bank accounts the next phase of the IRS’s offshore compliance crackdown. After receiving account information from Indian banks—one source of which was likely the John Doe summons issued to HSBC India—the IRS has about 100 Indian bank account cases that it is sending out for examination across the country, with 30 to 40 of those being in the Bay Area of Northern California. The civil examinations of these taxpayers will in all likelihood lead to criminal investigations and prosecutions. (Kristen A. Parillo, IRS Will Soon Examine U.S. Taxpayers with Undeclared Indian Bank Accounts, 2013 TAX NOTES 219–14, available at http://tinyurl.com/n2gqegy.)

**FATCA Developments**

Enacted in 2010 in response to the sordid tales of offshore tax evasion that witnesses told Congress, the Foreign Account Tax Compliance Act (FATCA) created a complex new regime under which foreign financial institutions (FFIs) would report their US customers to the IRS. FATCA’s core effective date has been delayed several times, but a 30 percent withholding tax will apply to payments of certain US source income to noncompliant FFIs starting July 1, 2014. FFIs must begin reporting their US customers on March 31, 2015. FATCA’s hundreds of pages of regulations are devilishly complex, but countries can relieve their FFIs of a great deal of this complexity by entering into intergovernmental agreements (IGAs) with the United States. These agreements simplify compliance and provide alternative reporting arrangements for FFIs in countries whose privacy laws prevent direct reporting of US customers’ data to the IRS. To date, the Treasury has entered into IGAs with 33 countries and has reached “agreements in substance” with 35 more.

In 2014, the United States has signed “Model 1” IGAs with Australia, Belgium, Canada, Estonia, Finland, Hungary, Italy, Jamaica, Liechtenstein, Luxembourg, and Mexico. In other words, the IGAs will require FFIs in those countries to report tax information about US account holders to their own governments instead of to the IRS. Those governments will then send the information to the IRS. All 12 were reciprocal versions of the Model 1 IGA. Reciprocity requires that the IRS send similar information about those countries’ citizens’ US accounts to their home governments.

On November 29, 2013, the Cayman Islands and the United States signed a Model 1 IGA that was nonreciprocal. In other words, the Cayman Islands government chose to negotiate an agreement under which the IRS will not report to the Cayman Islands government on Caymanian account holders in the United States. Only Austria, Bermuda, Chile, Japan, and Switzerland have signed Model 2 IGAs, under which FFIs in those countries will report information directly to the IRS. (FATCA—Archive, U.S. Dep’t of the Treasury, http://tinyurl.com/q6vg7nj (last updated May 5, 2014).)

**Conclusion**

The US government has clearly come to see tax enforcement as no longer a merely domestic issue. In spite of its name, the IRS has widened its focus to encompass revenue that it is losing externally. The US government’s global tax enforcement strategy has come to include the carrots of the OVDP and DOJ program for Swiss banks, the sticks of prosecutions of banks, bankers, and account holders, and joining with foreign countries to root out US taxpayers who would evade paying their share of the tax burden.
The Basics of Litigating a Fourth Amendment Suppression

BY MICHAEL D. DEAN

The motion to suppress is a critical weapon in the defense arsenal, and a potentially devastating threat to the government’s case. In many instances, a successful suppression will leave an otherwise impeccable criminal action too weak for continued prosecution. Accordingly, when it comes to getting a case kicked, the defendant with a sound suppression issue may very well get two bites at the proverbial apple.

A motion to suppress evidence is based on the exclusionary rule. This court-created rule mandates that evidence obtained in violation of certain constitutional rights will be unavailable for later use at trial. The primary purpose of the exclusionary rule is to create a deterrent to official misconduct. In theory, a law enforcement officer who understands the potential loss of evidence will be more likely to conform his or her conduct to the expectations of the law. In essence, the exclusionary rule is a judicial attempt to police the police by imposing a consequence for unacceptable behavior.

A suppression issue arises when the intended deterrence did not prevent a constitutional violation—that is, when a criminal defendant is being prosecuted in whole or in part upon evidence obtained in violation of certain constitutional protections, including the Fourth Amendment. To enforce the exclusionary rule, the defense attorney has the option to file a motion to suppress all evidence obtained as a “fruit” of the constitutional violation. This is usually a simple motion alerting the court that counsel believes a violation has occurred, that evidence was obtained as a result, that the evidence should be excluded, and that a hearing is being requested for the court to determine the merits.

The exclusionary rule is not as simple as it may initially appear. Over the years, American courts have been called upon to address the rule in the context of thousands upon thousands of cases, each with its own unique set of facts. The application of logic, fairness, and commonsense to these various fact patterns has led to the creation of a complex, heavily nuanced body of general rules, factor-tests, and new legal standards (e.g., “reasonable suspicion”). For attorneys new to litigating the suppression, the process may be daunting. However, with a firm understanding of the basics, the overwhelming can be reduced to a manageable procedure.

The Fourth Amendment: What Is Protected?

Even for those who routinely practice in this area, it is easy to get lost in the nuances of the case law and forget where it all starts: the text. The Fourth Amendment is only a single sentence long and reads, “The right of the people to be secure in their persons, houses, papers, and effects,
against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” At the risk of oversimplifying, the amendment essentially states that reasonable government searches are legal, and unreasonable searches are not.

That said, the Fourth Amendment does not extend its protection to every search by a government actor. There are certain areas over which an individual is protected from intrusion, and other areas where he or she is not. It would seem ridiculous for the Fourth Amendment to protect me from an unreasonable search of my neighbor’s garage . . . even if the search resulted in the seizure of a kilogram of cocaine that I provided the neighbor. Consequently, the Supreme Court has adopted an approach that focuses on the aggrieved individual’s sense of privacy. Thus, to fall within the amendment’s protection, the search must have involved (1) an area over which the defendant held a subjective expectation of privacy that (2) society is prepared to accept as reasonable. (Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).) If a search or seizure interfered with a reasonable expectation of privacy, the Fourth Amendment is implicated and the focus turns to whether that interference was “reasonable.” The reasonableness determination depends heavily on whether the search and seizure was preceded by a judicially authorized warrant.

Spotting Violations of the Fourth Amendment

Searches and seizures fall into one of two categories: those conducted pursuant to a warrant, and those conducted without a warrant. Because the law favors warrants, searches authorized after neutral judicial review are presumed reasonable and therefore constitutional. In such cases, a defendant challenging the search bears the burden to prove otherwise. More commonly, however, a suppression issue is raised after law enforcement conducted a search without a warrant. In these instances, the search is presumed unreasonable unless one of the “few well-delineated exceptions” to the warrant requirement applies. (Mincey v. Arizona, 437 U.S. 385, 390 (1978).) In these circumstances, the government carries the burden of proving one or more of these exceptions.

Know Your Warrant Exceptions

The exceptions to the warrant requirement are truly limited, both in scope and in number, such that the attorney should be capable of committing them to memory. A full article could be written about each of these exceptions. The purpose here is not to provide an exhaustive dissertation on the subject, but to provide a basic overview to assist the attorney with “issue spotting.” Before being ready to review a case for possible Fourth Amendment suppression issues, the attorney should be familiar with the following warrant exceptions:

1. Search incident to arrest. When police have probable cause to make an arrest, that person loses significant privacy protection and police are afforded fairly wide latitude to search the suspect’s person and property. (United States v. Robinson, 414 U.S. 218 (1973).) The suspect’s body and clothing may be thoroughly searched, as well as the interior of the shoes, and containers in the possession of the subject. Moreover, the permissible search is not limited to the suspect’s immediate person but rather extends to the “areas within the suspect’s control.” (Coolidge v. New Hampshire, 403 U.S. 443 (1971).) This includes items within reach as well as the entire interior compartment of a passenger vehicle. However, a suspect who is not restrained until after exiting his or her vehicle may only have the vehicle searched incident to arrest if (1) the vehicle was “recently occupied,” and (2) the vehicle may contain evidence pertaining to the offense for which the suspect was arrested. (Arizona v. Gant, 556 U.S. 332 (2009).)

It is important to note that there can be no search incident to arrest unless the arrest is valid. If evidence is seized as a result of an arrest, the attorney should determine whether there is a colorable argument that the objective facts failed to support a probable cause determination by law enforcement.

2. The Terry stop. In 1968, the United States Supreme Court issued the landmark decision of Terry v. Ohio, holding that a police officer may briefly detain an individual for investigative purposes if, based on the totality of the circumstances, the officer has a reasonable, articulable suspicion that criminal activity is afoot. (392 U.S. 1 (1968).) The purpose of the detention is to permit law enforcement an opportunity to conduct a limited investigation to either confirm or dispel the original suspicion.

This case was extremely important because of the new standard it outlined: “reasonable suspicion.” Although not precisely defined, reasonable suspicion has been held to be something less than probable cause. Whereas a full-blown arrest and incarceration requires “probable cause,” a Terry stop, as it has come to be known, is supposed to be brief. Because of the temporal limitations, the Supreme Court reasoned that it requires a correspondingly lower threshold to justify. Nevertheless, it is important to underscore that an officer is not able to restrain or detain an individual based on a hunch that a crime has been committed—the officer must be capable of articulating specific facts that support his or her conclusion. The practitioner should be on the lookout for fact scenarios where police initially detained the defendant on vague, minimal, or questionable information. If the stop appears to be on somewhat of a hunch, the resulting evidence may be subject to attack.

3. Pat-down. The pat-down is closely related to the Terry stop. Officers who are lawfully engaged in their duties may encounter an individual who, by words or actions, has indicated that he or she is a threat to officer safety. If the officer has an objective reason to believe that the person is armed and dangerous (in the conjunctive), the officer may conduct a brief pat-down of the subject’s outer clothing to feel for weapons. (Terry, 392 U.S. 1.) Any object that is reasonably believed to be a weapon may be removed. This often leads to the removal of crack pipes and the like. Such objects may easily be mistaken for a pocket knife when
felt through clothing and will not be suppressed if the evidence could have reasonably been mistaken for a weapon.

4. Exigent circumstances. Sometimes the emergency nature of a situation requires police to dispense with the formal warrant procedure. (Missouri v. McNeely, 133 S. Ct. 1552 (2013).) For example, if a child is located within a residence for which there is an objective reason to believe that it contains an active methamphetamine lab, the volatile (i.e., explosive) nature of the lab may support a warrantless entry to extract the child. The fact that police seize methamphetamine in plain view in the process should not later subject the substance to exclusion. Other examples of exigency include: (1) where police have an objective reason to believe that evidence is actively being destroyed—the classic example is when police are able to hear frantic discussion of drugs simultaneous to a toilet flushing; (2) there is reason to believe that a premises is being, or has recently been, burglarized; (3) there is reason to believe that somebody is in need of emergency assistance; and (4) police are engaged in a foot chase of a suspect who suddenly flees to the interior of a dwelling.

It is important to note that, absent exigent circumstances, a warrant must always be obtained before police may cross the threshold of a private home. The dwelling is considered deserving of the utmost protection, and searches thereof are more rigorously scrutinized. Any time there is an entry into a defendant’s home, the attorney must determine the basis that permitted the entry. If consent was not given, identify the possible exigency. If there is no consent, and no legitimate exigency, there may very well be a motion to suppress.

5. Automobile exception. Police do not need a warrant to conduct a search of an operable motor vehicle when there is probable cause to believe that the vehicle contains contraband. (Carroll v. United States, 267 U.S. 132 (1925).) The logic behind this exception is that vehicles are inherently mobile and there is a danger that the evidence would be removed if agents were required to follow the formal process of obtaining a warrant. Again, the key here is whether or not probable cause did in fact exist.

A word to the wise: the odor of burnt or raw marijuana alone is sufficient for probable cause. If the defendant was stopped for a valid traffic violation, marijuana odor or contraband in plain view is an easy way for police to get inside the car.

6. Plain view. The Fourth Amendment is based on a citizen’s reasonable expectation of privacy. If the citizen has left an object in a place for the whole world to see (i.e., a “lawful vantage point,” such as the driver’s side window during a traffic stop), the citizen forfeits his or her privacy interest in the item. (Minnesota v. Dickerson, 508 U.S. 366 (1993).) Of course, before an officer may seize evidence in plain view, the evidence must be such that its illegal nature was “immediately apparent” without the need to first seize, examine, or manipulate the item. Contraband in plain view will frequently form probable cause for a more thorough search of a person or vehicle. It will not, however, alone justify entry into a person’s home.

7. Consent. There can be no legitimate expectation of privacy in an area where a citizen has given permission for police to go. This is the most common way around a warrant, as citizens often feel that they “have to” give consent when it is requested. The issue of consent becomes much more complicated when the property at issue is shared. For example, when more than one person resides at a residence, there is a question of whether one consenting roommate has the authority to permit the search. To boil it down to its basics, a roommate may consent to a search of those areas that are under his or her exclusive control. In addition, the roommate may consent to a search of “common areas,” such as a kitchen or laundry room. However, in the event that two individuals are present with one giving consent to search the common area and the other opposing that consent, the opposing party’s wishes trump, and the search may not be conducted without a warrant or another warrant exception. (Georgia v. Randolph, 547 U.S. 103 (2006).)

Finally, there are instances where a consenting individual leads officers to believe that he or she has actual authority to give consent when in fact he or she does not. A search conducted pursuant to this “apparent” authority will not be disturbed if the mistake was reasonable. The logic being that the purpose of the exclusionary rule would not be served. Again, the goal is deterrence, and that goal cannot be met when the officer was innocently mistaken.

8. Inventory search. Police may, if part of an established department policy, conduct an inventory search of a vehicle after a determination to impound the vehicle has been made. There are, of course, restrictions. First, the impoundment must be pursuant to (1) a statute authorizing the same (e.g., a statute authorizing the impoundment of vehicles without proper registration); or (2) a “public care-taking function.” The latter usually involves a situation where a motorist is incapable of driving the vehicle away, whether because of arrest or medical attention after an accident, or because it has been determined that the individual may not otherwise continue to operate the vehicle lawfully. If the vehicle presents a threat to public safety due to its physical location, police may impound it.

The stated purpose of the inventory search is to protect the owner’s property by creating a list of property present in the vehicle at the time it was taken into police custody. This process is thought to insure against claims of lost, stolen, or vandalized property. If contraband is discovered during this process, no warrant is needed. Again, it bears emphasizing that such procedure must be pursuant to a standardized agency protocol. The individual officer does not get to determine if, when, and/or how it is conducted.

