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Reflections

BY JAMES E. FELMAN

What a blessing and an honor it has been to be allowed to serve as a chair of the Criminal Justice Section. The year has flown by, but certain things stand out in my mind and I wanted to share them.

The first thing that stands out is the staff of the Section. They stand out because they are, literally, outstanding. They oversee every detail of every Section activity with exceptional judgment, diligence, and, especially with me, patience. Thank you staff!

The next thing that comes to my mind as I reflect on the year is the members of the Executive Committee and the Council. It has been a special privilege to get to know and work with such a balanced team of prosecutors, defense attorneys, professors, judges, and other criminal justice professionals. We truly seek consensus and balance in our approach, and it has been heartening to see how frequently people of highly diverse backgrounds and life experiences can come to a common position through respectful, if sometimes passionate, discourse.

There were two projects in particular that I devoted a significant amount of my personal energies to—Clemency Project 2014 and the Task Force on the Reform of Federal Sentencing for Economic Crimes.

As I am drafting this column, President Obama has announced the commutations of the sentences of 22 individuals under his clemency initiative. A number of those receiving commutations were serving life sentences for nonviolent drug offenses. By the time this column goes to print, they will instead be at home with their families. Hopefully this trend will continue and many more unjust and excessive sentences will be addressed and reduced. We believe Clemency Project 2014, with its pledge to provide a free lawyer to identify and represent every federal prisoner who appears to meet the criteria for clemency announced by the Department of Justice, is the largest coordinated pro bono effort in our nation’s history. I feel equal parts proud and just plain lucky to have been in the right place at the right time to have been in a position to contribute to this effort.

On April 30, the United States Sentencing Commission submitted to Congress a package of amendments to the sentencing guidelines for economic crimes. (See U.S.S.G., Amendments to the Sentencing Guidelines (April 30, 2015), http://tinyurl.com/o7chnay.) Although I am disappointed that the commission did not do more along the lines recommended by our task force, I am confident that our Section could not have done more to...

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Looking Back to the Future

BY CYNTHIA HUJAR ORR

Originally, forensic evidence was admitted in criminal cases if it was generally accepted in the scientific community. Then, the rules of evidence and the Daubert opinion recognized that science and the law have divergent goals. The law seeks to achieve finality in decisions that will stand the test of time while science is constantly evolving from hypothesis to hypothesis. To maintain integrity and instill confidence in our system, the law must also adapt.

The advent of DNA testing in the 1990s firmly established wrongful convictions that we, then, resolved to prevent. In 2002, Albert Krieger formed the Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, on which I served. Under Myrna Raeder’s leadership, nine resolutions, one involving forensic science, were published in Achieving Justice: Freeing the Innocent, Convicting the Guilty (2006). This year, with the Judicial Division, CJS is developing forensic evidence resources for states—where 95 percent of cases finalize. They will help judges determine how to properly perform the gatekeeping function and will arm them with the tools necessary to determine whether to admit scientific, technological, or complex economic evidence.

Under Judge David Waxse’s and Dr. Peter Koelling’s tutelage, we held a summit on forensic science—“The Role of the Courts in Improving Forensic Science”—at Northwestern University School of Law in April. Among the speakers was the Section’s first vice-chair, Matt Redle.

I am also thrilled to work on an Enterprise Grant project—Fighting Implicit Bias—to end bias in our lifetime under the direction of chair-elect, Judge Bernice Donald, whose enthusiasm is infectious and abilities are formidable. With the Judicial Division and the Section of Litigation, this project will produce an implicit bias toolkit for jurists, jurors, and litigants. Ed Burnette, Wayne McKenzie, and Catherine Beane conducted implicit bias training at the spring Council meeting based on a 2010 Section project, “Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System.” It is the fact that fallible humans implement justice that means that it will always be flawed. So we must always be ready to correct these flaws.

For example, in 1997, an Office of the Inspector General report revealed problems in explosives...
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In the 1990s, Andre was sentenced to life in federal prison for a drug conviction. If sentenced today, he would likely receive a maximum of 10 years based on passage of the Fair Sentencing Act of 2010. However, retroactivity was not specified in the statute, so many nonviolent offenders languish in prison. Presidential clemency is their only open avenue. This article details the process for representing such a petitioner and the six criteria to be met.
Most of us went to law school to become trial lawyers, not “techies.” But with the explosion of technology offering such attractive services, lawyers who had once approached IT with “fear and loathing” are overnight embracing it. From reading and sending e-mails using Gmail, to conducting legal research using Westlaw or LexisNexis, to preparing briefs using Microsoft Office 365, solo practitioners and large firms alike have quickly adopted cloud technology. The cloud offers many benefits, but it also presents a number of potential pitfalls to unwary, inexperienced practitioners.

Benefits and Pitfalls of Cloud Storage

Confronting increasing volumes of information in their cases, lawyers have realized that the cloud can improve their efficiency, allow for greater flexibility, and reduce costs. Cloud storage is especially attractive. For small firm practitioners with little to no IT support, free to low-cost cloud storage services like Dropbox and Box.com are far cheaper than adding computers to the office, and require no tech capabilities. Providers tend to charge for the services used, and customers can turn apps on and off as needed. (See ARMA Int’l, Guideline for Outsourcing Records Storage to the Cloud (2010).) Lawyers can expand their cloud storage with the click of a button and not have to worry about buying new hardware or learning how to create a network.

Cloud storage also allows attorneys greater options in accessing files. They can reach their data anytime from anywhere in the world, regardless of whether they are on an office computer, laptop, tablet, or smartphone. Moreover, other people can be given secure access to cloud-stored information (e.g., clients, experts, investigators, and co-counsel) without having to let them breach the firm’s firewall.

Particularly popular is how cloud files are immediately updated or synced so that anyone accessing them from any device automatically reaches the most recent version...
of a document. Because attorneys often collaborate with others in different offices, the ability to share and sync files with them makes cloud storage a premium. In fact, many services (for example, Microsoft Office 365) let multiple individuals work on the same document concurrently, allowing for same-time group editing.

Cloud computing companies also offer the most recent versions of a variety of software programs to their users. In fact, many providers simply offer “software as a service,” allowing their customers to pay by subscription or hourly for using particular programs. That way, lawyers can open virtually any file without having to purchase and install the software on their office system. NetDocuments, for instance, can be used with every major file type and employ that file’s originating program; in other words, lawyers can continue drafting in the cloud in the program in which that document was created, so that it does not have to be “translated” to another program (such as from WordPerfect to Word) in order to revise it in the cloud. This service also allows lawyers to “test drive” a program to see if they like it before purchasing it.

Despite the tremendous utility of cloud storage, control and protection of data in the cloud is necessarily entrusted to an outsider. The cloud provider’s security and reliability will always be serious matters to consider due to security concerns and a number of data breaches within cloud storage services. Dropbox, the most popular of the current cloud storage services, has had several reported security glitches. In 2011, when it had more than 25 million users, Dropbox reported that a “code update” programmer error caused a temporary security breach that allowed any password to be used to access any user account for four hours. In 2012, a stolen password was used to access an employee’s Dropbox account that contained a document listing a number of Dropbox users’ e-mail addresses. Most recently, in May 2014, a flaw was discovered that allowed unauthorized users to gain access to Dropbox and Box.com, another popular cloud storage service. Outsiders could access users’ confidential files such as tax returns, bank records, and mortgage applications. (Dave Lee, Warning over Unintentional File Leak from Storage Sites, BBC News (May 6, 2014), suggests that outsiders’ ability to access the files was “an unexpected consequence of user behaviour,” i.e., the creation of public links to the files.)

Cloud services may also suffer from reliability issues. The companies could fail given the competitive market and emergence of new technologies. For example, in September 2013, cloud storage provider Nirvanix went out of business, giving customers only two weeks to remove their data. In the event of bankruptcy, shutdown, or corporate takeover, users may lose or temporarily lose touch with their data. For instance MegaCloud, a provider of free and paid consumer cloud storage, shut down without warning in late October 2013, with users complaining of not being able to access their data on social media sites in the days that followed. For that reason, lawyers may want to check the cloud company’s credit worthiness before signing on with it. Furthermore, because global cloud services maintain servers abroad, their data may be wiped out by foreign acts of war and terrorism. Moreover, cloud services that depend on the Internet will inevitably be “down” periodically when the provider’s Internet connections fail.

Many cloud services are global with servers located throughout the world. They are consequently subject to foreign laws, so privacy and accessibility laws could be quite different from what Americans have come to rely on.

**Ethics Obligations in Using Cloud Technology**

A major concern of resorting to cloud computing and storing is ethical duties that every lawyer must observe. Ethics obligations to maintain competency and protect client confidentiality may be impacted when using the cloud. Consequently, it is important that cloud consumers use it intelligently and take reasonable measures to safeguard client data in it.

In 2012, the ABA changed its model ethics rule regarding competence by commenting that the obligation to maintain competency also extends to “keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” (Model Rules of Prof’l Conduct R. 1.1 cmt. [8] (emphasis added).) State bars started to follow suit. (See, e.g., ARIZ. Rules of Prof’l Conduct R. 1.1 cmt. 6 (Jan. 1, 2015, adopting ABA Model Rule comment); PA. Rules of Prof’l Conduct R. 1.1, 1.6(d) (amended Nov. 21, 2013.).) This means that lawyers must have a basic working knowledge of how to take advantage of technological developments—including using the cloud—in representing their clients.