Know Potential Issues Involving the Warrant
A warrant is the preferred method of conducting a search. Such a search is presumed reasonable because its factual basis has been judicially reviewed by one who does not have a “dog in the fight.” This is, nevertheless, still a “presumption” that is subject to rebuttal. The following are issues that may be used to attack the presumptive validity of the search and seizure:
1. Was the warrant sufficiently clear? The text of the Fourth Amendment requires warrants to “particularly describe the place to be searched, and the persons or things to be seized.” In other words, warrants must be clear in their limitation such that they do not avails themselves to arbitrary enforcement. If the warrant fails to describe the property to be searched in a manner that it can be identified by the executing officer with reasonable effort, a subsequent search may be illegal. Moreover, if the items to be seized are too vaguely described such that a reasonable officer would be afforded discretion in what he or she is looking for, the warrant may also be invalid.

2. Did law enforcement exceed the scope? The warrant authorizes the search and seizure of particular items. Therefore, when executing the warrant, law enforcement may only search in those areas where the item may reasonably be located. For drugs, this is essentially anywhere (e.g., a toilet tank and even a matchbox). For other items of a definitive size, the areas that may be searched will be more limited. A handgun, unlike drugs, cannot fit in a matchbox.

3. Did the warrant lack probable cause? The language of the Fourth Amendment explicitly requires probable cause as a condition precedent to a warrant. One would assume that a warrant later determined to lack probable cause would subject any resulting evidence to exclusion. However, because the exclusionary rule is primarily focused on deterrence, a search conducted pursuant to a faulty warrant will not necessarily lead to suppression. After all, it stands to reason that the rule should only apply where police knew, or should have known, that their conduct overstepped a constitutional boundary. The primary purpose of the rule—deterrence—is not promoted where an officer acts in good faith and without reason to believe his or her actions are contrary to the Constitution. The good-faith exception recognizes this and comes into play when a search and/or seizure has been conducted pursuant to a judicially authorized warrant that was only later determined to lack probable cause. If the warrant was executed by law enforcement under a good faith belief as to the warrant’s validity, the resulting evidence is admissible. There are, nevertheless, exceptions. In rare cases, the facts supporting the issuance of the warrant may be so devoid of probable cause as to render any official belief of the warrant’s validity unreasonable. (United States v. Leon, 468 U.S. 897, 922–23 (1984).) In addition, the exception will not apply when the warrant was obtained based on information known to be false, or offered by the government in reckless disregard for its truth. In cases where false information was included knowingly or recklessly, a reviewing court will strike that information and determine whether probable cause still exists. If it does not, evidence gathered in reliance on the warrant will be suppressed. In cases involving a warrant based on false information, the attorney should request a “Franks hearing,” at which time evidence may be presented to demonstrate the falsity and, if necessary, readdress probable cause. (Franks v. Delaware, 438 U.S. 154 (1978).)

The Scope of the Exclusionary Rule
We have covered the exclusionary rule and the common Fourth Amendment issues that may implicate it. Before moving forward, the attorney should know that the exclusionary rule has limitations. The main principles that may take a constitutional violation outside of the ambit of the exclusionary rule are: the attenuation doctrine and inevitable discovery.

The attenuation doctrine. A motion to suppress is filed to exclude evidence that is obtained as a result of a constitutional violation. For example, police engage in unconstitutional search X and, because of that conduct, locate items of evidence A, B, and C. In legalese, evidentiary items A, B, and C are referred to as fruit of the poisonous tree—the poison being the illegal conduct and the fruit being the evidence that conduct harvested. Ideally, the motion should seek exclusion of these three items.

In a case where a government agent kicks in a suspect’s door without a warrant and flips over a mattress, thereby locating a kilogram of cocaine, the relationship between the poison and the fruit is obvious. However, what about situations where the nexus is much more remote? Should the rule apply when the evidentiary fruit was obtained by mere happenstance and chance rather than as a natural, foreseeable consequence of the illegality? The answer to the latter question is “no.” The attenuation doctrine holds that the exclusionary rule is inapplicable when “the causal connection between [the] illegal police conduct and the procurement of [the] evidence is ‘so attenuated as to dissipate the taint’ of the illegal action.” (United States v. Fazio, 914 F.2d 950, 957 (7th Cir. 1990).) In simple terms, the exclusionary rule does not lend itself to “but for” causation. (See Wong Sun v. United States, 371 U.S. 471 (1963).) Illegal action is a sufficient, but not necessary, condition.

To determine whether the causal nexus is sufficient, courts look to “(1) the time elapsed between the illegality and the acquisition of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.” (29 Am. Jur. 2d Evidence § 651 (2d ed. 2014).)

Inevitable discovery. In some cases, it is apparent that evidence discovered as a result of official misconduct would have been discovered lawfully anyway. In such circumstances, courts have favored admitting the evidence by analogizing the situation to harmless error. Proponents of inevitable discovery take the position that the defendant and government remain in the same position had no constitutional violation occurred. That is, the evidence would have been discovered legally regardless, so “no harm, no foul.” Before the inevitable discovery doctrine will apply, the reviewing court must be satisfied to “a high level of confidence that each contingency necessary to the legal discovery of the contested evidence

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would be resolved in the government’s favor.” (68 Am. Jur. 2d Searches and Seizures § 174 (2d ed. 2014) (citing United States v. Heath, 455 F.3d 52 (2d Cir. 2006)).)

Litigation Procedure

If you are new to this subject, you should now have an understanding of some of the common issues argued in a motion to suppress following a search and seizure. Moreover, you should now understand the basic limitations to the exclusionary rule. It is now necessary to understand the procedure to litigating a suppression. Please note, practice and procedure may vary from one jurisdiction to another.

Obtain initial discovery. Before the attorney can know whether there is a viable suppression issue in a case, the attorney first needs to obtain the available facts surrounding the stop, detention, investigation, and arrest of the defendant. For the prosecution, that is easy. The resources are at your fingertips. Police reports, witness interviews, and recorded media—such as 911 calls and the like—are often submitted at the conclusion of the investigation. For the defense, it may be a different story.

The rules surrounding discovery vary from one jurisdiction to another. Some jurisdictions—whether at the state or even local level—have codified rules mandating “automatic discovery.” In such jurisdictions, it is required that the prosecution provide all non-work product to the defendant without the defense having to initiate the process. This may require the prosecution to provide actual copies of all tangible documents and evidence, or alternatively may require the prosecution to make its file available for review and/or copying by defense counsel.

Other jurisdictions do not impose an affirmative requirement on the prosecution to immediately produce discovery. Instead, the jurisdiction may require the defense to initiate the process by filing a notice or request for discovery. If this is the case, both parties should pay particular attention to such motion. The government will likely have the obligation to turn over only those items that have been specifically requested (with the exception that it must turn over any exculpatory information whether or not it is requested). For that reason, the defense is wise to have ready, for any jurisdiction, an extremely broad discovery request that covers all conceivable categories of evidence. This should include, at a minimum, the following:

1. The names and last known addresses of all witnesses;
2. Copies of all statements, notes, memoranda, or reports prepared by any witness—whether or not the government intends on calling the witness at trial (including those audio and/or video recorded);
3. A list of persons interviewed by the government but whom the government does not intend to call;
4. All records revealing prior convictions and juvenile delinquency adjudications for the defendant and any government witness;
5. All consideration or promises of consideration given to or on behalf of any witness;
6. Any written, video, or audio recorded statements and the substance of any oral statements made by the accused or by a codefendant;
7. Any books, papers, documents, photographs, or tangible objects that the government intends to use at trial;
8. Any reports or statements of experts made in connection with the investigation;
9. A copy of any search warrants, affidavits submitted in support of any warrant, and any return on an executed warrant made in furtherance of the investigation;
10. A list of the dates, times, and places of, and each person present at, every lineup or identification procedure involving the accused;
11. A list of each date, time, and place any photograph of the defendant or other suspect was viewed by any witness;
12. A copy of the transcript of any grand jury proceedings related to the investigation;
13. A copy of any map, floor plan, plat, chart, or diagram used during the investigation, whether or not the same will be used as evidence in the case;
14. Any evidence that would tend to negate the guilt of the accused; and
15. Any 404(b) evidence the government intends to introduce at trial.

Once the discovery material is received from the government, an initial review is necessary to determine what additional information may be needed. Often the government’s own factual investigation is incomplete during the early stages of a prosecution. There may be important information not presently in the possession of the prosecuting attorney, and therefore not provided to the defense. If the information is potentially helpful, a defense attorney should take steps to ensure that the same is not lost, removed, or destroyed. This can be accomplished by filing a motion to produce and preserve. The motion may be simple or complex, and should indicate the nature of the evidence believed to exist, the location of the evidence, the custodian of the evidence, why the evidence is pertinent to the case, and a good faith statement that the evidence may disappear if the court does not order its preservation.

A common example of evidence that is subject to this type of motion is a 911 recording, police radio communication, or footage from a police cruiser in-car video camera. Due to the immense volume of data generated by these recording mediums, consideration of storage space often causes agencies to have retention policies that go back a finite period of time. For example, the data storage capacity of the hard drive used to store police car video may require purging of any data older than six months in order to make room for the new. If the attorney is slow to act, a valuable source of favorable, indisputable evidence may disappear if steps are not taken to ensure its preservation. For the defense, it may show that an officer failed to give one of the required warnings under Miranda, thereby guaranteeing the exclusion of a confession. For the government, it may contradict the defendant’s testimony that a roadside confession was coerced by threats.
Closely related to the motion to produce and preserve is third-party discovery. Sometimes information valuable to a potential suppression issue is in private hands rather than in the possession of a governmental agency. In such a case, it is not the government’s burden to conduct the defense attorney’s factual investigation. It is up to the defense to follow the proper procedures. The vehicle to accomplish this is the request for production from a nonparty. The moving party files a notice with the court indicating its intent to subpoena records from a third-party custodian. The purpose of filing the notice is to permit the opposing party an opportunity to object. After a specified period (e.g., 15 days), the moving party then serves a subpoena for the requested records, giving the third party a specified amount of time in which to respond. The third party either responds accordingly or moves to quash the subpoena. The latter option is normally exercised when the records requested are believed to be confidential and/or protected by a claimed privilege. If the third party is compliant, the moving party is often responsible for the payment of any expenses incurred by the third party as a result of complying with the request. In practice, records are routinely provided without incident and any “notice period” is routinely waived by the opposition.

After receiving the discovery response—whether automatic or the product of a carefully drafted motion—and after conducting any further third-party discovery, development of the suppression issue is on the defense. Of course, government attorneys should always review their own file for potential issues in order to be adequately prepared to discuss the same if raised by the defense in later negotiation.

Know your basic cases and your “broad strokes.” Even experienced criminal practitioners are not likely familiar with every published opinion dealing with suppression in their jurisdictions. True, the longer one practices in this area, the more “second-nature” spotting suppression issues will become. However, the new practitioner needs to—at a minimum—be familiar with the “landmark” cases upon which the dearth of case law dealing with the exclusionary rule is built. Such a basic and broad understanding of established doctrine is needed before the attorney can conduct a meaningful review of the case. Those new to this area of the law need to set aside time to read the foundational cases. These will later serve as a guide when the attorney is trying to spot potential issues. The foundational cases are usually covered in most law school curriculum as part of criminal law and/or criminal procedure. They are also summarized on countless online resources. It certainly helps to refresh up on the watershed opinions that you may have forgotten since your crim pro class. Identifying issues begins when, reviewing the discovery, the attorney is “reminded” of a particular case that he or she has read before.

Review initial discovery with an eye toward spotting potential issues. You have all of your discovery from the opposing party, third parties, and any preservation request. You are familiar with the foundational, “landmark” cases that serve as the basis of litigating the exclusionary rule. Great. Now it’s time to review the facts of your case in light of the law to discover potential suppression issues. This is essentially a brainstorming session during which there are no bad ideas . . . not yet anyway. As you go through the paper documents and the recorded media, take notes on leads that warrant further research and investigation. You may spot an issue that is “plain as day,” such as a warrantless entry clearly unsupported by exigent circumstances. Other potential issues may be based on nothing more than the proverbial “smell test,” where an officer’s actions just seemed intuitively overreaching. While you engage in this step, optimize your time with careful note taking. This is especially true with cases involving binders full of discovery. Find a way to organize the file and note the location of key facts in a manner that they may easily be located later. If you are reviewing electronic media, pause the disc and note the time for key events. In the words of George S. Patton, “An ounce of sweat saves a gallon of blood.” This all sounds intuitive, but you do not want to have to pore back through the file when you later learn that a seemingly weak issue you failed to document ended up being your strongest argument.

Conduct case-specific research. Again, few if any attorneys know the key facts, holdings, and reasoning of every published authority. The veterans are also likely going to have to conduct case-specific research after the initial brainstorming session. Even if the issue seems obvious, case law can change rapidly and may have recently been distinguished by new precedent. Never assume any issue to be a winner without Shephardizing the known authority to see if it has been questioned, overruled, or distinguished, or if there is a developing trend in other jurisdictions that may cause your jurisdiction to revisit the issue.

It is also a good practice to prepare case summaries as you conduct your research, bullet pointing the key facts, a concise statement of the relevant holding(s), and the syllogistic reasoning. This will serve multiple purposes. First, it keeps research all in one place, assisting the attorney with maintaining a bird’s eye view of the issue. Second, you will have the case boiled down to its bare essentials, which saves time later when you write a brief. Third, you will have a quick reference in court if you are asked to present argument on your motion following the presentation of evidence. More than anything, you will feel more organized and confident that you are “on top of it” when you reduce 200 pages of printed case law to two pages of bullet points.

Reevaluate issues and identify the “winners.” After the attorney has completed an initial round of case-specific research, he or she will likely be capable of sorting out the winners from the losers. Some of the potential issues may have been dead-end dogs, shot down by binding precedent. What is left will be the attorney’s focal point moving forward. Once the potential issues have become the litigating issues, it is common for additional investigation to be necessary.

Identify missing facts that are needed to finalize evaluation. Suppression is an area of the law that remains very gray. This is because there is a general absence of “bright-line” rules and “black letter law.” Instead, many issues are
Potential issues may be based on nothing more than the proverbial “smell test,” where an officer’s actions just seem intuitively overreaching.

decided based on the totality of the circumstances and the reviewing court’s common sense. For example, a brief, investigatory stop of an individual is justified if a prudent police officer would be warranted in formulating a reasonable suspicion that “criminal activity is afoot.” Where the law uses the word “reason” or “reasonable,” there is room for “reasonable” disagreement. Close cases may cut either way. Moreover, if the court makes a call and admits evidence obtained as a result of the allegedly unconstitutional intrusion, the decision to admit the evidence at trial will be reviewed on appeal only for abuse of discretion. This leaves plenty of room for a higher court to disagree with the result but nevertheless affirm the decision.

During the attorney’s research, a case may have been located with similar facts. This is good news because courts are guided in fact-sensitive cases to precedent that is factually similar. However, the attorney may find the potential exists to build a factual record that makes the case even more similar. The goal is to build a record in a manner that the similarities are too much for the court to overlook. In cases of discretion, similarities and differences with case law are often the basis for the final decision. Certain facts considered key in binding precedent may also have been present in the attorney’s case but never reduced to writing in a report or recorded in electronic media. It is definitely important to get the answers to the unknown before the hearing to see if anything else is out there that may parallel your matter to the precedent.

A brief word regarding unknown facts: it helps if the attorney is able to conduct an investigation “under the radar” so that if a fact ends up being unfavorable, the attorney is not introducing it into the record for the opponent. Informal interviews and record inspections are key in this regard. Conducting a third-party request for production of records imposes upon the moving party the obligation to provide the opponent with copies of and the opportunity to review any records received in response to the request. On the other hand, if the attorney is able to go to the location of a third-party record and view it without taking possession of or copying it, there is no duty to alert the opponent to the existence and location of the negative information (except, of course, if you represent the government and the material is considered Brady). Moreover, notes taken as a part of an informal telephone interview will be protected work product. If the desired fact does not exist, you have held your hand close.

Sometimes informal investigation may still be revealed to the opposition. In the event that a witness aligned with the opposing party must be interviewed further, it is important to have a witness present who is able to hear the conversation. The witness should take detailed notes and should be an individual who will present well on a witness stand. Later, if the valuable fact is denied, the attorney will have an impeaching witness.

Filing the motion. Once the attorney has gathered the discovery, conducted research, and conducted further discovery in light of that research, the attorney is now ready to file his or her motion. The general rule here is: keep it as vague as the jurisdiction will permit. This impacts both attorney and witness preparation for the opposition.

When witness testimony has not been “pinned down” (i.e., your jurisdiction does not permit discovery depositions in a criminal case), or there is otherwise some level of uncertainty as to what the testimony will be, there is room for the witness to “shade” the facts. Even those witnesses with great integrity may be biased. Being biased means that
Use of leverage and the “negotiation tradeoff.” The procedure recommended by this article is not always possible. Sometimes there are speedy trial concerns that make for less-than-ideal time constraints. Moreover, the attorney may not recognize a potential suppression issue until late in the game. This may be due to new precedent or simply overlooking the issue. For these reasons, sometimes a motion to suppress is made at the eleventh hour. Notwithstanding, if the attorney has filed the motion early, it is the normal practice of many courts to schedule the hearing several weeks down the road. This is valuable time for the parties to discuss a possible settlement.

Those who have practiced criminal law for any length of time know that most defendants hate uncertainty. When a potential prison sentence is on the line, the uncertainty of what the future holds may be torturous. In fact, experience has shown that most criminal defendants would rather have a “good” plea agreement than take the risk at all or nothing. That is good because many attorneys prefer that too—at least those of us in public service. Filing a motion to suppress does more than get a hearing on the calendar; it moves the case along by putting a time constraint on negotiations. A meritorious motion is an excellent bargaining chip for the defendant, and for the government, it is a fair reason to offer a better settlement. At one extreme, the motion is well supported by facts and the law and, if granted, would exclude evidence that is necessary for conviction. But, even a questionable motion that would only knock out a nonessential piece of evidence may affect settlement. Litigating a suppression motion on a serious case takes a lot of time. Research has to be conducted, witnesses have to be prepared and questioned, exhibits have to be gathered, calendars cleared, documents certified, etc. In addition, felony motions usually are followed by legal memoranda. Saving the parties’ time is worth something.

Consequently, it may be preferred by both parties and the defendant to come to the table before the hearing. Before sitting down to negotiate the case, the suppression issue needs to be valued by both parties. Again, the strength and potential consequences of a motion vary greatly. Therefore, the amount of consideration that should be given will also vary accordingly. The sentencing range and the likelihood of success at trial should be considered first to gauge where the case should settle, notwithstanding the suppression issue. The likely impact of the suppression should be factored in after that to discount the recommended plea agreement further.

As a final note, both parties should be aware that there is always a negotiation trade-off. To get what you want out of a negotiation requires convincing the opponent of your strengths and/or his or her weaknesses. The attorney must tip his or her hand to make the points. The harder you negotiate, the more your opponent learns how you view your case and what your strategies are. This is not as important when both parties are firmly committed to reaching a settlement. In other situations, the attorney must be cautious about the true intentions of the opponent. If the other side has nothing to lose by litigating the suppression, tends to only ask questions about your points without making any of his or her own, or you otherwise get the sense that it is not a serious negotiation, you might as well save your breath.

The Hearing
During the hearing, both the defendant and the government have the opportunity to present evidence. The party with the burden of proof should present first. The other party may rest on the presenting party’s evidence, or offer additional evidence.

Burden of proof. On issues pertaining to a search or seizure, the burden usually depends on whether the search was conducted pursuant to a warrant. Again, searches and seizures pursuant to a warrant are presumed reasonable, while warrantless searches and seizures are presumed unreasonable. In instances where the search or seizure was pursuant to a warrant, the defense will carry the burden. More frequently, a motion to suppress a search or seizure will be based on a warrantless search. Because warrantless searches are presumed to be unreasonable, and therefore unconstitutional, the burden is on the government to show that an exception to the warrant requirement justified the presumptively illegal action.

Regardless of who carries the burden, the burden itself is usually the same: suppression issues are decided based on a preponderance of evidence, although states remain free to impose a higher burden. (See Lego v. Twomey, 404 U.S. 477 (1972).)

Standing. One special consideration on the presentation of evidence warrants further discussion: standing. The Fourth Amendment has long been held to protect persons, not places. It seems intuitive that a defendant has no right to complain about a search resulting in the seizure of cocaine from under his neighbor’s mattress. A defendant must have a private, personal connection to the area searched. Establishing this private, personal connection means establishing standing.

The government is not required to disprove standing, even with warrantless searches. Standing is an issue raised by the evidence and for which the defense always has the burden. This is easily done by calling the defendant to testify for that limited purpose. Simply asking the defendant a few basic questions about his or her relationship to the property in question will do it. Rule 104(d) of the Federal Rules of Evidence—followed by many jurisdictions—permits a criminal defendant to testify regarding a preliminary matter (including standing at a suppression hearing) without being subject to cross-examination on other issues pertaining to the case. Moreover, the defendant’s testimony admitting to having a connection to the property may not be used later as substantive evidence during a jury trial. The one caveat is that, should the defendant testify at trial and contradict the previous suppression testimony, that fact may be used to impeach the trial testimony.

Forgetting to establish standing is a quick and easy way for the defense to lose a suppression hearing. Government attorneys should be on the lookout for this simple blunder. Unless the connection to the property is clear (such as a search of a personal wallet found on the defendant), the
defense should err on the side of caution. Call the defendant to the stand and make a clear record.

**Fact gathering.** One benefit to the suppression hearing is that the defendant gets an opportunity to develop testimony and nail down facts for trial, even if unsuccessful in the hearing. The vast majority of states do not permit depositions in a criminal case unless there are special circumstances (e.g., the party is able to demonstrate that a witness will be unavailable for trial and the deposition is needed to secure the witness’s testimony). This is the attorney’s opportunity to take a pseudo-deposition. Although the attorney will likely not be able to ask any question that is reasonably likely to lead to admissible evidence, the attorney should be able to get a core set of facts surrounding the investigation. This may later be used for impeachment purposes, or as foundational facts for planning the cross-examination of opposing witnesses. It is good practice to request the preparation of a transcript for each testifying witness.

**Argument.** Your court may require oral argument at the conclusion of evidence. Judges—like everybody else—hate to have their time wasted. Courts are absolutely clogged with litigation. Time is a court’s most precious asset. Judges do not want you to repeat the facts that they’ve just heard. They want a very simple and concise outline of your argument. You do not win points for theatrics, as you may in a jury trial. Restate the issue and very simply explain why the facts and law require the outcome you seek. Be clear and articulate and pace yourself. Nerves cause us to speak too quickly, sound reedy, and use so-called “fillers” (e.g., “uhhs” and “ums”). To a polished litigator, these things stick out like a sore thumb. Be relaxed, paced, and—above all else—be clear! It sounds obvious, but this can never be overstated.

**Ruling: What’s Next?** Successful motions to suppress do not all yield the same result. There are cases where a motion to suppress earns the defendant the functional equivalent of an acquittal. If the case is a charge for the possession of narcotics, the government is forced into a dismissal when the narcotics have been suppressed. One cannot prove that a defendant possessed something that, legally speaking, does not exist. On the other hand, if the court suppresses DNA evidence from a rape but the victim is still able to identify her attacker, the government may determine the case remains viable. In the latter example, the motion still had an effect on the case. A case that began as a sure conviction now lends itself to a theory of misidentification. At any rate, the parties must reevaluate the case in light of the court’s ruling. A successful motion should reopen negotiations with the parties adjusting their positions based on the quality of the case without the excluded evidence.

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Inconsistent Jury Verdicts

BY STEPHEN A. SALTZBURG

Juries are supposed to render verdicts that are internally consistent. At times they do not. The law is clear that a defendant cannot set aside a conviction on the grounds that a verdict is inconsistent. (Dunn v. United States, 284 U.S. 390, 393 (1932) (“Consistency in the verdict is not necessary.”).) But what if a trial judge explicitly instructs a jury that its verdict need not be consistent? The answer is provided in United States v. Moran-Toala, 726 F.3d 334 (2d Cir. 2013).

The Facts

The case began in 2005 when Immigration and Customs Enforcement (ICE) agents began investigating a Delta Airlines baggage handler’s involvement with narcotics at New York’s John F. Kennedy International Airport (JFK Airport). ICE agents obtained judicial authorization to wiretap Jorge Espinal’s phone and discovered that the baggage handler was working with Henry Polanco, a narcotics distributor based in New York. Espinal told Polanco that, as a luggage-ramp supervisor at the airport, he could intercept packages containing narcotics on Delta planes and prevent them from being screened by Customs and Border Protection (CBP) agents. For his part, Polanco arranged for a Dominican Republic supplier to hide packages containing cocaine, heroin, and ecstasy on many Delta flights; six packages were eventually seized by CBP agents.

The drug smuggling was not without incident. On February 11, 2006, CBP agents seized a backpack with cocaine and heroin from a Delta flight from the Dominican Republic to New York. Not realizing that CBP agents had the backpack, Espinal informed Polanco that the backpack had ended up on the international baggage carousel and then was taken to unclaimed baggage. The Dominican supplier, meanwhile, suspected that Espinal and Polanco had stolen the drugs and demanded either the return of the drugs or payment for the loss. When Espinal learned that the backpack had been seized, he informed the Dominican supplier that his girlfriend worked for the government and had access to confidential information that would prove that the seizure actually occurred.

The girlfriend—Elizabeth Moran-Toala—worked as a CBP officer from 2003 to 2007 at Hollywood International Airport in Fort Lauderdale, Florida. Her job required her to review flight manifests to identify airline passengers who were suspected of criminal activity. In that role, Moran-Toala had access to the Treasury Enforcement Communications System (TECS) database for work-related use. She was prohibited from browsing for personal or other non-work-related reasons. Three days after the backpack was seized in New York, she used the TECS database to access the seizure report.

In another incident, agents learned from the wiretap that Espinal and Polanco had arranged for a drug mule, Henry Cabrera, to carry a suitcase containing narcotics on an August 24, 2007, Delta flight from the Dominican Republic to JFK Airport. While waiting for Cabrera’s plane to land so they could arrest him, agents saw Espinal attempt to enter a sterile area where they suspected he planned to collect the suitcase before Cabrera went through customs. However, those plans were foiled when Espinal was scared off by the heavy law enforcement presence. Espinal informed Polanco that he was unable to meet Cabrera and did not know what happened to the suitcase. Once again, Espinal said that he would contact his girlfriend to provide confirmation that police had, indeed, intervened. Five days later, Moran-Toala used the TECS database to access a record of Cabrera’s arrest. Telephone records revealed that she called Espinal’s airport work station the next day.

Three days after she accessed the TECS database to check on Cabrera, Moran-Toala used the database to determine whether another associate of Espinal’s, Victor Perez, had any outstanding warrants. The search revealed none, and telephone records showed two outgoing calls from Moran-Toala’s phone to Espinal.

The government charged Moran-Toala in the United States District Court for the Eastern District of New York with conspiracy to import more than one kilogram of heroin and more than five kilograms of cocaine (count one), and with conspiracy to use a government computer unlawfully (count two).

While awaiting trial on the New York charges, Moran-Toala pleaded guilty in the Southern District of Florida to involvement in a separate heroin importation and distribution conspiracy. That conspiracy included her sister and brother-in-law, who were officers of the CBP and Transportation Security Administration. Moran-Toala admitted that she used the TECS system to run travel checks for drug couriers flying out of Fort Lauderdale and to access a seizure report to prove to a supplier that a shipment was seized, not stolen.
The New York Trial Instructions
In the New York case, Moran-Toala admitted to misusing her CBP computer, but claimed that she had no knowledge of the drug activity on the part of Espinal and Polanco. The trial judge in New York, after initially hesitating, decided to admit the signed, written plea allocution in the Florida case pursuant to Federal Rule of Evidence 404(b). The judge gave the following instruction to the jury:

If you determine, in respect to count two, that the defendant is guilty of that count, you must determine whether the government has proved beyond a reasonable doubt... that the offense in [18 U.S.C. § 1030(a)(2)(B)(ii)] was committed in furtherance of a criminal act in violation of the Constitution and laws of the United States; namely, the conspiracy to import narcotics as charged in count one. It’s linked to count one if you find she is guilty.

The phrase in furtherance means with the intent to help, advance, move forward, promote or facilitate. The government must therefore show that the defendant engaged in the conduct of accessing the United States Department of Homeland Security computer in excess of authorization, with the intent to advance, move forward, promote or facilitate the conspiracy charged in count [one] about which I’ve already instructed you.  

(Moran-Toala, 726 F.3d at 339–40 (first alteration omitted.).)

The trial judge also provided the jury with a verdict sheet containing four “questions”:
1. Verdict on count one.
2. Amount of heroin and cocaine involved in the conspiracy, if any.
3. Verdict on count two.
4. “Was the [unlawful computer use] conspiracy in furtherance of the crime charged in Count One, namely, the conspiracy to import a controlled substance?” (Id. at 340.)