Additionally, as part of their duties to competently use modern technology, lawyers who engage third parties to provide outsourced services are responsible to some degree for the third parties’ conduct. Model Rule 5.3 provides, “[A] lawyer shall be responsible for conduct of [a nonlawyer retained by that lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.” Because cloud storage is a form of outsourcing, attorneys must be mindful that they remain ultimately responsible for the conduct and use of cloud storage providers. (See Pa. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 2011-200 (Nov. 2011) (“Ethical Obligations for Attorneys Using Cloud Computing/Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property”).) Therefore, they should make reasonable efforts to ensure that their cloud service is compatible with their obligations to provide direct supervisory

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The other ethical quandary lawyers face in the cloud is ensuring that client confidentiality is not violated. (Toby Brown, Use Gmail—Waive Privilege?, 3 GEeks & A Law Blog (Aug. 19, 2009), http://tinyurl.com/kkuguv.) Attorneys can retain service providers—like retaining experts—and the work they provide falls under the confidentiality umbrella of the firm. Hence, placing client communications and work product in the hands of a third-party cloud company is not necessarily a violation of Model Rule 1.6. (Donna Lee Elm & Sean Broderick, Third-Party Case Services and Confidentiality, CRIM. JUST., Spring 2014, at 15.) Nonetheless, that depends on choosing a cloud provider that has adequate security protections in place, or drafting a service level agreement (SLA) that spells out access, ownership, and notice about security breaches. Absent due diligence in setting up adequate safeguards, a lawyer is at risk of negligently exposing clients' confidences.

Ethics considerations regarding cloud computing and storage services do not mean they cannot be used. The benefits are too great to ignore, and the change in Model Rule 1.1 indicates that lawyers are now expected to have some minimal understanding of cloud offerings whether they use them or not. Small firm practitioners who decide to use cloud services, but want to avoid running afoul of their ethics obligations or encountering security and reliability pitfalls, need some practical guidance.

Best Practices for Cloud Provider Selection
Small firms often do not have the IT staff or resources to invest in creating their optimal cloud solution. But there are some basic steps they can take, requiring minimal technology experience, to meet the competency and confidentiality duties and avoid common pitfalls in selecting and utilizing cloud programs.

Understand the SLA and company policies. This calls for a due diligence review. Thoughtfully read the SLA to ensure that client data can be adequately protected and maintained in the cloud. Watch for:

- Who owns the data? Because the provider often owns it, look for a company whose agreement clearly states that the attorney/firm owns the data. (See Gil Press, Do You Know Where Your Data Is and Who Reads It? Varonis Knows, FORBES, Oct. 21, 2013, http://tinyurl.com/ormwak.)
- Who can access the data? The agreement should ensure that access is kept to a minimum, and specify which employees will have access as well as which ones are prohibited from viewing file contents.
- Do they adequately preserve the data's confidentiality and security? Besides hacking security, do they encrypt the data when it is in storage or being transmitted?
- How do they guarantee the availability of your files? They should have a robust file backup and recovery plan.

- What notice will they provide if the data is subpoenaed? Confirm their obligation to notify customers immediately of any legal attempts to access data, specifying what steps will or will not be taken in response, whether the provider will challenge it in court, and allocation of costs involved in litigation and production. Note that the Stored Communications Act, 18 U.S.C. § 2703(b), requires cloud providers to keep government search warrants for customer records secret. (See Steve Kovach, Dropbox: We'll Turn Your Files Over to the Government If They Ask Us To, BUS. INSIDER (Apr. 18, 2011), http://tinyurl.com/3pks9e (quoting Dropbox policy: “It is also worth noting that all companies that store user data (Google, Amazon, etc.) are not above the law and must comply with court orders and have similar statements in their respective terms of service.”).)

- What happens to data if the service changes hands or goes out of business? Although most companies do not address this issue in their materials or agreements, a prudent consumer will ask a representative this question before signing on.

- What are the remedies if the cloud service fails to live up to its promises? Though most companies' agreements do not address failure contingencies, customers can take extra comfort in those companies that do.

Many cloud services have set SLA terms and will not modify them. But unless you are comfortable with their existing degree of security and restrictions on access to client data, you should not risk violating Model Rule 1.6 by hiring that provider. Also bear in mind that cloud providers' policies may change over time, so you should periodically check. For instance, in 2012, Dropbox added terms to make it clear that it did not own its customers' data. (Nilay Patel, Is Google Drive Worse for Privacy Than iCloud, Skydrive, and Dropbox?, THE VERGE (Aprt. 25, 2012), http://tinyurl.com/7o7f7ca.)

Subscribe to a paid version of cloud storage. When using a free cloud service, you may well get what you pay for. Free services may need to shortchange the security and options they offer, or sell your browsing information, in order to stay in business. The apps or programs they provide also often lack the full features and functions of paid versions. Unless you can risk having your cloud data compromised, do not resort to free versions of a cloud storage provider.

Know where the data is stored. Generally, the security and confidentiality of cloud data is governed by privacy and accessibility laws of the jurisdiction where the server holding that data is located. Dropbox files, for example, are maintained in data centers across the United States, whereas Google data centers are located throughout the Americas, Asia, and Europe. (Where Does Dropbox Store Everyone's Data?, DROPBOX, https://www.dropbox.com/en/help7 (last visited May 8, 2015); Data Center Locations, GOOGLE DATA CENTERS, http://www.google.com/about/datacenters/inside/locations/ (last visited May 8, 2015).) Foreign data storage locations led to Microsoft's recent challenge of a government warrant for e-mails residing on
its Dublin, Ireland, server. (See Ellen Nakashima, Microsoft Fights U.S. Search Warrant for Customer E-mails Held in Overseas Server, Wash. Post, June 10, 2014, http://tinyurl.com/pnlv8sa.) Some customers also prefer to have their data stored within the United States so that our federal government can intervene if there is a problem with the vendor. But others prefer that their data be stored abroad, perhaps in countries with stricter privacy laws than the United States and that actively resist foreign governments’ subpoenas.

Review the provider’s uptime. Cloud services are only as valuable as they are accessible. If a cloud provider relies on an Internet connection that fails from time to time, users will be stranded, unable to reach their data until the system comes back up. Lawyers choosing a provider should inquire into its uptime record, and may want to negotiate more favorable uptime options.

Ensure that data can be recovered. Most cloud providers presently use multiple sites to hold the data. Hence if one site goes down, they have the ability to have the server copied or backed up to a different data center, so it can be back in operation in minutes. Cloud providers with that type of configuration are clearly preferable to those without it.

Confirm adequate cloud security. Because of obligations to preserve client confidences inviolate, it is critically important to understand what security a particular cloud provider offers. Although service providers fall under the lawyer’s umbrella of confidentiality, if they grant access to any other third party, otherwise privileged information can lose its privilege. Cloud providers should explain their firewalls and what security measures they have taken to detect and stop unwanted intrusion. A good example of what to look for can be seen on the Amazon Web Services website, which provides specific information on a host of security considerations such as secure access, firewalls, and multifactor authentication. (AWS Security Center, Amazon Web Services, http://aws.amazon.com/security/ (last visited May 8, 2015).) Practitioners may instead consider services guaranteeing no access to the data, which are currently on the rise. A prominent example of nonaccess service is SpiderOak, which has zero-knowledge privacy—meaning the server never knows the content of the data being stored. The information is strictly encrypted so the company cannot access it. The downside to this option is that SpiderOak cannot offer any assistance if the customer forgets his or her encryption password. (See Engineering: The Details Behind What We Do, SPIDEROAK, https://spideroak.com/engineering_matters (last visited May 8, 2015).)

Stay abreast of cloud security advances. Most state bar opinions on cloud computing take into account how technology keeps changing, requiring attorneys to stay informed. In practical terms, this means that lawyers should periodically check the cloud storage service’s security measures. They ought to review settings such as account permissions, backup and restore options, and activity logging/notification—paying special attention to security settings after upgrading to a new version of the operating system. Lawyers should investigate new security options and confirm that security measures that were in place remain intact.

Ensure security in transit to and from the cloud server. When data must move across the Internet (as it does in cloud computing), a cautious practitioner will check whether the data is encrypted when traveling to and from the cloud. Confirm that data is encrypted whether it is in motion or at rest. For example, Dropbox uses SSL (keeping transmitted data encrypted) in transit, and uses 256-bit AES encryption when the data is being stored. (Your Stuff Is Safe with Dropbox, DROPBOX, https://www.dropbox.com/security (last visited May 8, 2015).)

Confirm complete data destruction when finished. Cloud storage providers are far more concerned with not losing data entrusted to them than with ensuring that it is completely destroyed when the user is finished. A lawyer should check whether a cloud company has a data return or destruction policy that will ensure client confidentiality.

Consider client permission to use the cloud. Some state bars encourage attorneys to obtain their clients’ written, informed consent to use cloud-based services. For instance, the Pennsylvania Bar stated that in some circumstances, “a client may need to be advised of the outsourcing or use of a service provider and the identification of the provider” and a lawyer “may also need an agreement or written disclosure with the client to outline the nature of the cloud services used, and its impact upon the client’s matter.” (Pa. Bar Ass’n Comm. on Legal Ethics, Formal Op. 2011-200, at 7 (Nov. 2011).) This step was recommended due to the lack of direct control over the vendor and the unpredictability of technology (including advances, interruptions of service, and loss of data).

Best Security Practices for Cloud Use

Some basic practices help small firms ensure security of their confidential data when resorting to cloud computing and storage.

Restrict what files will be stored in the cloud. There may be some files that are so sensitive that even a very small possibility of exposure is unacceptable. They should not be placed in the cloud.

At a minimum, encrypt sensitive files. In addition to security settings, cloud users may be able to encrypt sensitive files. The surest option is to encrypt files on your device before they are sent to the cloud. Otherwise, choose an encryption option offered by the cloud service.