Jury Questions
During the first day of deliberations, the jury sent the judge a note that asked, “Count 2: must the verdict in #4 be in agreement with Count #1?” (Id.) The jury was asking whether the findings it would use to answer question 4 had to be consistent with its verdict on count one. The trial judge consulted with counsel. The prosecution urged a “no” answer, arguing that Moran-Toala could have intended to have exceeded her computer authority in furtherance of the narcotics conspiracy without having enough knowledge to be a member of the conspiracy. Defense counsel urged a “yes” answer to foreclose the possibility of inconsistent verdicts. The trial judge’s initial reaction was that the defense was correct, but ultimately he told the jury that its verdict on count one and the felony enhancement did not have to be “in agreement.” The jury returned its verdict about 20 minutes after getting the judge’s response to its note. It acquitted Moran-Toala of the narcotics conspiracy, but convicted her of conspiring to unlawfully access a computer in furtherance of the same narcotics conspiracy.

Post-Trial Motion
Moran-Toala filed a post-trial motion pursuant to Federal Rule of Criminal Procedure 33 to set aside the jury’s enhancement finding. The trial judge concluded that the jury’s verdict was inconsistent.

While there may be scenarios in which an individual can act in furtherance of a conspiracy without joining the conspiracy, there is no view of the evidence in this particular case that would permit that conclusion. The government’s theory at trial was that Moran-Toala would, at a co-conspirator’s request, periodically access confidential information regarding narcotics seizures and other information and pass it on to the coconspirator... By finding that Moran-Toala committed the conspiracy computer offense “in furtherance of the crime charged in Count one,” the jury necessarily determined that she had agreed with another—her co-conspirator on the computer charge—to commit the crime; that she had intentionally advanced the narcotics conspiracy; and that she had committed an overt act in furtherance of the conspiracy. Put simply, Moran-Toala could not have intentionally misused her computer to advance a narcotics conspiracy without being a member of that conspiracy. Thus, when the jury asked whether the special verdict on the [felony] enhancement needed to be “in agreement” with its verdict on count one, it was effectively asking whether the verdict had to be consistent. 

(Moran-Toala, 726 F.3d at 340–41.)

But the judge also concluded that even if the court’s error produced the inconsistency, Moran-Toala was not entitled to relief.

The Appeal
The court of appeals first noted that because the jury acquitted the defendant on count one, the double jeopardy clause barred any retrial of the
defendant on that count, regardless of the correctness of the verdict or whether it was a consistent verdict. The court cited not only Dunn but also its decision in United States v. Acosta, 17 F.3d 538 (2d Cir. 1994), for the proposition that inconsistent verdicts are unreviewable on appeal. But the court noted that Moran-Toala was challenging the judge’s “no” instruction to the jury in response to its question rather than simply focusing on inconsistency.

The court observed that the judge initially and correctly explained to the jury that its verdict on the narcotics conspiracy should be “linked” to its findings on the felony enhancement because the felony enhancement only applied if Moran-Toala unlawfully used her CBP computer with the intent to further the conspiracy. The court opined that the jury clearly recognized the tension between acquittal on count one and an affirmative answer to question 4 and that the trial judge essentially blessed the jury’s desire to be inconsistent.

The court concluded that, had the judge answered “yes” to the jury’s question and had the jury nonetheless returned an inconsistent verdict, the jury’s act would have been one of nullification; but the judge’s “no” answer to the jury effectively invited the jury to nullify the law and misled the jury as to its duty.

Nature of the Error
The court ultimately concluded that the judge’s erroneous “no” answer to the jury did not amount to “structural error,” which always requires reversal. Citing Hedgpeth v. Pulido, 555 U.S. 57 (2008), the court reasoned that a harmless error analysis applies to instructional errors unless an error categorically vitiates all the jury’s findings, and concluded that the erroneous “no” should be subject to harmless error review. The court explained the difficulty in assessing the effect of the error:

Harmless error review in this case is complicated by the factual, if not legal, inconsistency in the jury’s verdicts. The very reason such verdicts are unreviewable in and of themselves is because we could do no more than “try to guess which of the inconsistent verdicts is the one the jury really meant.” We might speculate as to what the jury actually had in mind in order to seek to reconcile the two verdicts: perhaps the jury found that Moran-Toala had insufficient knowledge of the narcotics conspiracy to support a conviction on Count One, in which case a properly instructed jury likely would have also rejected the felony enhancement. Or the jury might have found that Moran-Toala’s intent to further the narcotics conspiracy by misusing her CBP computer also proved her membership in the narcotics conspiracy, but it did not wish to convict on such a serious charge without evidence that she personally imported or sold drugs; in that case, a properly instructed jury likely would have applied the felony enhancement. The problem with either speculation, though, beyond the fact that they are speculations, is that they do not account for the jury’s query: “Count 2: must the verdict in #4 be in agreement with Count #1?” This note strongly suggests that the jury itself could not reconcile the verdicts on the two counts and was seeking (and obtained) permission to render its contemplated verdicts despite the inconsistency.

There is thus no serious doubt that the erroneous instruction contributed to any inconsistency in the verdicts inasmuch as it explicitly permitted them. We are not unaware of the fact that the district court’s instruction ultimately resulted in a highly favorable verdict for Moran-Toala, who was convicted of the less serious charge and acquitted of the more serious one. But, in light of the dearth of evidence of Moran-Toala’s knowledge of the Espinal-Polanco airport conspiracy, it is nevertheless possible that a jury would have acquitted her of the narcotics conspiracy and declined to apply the felony enhancement had the supplemental instruction been correct and informed the jury that inconsistent verdicts are impermissible. We therefore cannot say with any confidence that it is clear beyond a reasonable doubt that a properly instructed jury would have convicted Moran-Toala of felony-level unlawful computer access conspiracy. Accordingly, the conviction on Count Two must be vacated and the case remanded to the district court for retrial, should the government be inclined to pursue the charge.

(Moran-Toala, 726 F.3d at 344–45 (footnote omitted).)

The Lesson
The lesson of the case is clear. Whether courts and judges like it or not, juries have the ability to engage in a type of jury nullification by returning inconsistent verdicts. The law is well established that courts will not review such verdicts and set aside convictions because a jury compromised. But courts will not knowingly encourage nullification, and if they do the encouragement is reviewable and may, as in Moran-Toala, result in the setting aside of a conviction when it is too difficult to ascertain what the jury would have done absent the improper judicial encouragement.

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FBI Review of Microscopic Hair

BY PAUL C. GIANNELLI

In May 2013, the Mississippi Supreme Court, in a 5–4 decision, rejected Willie Jerome Man-ning’s request for a stay of execution to permit DNA testing—“potentially setting up what experts said would be a rare case in recent years in which a person is put to death with such requests unmet.” (Campbell Robertson, Mississippi Inmate’s Bid for DNA Tests Is Denied with Tuesday Execution Set, N.Y. TIMES, May 4, 2013, at A11.)

A week later, the Court unexpectedly stayed Manning’s execution—after the Department of Justice (DOJ) notified state officials that FBI experts had presented misleading testimony at his trial, including hair and firearms evidence. (See Campbell Robertson, With Hours Left to Go, Execution Is Postponed, N.Y. TIMES, May 8, 2013, at A17 (noting that the DOJ “disavow[ed] the degree of certainty expressed by F.B.I. forensic experts at the man’s trial”)).

Days later, the FBI announced that Manning’s case was but one of 120 cases—including 27 death pen-alty prosecutions—in which improper microscopic hair analysis was introduced in evidence. (See Jack Nicas, Flawed Evidence under a Microscope: Disputed Forensic Techniques Draw Fresh Scrutiny; FBI Says It Is Reviewing Thousands of Convictions, WALL ST. J., July 18, 2013.)

The FBI Review

The FBI review came after three District of Colum-bia men, who were convicted for rape or murder in the early 1980s, were exonerated through DNA testing. The testimony of FBI microscopic hair examiners played a part in their wrongful convictions. FBI protocols had long acknowledged that a positive identification is not possible with hair analy-sis. Nevertheless, some FBI experts went way beyond this limitation when testifying.

As a result, the FBI and the DOJ reviewed more than 20,000 lab files in consultation with the Inno-cence Project and the National Association of Criminal Defense Lawyers. “The new review listed examples of scientifically invalid testimony, including claiming to associate a hair with a single person ‘to the exclusion of all others,’ or to state or suggest a probability for such a match from past casework.” (Spencer S. Hsu, U.S. Reviewing 27 Death Penalty Convictions for FBI Forensic Testimony Errors, WASH. POST, July 17, 2013 (“O[n the witness stand, several agents for years went beyond the science and testified that their hair analysis was a near-certain match.”)).

Subsequently, the Texas Forensic Science Commission “directed all labs under its jurisdiction to take the first step to scrutinize hair cases.” (Id.)

Prior Criticism

The criticism of hair analysis is not new. In 1995, a federal district court observed: “Although the hair expert may have followed procedures accepted in the commu-nity of hair experts, the human hair comparison results in this case were, nonetheless, scientifically unreliable.” (Williamson v. Reynolds, 904 F. Supp. 1529, 1558 (E.D. Okla. 1995), rev’d on this issue sub nom., Williamson v. Ward, 110 F.3d 1508, 1523 (10th Cir. 1997)).

The district court noted that the “expert did not explain which of the ‘approximately’ 25 characteristics were consistent, any standards for determining whether the samples were consistent, how many persons could be expected to share this same combination of character-istics, or how he arrived at his conclusions.” (Id. at 1554.) Williamson, who was five days from execution when he obtained habeas relief, was subsequently exon-erated by DNA testing. (BARRY SHECK ET AL., ACTUAL INOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 146 (2000) (noting that the hair evidence was shown to be “patently unre-liable”); see also JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (2006) (examining the Williamson case).)

The following year, two commentators wrote: “If the purveyors of this dubious science cannot do a better job of validating hair analysis than they have done so far, forensic hair comparison analysis should be excluded altogether from criminal trials.” (Clive A. Stafford Smith & Patrick D. Goodman, Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?, 27 COLUM. HUM. RTS. L. REV. 227, 231 (1996).)

In 1998, a Canadian judicial inquiry into the wrongful conviction of Guy Paul Morin was released. Morin’s original conviction was based, in part, on hair evidence. The judge conducting the inquiry recom-mended that “[t]rial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt.” (HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN recommendation 2 (Ont. MINISTRY OF THE ATTORNEY GEN. 1998).)

A study of 200 DNA exonerations found that expert testimony (55 percent of cases) was the

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second leading type of evidence after eyewitness identifications (79 percent of cases) used in wrongful conviction prosecutions. (See Brandon L. Garrett, Judging Innocence, 108 COLUM. L. REV. 55, 81 (2008).) A subsequent investigation of trial transcripts underscored the role of hair analysis in the exoneration cases: “Of the 65 cases involving microscopic hair comparison in which transcripts were located, 25 cases, or 38%, had invalid forensic science testimony.” (Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 VA. L. REV. 1, 14–15 (2009).)

Similarly, the National Academy of Sciences 2009 report on forensic science observed that “testimony linking microscopic hair analysis with particular defendants is highly unreliable.” (Nat’l Research Council, Nat’l Acad. of Sci., Strengthening Forensic Science in the United States: A Path Forward 161 (2009).)

There are two principal issues with hair comparison testimony. The first concerns the probative value of testimony that hairs from two sources are “consistent.” The second concerns gross overstatements in the testimony of many examiners.

“Consistent with” Testimony

What does the term “microscopically indistinguishable” or “consistent with” mean? The probative value of this conclusion would, of course, vary if only a hundred people had microscopically indistinguishable hair as opposed to several million. If the expert testifies that the accused’s examplars are “consistent with” the crime scene hairs, the expert should concede on cross-examination that the hair could have come from a person other than the accused.

Once this concession is made, the cross-examiner could take the expert “up the ladder”: The crime scene hair could have come from five other persons, 10, 50, 100, 500, 1,000, 100,000, and so forth. As one hair examiner wrote: “If a pubic hair from the scene of a crime is found to be similar to those from a known source, [the courts] do not know whether the chances that it could have originated from another source are one in two or one in a billion.” (B.D. Gaudette, Probabilities and Human Pubic Hair Comparisons, 21 J. FORENSIC SCI. 514, 514 (1976).) In sum, the evidence may have little probative value, while at the same time be quite misleading.

A 2002 FBI study compared microscopic (“consistent with” testimony) and mitochondrial DNA (mtDNA) analysis of hair: “Of the 80 hairs that were microscopically associated, nine comparisons were excluded by mtDNA analysis.” (Max M. Houck & Bruce Budowle, Correlation of Microscopic and Mitochondrial DNA Hair Comparisons, 47 J. FORENSIC SCI. 964, 966 (2002).) If one assumes the mtDNA results are accurate, then microscopic analysis was wrong in a significant number of cases (over 11 percent).

Overstatements

Experts have often gone beyond “consistent with” testimony. In the Edward Honaker case, the forensic expert testified that the crime scene hair sample “was unlikely to match anyone” other than the defendant. (Edward Connors et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial 58 (1996).) At best, the expert could have testified that the samples were “consistent,” which means, as noted above, that they could have come from Honaker or tens (hundreds?) of thousands of other people. A competent expert should have known this. A competent prosecutor also should have known this. Honaker spent 10 years in prison before DNA proved him innocent.

In the Williamson case, discussed above, an expert testified that the hair samples were “consistent microscopically,” but then elaborated: “In other words, hairs are not an absolute identification, but they either came from this individual or there is—could be another individual somewhere in the world that would have the same characteristics to their hair.” (904 F. Supp. at 1554 (emphasis added).) If these were true, hair evidence would be on a par with nuclear DNA profiling.

Similarly, in State v. Faircloth, 394 S.E.2d 198, 202 (N.C. Ct. App. 1990), the expert testified that “it would be improbable that these hairs would have originated from another individual.” The court reversed, noting that this testimony amounted “effectively, [to] a positive identification of defendant.”

Positive identifications have also been proffered. In a Mississippi capital case, the expert testified that, “based on his experience and the ‘matches’ he had seen, it was his ‘opinion that there was a transfer of hair from the Defendant to the body of [the victim].’” (Smith & Goodman, supra, at 273 (quoting trial transcript in Randy Bevill case).)

In a Missouri case, the expert opined, to “a reasonable degree of certainty” that the unidentified hairs were in fact from” the defendant. (Butler v. State, 108 S.W.3d 18, 22 (Mo. Ct. App. 2003) (rejecting testimony).)