Consider using the cloud only for temporary storage. Although cloud storage can serve as the “backup system” for office computers for some firms, the less confidential information placed in the cloud, the less risk of a catastrophic security breach. If the cloud is used primarily to upload and download documents to and from a client, then creating an automatic deletion policy after a certain amount of time minimizes the risk of hacking those documents.

Review security settings on the devices used to access the cloud. One of the greatest benefits of cloud computing is the ability to access the stored data from a large number and variety of devices. Security of cloud data, then, also depends on security of the devices transmitting and
accessing the cloud data. The security options often differ between work computers, home computers, tablets, mobile devices, and the specific web browsers used on each device. A user’s security options may also vary depending upon how he or she accesses cloud storage.

What options to use may be specific to the device, operating system, and web browser. For examples of options available on a Windows machine, see Understanding Security and Safe Computing, WINDOWS, http://tinyurl.com/ke4rtty (last visited May 8, 2015).

Encrypt data before loading it into the cloud. A number of tools can encrypt data before transmitting it to the cloud. Two popular ones are Boxcryptor and MEO File Encryption Software. Boxcryptor advertises that it can securely encrypt files before they are uploaded to the cloud, and this service works with Dropbox, Google Drive, Microsoft OneDrive, SugarSync, Box.com and any other major cloud storage provider. MEO File Encryption Software offers a similar process, but can also assist in sending encrypted e-mails; it allows customers to use encrypted e-mail even if the receivers do not have the decrypting software on their machines.

Limit access to cloud storage files. Only those who need access to files in the cloud storage account should be authorized to access them. Once they no longer need that access, it should be immediately terminated. Moreover, although a defense team member may need to review information in a certain folder, he or she need not be given access to the entire account.

Receive and review records of access to your data. Most cloud companies will provide periodic reports of who has accessed your data. Reviewing this for any improper access will improve your security.

Security trumps convenience when selecting service options. Some popular cloud services may impair your security. They frequently offer “helpful” applications such as automatically transferring information from devices to the cloud or vice versa when accessing the service (this is a popular feature with Dropbox). As enticing as that service may be, users should change it so that the cloud provider only automatically transfers those files that the customer wants it to transfer. Bear in mind that some cloud services provide these options as their default setting, requiring manual override to change them.

Other things to avoid, so as to keep account security primary, include:

“Log off” the service when finished, do not just “exit” from it.

Do not select “remember me” on your devices when accessing the cloud, as it also allows others to log in to the service as you without your password.

Enable automated notifications of account activity, sending e-mail alerts when a password reset is requested for your account.

Create strong passwords. Cybersecurity experts currently recommend using a 12-character password. Passwords with fewer characters are more susceptible to being hacked. Also consider using full sentences (such as “Mybeagleres-cuedme!”) or passphrases (such as “Courthouseterror?!?”) that are both easier to remember and harder to hack. Adding non-letter characters (a number or a symbol) will make it even more difficult for hackers to access your password.

Consider implementing two-factor authentication. Two-factor authentication is becoming a popular way to substantially increase the security of cloud storage. It uses “something you know” (like a password) and “something you have” (like a phone). Commonly, cloud storage services implement two-factor authentication by sending a second code to customers’ telephones after they enter their password. Only after entering the second code that was sent to the phone will the service permit access to their account. Many cloud computing services now allow the use of two-factor authentication. For instance, Duo for Cloud offers to integrate two-factor authentication with existing Google Apps, Box.com, Office 365, OneLogin, Amazon Web Services, and Salesforce applications. (See Cloud Authentication for Apps, DUO SECURITY, http://tinyurl.com/ma86nds (last visited May 8, 2015).)

Consider using biometrics for cloud access security. Alternatively, another means of substantially increasing security of cloud storage is using biometric “passwords” in order to access data. This is a growing popular means of controlling access to cloud data. Common biometric examples include fingerprint, voice or facial recognition, or an eye scan. For better security, biometrics (such as a fingerprint) combined with a password produce a highly secure two-factor authentication option.

Human error remains the weakest link. People, through our own human failings, laziness, and ignorance, can create the greatest security risks to cloud data. Data breaches that have occurred due to lost flash drives, smartphones, or laptops (that were not encrypted) can become exponentially worse when those devices link to massive data in the cloud. Smartphones are particularly vulnerable given that they are easily lost and too often have no password protection at all. From using weak passwords, to being tricked into providing a spoofed “friend” access, to allowing viruses and malware to get onto the system, to leaving an iPhone at Starbucks—remember that it is human error that often compromises the security of cloud information.

Conclusion

Cloud options provide a great opportunity to increase efficiency, quickly share information, and improve productivity. But it is imperative for attorneys to have a basic working knowledge of technological advances and unintended risks that these advances can have with client information in the cloud. By understanding how relevant technology like cloud computing works, solo and small firm practitioners can utilize these tools to keep up with their clients’ needs as well as the standard of care for modern criminal defense. Ideally, small firms will periodically invest in an IT consultant to ensure the most competent use of cloud technology as well as the greatest security of confidential information placed in the cloud. But even without that, following the recommendations presented above will dramatically reduce the risks of using cloud computing.
The Execution of Shannon Johnson
A Subversion of Due Process and the Adversarial System?

BY GREGORY M. SLEET

There is a systemic reason for the zealous representation that characterizes the adversary system. Our purpose as a society is not only to respect the humanity of the guilty defendant and to protect the innocent from the possibility of an unjust conviction. Precious as those objectives are, we also seek through the adversary system “to preserve the integrity of society itself . . . by keeping sound and wholesome the procedure by which society visits its condemnation of an erring member.”


At 2:55 a.m. on April 20, 2012, Shannon Johnson was executed by the State of Delaware—five minutes before his execution warrant was to expire—for killing Cameron Hamelin and the attempted murder of Lakeisha Truitt, his former girlfriend and the mother of his son. Johnson’s guilt was not in dispute. Truitt provided eyewitness testimony of Hamelin’s murder and the attempt on her own life. Johnson also admitted to committing these acts and even waived his right to appeal his sentence so that his execution could proceed expeditiously. Nevertheless, six days before his scheduled execution, the Federal Public Defender for the District of Delaware filed an application to proceed through next friend on behalf of Johnson’s sister, Lakeisha Ford, arguing that the state court competency proceeding that adjudged Johnson competent to waive his appellate rights was constitutionally infirm and that Johnson was, in fact, mentally incompetent.

This application, filed at 6:02 p.m., Friday, April 13, 2012, petitioned the US District Court for the District of Delaware to stay Johnson’s execution so that the court could evaluate whether the state competency proceeding afforded Johnson the due process constitutionally required and, ultimately, to assess the competency finding. Ford’s filing consisted of an 88-page brief and 280 pages of exhibits, including 227 pages of expert reports. The state responded in opposition to Ford’s application at 6:44 p.m. on Monday, April 16, 2012, filing its own 36-page brief accompanied by exhibits totaling 48 pages. In light of the voluminous nature of the filings and the fact that Johnson was scheduled to be executed in less than 72 hours,
the court ordered, on Wednesday, April 18, that the execution be stayed so that it could adequately examine the filings and conduct oral argument on the issues raised in the application and respond at 10:00 a.m. Monday, April 23—10 days after the initial filing. The court, however, was precluded from doing so.

The Third Circuit vacated the district court’s stay at 4:58 p.m. the night of Johnson’s scheduled execution, prompting Ford to file a second motion to stay at 7:43 p.m. The State again opposed the stay, filing a response at 9:21 p.m. The district court then issued an order granting Ford’s motion and reinstating the stay at 10:46 p.m., finding that “Ms. Ford has raised at least two potentially meritorious issues amounting to ‘substantial grounds upon which relief might be granted’” and concluding that the record contained “meaningful evidence” warranting a brief stay for the court to review the filings. The State, however, appealed this order at 10:52 p.m. and, at 1:46 a.m.—74 minutes before Johnson’s execution warrant was set to expire—the Third Circuit again vacated the district court’s stay. The Third Circuit ultimately concluded that the district court erred in granting both stays because Ford could not “clearly establish” that Johnson was incompetent because he was deemed competent in the very proceeding she sought to challenge. Thus, with a near contemptuous disregard for Professor Fuller’s essential admonition as to the role of the adversary process in our system of justice, and at the behest of his own attorney and an aggressive state prosecutor, Johnson was executed without a single court—state or federal—reviewing the process and the constitutionality of the state court competency proceeding.

Death penalty jurisprudence is often evaluated in the context of innocence concerns—cases where individuals sentenced to death are or would have been exonerated were it not for the absence or withholding of exonerating evidence. Clearly, Johnson’s case did not raise these concerns. Importantly, however, Johnson’s execution—and, specifically, the impediments that precluded a federal court, or any court, from meaningfully assessing the constitutionality of a competency proceeding—raises a number of critical concerns that go to the heart of the question of whether our judicial process effectively safeguards the constitutional rights of those individuals who face the ultimate punishment—execution.

This process is viewed around the world as the paradigm that protects the accused, the convicted, and each of us from irrational, arbitrary, and unjust decision making within this nation’s halls of justice. As the federal judge tasked with assessing the filings in this case, it is my conclusion that, at present, the process does not. Nevertheless, if one of the goals of our adversarial process is, as I believe it to be, to “preserve the integrity of society itself,” we must face the fact that, in so far as the administration of the death penalty is concerned, the process is broken. The belief that our courts, in this particular instance the Third Circuit Court of Appeals, stand like sentinels ready to vindicate this process was, in the case of Shannon Johnson, exposed to be unfounded. This is the mythopoesis—the myth-making—of which I write.

Normally a judge—and this judge in particular—is content to have his or her rulings, whether they be written or oral, speak for themselves. This, however, is not such an instance. Thus, while it is impossible to remedy any possible constitutional infirmity in Johnson’s case, it seems to me that it is incumbent upon us as participants in the legal process at issue, especially those of us at the very heartbeat of that process, to continuously evaluate whether that process has functioned consistent with both our notions of due process and societal precepts of what is or is not fair.

To start this necessary dialogue, this article discusses the role of the Superior Court in Johnson’s competency proceeding, the Delaware Supreme Court, and the Third Circuit’s standards for granting a stay or next friend petition in a capital case. It is my hope that this discussion and the recommendations offered will serve as a starting point for future analysis and action.

A Troubled Relationship

The facts of Shannon Johnson’s crime are not in dispute. Johnson and Truitt were in a tumultuous relationship—dominated by Johnson’s abusive behavior—until 2003 when Truitt finally ended it, working two jobs to buy a house and provide for her child, Shannon Jr. Three years later, Truitt began dating Cameron Hamlin, a 25-year-old aspiring musician. On September 23, 2006, Johnson called Truitt repeatedly, asking that they meet for breakfast the next morning to try to “work it out.” Truitt declined, and that evening, she and Hamlin went on a date, returning eventually to her home. Unbeknownst to either, Johnson was lying in wait.

When the two emerged the next morning—Truitt to pick up her son and Hamlin to drive his mother to church—Johnson pulled alongside their vehicle. An argument ensued, and Johnson drew a gun and fired into the vehicle, killing Hamlin with multiple shots to the chest and abdomen. Truitt escaped, but fearing for her life, she remained in hiding in a women’s shelter until November 10, 2006, when she returned home briefly to pick up clothes for herself and her son. Johnson, however, spotted her driving down the street, pulled a gun, and fired into her vehicle. A bullet struck Truitt in the arm and passed through her chest. As the car came to a stop, Johnson broke the driver’s window, pulled Truitt from the vehicle, and tried to shoot her again. But the gun jammed and he fled. Police apprehended him five days later; however, that was not the last of it. While in jail, Johnson attempted to contract with another inmate to kill Truitt so she could not testify against him.
Johnson's State Court Proceedings

After an eight-day jury trial in March 2008, Johnson was found guilty of first-degree murder and first-degree reckless endangerment, among other charges. In April, a jury unanimously recommended he be sentenced to death, and in September, the Delaware Superior Court agreed. He subsequently appealed his convictions and sentence to the Delaware Supreme Court, which affirmed both on November 8, 2008. In early February 2010, Johnson’s direct appeal counsel informed the superior court that Johnson had decided to waive “all appeals including his right to one post-conviction proceeding under Superior Court Criminal Rule 61(1),” and asked the court to “schedule a hearing for the purpose of addressing Mr. Johnson personally and determining whether [he] understands the legal consequences of his waiver.” (Letter from Jennifer-Kate Aaronson to Delaware Superior Court Judge M. Jane Brady (Feb. 17, 2010).)

A week later, the Federal Public Defender’s Office requested that the superior court admit its office pro hac vice to represent Johnson at the competency proceeding, stating that “there are substantial reasons . . . to doubt” that Johnson “meets the standard” required to waive his appellate rights based on his history of cognitive and psychiatric impairment. The public defender also expressed concern about permitting Johnson’s attorney to continue to represent him, noting that Delaware Supreme Court Criminal Rule 61(1)(3) presumes that new counsel be appointed in state post-conviction proceedings to avoid an inherent conflict of interest, and suggested there were viable issues of ineffective assistance of counsel in the case that Johnson could pursue. The office filed a formal motion in April 2010. The State and Johnson’s attorney filed motions in May 2010 opposing the public defender’s intercession.

At the same time, the public defender also sought to be appointed to represent Johnson in district court, but failed to inform the court that it did so without Johnson’s permission and despite his waiver of appellate review. Judge Joseph Farnan, then assigned to the case, granted the motion and the public defender’s office immediately filed a petition for cert in the US Supreme Court, which was denied May 24, 2010. Johnson’s attorney responded, describing her role as one of “protecting . . . Mr. Johnson’s decision to abandon further appeals,” and asking that the court vacate the public defender’s appointment as Johnson’s counsel at the federal and state levels. As the judge assigned to the case after Judge Farnan’s retirement, I ultimately vacated the public defender’s federal appointment on August 31, 2010, because the office had never represented Johnson in any proceeding and, prior to the filing, had not consulted with him or obtained his consent.

Instead of addressing the pro hac vice motion, the superior court in July appointed attorney Thomas A. Foley “to participate” in the proceedings. Foley’s role was clarified in September as that of “aide to the Court” to discuss with Johnson any potential claims of ineffective assistance of counsel and to participate in the competency hearing to determine whether he understood his waiver of post-conviction review and his ability to challenge any aspect of his attorney’s performance. Foley ultimately determined that the critical issue was whether Johnson should waive meritorious post-conviction claims against his trial counsel, such as counsel’s failure to raise the issue of whether he suffered from “mental retardation.” The responsibility to pursue such claims fell instead to the attorney who simultaneously argued for her client’s competence to waive review.

Johnson, however, had already informed the Delaware Superior Court several days earlier that he would not cooperate or speak with Foley, and the trial court declared this action acceptable. Foley would later state that his “review of Johnson’s record and background revealed long-standing evidence that Johnson was mentally retarded, and hence, categorically excluded from execution, per Atkins v. Virginia.” Foley also voiced his concerns with the methodology employed by and, thus, the findings of, the two state experts who evaluated Johnson. (Letter from Thomas Foley to Delaware Superior Court, April 8, 2011.)

Undeterred by Johnson’s refusal to cooperate, Foley identified competency experts and requested that the court order Johnson to meet with them. The superior court refused and, on December 17, 2010, Johnson’s attorney filed a letter with the court in opposition to hiring additional experts to evaluate her client. She argued:

[I]t is clear that Mr. Foley’s role at the waiver hearing (as it relates to expert witnesses) is limited to questioning the “two mental health experts who have [already] conducted thorough examinations of the Defendant.” Nothing in the September 7, 2010 Order authorizes, or even contemplates, granting Mr. Foley the “unfettered ability to develop potential evidence that may call into question the conclusions” of Johnson’s psychiatric experts, much less the authority to retain new experts with whom Johnson would be compelled to cooperate. (Letter from Jennifer-Kate Aaronson to Delaware Superior Court, April 25, 2011.)

Nevertheless, Foley filed repeated requests for the superior court to order Johnson to meet with Foley’s experts. It was, however, only the three experts selected by Johnson’s attorney who would evaluate the condemned man during face-to-face meetings—many of which occurred after Johnson refused to communicate with Foley’s experts.

The superior court conducted hearings on competency and mental retardation on various dates in August, September, and October of 2011, addressing the issue of mental retardation separately because, as the court had explained earlier, “if the determination is made that [Johnson] suffers from mental retardation, then under the
federal case law he can’t be executed.” (Transcript of Delaware Superior Court proceedings at 13 (Dec. 10, 2010).) In a colloquy with Johnson on October 7, 2011, he stated to the court that he had discussed ineffective assistance of counsel issues with his direct appeal counsel and decided not to pursue such action. Foley, contrary to his role as “an aide to the court,” was not provided the opportunity to discuss possible ineffective assistance of counsel claims with Johnson. On February 24, 2012, the superior court issued an opinion and order finding that Johnson was not mentally retarded and was competent to waive post-conviction review.

On March 6, 2012, Foley asked that the court continue his appointment so he could appeal the February 24 order to the Delaware Supreme Court. The request was opposed by both the State and Johnson’s attorney, and ultimately denied. On March 9, 2012, the court received “Shannon Johnson’s Waiver of Administrative Directive No. 131(C) (1) and Superior Court Criminal Rule 61(1)(6),” which Johnson signed to waive the 90-day waiting period. Johnson also asked that “the Court schedule my execution on the soonest available date.” The court resentenced Johnson to death on March 14, 2012, and set his execution date for April 20, 2012. Finally, on March 20, 2012, Foley petitioned the Delaware Supreme Court, requesting that it allow him to appeal the superior court’s February 24 order; March 23, 2012, the Delaware Supreme Court denied his request, citing lack of “standing.”

Next Friend Petition
Based on the late filing of the federal public defender’s April 13, 2012, application to proceed through next friend (on behalf of Johnson’s half-sister, Lakeisha Ford), the volume of documents in both the application and the State’s response, and the absence of the public defender’s reply to the State, I ordered on April 18 that Johnson’s execution be stayed so that the court could meaningfully assess the parties’ filings, the State record, and the applicable law. I also directed the parties to reconvene at 10:00 a.m. on April 23 to present oral arguments. As that order made clear, the court “recognize[d] the interests of the parties and the public in having these issues resolved as expeditiously as humanly possible, and [would] proceed accordingly in rendering a decision.” The stay was not indefinite and was necessary, as I stated then, because: “the State in particular, and the parties involved, have an interest in ensuring that the process that may result in the execution of Shannon Johnson will be able to be judged in hindsight as having complied with the requirements of constitutional due process, as well as appear to the general public, which has a great interest in the issue, to have done so.”