In an Oklahoma case, the expert testified that, based on her examination, the defendant was present at the time of the crime:

[In response to Assistant District Attorney Barry Albert’s question based on her expertise and examination of the forensic evidence as to whether Ms. Gilchrist had ‘an opinion as to whether Mr. McCarty was physically present during the time violence was done to Miss]
Confronting Prosecutors with Their Own Words?

BY PETER A. JOY
AND KEVIN C. McMUNIGAL

C onsider the following scenario. The state charges two young men, Defendant A and Defendant B, with murder. A and B are members of the same gang. The victim was a rival gang member. A single pistol shot, fired in the evening hours in a restaurant parking lot, took the victim’s life. The evidence is conflicting about which of the men fired the fatal shot. But the prosecution’s evidence is strong that both men purposefully participated in the murder and thus are liable for murder under principles of accessorial liability regardless of who fired the shot.

The men are tried separately. In the first trial, the prosecutor argues that A fired the fatal shot and the jury convicts A. At B’s trial a few months later, the same prosecutor argues that B fired the fatal shot. B seeks to admit into evidence the prosecutor’s prior inconsistent argument that it was A who fired the fatal shot. Should this evidence be admitted? In other words, should the jury in B’s trial be informed of the prosecutor’s inconsistent argument in the prior case? Should the prosecutor be forced to confront and explain this inconsistency to the jury?

Both courts and commentators have addressed a variety of issues that arise when prosecutors pursue inconsistent prosecutions. An issue often raised is whether such prosecutorial inconsistency violates due process. The Supreme Court has yet to address this question. But a number of lower courts—both state and federal—have addressed it. Some courts have found that prosecutorial inconsistency in certain circumstances does violate due process. (See, e.g., Stumpf v. Mitchell, 367 F.3d 594 (6th Cir. 2004), vacated on other grounds, Bradshaw v. Stumpf, 545 U.S. 175 (2005).) Others have found that it does not violate due process. (See, e.g., Housen v. Gelb, 744 F.3d 221, 228 (1st Cir. 2014) (“After all, the Supreme Court has never held that the prosecution of different defendants in different trials on materially inconsistent theories of guilt violates due process when, as in this case, state law permits such a course of action.”); State v. Miller, 775 N.E.2d 498, 503 (Ohio 2002) (“[T]he prosecution is entitled to offer differing theories as to what actually transpired in the commission of an offense . . . .”).

A separate question is whether prosecutorial inconsistency violates a prosecutor’s obligation to protect the innocent. Commentary to ABA Prosecution Function Standard 3-1.1 states that the prosecutor is a “minister of justice” obliged “to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.” In a previous column, as well as a chapter in our book, we have argued that prosecutorial inconsistency in certain circumstances does violate that prosecutorial obligation. (Peter A. Joy & Kevin C. McMunigal, Should Prosecutors Use Inconsistent Arguments?, CRIM. JUST., Winter 2005, at 47; Peter A. Joy & Kevin C. McMunigal, Do No Wrong: Ethics for Prosecutors and Defenders 187 (2009).

In this column, though, we focus on a distinct but related evidentiary question: whether a defendant should be allowed to introduce an inconsistent factual argument made by a prosecutor at a prior related trial. Rather than constitutional law or legal ethics, we primarily address evidence law—both the Federal Rules of Evidence and relevant case law.

FRE 801 on Admissions
Federal Rule of Evidence (FRE) 801(d)(2) deals with admissions. For a statement to qualify under this rule it must be offered “against an opposing party.” This requirement is clearly fulfilled in situations in which a defendant is offering a prosecutor’s prior inconsistent argument. The defendant is offering the evidence against the government, which is the opposing party in the case.

FRE 801(d)(2) creates five categories of admissions: personal, adoptive, authorized, vicarious, and co-conspirator statements. The words of a party’s lawyer from a prior trial easily fall into two of these: authorized admissions and vicarious admissions. In our introductory factual scenario, the prosecutor at the first trial without question was a person whom the government “authorized to make a statement on the subject” of who fired the fatal shot. Thus,
the prosecutor’s words fall within the language of FRE 801(d)(2)(C) delineating authorized admissions. The prosecutor at the first trial was also an agent and employee of the government and at that trial was speaking “on a matter within the scope of that relationship and while it existed.” Thus, the prosecutor’s words also fall within the language of FRE 801(d)(2)(D) delineating vicarious admissions. State rules of evidence usually track FRE 801. (See, e.g., Wis. Stat. § 908.01; see also Stephen P. Hurley & Marcus J. Berghahn, “Sharp Practice:” The Use of Section 908.01(4)(b) Admission by Party-Opponent to Hoist a Prosecutor by His Own Words, or the Lessons of State v. Cardenas-Hernandez, Wis. Defender, Fall 1999, at 11.)

The McKeon Case

United States v. McKeon, 738 F.2d 26 (2d Cir. 1984), is the landmark case on the admissibility of a lawyer’s statements from a prior trial. In it, the Second Circuit approved the admission of a criminal defense lawyer’s statements at one trial in a subsequent retrial of the same case. Later federal and state cases dealing with the admission of prior inconsistent statements by prosecutors regularly cite and discuss McKeon.

McKeon was charged with a variety of federal firearms offenses related to the surreptitious shipment of guns from New York to Ireland. The case was tried three times, the first two ending in mistrials. At the second trial, McKeon’s lawyer told the jury in his opening statement that McKeon’s wife “had absolutely nothing to do with the case.” In his opening statement at the subsequent retrial, though, the same lawyer told the jury that the defendant’s wife had been involved in creating certain key documents related to the gun shipments. The trial judge admitted the earlier statement and also disqualified McKeon’s lawyer under the advocate witness rule, finding that it was necessary for him to testify to explain the inconsistency in his statements.

Before admitting counsel’s prior statements, the McKeon court stated that three requirements must be met: (1) the court must be satisfied that the statement is an assertion of fact inconsistent with the assertion at the later trial and the inconsistency in the statements is “clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial”; (2) the statements of counsel must be the equivalent of testimonial statements by the defendant; and (3) the trial court must, in a hearing outside the jury, “determine by a preponderance of the evidence that the inference the prosecution seeks to draw from the inconsistency is a fair one and that an innocent explanation . . . does not exist.” (Id. at 33.) The prior statement should be excluded if opposing inferences are of equal weight, or the preponderance of evidence favors an innocent explanation. (Id.) Applying this three-part test, the McKeon court found the prior opening statements admissible in the subsequent trial.

Admission of Prior Prosecutorial Statements

The question of admission of a prosecutor’s prior inconsistent statements has usually arisen in a context different than the one presented in McKeon. The McKeon case dealt with a retrial of the same case, i.e., the same charges against the same defendant. Cases addressing admission of prior inconsistent arguments by a prosecutor, in contrast, usually involve the same or similar charges against different defendants. Still, courts examining the admission of a prosecutor’s prior inconsistent statements have tended to apply the three-part test set forth in McKeon.

The first case we have found dealing with the admissibility of a prosecutor’s prior inconsistent argument is Hoover v. State, 552 So. 2d 834 (Miss. 1989). The state prosecuted three incarcerated inmates for killing a prison guard while he was driving the inmates from a county jail to a state prison facility. Hoover assaulted the driver from behind and choked him with the handcuffs he was wearing. Another inmate, Sutherland, took the driver’s gun from him. Thereafter, the driver was shot three times with the gun, killing him.

As in our introductory factual scenario, the evidence was not clear on who fired the fatal shots. Hoover and Sutherland were tried separately. At Sutherland’s trial, the prosecution argued that Sutherland fired the shots. At Hoover’s trial, the prosecution argued that Hoover fired the fatal shots. Hoover sought to introduce the prosecutor’s prior inconsistent argument, but the trial court refused to admit it. Relying primarily on the McKeon case, the Mississippi Supreme Court held that the prosecutor’s prior argument “was admissible and therefore, exclusion of this evidence was error.” (Id. at 840.)

Two years after the Mississippi Supreme Court decided Hoover, the Second Circuit followed suit by extending the McKeon principle to include prior arguments of prosecutors. In United States v. Salerno, 937 F.2d 797 (2d Cir. 1991), the defendant sought to introduce the indictment as well as the prosecution’s opening statement and closing argument in a prior related case in which the prosecution had taken an inconsistent position on whether a particular person was a victim or a participant in illegal bid-rigging. The trial court excluded the evidence. The Second Circuit reversed on other grounds, but gave detailed “guidance” on the admissibility of the prosecutor statements because it was likely to be an issue at a retrial.
The Salerno court found that the indictment was not admissible because “a grand jury is neither an officer nor an agent of the United States, but a part of the court.” (Id. at 811.) But, relying on McKeon, it found that the prosecutor’s opening statement and closing argument from the prior case were admissible and that the trial court had abused its discretion in refusing to admit them. In doing so, it applied the three-factor McKeon test.

Not all courts have followed the leads of the Second Circuit in Salerno and the Mississippi Supreme Court in Hoover. The Massachusetts Supreme Court recently dealt with the issue of admission of prior inconsistent prosecutor arguments in Commonwealth v. Keo, 467 Mass. 25 (2014). The factual scenario that introduces this column is loosely based on the facts in Keo. As in Hoover, a disputed issue at the separate trials of two defendants charged with a murder was which one fired the gun that killed the victim. At the first trial of defendant Sok, the prosecution claimed that Sok fired the fatal shot. At the later trial of defendant Keo, the prosecution argued that Keo fired the fatal shot.

The Massachusetts Supreme Court acknowledged and discussed McKeon, Hoover, and Salerno, but noted that Massachusetts had not to date permitted introduction of prior statements by lawyers as admissions. Keo had not sought to admit the prosecutor’s prior inconsistent argument at trial, but claimed on appeal that his lawyer’s failure to seek to have the prior inconsistent argument admitted constituted ineffective assistance. The court denied the ineffective assistance claim.

Though it refrained from taking a position on the admissibility of prior inconsistent prosecutor arguments, the court was clearly uncomfortable with prosecutors taking factually inconsistent positions at different trials. The court offered the following cautionary words to prosecutors:

[P]rosecutors, in future cases, should proceed with caution when asserting inconsistent arguments in different trials involving the same crime, assuming no “innocent explanation,” significant changes, or new evidence have come to light. . . . If a prosecutor does so and the position is inconsistent with what he formerly argued at another trial for the same crime, he does so possibly at his own peril. (Keo, 467 Mass. at 46.)

The “peril” to which the court refers here appears to be admission of a prior inconsistent argument. Professor Anne Bowen Poulin, in a thorough and thoughtful treatment of admission of prior inconsistent prosecutor arguments, argues for admission of such statements. But, unlike the Second Circuit in the McKeon and Salerno cases, she would not apply the same standard for admission to prior defense and prosecution statements. Conceding that McKeon’s three-part test is appropriate for prior statements by defense counsel, she takes the position that use of FRE 403’s well-known balancing test, which favors admission, should be used in regard to prior prosecutor statements rather than the McKeon test. (Anne Bowen Poulin, Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?, 87 Minn. L. Rev. 401 (2002).)

Conclusion
In our view, the trend toward admitting prior inconsistent arguments by prosecutors in related cases is a good one. As we have argued previously, courts and ethics authorities should discourage prosecutors from taking inconsistent positions unless there is a good reason for doing so that the prosecutor is willing to explain to the fact finder, such as the discovery of new evidence. Such inconsistency can risk punishing the innocent and also is likely to increase public mistrust of prosecutors and the criminal justice system. By informing the jury of the inconsistency and forcing the prosecutor to confront it, the admission should have the salutary effect of discouraging prosecutors from taking inconsistent positions except in those cases in which they are comfortable explaining why they have done so to a jury. ■
Recusing and Reporting Judges: The Ethical Dimensions

By J. Vincent Aprile II

How many criminal law practitioners, whether prosecutors or defense counsel, whether at trial, on appeal, or in postconviction proceedings, have ever moved to disqualify a judge? How many of those attorneys have ever reported serious judicial misconduct to the appropriate authority? Often in response to these questions, criminal law practitioners recite a litany of justifications for declaring to recuse or report a judge.

For example, the fears often voiced by litigators who decline to file disqualification motions include: (1) a motion to disqualify the judge will possibly incur the judge’s wrath in this case, if the judge remains on the case; or, if disqualified, in other cases the attorney has before the challenged judge; (2) the next judge assigned after a successful disqualification motion will be worse than the recused judge; (3) other judges will view the lawyer filing the recusal motion as a troublemaker or a judge basher; (4) the litigator’s attempt, whether successful or unsuccessful, to disqualify a judge will create the impression that the litigator is unethical; and (5) the challenged judge may view the disqualification motion as an attack on the judge’s own judicial ethics. These and other anxieties that cause litigators to shun judicial disqualification motions must be evaluated in light of the lawyer’s ethical obligations.

If a lawyer is aware that the judge is disqualified to preside in the lawyer’s case, is the lawyer ethically required to bring the recusal issue to the judge’s attention? A litigator may not decide as a matter of personal preference or litigation strategy to decline to seek the disqualification of a judge whose participation is barred by statutory law, a code of judicial conduct, and/or federal or state constitutional grounds. Ethical obligations require the litigator to file the disqualification motion under such circumstances. “It is professional misconduct for a lawyer to . . . knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.” (Model Rules of Prof. Conduct R. 8.4(f) (2013)).

Once the litigator is aware that the judge presiding over the case or the appeal is disqualified, the litigator may not ethically rely on the judge to sua sponte recuse himself or herself from the matter. By leaving the disqualification issue in the hands of the judge, the litigator is knowingly assisting the judge in violating statutory law, the judicial conduct code, or federal or state constitutional due process provisions, regardless of whether the judge is unaware of his or her disqualification in the case. The key fact is the litigator knows the judge is disqualified. “‘Knowingly’ . . . denotes actual knowledge of the fact in question.” (Model Rules of Prof’l Conduct R. 1.0(f).)

Judicial ethics require a judge to sua sponte recuse herself or himself. “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” (Model Code of Judicial Conduct R. 2.11(A) (2011).) Additionally, where, by law or code of judicial conduct, a judge must disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned, the judge’s actual knowledge of the disqualification grounds may not be controlling. “[R]ecusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.” (Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860–861 (1988) (quoting Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986)) (interpreting 28 U.S.C. § 455(a)).) Other jurisdictions have adopted this test. (See, e.g., Petzold v. Kessler Homes, Inc., 303 S.W.3d 467, 473 (Ky. 2010).) As a result, a judge who is unaware of the basis for disqualification is in many situations disqualified nonetheless.