The State appealed this stay at 4:22 p.m. that same day, and the Third Circuit ordered that the public defender respond to the State’s motion to vacate by 8:00 a.m. on April 19. The public defender complied and the Third Circuit rendered its decision at 5:14 p.m. In vacating the stay, the Third Circuit noted that “[t]he fact that Johnson himself ha[d] joined the State’s motion speaks volumes about this case,” and emphasized that “Johnson ha[d] consistently indicated his wish to proceed with his state-ordered execution.” The Third Circuit went on to detail its understanding that the superior court: (1) had conducted a competency proceeding and appointed independent counsel to “advocate for the position that Johnson is not competent to make that decision”; (2) heard from six mental health professionals and “none of them testified” that Johnson was incompetent; and (3) conducted two colloquies with Johnson as well as “reviewed numerous letters he had written to lawyers involved in the proceeding and to the court consistently and unequivocally stating his desire to dispense with further legal challenges.”

Based on this recitation of the trial court proceedings, the Third Circuit vacated the stay because the imposition of a stay to allow the district court “time needed to consider this important matter in the way that it should,” was “insufficient to support a stay of execution, particularly one that the actual parties in interest do not want and instead have actively opposed.” The Third Circuit further noted that “the District Court, before interfering with the State’s strong interest in enforcing its criminal judgments (which happens to be Johnson’s own expressed interest as well), must conclude, at the very least, that the movant has shown ‘substantial grounds upon which relief might be granted.’” Here, the Third Circuit concluded, “in light of the extensive background of this case,” that Lakeisha Ford did not have standing to act on Johnson’s behalf because, “regardless of whether the Superior Court’s finding that Johnson is competent must be presumed to be correct, Ford still bears the burden ‘clearly to establish’ Johnson’s incompetence . . . and . . . nothing we have reviewed so far suggests to us that Ford will be able to meet that burden.”

Notably absent from the Third Circuit’s decision, however, was any discussion of the primary argument advanced in the next friend petition—that the state court competency proceeding was arguably nonadversarial and, therefore, constitutionally infirm. As detailed above, the public defender then filed a second motion to stay execution, to which the State and Johnson’s attorney replied, completing briefing at 9:21 p.m. the night of Johnson’s execution. In response to the parties’ filings and to the Third Circuit’s admonishment that the original order staying Johnson’s execution cited only the need for more time to review the application and did not “articulate any merits-based rationale,” I issued a second order reinstating the stay, which I believed addressed the court’s concerns and identified at least two meritorious arguments necessitating a stay of execution (discussed below).

The State appealed the reinstated stay six minutes after it was filed and the Third Circuit vacated that stay at 1:46 a.m., explaining that it did “so primarily because our review of the record reveals an absence of ‘meaningful evidence’ to support Ford’s contention that Johnson—despite the extensive history in this case to the contrary—is mentally incompetent to waive his right to dispense with
further legal challenges . . . and proceed to execution.” The Third Circuit then went on to state, as its critique of the district court’s decision to reinstitute the stay, that the “District Court focused on side issues—whether the state court proceeding was sufficiently adversarial and the extent of disagreement among the experts who evaluated Johnson’s competency.” The district court, the Third Circuit maintained, “ignored among other things the fact that the Superior Court conducted a face to face colloquy,” which made it clear, in the Third Circuit’s view, that the superior court’s “finding of Mr. Johnson’s competency is entitled to a presumption of correctness.” Thus, the Third Circuit concluded, “[b]ecause Ford lacks standing as next friend, the District Court abused its discretion in granting a stay of execution.”

The Third Circuit denied a petition for rehearing en banc at 2:15 a.m. and, after a fruitless last-minute appeal to the US Supreme Court, Shannon Johnson was executed at 2:55 a.m. in Smyrna, Delaware, uttering as his final words—“Loyalty is important. Without loyalty you have nothing. Death before dishonor”—followed by a statement in Arabic. Commenting on Johnson’s last words, his attorney stated: “And it is just as important for an attorney to be loyal to a client. That was my responsibility, to be loyal and I did that.”

As the federal judge tasked with assessing Ford’s petition and the substance of her arguments as a neutral arbitrator, and understanding that the ending of a life was imminent, I, as well as my staff—all of whom stayed in chambers that night until after Johnson’s execution, working tirelessly under tight time constraints and the pressure that came with that effort to render an even-handed disposition of Ford’s filings—did not feel the same sense of assuredness expressed by Johnson’s attorney and the Third Circuit in its order vacating the stay. Instead, we felt that night, and still feel today, that Ford’s next friend petition raised serious doubts as to the constitutionality of the competency proceeding and Johnson’s competency—doubts that the court was precluded from examining.

Indeed, in the 39 years since I graduated law school—the vast majority of which time has been spent in the state and federal criminal justice systems (eight years as an assistant public defender in Philadelphia, four years as the US attorney for the District of Delaware, and 17 years as a US district court judge)—the Johnson case, and its result, is by far the most troubling I have encountered. The case was troubling to me not because I was certain, based on the parties’ filings, that Johnson was, in fact, incompetent—he very well may have been competent. Rather, the case was and remains disturbing to me because, in the unnecessary haste to execute Johnson before his execution certificate expired—a haste arguably exacerbated by the State and the Third Circuit—I believe that the judiciary’s fundamental role of ensuring due process, as realized through an adversarial process, was sacrificed or, at the very least, undermined. Central to this concern is my recognition of the lack of fail-safes in our death penalty process that could allow a potentially incompetent individual to waive appeals and be adjudged competent in a nonadversarial proceeding without a single reviewing court examining the constitutionality of that proceeding. It is for this reason that I write this article in the hope that members of the legal community are made aware of, what I perceive to be, the failings in the judicial process leading to Johnson’s execution and seek to prevent a recurrence of a similar breakdown. While there are a number of issues that could be explored, based on the nature of this article and inherent space limitations, I explore only three below and provide recommendations for each.

The Role of the Courts in Competency Proceedings

The state court. The notion of an adversarial process is the mainstay of our justice system. The Anglo-American commitment to an adversarial process was originally framed in the US Constitution and was based on the development, birthed in the late 1600s, of a more neutral jury system and the possibility of appellate review, previously unavailable to defendants. Indeed, by the eighteenth century, juries assumed a more autonomous position, operating as a check on governmental and judicial abuse. The framers of the Constitution recognized the importance of an adversarial process, whereby legal disputes were resolved by an impartial arbitrator, and guaranteed this right in the Sixth and Eighth Amendments. This adversarial system stands in stark and purposeful contrast to the “inquisitorial” system of justice, wherein a defendant is presumed guilty and must prove his or her innocence. In the inquisitorial system, the parties play a minimal role in the fact-finding process and a judge examines the facts, questions witnesses, and reaches a decision.

Conversely, the adversarial system demands, in the criminal context, that the government establish a defendant’s guilt beyond a reasonable doubt before a neutral arbitrator. This commitment to the adversarial process extends beyond trial to any proceeding where one side’s burden of proof is put to the test. As former Harvard Law School Professor Lon L. Fuller has explained,

When we speak of the “adversarial system” in its narrow sense we are referring to a certain philosophy of adjudication, a conception of the way the trial of cases in courts of law should be conducted, a view of the roles that should be played by advocates and by judge and jury in the decision of a controversy. The philosophy of adjudication that is expressed in “the adversary system” is, speaking generally, a philosophy that insists on keeping distinct the function of the advocate, on the one hand, from that of the judge, or of the judge from the jury, on the other. That decision must be as objective and as free from bias as it possibly can.

This Anglo-American commitment to an adversarial process is the central tenet of fairness in the American justice system and was established to ensure that the government’s power is not unfettered and that individual rights and the dignity of an individual are protected. To this end, no individual can be deprived of life, liberty, or property without due process of law, which is guaranteed by the adversarial system.

Thus, no hearing or proceeding is or can be presumed constitutionally defensible without the safeguards provided by such a process, wherein parties with opposing views meaningfully test the sufficiency of the other side’s position and evidence. It is unclear, however, whether this threshold constitutional safeguard was procedurally or substantively satisfied in Johnson’s state court competency proceedings. In fact, as stated in the second order I issued reinstating the stay, Ford’s application presented “substantial and significant questions” as to whether this constitutional due process requirement” was satisfied.

Specifically, Ford asserted that, because the State, Johnson, and Johnson’s attorney all advanced the argument that Johnson was competent, the proceedings represented only one interest and were thus, by definition, nonadversarial. This alleged constitutional infirmity was not cured, Ford argued, by the superior court’s appointment of Foley as amicus counsel because Foley was prevented from effectively presenting an adverse position. The nonadversarial nature of the competency hearing was critically important because, as I explained in the order reinstating the stay, although federal courts generally must defer to state court findings by presuming they are correct, “these findings are not entitled to such deference where the fact-finding procedures conducted are constitutionally flawed.” More specifically, “[w]here a state court proceeding ‘fails to reveal whether the requirements of valid waiver have been met due to procedural infirmities, substantive deficiencies, and an insufficient probing into the defendant’s knowledge of the rights he is waiving,’ the court’s findings ‘are too unreliable to be considered ‘factual determinations.’”

The Third Circuit vacated the district court’s stay, in the main, because Johnson was found competent in the state court’s competency proceeding and this finding was supported by the court’s colloquy and examination of supporting exhibits, namely letters Johnson submitted to the court and his attorneys. The Third Circuit concluded that this competency finding was entitled to deference and, in a surprising and troubling exercise of circular reasoning, that Ford could not establish meaningful evidence that Johnson was incompetent because of the superior court’s finding. However, as well-established precedent makes clear, the question of whether the state court competency proceeding was constitutional was far from the “side issue” the Third Circuit characterized it to be. Rather, as I discussed in the order reinstating the stay, if, as the facts in Ford’s petition supported, the competency hearing was nonadversarial and constitutionally infirm, the superior court’s competency finding was not entitled to deference. I would contend that the Third Circuit’s relegation of this due process concern to a “side issue” is a problematic precedent to set in any case, particularly one in which a defendant can be executed without review of that constitutionally questionable proceeding.