The ethical requirement to raise the judicial disqualification issue in this context is premised on the responsibility of the litigators in a case to police the fundamental requirement that a fair and impartial judge is essential to justice. But what if the litigator decides that, even though the judge is disqualified as a matter of law or judicial ethics, this judge should nevertheless remain on the case? In that circumstance, is the litigator ethically permitted to waive the disqualification issue by electing not to raise the issue? A litigator may not ethically decide, without the consent of the client, to waive the disqualification and, even with the client’s consent, cannot waive the disqualification by simply doing nothing.

Under the Model Code of Judicial Conduct and its counterparts, such as the Code of Conduct for United States Judges, a waiver of a judicial disqualification must be performed via a special procedure, designated in some jurisdiction as remittal of disqualification.

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(Code of Judicial Conduct for U.S. Judges Canon 3(D.) A remittal procedure enables the parties to continue with the assigned judge if they are willing to waive the judge’s disqualification. A judge who would be disqualified on grounds other than bias or prejudice concerning a party or a party’s lawyer “may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification.” (Model Code of Judicial Conduct R. 2.11(C).) Some codes of judicial conduct exempt additional grounds for disqualification from this waiver procedure. (See, e.g., Code of Judicial Conduct for U.S. Judges Canon 3(D).)

After the disclosure is made, should the parties and their lawyers, without the involvement of the judge or any court personnel, agree that “the judge should not be disqualified,” the judge may remain on the case. It is imperative that the decision to remit be made independently of the judge, who must not request that counsel consider waiver of the disqualification or otherwise advance the concept of remittal, and who should not be privy to the discussion by the parties and their counsel concerning whether to waive the disqualification.

The waiver agreement must be placed on the record. In some jurisdictions, the waiver must be in writing and signed by the parties and their counsel. The decision to waive the judicial disqualification must be made with the consent of the parties. The attorneys alone cannot decide to waive a judicial disqualification, regardless of a strategic reason to do so.

Although not specifically expressed in most codes of judicial conduct, counsel, as opposed to the judge, should be able to place on the record the basis for the judge’s disqualification and express a willingness to waive the disqualification through a remittal procedure if all parties and counsel agree and the judge is willing to remain on the case after a waiver is finalized. A judge should not be the only one to initiate the remittal procedure by disclosing the grounds for his or her disqualification.

Does a lawyer have an ethical obligation to report judicial misconduct? If, for example, a trial judge is treating a criminal defense attorney at a pretrial hearing with contempt and preventing defense counsel from representing the defendant by what clearly appears to be serious judicial misconduct, which litigators, if any, have an ethical obligation to report the judge’s actions? Does the reporting obligation, if any, fall solely on the defense attorney who suffered the judge’s misconduct? Does the prosecutor, who did nothing to encourage the court’s attack on defense counsel, have an ethical reporting obligation? If the situation were reversed and the judge was committing serious judicial misconduct against the prosecutor, would defense counsel have an ethical obligation to report the judge?

“A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.” (Model Rules of Prof’l Conduct R. 8.3(b).) This is a mandatory ethical reporting duty. Every attorney who witnessed these instances of serious judicial malfeasance has an ethical obligation to report the offending judge to the appropriate authority responsible for monitoring and sanctioning judicial misconduct, regardless of whether the litigator was the target of the court’s misconduct or believes another lawyer will report the judge.

Obviously there is not an ethical obligation to report every questionable action of a judge. The standard is whether the judge’s misconduct raises a “substantial question” as to the judge’s fitness to serve. “The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” (Model Rules of Prof’l Conduct R. 8.3 cmt. [3].) However, a lawyer cannot turn a blind eye to serious judicial misconduct and decline to report it by conveniently minimizing the seriousness of the court’s violation of applicable rules governing judicial conduct.

Reporting is not a one-way street. A judge has an ethical duty to report lawyers and judges when a judge has knowledge that a lawyer or another judge has violated a rule of professional conduct or the code of judicial conduct, respectively, and the violation raises “a substantial question regarding” the violator’s “honesty, trustworthiness, or fitness . . . in other respects” as a lawyer or a judge. (Model Code of Judicial Conduct R. 2.15(A)-(B).) Even upon the mere receipt of information that a lawyer or another judge has violated an ethical obligation, a judge must “take appropriate action,” which includes, but does not necessarily require, reporting the violator. (Model Code of Judicial Conduct R. 2.15(C)-(D); see Code of Judicial Conduct for U.S. Judges Canon 3(B)(5).)

Litigators in the criminal justice system must understand their ethical obligations to file judicial disqualification motions and only waive the judge’s disqualification, where remittal is authorized, with the client’s expressed consent and through the appropriate waiver procedure. Equally important, litigators must be aware of their mandatory ethical duty to report judges who are guilty of serious judicial misconduct. Only when litigators in all stages of the criminal justice process embrace and appreciate these ethical responsibilities pertaining to the monitoring of judicial conduct will the criminal bar perform its ethical function to ensure that every defendant and the government will have a fair and impartial judge presiding over every criminal case, whether at trial, on appeal, or in postconviction proceedings.
Supreme Court Cases of Interest

BY CAROL GARFIEL FREEMAN

On the next to last argument day of the Term, April 29, the Court heard the two cases addressing the applicability of the Fourth Amendment to cell phone searches, Riley v. California, cert. granted, 134 S. Ct. 999 (Jan. 17, 2014) (No. 13-132), and United States v. Wurie, cert. granted, 134 S. Ct. 999 (Jan. 17, 2014) (No. 13-212). Other cases undecided as of April 30 include Hall v. Florida, cert. granted, 134 S. Ct. 471 (Oct. 21, 2013) (No. 12-10882), involving the standards for identifying mental retardation sufficient to preclude the death penalty, and McCullen v. Coakley, cert. granted, 133 S. Ct. 2857 (June 24, 2013) (No. 12-1168), regarding limitations on the area allowed for protests at family planning clinics. Opinions in all argued cases will be released by the end of the Term on June 30, and noted in the fall issue of Criminal Justice.

Gregory Holt, the petitioner in Holt v. Hobbs, infra, filed his cert petition pro se, claiming that the policy of the Arkansas Department of Correction regarding beards violates the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. Holt apparently is not a lawyer but drafted a very well-written petition supported by appropriate authority; the petition is available online at www.scotusblog.com and other sites. In November, the Court enjoined the respondents from enforcing the grooming policy pending disposition of the cert petition and the Court’s judgment, to the extent that it prohibited Holt “from growing a one-half-inch beard in accordance with his religious beliefs.” (Holt v. Hobbs, 134 S. Ct. 635 (Nov. 14, 2013) (No. 13-6827).) Holt has since retained a professor from the University of Virginia to represent him. His case, and the five others in which the Court recently granted cert, will be argued next term.

In two cases involving questions about the drugs to be used in conducting an execution, the Court denied stays of execution over the dissents of Justices Ginsburg, Breyer, Sotomayor, and Kagan. (Ferguson v. Lombardi, 134 S. Ct. 1582 (Mar. 25, 2014) (No. 13-9374); Villegas v. Texas, 2014 WL 1488519 (S. Ct. Apr. 16, 2014) (No. 13-9715).) Given the botched execution in Oklahoma of Clayton Lockett (Lindsey Bever, Botched Oklahoma Execution Reignites Death Penalty Debate, WASH. POST, Apr. 30, 2014, http://tinyurl.com/lzc2tuz), and similar problems in other states, the Court will ultimately need to address the Eighth Amendment implications of current lethal injection procedures.

Justice Breyer wrote separately respecting the denial of cert in Hussain v. Obama, 134 S. Ct. 1621 (Apr. 21, 2014) (No. 13-638), noting that the Court has not addressed the question whether the Authorization for Use of Military Force (AUMF), 115 Stat. 224, and the Constitution allow possibly indefinite detention of a person who was allegedly part of al Qaeda or the Taliban but who was not “engaged in an armed conflict against the United States” prior to his or her detention. Hussain’s situation may involve this issue but his petition did not raise these questions, and thus Justice Breyer agreed with the decision to deny cert.

Further information about these cases and other cases on the Court’s docket, including transcripts of oral arguments, is available on the Court’s website, www.supremecourt.gov.

CERTIORARI GRANTED
Note: Questions presented are quoted as drafted by the parties, or, in some instances, by the Court.

Correctional Policy (Religious Rights)
Holt v. Hobbs, cert. granted limited to question posed by the Court, 134 S. Ct. 1490, 1512 (Mar. 3, 2014) (No. 13-6827), decision below at 509 F. App’x 561 (8th Cir. 2013), reh’g denied, July 17, 2013.

Whether the Arkansas Department of Correction’s grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq., to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

Crimes and Offenses

Whether mere possession of a short-barreled shotgun should be treated as a violent felony under the Armed Career Criminal Act?

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Yates v. United States, cert. granted limited to Question 1 presented by the petition, 2014 WL 1659863 (S. Ct. Apr. 28, 2014) (No. 13-7451), decision below at 733 F.3d 1059 (11th Cir. 2013).

In the wake of the criminal charges filed against Enron’s corporate officers, Congress passed the Sarbanes-Oxley Act of 2002. Known as the “anti-shredding provision” of the Act, 18 U.S.C. § 1519 makes it a crime for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with the intent to impede or obstruct an investigation. 18 U.S.C. § 1519 (emphasis supplied). John L. Yates, a commercial fisherman, was charged and convicted under this anti-shredding criminal statute for destroying purportedly undersized, harvested fish from the Gulf of Mexico after a federally-deputized officer had issued him a civil citation and instructed him to bring them back to port.

This petition presents the important question of whether the reach of section 1519 extends to the destruction of anything meeting the dictionary definition of “tangible objects,” or instead is limited to the destruction of tangible objects related to record-keeping as follows:

Whether Mr. Yates was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, where the term “tangible object” is ambiguous and undefined in the statute, and unlike the nouns accompanying “tangible object” in section 1519, possesses no record-keeping, documentary, or informational content or purpose?

Fourth Amendment

Did the Fifth Circuit err in holding that a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected even though the Fifth Circuit acquired jurisdiction over the entire claim as a result of the respondent’s appeal?


Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

DECIDED CASES
Capital Case—Habeas
White v. Woodall, 134 S. Ct. 1697 (Apr. 23, 2014) (No. 12-794). Woodall pleaded guilty to capital murder, capital kidnapping, and rape. At the penalty phase, he unsuccessfully sought an instruction that the jury should not draw any adverse inference from his failure to testify. On direct appeal, the state court rejected his claim that this violated his Fifth Amendment rights. Although the federal district court on habeas had granted relief and the court of appeals had affirmed, the Supreme Court reversed.

In order to grant habeas on a claim adjudicated in the state courts, a federal court must find that the state court’s decision was “contrary to, or . . . an unreasonable application of, clearly established Federal law.” (28 U.S.C. § 2254(d).) A non-testifying defendant is entitled to a no–adverse-inference instruction at the guilt phase of a trial, Carter v. Kentucky, 450 U.S. 288 (1981), and at the penalty phase when the state offers evidence of an involuntary psychiatric examination conducted without Miranda warnings, Estelle v. Smith, 451 U.S. 454 (1981).
However, these cases are not reasonably interpreted as requiring a no-adverse-inference instruction at the penalty phase unless factual questions regarding the circumstances and details of the crime are still at issue as in *Mitchell v. United States*, 526 U.S. 314, 327–30 (1999). The decision in *Mitchell* expressly reserved the question whether silence would bear on the issue of remorse for acceptance of responsibility. Because Woodall pleaded guilty to facts supporting all charges, the facts and circumstances of the crimes were no longer at issue. Thus, it was not unreasonable for the Kentucky courts to conclude that such an instruction was not required when Woodall did not testify at the penalty phase. This is true even though remorse was at issue on sentencing, and the jury might well consider his silence as evidence that he felt no remorse. Nor can the grant of habeas be justified on the theory that the state court unreasonably refused to extend the no-adverse-inference rule to the sentencing phase generally. Opinion by Justice Scalia, in which Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Kagan joined. Justice Breyer, in an opinion joined by Justices Ginsburg and Sotomayor, dissented on the ground that the Court interprets *Estelle* and *Mitchell* too narrowly and that prior decisions require a no-adverse-inference charge at the penalty phase.

**Capital Case—Sixth Amendment**

**Hinton v. Alabama**, 134 S. Ct. 1081 (Feb. 24, 2014) (No. 13-6440). In a per curiam opinion, the Court granted cert and reversed in a death penalty case, concluding that defense counsel’s performance had been constitutionally inadequate under *Strickland v. Washington*, 466 U.S. 668 (1984). Two restaurant managers had been murdered during robberies in each of which two shots were fired. A third manager, Smotherman, survived a similar robbery and picked Hinton as the robber from a photo array. The police recovered all six .38 caliber bullets from the scenes of the robberies; state forensic examiners concluded that all had been fired from a gun found at Hinton’s house. The state indicted Hinton for the two robbery-murders and offered only evidence of his identification as the Smotherman robber and the testimony of their toolmark experts. When Hinton’s attorney sought funds to hire a competing expert, the trial judge thought he was limited by statute to authorizing no more than $500 per case, but said that if the lawyer sought additional funds he would see if he could grant such a request. In fact, a year before Hinton was arrested the statute had been amended to authorize reimbursement “for any expenses reasonably incurred [and] approved in advance by the trial court.” (ALA. CODE § 15-12-21(d) (1984).) The lawyer never sought additional funds and was only able to obtain an expert, Payne, who had minimal qualifications and limited vision. Payne testified that the barrel of Hinton’s revolver was so corroded that it would be impossible to identify as having fired any particular bullet. In support of a postconviction petition in state court, Hinton’s new lawyer produced three well-qualified toolmark experts (one from the FBI and two from the Dallas County Crime Laboratory) who testified that they could not conclude that any of the six bullets had been fired from Hinton’s gun. The state expert refused to cooperate with new counsel. Trial counsel had settled for Payne, whom he knew to be inadequate, not because of any strategic decision but because he mistakenly believed Alabama law would not provide additional funds. His “ignorance of a point of law that [was] fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” (Hinton, 134 S. Ct. at 1089.) If there is a reasonable probability that an effective counsel would have hired an expert who would have persuaded the jury of a reasonable doubt, then Hinton was prejudiced by the inadequate representation. The testimony of the state’s experts does not in itself show that Hinton was guilty; testimony of a competent defense expert might effectively counter their testimony. The case was remanded for a proper evaluation of the question whether Hinton was prejudiced by his counsel’s deficient performance.