**Johnson did not meet with Foley’s experts.** Notably, neither side’s filings dispute that the superior court did not request and certainly did not compel Johnson to meet with Foley or any of his experts, despite Foley’s requests to do so. As Ford argued in her next friend petition, the result of the superior court’s decision was to “eviscerate [] any opportunity counsel had to meaningfully counter the State and Ms. Aaronson’s evidence.” For instance, Foley’s expert, Richard Dudley, was unable to render an opinion as to Johnson’s competency, stating that: “After I was retained amicus counsel informed me that the Superior Court would not compel Mr. Johnson, nor even ask him, to see me. . . . I informed amicus counsel that, absent a psychiatric examination, I would not be able to render an opinion as to Mr. Johnson’s competency.”

Moreover, while one of Foley’s experts, Dr. Swanson, was able to render an opinion based on Johnson’s multiple below-70 IQ scores, proper IQ assessment, and personal history, and found him incompetent, the State was able to undermine this conclusion because Swanson did not meet with Johnson in person. In fact, the State addressed this issue with Swanson on cross-examination, and emphasized in the direct examination of its own expert, Dr. Mack, that Mack had the opportunity to meet extensively with Johnson, making his conclusions more credible. Notably, the superior court even allowed Johnson’s attorney to hire Mack as Johnson’s third expert after it denied Foley’s request that the court order Johnson to meet with his experts. Mack met with Johnson for 18 hours and was hired with the express purpose of rebutting Swanson’s findings.

In an effort to persuade the court to order Johnson to meet with his experts, Foley argued that “[t]he deck couldn’t be further stacked [in favor of a finding of competency and lack of mental retardation], whereby this Court
has ceded its authority to let Johnson determine which experts to cooperate with.” As Foley correctly referenced in his comments to the court, and has been made clear by the Supreme Court in its 2007 ruling in *Panetti v. Quarterman*, 551 U.S. 930 (2007), a competency determination “made solely on the basis of the examinations performed by state-appointed psychiatrists” is questionable. (551 U.S. at 949 (quoting Ford v. Wainwright, 477 U.S. 399, 424 (1986)).) Indeed, as Ford noted in her application, courts “routinely refuse to permit potentially incompetent defendants to subvert the competency adjudication process and skew the result by deciding which experts with whom they will and will not cooperate.” (Application to Proceed as Next Friend, 12-cv-469, D.I. 1 at 41 (citing United States v. Hines, 2011 WL 467065 at *1 (7th Cir. Feb. 9, 2011) (rejecting defendant’s desire to represent himself pro se, after the defendant repeatedly refused to participate in competency evaluation); Wiseman v. Beard, 629 F. Supp. 2d 488 (E.D. Pa. 2009) (denying habeas petitioner’s right to proceed pro se where he refused to submit to competency examination); United States v. Nagy, No. 96 CR 601 (RWS), 1998 WL 341940 at *3 (S.D.N.Y. June 26, 1998) (notwithstanding the defendant’s insistence that he was competent to stand trial, his refusal to submit to evaluation supported the court’s conclusion that he was not competent)).)

Thus, the superior court’s refusal to order Johnson to meet with Foley’s experts had the practical effect of depriving Foley of the opportunity to present expert testimony challenging the expert opinions the State and Johnson’s attorney offered. As Foley argued, “[d]enying independent counsel’s experts similar access would undermine the integrity of the fact finding process at the [competency] hearing, and compromise counsel’s role properly envisioned by this court.” In fact, despite facilitating these impediments, the superior court made clear in its opinion finding Johnson competent that it had discredited Foley’s experts because they did not meet with Johnson, making their conclusions less reliable.

This absence of an adversarial and meaningful testing of the State’s evidence of Johnson’s competency is even more disconcerting, to say the least, in light of the US Supreme Court’s recent opinion in *Hall v. Florida*, 134 S. Ct. 1986 (2014). Indeed, in *Hall*, the Supreme Court concluded that Florida’s requirement that defendant’s must show an IQ test score of 70 or below before being permitted to submit additional intellectual disability evidence is unconstitutional because it creates an unacceptable risk that persons with intellectual disabilities will be executed. In reaching this conclusion, the Supreme Court noted the unreliability of using exact, cut-off IQ figures to assess an individual’s mental competency. Johnson had received multiple below-70 IQ scores and, despite these scores, the court relied on the State’s IQ figures and analysis. Ford’s recitation of the foregoing, as I attempted to explain when reinstituting the stay, clearly supported a finding that she presented “meaningful evidence” that the competency proceeding was nonadversarial.

**Foley’s role as amicus counsel was insufficient to guarantee an adversarial proceeding.** It is well established in Supreme Court jurisprudence that an individual cannot waive his or her appellate rights without that waiver being knowing, voluntary, and intelligent. Importantly, the burden of proving a knowing, voluntary, and intelligent waiver rests with the prosecution and, therefore, demands an adversarial process. Here, however, the State and Johnson’s attorney both argued that Johnson did not suffer from mental retardation, and was, therefore, competent to effect a waiver. The attorney took this position despite acknowledging that, based on Johnson’s history of mental disorder and cognitive impairment, a competency hearing was required. Notably, she urged the superior court to hold a competency hearing because, “[i]f this Court does not hold a competency hearing in accordance with minimal federal standards of procedural due process, then no deference is due to the state court’s competency determination. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2855–59 (2007).”

In *Hull v. Freeman*, the Third Circuit concluded that “the desire of a defendant whose mental facilities are in doubt to be found competent does not absolve counsel of his or her independent professional responsibility to put the government to its proof at a competency hearing when the case for competency is in serious question.” (932 F.2d 159, 169 (3d Cir. 1991).) Where a defendant’s counsel does not challenge that defendant’s competency, such action “constitutes an abdication of counsel’s professional obligations” and can amount to ineffective assistance. (Id.) Indeed, the Third Circuit has clarified that representation of the incompetency position is necessary to “subject[ ] the state’s evidence of competency to meaningful adversarial testing.” (Appel v. Horn, 250 F.3d 203, 215 (3d Cir. 2001) (concluding that, even where a client seeks to be found competent, counsel “had an obligation to act as counsel at Appel’s competency hearing by subjecting the state’s evidence of competency to meaningful adversarial testing”).

It was clear at the time of the competency hearing that the State and Johnson’s attorney would advocate the same position, which is, presumably, why the superior court appointed Foley to act as a friend of the court to make the argument, if the facts warranted, that Johnson was incompetent and to advise him regarding possible ineffective assistance of counsel claims. The parties’ filings cast serious doubt as to whether Foley was able to serve this role effectively, if at all. In fact, during the in-court conference held on April 18, 2012, I asked Foley to prepare an affidavit for the court describing his role in the proceedings because the record, as recited in Ford’s application, detailed that Johnson refused to meet with Foley and that the superior court would not order or even urge Johnson to do so. Therefore, Foley did not have the opportunity to explain to Johnson his ineffective assistance of counsel claims. Johnson only heard about these claims from his direct appeal counsel, who was operating under a conflict of interest. While death penalty defendants do have the
right to retain their direct appeal counsel, the nonadversarial nature of the competency proceeding gave me pause as to whether Johnson's retention of his counsel and his waiver of post-conviction review were knowing, voluntary, and intelligent.

In addition, it did not appear that Foley was able to act effectively to advance the position that Johnson was incompetent because his experts did not have the opportunity to meet with Johnson. Instead, Foley was relegated to the role of, at best, an amicus counsel, not Johnson's counsel. Indeed, the superior court defined Foley's role as that of an “independent counsel and an aid to the court . . . appointed to represent neither the Defendant nor the State.” (Ellis v. United States, 356 U.S. 674, 675 (1958).) Foley was put on the horns of this dilemma despite the fact that Johnson was entitled to “representation in the role of an advocate,” which is not met by an attorney appointed to “perform essentially the role of amic[us] counsel.”

In a clear misreading of, or failure to read the record, the Third Circuit cited, as support for vacating the stay, that the Delaware Superior Court appointed an “independent counsel,” Foley, in the competency proceeding to “advocate for the position that Johnson is not competent to make that decision.” The circuit court’s finding notwithstanding, Foley was unable to fulfill that role. The superior court’s own statements made clear Foley’s purpose and, in fact, my discussions with him after Johnson’s execution confirmed this point. Foley was precluded from speaking with Johnson, was unable to have his experts evaluate Johnson personally, and, ultimately believed his position was relegated to “window dressing,” as opposed to a substantive, active role.

However, even without the additional information I learned from Foley after Johnson’s execution, Ford’s petition contained meaningful evidence—particularly when coupled with her other arguments—that Johnson’s competency hearing was not adversarial and, therefore, failed to adhere to due process requirements. Thus, the Third Circuit’s conclusion that the superior court’s competency finding was entitled to deference, without any discussion of the adversarial or nonadversarial nature of that proceeding, made its decision to vacate the district court’s stay questionable at best, and, at worst, a possible failure of that court to ensure that every procedural “t” was crossed and “i” was dotted before the government was permitted to take a life in the name of citizens it is sworn to protect. This failure to evaluate the constitutionality of the competency proceeding likewise undermined the Third Circuit’s conclusion that Johnson’s waiver of his appellate rights and his decision to join the State in its motion to vacate the stay, supported its decision. Clearly, if the superior court’s competency proceeding was nonadversarial and, thus, constitutionally infirm, Johnson’s competency would be called into question and the competency finding would not be entitled to the deference the court of appeals afforded it.

Based on the facts presented in Ford’s application, it appeared clear to me then that further examination of the competency proceeding was required, necessitating the stay I imposed. Foley’s comments post-execution—comments I sought to elicit during the April 23 oral argument on Ford’s application—confirmed this conclusion. It is my belief that where, as here, a death penalty defendant and the State are both arguing for a finding of that defendant’s competence, courts should be required to appoint counsel for the defendant to advance a contrary position, if the evidence warrants. Clearly, if the defendant’s counsel decides to assert the incompetence position, such appointment would not be necessary. However, where the government and defense are aligned—as they were in this case—a court should appoint counsel to “represent” the defendant under a revised Rule 61, not serve merely as a friend to the court, and the court should order the defendant to meet with the appointed counsel and be subject to evaluation by counsel’s experts.

The role of death penalty defense counsel is beyond the scope of this article. Nevertheless, it is my contention that such counsel should be required to assert the incompetence position despite a defendant’s contention to the contrary. To do otherwise, is to relieve the government of its responsibility to engage the adversarial process and establish the bona fides of its position. Notably, while Johnson’s attorney may have proved “loyal” to her client’s wishes, the role of counsel in cases such as this demands “a competency hearing in accordance with minimal federal standards of procedural due process”—as stated by counsel herself. It is to that principle that counsel owed her fidelity, and if she felt a divided loyalty, she should have stepped aside and at the very least not have become an advocate, along with the State, for finding competency and the resultant execution of Shannon Johnson. Indeed, perhaps it is ultimately the responsibility of the presiding judge, and not the lawyer faced with this dilemma, to order his or her removal.

The Delaware Supreme Court. As is clear from the procedural posture outlined above, no appellate court reviewed the competency hearing to ensure that it passed constitutional muster. The Third Circuit did not address the absence of appellate review in either of its orders vacating the district court stays, yet relied expressly upon and granted deference to a proceeding that even the most cursory review should have revealed needed a closer look. As I made clear in the district court order reinstituting the stay, this fact was disconcerting because “the state court’s competency hearing and process ultimately—though not by design—insulated the competency finding from appellate view.” Instead, here, the very court that has recognized the need in matters of competence such as this for meaningful adversarial testing refused to enforce that requirement. Consequently, I felt then, and feel today, that because I was prevented from doing what trial courts do—develop a record for review—the process leading to Johnson’s execution was constitutionally infirm. Had the Delaware Supreme Court reviewed the proceedings in the superior court, I would have had a lot less about which to complain. The fact is, that didn’t happen either.
Following the superior court’s February 24 competency finding, Foley requested that the court allow him to appeal the order to the Delaware Supreme Court. The superior court denied him the opportunity to appeal. Foley then asked the Delaware Supreme Court, in a letter to the Chief Justice Myron T. Steele, to allow him to appeal the superior court’s finding. Foley based his request on the Delaware Supreme Court’s precedent in *Bailey v. State*, which he referenced in the letter, whereby amicus counsel are ethically required to seek appeal. In *Bailey*, the trial court held an evidentiary hearing and found the defendant competent to waive review. The defendant’s counsel then filed an appeal of the trial court’s ruling, despite the fact that the defendant did not communicate with his counsel or authorize the filing of a post-conviction petition. Nevertheless, the Delaware Supreme Court redesignated the defendant’s counsel as an “amicus counsel” and allowed him to prosecute the appeal of the trial court’s rulings. The Delaware Supreme Court concluded that, “[w]hen issues of competency are the subject of an appeal relating to a defendant’s waiver of his trial court and appellate rights, this Court, as a matter of policy, will not entertain a Motion to Dismiss an appeal until the competency issue has been resolved.”

Despite this supporting precedent, the Delaware Supreme Court denied Foley’s request on March 23, 2012, citing his lack of “standing” to pursue the appeal.

The Delaware Supreme Court’s decision not to hear Foley’s appeal—and the Third Circuit’s lack of recognition that Johnson’s competency proceeding was never subject to appellate review—was, to understated the point, highly problematic. While appellate review may not always be necessary, based on the facts and procedural posture of a given case, it seems evident to me that appellate review of competency proceedings in death penalty cases should be required to ensure that a defendant’s waiver of post-conviction review is knowing, intelligent, and voluntary. Indeed, some courts have found that a state court competency proceeding is not entitled to the presumption of correctness unless it has been reviewed by an appellate court. I would agree.

In addition, I would recommend that, at the very least, in all cases where a death penalty defendant is subject to a competency proceeding, his or her counsel or the counsel appointed to advocate for incompetence, should have standing to appeal a trial court’s finding. Optimally, I would assert that the constitutionality of a competency hearing in which a defendant waives his or her appellate rights should be automatically reviewed by the state supreme court. It is the fundamental role of courts at every level of the judiciary to ensure that all proceedings are conducted in accordance with the dictates of procedural and substantive due process. This responsibility is equally and, perhaps, most especially true in those cases where a court is tasked with assessing whether an individual is competent to waive their appellate rights and expedite their own execution. As I stated in my order reinstituting the stay of Johnson’s execution, it is of paramount importance that we—members of the judiciary, the legal community, and the general public—can, in hindsight, rest assured that individuals executed in our system were subject to a process that met these due process requirements. Unfortunately, as the Johnson case makes clear, such appellate review is not, at present, required and can result in an unreviewed competency finding receiving the presumption of correctness.

**Third Circuit precedent on granting stays in death penalty cases.** As detailed above, the Third Circuit vacated both of the district court’s stays, finding that the court could not stay Johnson’s execution because: in the first instance, a short stay to allow sufficient time to evaluate a voluminous eleven hour petition was an insufficient ground for such action; and, ultimately, because Ford could not establish “meaningful evidence” of incompetence in light of the superior court’s competency finding. The Third Circuit’s rationale in both orders raises critical questions as to whether precedent in this circuit provides district courts with the necessary authority to review potentially substantive petitions and whether it adequately protects the constitutionally protected due process rights of death penalty defendants. Having viewed the implications of this precedent first hand in the waning hours of April 20, 2012, I believe it does not.

**District courts’ authority to stay proceedings to ensure adequate review.** The federal public defender’s office filed its next friend application on Ford’s behalf on April 13, 2012, the Friday before Johnson’s April 20 execution, in an 88-page filing accompanied by nearly 280 pages of exhibits. The State then responded in opposition at 6:44 p.m. on Monday, April 16. By the time the district court held its in-court conference the morning of Wednesday, April 18, the public defender had not yet filed its reply. The court also did not have the benefit of Foley’s statements as to the role he was allowed—or not allowed—to play as amicus counsel in the superior court’s competency proceeding. It was apparent to me that a statement from Foley would prove exceedingly helpful in assessing the application because one of Ford’s central arguments was that the competency proceeding...
was nonadversarial and the recitation of facts in the application appeared to support her contention. Equally clear was that the district court was being provided less than three days—should it rely on the filings without the benefit of the public defender’s reply—to determine whether a previously unreviewed competency proceeding was constitutional.

In consideration of the potentially meritorious arguments that Ford advanced, the voluminous nature of the record, and the finality of the result should her petition be denied, I instituted a stay on April 18 to allow more time to review the substance of the application. This stay, however, was not indefinite. In the same order instituting the stay, I directed the parties to reconvene on Monday, April 23, and expressly noted that the court would render a decision following the hearing “as expeditiously as humanly possible.” I also directed that the public defender submit its reply and that Foley submit his affidavit by Friday, April 20.

The Third Circuit, however, disagreed with my order staying Johnson’s execution for this reason. In fact, the circuit court—in addition to noting that Johnson’s decision to join the State’s opposition to the stay supported its decision to vacate, despite the fact that the constitutionality of the competency proceeding was being challenged—directly rejected the rationale I advanced. The circuit court stated that “[t]hat rationale is insufficient to support a stay of execution, particularly one that the actual parties in interest do not want and instead have actively opposed.” Instead, the “District Court, before interfering with the State’s strong interest in enforcing its criminal judgments (which happens to be Johnson’s own expressed interest as well), must conclude, at the very least, that the movant has shown ‘substantial grounds upon which relief might be granted.’” Thus, because the court’s order “did not identify any potentially meritorious issues raised by Ford’s next-friend petition,” vacating the stay was necessary.

This precedent, particularly in death penalty cases, is disquieting. At present, there is no precedent in the Third Circuit that allows a district court to stay an execution in circumstances like the one presented here, where a petition is filed—a petition that, importantly, the court finds worthy of further review—and that court is provided insufficient time to fully evaluate its merits before execution. This, in my view, must change. Generally speaking, a district court is granted broad authority to manage its own docket. In light of cases such as this, I believe it is critical that district courts have the authority to stay an execution where the petition filed is potentially meritorious and the court establishes parameters as to the length of the stay so that it is not indefinite. Indeed, district court judges are tasked daily with assessing the merits of parties’ filings in a myriad of suits and rendering impartial and informed decisions impacting parties’ rights and property. It seems self-evident then that those same judges should be allowed the time necessary to assess parties’ filings and make an informed disposition of those filings in cases where execution is the possible result.

Third Circuit precedent for granting next friend petitions. As noted, the Third Circuit vacated the district court’s order reinstating the stay at 1:46 a.m. on April 20. This second order reinstating the stay detailed what I had found to be “at least two potentially meritorious issues amounting to ‘substantial grounds upon which relief might be granted’”—namely, whether the state court competency proceeding was sufficiently adversarial to satisfy due process requirements and whether Johnson was, “in fact, incompetent due to mental retardation, delusional disorder, brain damage, or trauma.” In this order, I explained my concerns that, based on the facts outlined in Ford’s application, the competency proceeding was nonadversarial.