**Crimes and Offenses**

**Rosemond v. United States**, 134 S. Ct. 1240 (Mar. 5, 2014) (No. 12-895). Rosemond was convicted of aiding or abetting the crime of using or carrying a firearm “during and in relation to any crime of violence or drug trafficking crime.” (18 U.S.C. § 924(c).) Rosemond went with two others to the site of a proposed drug deal but claimed he had taken no action with respect to a firearm. When the drug deal went bad, shots were fired. The government contended that Rosemond was the shooter, but alternatively that he aided and abetted the shooter. Under federal and common law, a conviction for aiding and abetting requires evidence that the defendant took some affirmative act in furtherance of the offense and that he acted with the intention of promoting the commission of the offense. Section 924(c) has two aspects: commission of a crime of violence or drug trafficking crime, and use of a firearm while engaged in that crime. The Court held that in the case of a § 924(c) offense, a defendant must know that a firearm is involved, and must learn of the firearm’s presence at a point when he or she can withdraw from the action. If the defendant knows of the presence of the firearm and fails to withdraw, he or she has participated knowingly in the
armed drug transaction. If the defendant learns of the presence of the gun only when the transaction is under way, his or her role as an aider of the offense may already be over, or, as a practical matter, withdrawal may not be feasible. Indeed, the government conceded that a defendant cannot aid and abet a § 924(c) violation unless he or she has “foreknowledge” that a gun will be involved. The case was remanded for further proceedings. Opinion by Justice Kagan, with whom Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined, and in which Justice Scalia joined except for two footnotes. Justice Alito filed an opinion concurring in part and dissenting in part, in which Justice Thomas joined, objecting to the majority’s conclusion that the knowledge must come to the abettor at a point when the abettor has a realistic opportunity to withdraw.

United States v. Apel, 134 S. Ct. 1144 (Feb. 26, 2014) (No. 12-1038). Vandenberg Air Force Base in California is a “closed base,” which means that civilians may not enter without permission. Nevertheless, the base has granted an easement for two state-maintained roads through the base, subject to rules prescribed by the base commander. Where one of these roads intersects with a base road, the government has established an area, set off by a green line, for protests. The area is subject to regulations promulgated by the base commander, violation of which may result in an order to leave, a citation for trespass, or an order barring the violator from the base. John Dennis Apel, an antiwar activist, has been cited for trespass and barred several times for varying periods. In 2010, he entered the base in violation of a barring order and was convicted of trespass under 18 U.S.C. § 1382, for reentering a “military installation” after having been ordered not to do so “by any officer or person in command.” The Court concluded that the statute does not require exclusive possession by the military, and that the protest area and public road easement remained part of the military installation, subject to the control of the base commander. The Court declined to consider Apel’s argument that the statute was unconstitutional as applied to him at Vandenberg because the court of appeals had not reached this issue. The case was remanded for further proceedings consistent with the opinion. Opinion by Chief Justice Roberts for a unanimous Court. Justice Ginsburg, joined by Justice Sotomayor, filed a concurring opinion, noting that once the military allows the public on its property, the regulations governing expressive conduct on the property must be content-neutral and narrowly defined. The question “whether Apel’s ouster from the protest area can withstand constitutional review” is “properly reserved” for the remand. (Apel, 134 S. Ct. at 1155 (Ginsburg, J., concurring).) Justice Alito filed a short concurrence stating that there was no reason to voice any view on the constitutional issue at this time.

United States v. Castleman, 134 S. Ct. 1405 (Mar. 26, 2014) (No. 12-1371). Possession of a firearm by a person convicted of “a misdemeanor crime of domestic violence” is prohibited by 18 U.S.C. § 922(g)(9). Such a misdemeanor is described as one that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon” by someone in a specified relationship with the victim. (18 U.S.C. § 921(a)(33)(A).) The circuits have divided as to whether the required “physical force” must be “violent” or simply involve any physical force. The Court held that the required “force” is the force encompassed in the common law meaning of the word, that is, offensive touching. Domestic violence offenses are generally prosecuted as simple assault or battery, and do not involve the “substantial degree of force” suggested by the word “violent.” Castleman was convicted under a Tennessee law that prohibited causing or causing the victim to fear “bodily injury” or causing “physical contact” with the victim in a manner that “a reasonable person would regard . . . as extremely offensive or provocative.” (Tenn. Code Ann. § 39-13-101(a).) Not all violations of this statute would involve “physical force” or the threatened use of a deadly weapon. Using the “modified categorical approach,” review of Castleman’s indictment reveals that he pleaded guilty to “intentionally or knowingly caus[ing] bodily injury” to his child’s mother, which necessarily involved the use of “physical force.” (Castleman, 134 S. Ct. at 1414.) Other arguments, including those based on legislative history and the rule of lenity, were not persuasive, nor was Castleman’s one-paragraph suggestion that the conviction violated his constitutional right to bear arms. Opinion by Justice Sotomayor, with whom Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan joined. Justice Scalia filed an opinion concurring in part on narrower grounds and in the judgment. Justice Alito, joined by Justice Thomas, filed an opinion concurring in the judgment.

Fourth Amendment

Fernandez v. California, 134 S. Ct. 1126 (Feb. 25, 2014) (No. 12-7822). Fernandez and associates attacked and robbed Lopez. A man told responding officers that “the guy” was in an apartment, and the officers saw a man run through an alley and into the building to which the man had pointed. The officers heard screams and sounds of fighting and knocked on the door of the specific apartment. Roxanne Rojas, holding a baby and showing signs of recent...
injury, answered the door and said she had been in a fight. Fernandez appeared and told the officers they didn’t have “any right to come in here. I know my rights.” (People v. Fernandez, 145 Cal. Rptr. 3d 51, 53 (Ct. App. 2012).) Fernandez was arrested and taken to the police station after Lopez appeared and identified him as his attacker. An hour later, a detective returned to the apartment and obtained Rojas’s consent to search. A knife, clothing worn by Lopez’s attacker, ammunition, gang paraphernalia, and a sawed off shotgun were recovered. In Georgia v. Randolph, 547 U.S. 103 (2006), the Court had held that the consent of one co-tenant to a search of the premises did not overcome the objection of another tenant who was present and voiced his objection to the search. In Fernandez, the Court essentially limited Randolph to its specific facts. The consent of a resident to a search is sufficient to satisfy the Fourth Amendment’s requirement that a search must be reasonable, and when a resident consents to a search it would be unreasonable to require a warrant. In this case, Fernandez was removed from the scene pursuant to a valid arrest. A holding that the objection of one tenant continues even after he is no longer at the scene would be unworkable, even if limited to a “reasonable” time. Requiring a warrant despite the consent of one tenant would be burdensome on the officers, the magistrate, and on the tenant herself who might want any contraband to be removed promptly. Thus, Rojas’s consent authorized the search, despite Fernandez’s objection. Opinion by Justice Alito, in which Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer joined. Justices Scalia and Thomas filed concurring opinions, both disagreeing with Randolph. Justice Ginsburg filed a dissent in which Justices Kagan and Sotomayor joined, arguing that the Fourth Amendment requires the police to obtain a warrant before searching a house, except in very limited circumstances, not present here.

Navarette v. California, 134 S. Ct. 1683 (Apr. 22, 2014) (No. 12-9490). At 3:47 p.m., a California Highway Patrol (CHP) dispatcher reported that an otherwise unidentified person had called 911 and reported that a Silver Ford 150 pickup, with a particular license plate, had run her off the road southbound on Highway 1 at mile marker 69, last seen about five minutes before. A CHP officer northbound responded and at 4:00 p.m. passed the truck near mile marker 69. He made a U-turn and stopped the truck at about 4:05 p.m. He and another CHP officer smelled marijuana as they approached the truck. They arrested the driver and his passenger (the petitioners) and seized 30 pounds of marijuana. The Court rejected a Fourth Amendment challenge to the stop, holding that the officers had a particular and reasonable suspicion to make the traffic stop. In Adams v. Williams, 407 U.S. 143 (1972), the Court held that the reasonable suspicion justifying the stop need not be the officer’s own observations. In Alabama v. White, 496 U.S. 325, 327 (1990), the Court observed that although an anonymous tip often will not include the basis of the informant’s knowledge or why he or she should be believed, an anonymous tip may have “‘sufficient indicia of reliability to provide reasonable suspicion’” for the stop. In this case, the Court concluded the tip was sufficient. The tip was that the caller had been run off the road by a specific model of truck with a given tag number, and that the truck had been southbound at mile 88 about five minutes earlier. This detailed information indicated eyewitness knowledge of alleged dangerous driving. The CHP officer then saw the truck going south at mile marker 69, about 19 miles and 13 minutes after the 911 call, thus suggesting the 911 call had come shortly after the incident. The Court noted that a false report to 911 is unlikely because such calls can be recorded and the caller perhaps identified. The tip itself suggests the driver may be drunk (an ongoing crime) rather than having just committed one incident of reckless driving. That the officers saw no suspicious conduct can be explained by the tendency of drivers to be extra cautious when they see a marked police car. The Court considered this a “close case” but held that there were sufficient indications of reliability to give the officer reasonable suspicion to stop the car. Opinion by Justice Thomas, with whom Chief Justice Roberts and Justices Kennedy, Breyer, and Alito joined. Justice Scalia, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented on the ground that the single incident reported by the anonymous informant did not provide reasonable suspicion sufficient to justify a traffic stop. The conduct reported (running off the road) did not suggest that the driver was drunk (he might have swerved to avoid an animal or he might have been personally hostile to the tipster), and the officer who followed the truck for five minutes saw no traffic violations or even any suspicious conduct, thus “affirmatively undermin[ing]” the suggestion that the driver was drunk. (Navarette, 134 S. Ct. at 1696 (Scalia, J., dissenting).) Although drunk driving is a serious offense, this stop was not justified.

Procedure
Kaley v. United States, 134 S. Ct. 1090 (Feb. 25, 2014) (No. 12-464). The Kalesys were indicted for reselling stolen medical devices and laundering the proceeds. Relying on 21 U.S.C. § 853(e)(1), the government sought and obtained an order freezing their property (a $500,000 CD from a home equity loan and later
other property including their house) as sufficiently related to the underlying crimes to be subject to forfeiture. The CD was intended to pay counsel fees for a trial, the Kaleys having worked with a lawyer for about two years while the government investigation was going on. Challenging the forfeiture, the defendants sought a hearing on whether there was probable cause to believe they had committed the crimes charged. Although lower courts have divided on whether the indicted defendant has a right to a hearing on whether there is probable cause to believe he or she has committed the charged offense(s), the Court held that the grand jury indictment settles that issue and that no further hearing on this question is permissible. At oral argument, the government conceded that there is a constitutional right to a hearing on whether the property to be forfeited has a sufficient connection to the charged offense, a matter not at issue before the Court. Opinion by Justice Kagan, in which Justices Scalia, Kennedy, Thomas, Ginsburg, and Alito joined. Chief Justice Roberts, joined by Justices Breyer and Sotomayor, dissented, arguing that the right to obtain counsel of one’s choice is a fundamental right and entitles a defendant to a further hearing on the probable cause issue in connection with forfeiture.

Sentencing—Restitution
Paroline v. United States, 134 S. Ct. 1710 (Apr. 23, 2014) (No. 12-8561). Paroline pleaded guilty to possessing between 150 and 300 images of child pornography, two of which portrayed a child known as “Amy Unknown.” One section of the Violence Against Women Act of 1994, 18 U.S.C. § 2259, requires the court at sentencing to impose a condition of restitution to the victims of childhood abuse shown in such pornographic materials, both to compensate the victims and to impress on offenders the harm their conduct causes the victims. The statute enumerates the losses that are to be covered, including medical expenses, lost income, and attorney’s fees, and “any other losses suffered by the victim as a proximate result of the offense.” (18 U.S.C. § 2259(b)(3)(F).) As a small child, Amy was abused by her uncle, who was convicted and imprisoned. She underwent therapy and apparently had recovered, but suffered additional torment when she learned that pictures of the abuse were on the Internet. It is estimated that the pictures have been seen by more than 70,000 persons. Amy has collected $6,325 from her uncle and between $50 and $530,000 from different defendants in several cases. She sought almost $3,400,000 from Paroline for lost income, future treatment and counseling costs, and attorney’s fees and costs. The parties stipulated that none of her losses came from any specific information about Paroline or his conduct. In a lengthy opinion, the Court wrestled with the question of how to attribute Amy’s damages to the conduct of a specific defendant who did not act in concert with the other viewers of her pictures. It rejected a rule that would make any defendant liable for all her damages with the right to seek contribution from other defendants. The Court concluded that restitution should be awarded “in an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses,” not “a token or nominal amount” but “not . . . severe in a case like this” where thousands of offenders were involved. (Paroline, 134 S. Ct. at 1727.) Opinion by Justice Kennedy, in which Justices Ginsburg, Breyer, Alito, and Kagan joined. Chief Justice Roberts filed a dissent, in which Justices Scalia and Thomas joined, concluding that it is impossible to attribute any of Amy’s damages to a defendant such as Paroline and that therefore the statute as written allows no recovery in a case such as this. Justice Sotomayor filed a dissent, concluding that the statute requires a restitution order for all of Amy’s damages.

CRIMINAL JUSTICE

Criminal Justice is a magazine for everyone who cares about the quality of our justice system. Its focus is on practice and policy. Our readers are private and public defense attorneys, prosecutors, judges, law professors, and others who recognize that society is itself ultimately judged by its system for judging others. The magazine is published by the Section of Criminal Justice of the American Bar Association with the assistance of ABA Publishing.

The membership of the Section is diverse. Some members preside over or practice in state courts, others primarily in federal courts. Some specialize in white collar crimes, others prosecute or defend street crimes, and still others specialize in juvenile cases. Articles in Criminal Justice thus cover a wide variety of subjects, addressing areas of importance to all segments of the Section.

Those who prosecute and defend, regardless of their level of experience, constantly seek information on how to enhance their practice skills. Criminal Justice is also a forum for airing significant issues of interest to everyone concerned with the administration of justice. Accordingly, critical policy questions and recent trends are routinely covered. In doing so, Criminal Justice does not avoid controversy or unpopular viewpoints. Although a serious journal, Criminal Justice aims to be lively, provocative, and always highly readable.

Readers are cordially invited to submit manuscripts and letters for publication. Final decisions concerning publication are made by the Editorial Board of Criminal Justice, but are not to be taken as expressions of official policy of the Section or the ABA unless so stated.
Shaken Baby Syndrome on Trial

BY KEITH A. FINDLEY AND BARRY SCHECK

Shaken baby syndrome (SBS) burst into public awareness in 1997 with the highly publicized trial of British au pair Louise Woodward in a Boston courtroom. Woodward was convicted of second-degree murder in the death of eight-month-old Matthew Eappen based on expert medical testimony about a constellation of medical findings from which the prosecution’s doctors inferred that Woodward must have slammed the infant’s head against a fixed hard surface at a speed of 26 miles per hour or violently shaken him for more than a minute. The prosecution’s witnesses offered these opinions notwithstanding the absence of swelling at the site of the skull fracture upon admission to the hospital or injuries to the infant’s neck. The research scientists, upon whose studies the prosecution’s experts relied, testified for the defense that their work had been misinterpreted and there was no validated scientific basis for making these inferences. The case was televised internationally and gained heightened notoriety when, shortly after the verdict, the trial judge reduced the conviction to ten years later, the lead expert for the prosecution recanted his testimony as not being “evidence based” and became a prominent critic.

The “Boston Nanny Case” was perhaps the first SBS case to capture the public’s attention. But it was hardly the beginning or the end of the debate about what has become an increasingly contentious medico-legal hypothesis.

Law professor Deborah Tuerkheimer’s new book, Flawed Convictions: “Shaken Baby Syndrome” and the Inertia of Injustice (Oxford University Press 2014), comprehensively and neatly describes the evolution of the SBS medical hypothesis—how it emerged, became entrenched in both the medical and legal communities, then unraveled under the scrutiny of evidence-based medicine, shifted in form but still persists—and the problematic ways it is used in criminal cases. The book takes a hard and honest look at the issues that increasingly divide doctors and challenge the legal system’s ability to adapt to the changing medical and scientific evidence upon which the legal system is increasingly dependent.

As Tuerkheimer explains, the hypothesis first emerged in the early 1970s when a British pediatric neurosurgeon, A. Norman Guthkelch, and an American pediatric radiologist, John Caffey, independently hypothesized that brain injuries (marked by bleeding around the brain, bleeding in the back of the eyes, and brain swelling—what was to become known as the classic “triad”) in children who otherwise had no external signs of injury might have been caused by the rotational forces generated by violent or vigorous shaking. Because infants have large heads and weak neck muscles, they reasoned, such shaking might cause infants’ heads to flop back and forth and their brains to move within the skull, stretching and tearing blood vessels and nerve fibers.

But as Guthkelch, now 98 and living in the United States (Caffey died in 1978), has expressed in writings and interviews recently, the SBS hypothesis was, and remains, just that—a hypothesis, unproven by scientific research. To Guthkelch’s chagrin, however, his hypothesis has been the basis for thousands of criminal prosecutions and convictions, as well as actions to remove children from the homes of their parents.

As Tuerkheimer, herself a former child abuse prosecutor in Manhattan, points out, SBS prosecutions in their most troubling form are cases in which the prosecution rests entirely upon medical expert opinions to prove all elements of the crime—causation (shaking), the accused’s mental state (the shaking had to be so hard that it had to be intentional, or at least reckless), and identity (because the child would collapse immediately, the person with the child at the moment of collapse was the one who did it). As she puts it, in these cases, “the expert is the case.”

But Tuerkheimer convincingly shows how each leg of this three-legged stool has been undermined in recent years. Whether shaking alone can cause serious brain injury and death has been challenged by biomechanical research; and even if it can be the cause, research shows that all sorts of other natural and traumatic causes can also cause the “triad,” so there is no way to identify abuse based solely on those medical findings. Nor can the medical findings alone prove the suspect’s state of mind, because research now shows that relatively minor trauma, including accidental short falls, can cause such...
injuries and death, even if (thankfully) rarely. And the science can no longer prove identity, because research conclusively shows that children can suffer such injuries and remain lucid and alert for hours or even days before collapsing and dying.

As troubling, Tuerkheimer paints a picture of a legal system that is not equipped to respond well to these shifts in medical science. Tuerkheimer describes an institutional response that lags behind the science—or worse, defies the evolution of the science, and indeed to some extent exercises a corrupting effect on the science. According to Tuerkheimer, the result is an arbitrary distribution of justice marked more by institutional inertia and a quest for finality than a commitment to fairness and reliability.

In some cases—increasing in number—the new science is leading to acquittals or judicial decisions overturning convictions obtained under the old science. Tuerkheimer tells the stories of these cases, such as that of Audrey Edmunds, the Wisconsin woman who became the first person whose conviction was overturned based on new evidence challenging the diagnostic specificity of the SBS hypothesis, and Jennifer Del Prete, a 43-year-old Illinois woman who was ordered freed in late April 2014 by a federal judge who found her to be actually innocent of the SBS death for which she had been convicted.

But Tuerkheimer also shows how the old scientific dogma, marked by the belief that abuse can be diagnosed with near certainty on the basis of a few medical findings, continues to produce convictions and orders separating families in other cases.

The shaky state of the science, and the arbitrary nature of the justice system’s response, is reflected in the geographical patterns and racial and class disparities reflected in SBS-based prosecutions. A handful of states, and even a smattering of counties, account for a strikingly disproportionate volume of such cases, as if parents or caregivers were more intemperate or infants more vulnerable in those regions of the country. And even the most ardent supporters of the SBS hypothesis acknowledge troubling biases in diagnosis and prosecution along race and class lines.

Tuerkheimer’s book tells us a lot about both medicine and science. And it offers keen insights into the problems when these two disciplines, with their vastly different methods and demands, become too closely intertwined and interdependent. In the end, both can become corrupted and erratic.

The interests of both medicine and law demand that those steeped in both fields step back, take a deep breath, and openly engage in critical self-evaluation about SBS and abusive head trauma. Tuerkheimer’s book marks an important start down that path. The health of children and their families, and the promise of justice in our courts, depend on following Tuerkheimer down that path.

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Willis,’ Gilchrist replied ‘he [McCarty] was in fact there.’ We find that the admission of this opinion testimony was error, because Ms. Gilchrist did not, and could not, testify that such opinion was based on facts or data ‘of a type reasonably relied upon by experts in the particular field’ in forming such an opinion. (McCarty v. State, 765 P.2d 1215, 1218 (Okla. Crim. App. 1988) (citation omitted.).)

Conclusion
The few cases cited above that reject such testimony are by no means representative of judicial treatment of hair evidence. The courts have long accepted this type of evidence. As one commentator observed: “The massive body of case law, liberally admitting even hair evidence of low probative value, dwarfs the handful of cases excluding hair evidence.” (Edward J. Imwinkelried, Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence, 39 Wash. & Lee L. Rev. 41, 62 (1982) (footnote omitted.).)

Even after Daubert, when the validity of hair evidence came under attack, courts continued to turn a blind eye. In Johnson v. Commonwealth, 12 S.W.3d 258, 267 (Ky. 1999), the Kentucky Supreme Court upheld the admissibility of hair testimony, taking judicial notice of the reliability of hair evidence and thus implicitly finding this evidence to not only be admissible but also based on a technique of indisputable validity. Thus, the proponent of hair comparison evidence does not need to prove reliability; the burden shifts to the opponent of the evidence to prove unreliability. The dissent noted that “[a]ppellant’s future is, both literally and figuratively, hanging by a hair.” (Id. (Stumbo, J., dissenting.).) The dissenting justice correctly believed that the hair comparison evidence should have been scrutinized in accordance with Daubert. She noted that the level of acceptance of a scientific technique can change over time, and judicial notice “should be reserved for the rare occasion when the evidence sought to be admitted is seemingly beyond dispute, such as, for example, evidence that the sun rises every day in the east, or acknowledgment of the law of gravity.” (Id.) Similarly, a 2005 decision observed that “[t]he overwhelming majority of courts have deemed such evidence admissible.” (State v. West, 877 A.2d 787, 808 (Conn. 2005.).)
CJS International CLE in Amsterdam

BY KYO SUH

The CJS International CLE, International White Collar Crime & Regulatory Trends in the European Union & U.S., took place on May 15, 2014, at the Law Offices of NautaDutilh, in Amsterdam, Netherlands. The conference brought together a cadre of international experts to examine the most current, pressing, and difficult issues in the European Union and United States regarding this rapidly changing field. The panelists addressed corporate espionage and cybercrime, global internal investigations, securities laws and accompanying whistleblower programs, anticorruption enforcement, money laundering and sanctions violations, and trends in enforcement and compliance.

In addition, conference attendees had the unique opportunity to participate in a day trip to the Hague on May 16, during which they could network with panelists and tour the International Criminal Court, the Peace Palace, and Panorama Mesdag.

CJS Spring CLE Focuses on Child Abuse

The CJS Spring CLE, Bridging the Systems: Stakeholders Working Together to Fight Child Abuse & Exploitation, in collaboration with the National Children’s Alliance, ABA Commission on Domestic & Sexual Violence, ABA Commission on Youth at Risk, and PricewaterhouseCoopers, took place May 2, at the ABA office in Washington, D.C.

Topics included: “Innovative Ideas from the Field,” “Preventing Re-victimization,” and Ethical Obligations in Dealing with Child Victims: Roles and Responsibilities of System Actors.” The opening keynote addresses began with “A Survivor’s Story” followed by “Why Collaboration Is the Key” with remarks delivered by Teresa Huizar, executive director of the National Children’s Alliance. The luncheon keynote address was delivered by prosecutor Sherri Bevan Walsh from Summit County, Ohio, who was joined by a very special guest, Avery II, a certified facility dog.

Successful White Collar Crime Conference

The 28th Annual National Institute on White Collar Crime took place March 5–7, 2014, in Miami Beach, Florida. Drawing over 1,100 attendees, the forum addressed “The Foreign Corrupt Practices Act”; “Women in White Collar”; “Money Laundering and Asset Forfeiture”; “Cybercrime”; and “Technology, Social Media, Law and Ethics.” Media was well represented, with 16 reporters covering the event. Onsite tweets were sent out via the CJS Twitter account. Also CJS staff pre-arranged a special conference discount on books related to the white collar crime field and sold books onsite. Other highlights were the Women in White Collar reception and the White Collar Crime Committee meeting. Next year’s conference will be in New Orleans, March 4–6, 2015.

CJS Awards

Recipients of the 2014 CJS awards are:

- Frank Carrington Crime Victim Attorney Award: T. Markus Funk, Perkins Coie, Denver, CO
- Charles R. English Award: Professor Andrew Taslitz (posthumously), American University, Washington College of Law, Washington, DC
- Livingston Hall Juvenile Justice Award: Hon. J. Matthew Martin, associate judge of the Cherokee Court (Ret.); the Martin Law Firm, P.A., Asheville, NC
- Norm Maleng Minister of Justice Award: Andrew Boutros, assistant US attorney, US Department of Justice, Chicago, IL

New Resources

The following are available from the CJS website at www.americanbar.org/crimjust:

- CJS: Around the Circuit (Spring 2014): case summary digest of recent federal circuit court opinions

Recent committee newsletters:

- International Committee Newsletter (Spring 2014)
- Academic Committee Newsletter (Winter/Spring 2014)
- White Collar Crime Committee Newsletter (Winter/Spring 2014)

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attendees visited the Peace Palace and the International Criminal Court in the Hague.

This year also saw the completion of the award-winning ABA CJS National Inventory of the Collateral Consequences of Conviction, a database compiling criminal offenses and their sometimes surprising legal consequences from 50 states and the District of Columbia. This database will assist legal practitioners on both sides of the courtroom and judges as they confront charging decisions and plea negotiations, as well as lawmakers with an eye for reform and legislation narrowly tailored to public safety concerns.

Finally, I had the honor of forming the first CJS Tribal Lands Committee. The mission of this committee will be to (1) develop policy initiatives and resolutions that recognize and protect the rights of Native Americans by promoting the rule of law; (2) effectively intervene with and restore those victimized by child abuse on tribal lands and ensure that those child victims of criminal conduct have prompt access to legal advice and counsel and to specialized services and protections such as those provided by Child Advocacy Centers approved and accredited by the National Children’s Alliance; (3) effectively intervene with and restore all victims on tribal lands of sexual assault, domestic and all other forms of criminal violence, human trafficking and exploitation, and trafficking in controlled substances and individuals facing the challenges of chemical dependency; (4) intervene with, rehabilitate, and restore to their communities those who have committed such acts on tribal lands; (5) promote the right to counsel on tribal lands; and (6) build and support within tribal lands and Native American communities the capacities necessary to accomplish these aims. We foresee collaboration on issues of justice with leaders from many tribal groups as well as the US Department of Justice and the Bureau of Indian Affairs. I look forward to continuing to work on this initiative, along with my friend and First Vice-Chair Matt Redle, long after I pass the gavel.

Despite our tremendous success this year, the Section also experienced tremendous loss with the passing of two dedicated and longtime Section leaders: Myrna S. Raeder, former CJS chair and professor at Southwestern Law School, and Andrew “Taz” Taslitz, professor at American University, Washington College of Law, and this year’s chair-elect of the Section. Raeder, who received both the Margaret Brent Women Lawyers of Achievement and Charles R. English Awards, championed gender equity in the legal profession and dedicated her career to help women and children impacted by domestic violence and incarceration. Taslitz, the posthumous winner of this year’s Charles R. English Award, dedicated more than 20 years to legal academia, and taught previously at Howard University, Duke, Villanova, and the University of Pittsburgh. Andy’s scholarship advanced our profession in the areas of criminal procedure, evidence, criminal law, and professional responsibility. Both Raeder and Taslitz were brilliant and exceptional scholars, who touched the lives of many. They will be greatly missed. The Section intends to honor their memory with an annual award for academics: the Raeder-Taslitz Award for a law professor whose excellence in scholarship, teaching, or community service has made a significant contribution to promoting public understanding of criminal justice, justice and fairness in the criminal justice system, or best practices on the part of lawyers and judges.

As I reflect on my term as chair of the Criminal Justice Section, it has truly been a year of new beginnings. Much of our success as a Section is due to the work of our remarkable and dedicated Council, as well as our hardworking, committed, and fantastic staff, led by Jane Messmer—I thank you all. I also want to acknowledge our delegates, Professor Stephen A. Saltzburg and Neal R. Sonnett, both former chairs of the Section. Their unflagging dedication and years of hard work are truly remarkable, and in no small part account for our Section’s leading the ABA in resolutions successfully passed. Personally, I appreciate all of their advice and counsel, especially over the last year.

I am proud that we have a solid, engaged, and goal-oriented Section, and a supportive and outstanding Council for the incoming co-chairs, my colleagues and friends, Jim Felman and Cynthia Orr, and look forward to watching our Section thrive under their leadership. I wish them all the best during their term and for even bigger and greater accomplishments for the Criminal Justice Section and its members.

Again, thank you for the privilege and honor of serving as your chair.