The order also highlighted information Ford presented indicating that: contrary to the Third Circuit’s recitation of the facts in its first order vacating the stay, Dr. Swanson did testify that she found Johnson incompetent based on her “evaluation of the record and analysis of the other experts’ methodology and findings”; Dr. Eichel, an expert for the State, had concluded, before changing his opinion as to competency, that Johnson may suffer from serious psychiatric illness and noted that Johnson believes his “death will somehow punish those who snitched on him or otherwise betrayed him”; and Dr. Woods, Jr., a neuropsychiatrist with extensive experience in capital cases, reviewed Dr. Mack’s findings for Ford’s application and found that “Johnson’s cognitive defects may significantly impair his ability to make a rational [as well as intelligent] waiver.”

In contrast to these facts, the Third Circuit’s first order vacating the district court’s stay stated that the “Superior Court conducted a four-day evidentiary hearing,” “heard the testimony of six mental health professionals,” and that “none of them testified” that Johnson was incompetent. Presumably, the Third Circuit provided emphasis to its statement that “none” had testified that Johnson was incompetent because it viewed the absence of such testimony as important. The Third Circuit’s recitation of the facts was incorrect, however, as Dr. Swanson testified that she believed Johnson was incompetent.

In consideration of the facts, I concluded that Ford satisfied the two requirements of next friend standing: (1) she presented “meaningful evidence” that a prisoner is “suffering from mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision”; and (2) demonstrated herself to be “truly dedicated to the best interests of the person on whose behalf [s]he seeks to litigate.” (Whitmore, 495 U.S. at 165–66.) I also addressed the Third Circuit’s conclusion in its first order vacating the stay that Ford could not “clearly establish”—as Whitmore requires—Johnson’s incompetence because he was judged competent in the state court proceeding. Specifically, I noted that “requiring Ms. Ford to ‘clearly establish’ Mr. Johnson’s incompetency at this stage and based on the facts before the court is the product of . . . circular reasoning wherein Ms. Ford is precluded from
pursuing review of a potentially constitutionally infirm proceeding because her brother . . . was adjudged competent in that very proceeding.”

The Third Circuit disagreed. In addition to concluding that the district court had focused on “side issues”—whether the state court competency proceeding was significantly adversarial and the extent of disagreement among the experts—as to Johnson’s competency—the court found that Ford had not presented “meaningful evidence” to warrant next friend standing. The evidence Ford presented failed to meet this standard because the state court had conducted a colloquy with Johnson, the transcript of which the Third Circuit “reviewed” in addition to “exhibits in support.” Based on this colloquy and supporting documents, the Third Circuit was “firmly convinced that the Superior Court’s finding of . . . competency is entitled to a presumption of correctness.” The Third Circuit also again highlighted Johnson’s own support of the State’s position in concluding that Johnson “is competent under the standards set down in established precedent.” Thus, Ford failed to establish “clear and convincing evidence to rebut the presumption.” The Third Circuit vacated the district court’s stay, concluding that it had “abused its discretion in granting a stay of execution,” and directed it to “dismiss the application to proceed as next friend.”

The Third Circuit’s reliance on its review of the state court’s colloquy with Johnson and of letters he submitted to the court and his attorneys did not, in my view, compensate for the fact that the state court competency finding was not examined to ensure its constitutionality and the merits of its finding. In Heidnik v. Horn, the Third Circuit established, in a similar case involving a next friend application, that to waive further appeals a defendant must provide a “rational basis” for his or her decision that cannot be “based on delusional perception.” (112 F.3d 105, 111 (3d Cir. 1997).) Here, however, Johnson’s explanation as to why he sought to waive appellate rights and expedite his execution consisted of the following in his colloquy with the superior court:

The Court: Tell me in your own words why you wish to not pursue any post-conviction or appeals at this point.

The Defendant: The furthest I can go into that is just by telling you that it’s a choice that I made and I took it up with Allah and it’s final, that’s all.

The Court: And that’s final, you said?

The Defendant: Yes.

Based on my review of Ford’s application, this explanation appeared insufficient to constitute a “rational basis” for waiving appellate rights, particularly where there was disagreement among the experts who testified at the competency hearing and that hearing was arguably nonadversarial. The Third Circuit’s failure to address the substance of Johnson’s letters or colloquy with the state court, or to evaluate whether either reflected a “rational basis” for waiving appellate rights is, to say the least, curious—especially when it relegated questions of the competency proceeding’s constitutionality and expert disagreement to “side issues” unworthy of review.

Ultimately, the Third Circuit’s conclusion that Ford did not meet the requirements of next friend standing and, further, that the district court had abused its discretion in granting a stay on the grounds advanced, establishes an unfortunate precedent. Ford could not meet the next friend requirements in this case because she could not “clearly establish” by “clear and convincing evidence” that Johnson was incompetent by virtue of the state court’s competency finding. This result is counterintuitive—and, I would argue, startling. Indeed, the practical effect of this ruling is that a state court’s finding of competence is now insulated from review, even in cases such as this where no court reviewed the constitutionality of the competency proceeding.

It is my contention that Third Circuit precedent requiring a next friend petitioner to “clearly establish” incompetence in cases where a defendant was found competent in an unreviewed state court competency proceeding must change. Specifically, rather than requiring a petitioner like Ford to “clearly establish” “meaningful evidence” of incompetence, I would suggest that a petitioner should be granted standing where they can establish “meaningful evidence” that the competency proceeding finding the defendant competent was constitutionally infirm. The Third Circuit did not take the opportunity in Johnson’s case to recognize and confront the fact that its current precedent would lead to an untenable result implicating future cases involving unreviewed competency findings. While cases presenting facts such as the one here may be rare, the need to address the failings of current Third Circuit precedent is no less critical.

Conclusion

Johnson’s case—a case that proceeded with notable and unnecessary haste from the time of his competency hearing to his execution—highlights profound failings in our judicial process. As a federal judge tasked with ensuring that individuals and entities that move through our judicial system are guaranteed a process consistent with the dictates of constitutional due process, I believe that the district court was prohibited from doing so in this case and that the process afforded Johnson fell far short of this guarantee. While Johnson may have, in fact, been competent to waive his appellate rights and expedite his own execution, I believe now, as I did then, that it is critical that the process resulting in an execution may be “judged in hindsight as having complied with the requirements of constitutional due process, as well as appear to the general public, which has a great interest in the issue, to have done so.” It is my sincere hope that this case and the subsequent examination of it will promote the changes necessary to ensure we can do so in the future.■
A series of high-profile disputes erupted recently over the application of legal privilege in the context of internal investigations. The Supreme Court of Delaware ordered Wal-Mart to turn over privileged investigation material to a shareholder. A federal district court slapped down KBR’s assertion of privilege over internal investigation files from its legal department. Bank of China learned that some of its in-house counsel in China were not entitled to assert privilege—ever. And Penn State found itself in the middle of a privilege waiver dispute after publicly releasing an investigative report on the Jerry Sandusky scandal.

These cases highlight some of the limits of the protections offered by the attorney-client privilege and work product doctrine. They also provide helpful reminders of common pitfalls associated with asserting those privileges—and how to avoid them.
KBR’s Code of Business Conduct Investigation Reports
On March 6, 2014, a federal district court sent a shockwave across the legal community and regulated industries when it ordered Kellogg Brown and Root (KBR), a government contractor, to disclose a series of documents related to an internal investigation conducted by its legal department. (United States ex rel. Barko v. Halliburton Co., 37 F. Supp. 3d 1 (D.D.C. 2014).) The district court determined that because KBR was required to conduct that type of internal investigation as part of its compliance obligations as a government contractor, the investigation was not protected by attorney-client privilege or the work product doctrine.

Less than four months later the D.C. Circuit vacated the district court’s order, finding that the district court misconstrued the applicable legal test and had “generated substantial uncertainty about the scope of the attorney-client privilege in the business setting.” (In re Kellogg Brown & Root, Inc. (KBR), 756 F.3d 754, 756 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 1163 (2015).)

The district court’s infamous decision. The privilege dispute at issue arose in a False Claims Act (FCA) suit brought by whistleblower Harry Barko alleging misconduct under a government contract in Iraq. KBR’s legal department had previously investigated the same misconduct in response to “tips” received through its ethics and compliance hotline pursuant to its code of business conduct (COBC). As part of that investigation, KBR’s legal department sent a nonattorney investigator to interview employees and prepare summary reports.

KBR produced some of the tips during discovery in the FCA case. However, KBR withheld materials related to the COBC investigation, claiming they were protected by attorney-client privilege and the work product doctrine. Barko countered that the COBC investigation was not privileged because its primary purpose was not to provide legal advice. Rather, Barko asserted that KBR performed the investigation as a “business necessity” because it was required by law as a government contractor to undertake such investigations.

To resolve this privilege dispute, the district court applied a novel “but for” test to ascertain the primary purpose of the investigation and found that the documents were not privileged. The court reasoned that the primary purpose of a communication is to obtain or provide legal advice only if that communication would not have been made but for the fact that legal advice was sought. Because KBR would have conducted the investigation to satisfy its regulatory obligations, the district court concluded that its primary purpose was not to provide legal advice. Therefore, it was not privileged. (Halliburton, 37 F. Supp. 3d at 5–6.)

KBR petitioned the D.C. Circuit to issue a writ of mandamus vacating the district court’s ruling. It was soon supported by several business and trade associations that signed on to a US Chamber of Commerce amicus curiae brief. (Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioner, KBR, 756 F.3d 754 (D.C. Cir. Mar. 19, 2014), ECF No. 148441.)

The D.C. Circuit court steps in. The D.C. Circuit granted KBR’s petition. The circuit court found that the district court’s decision rested on a “false dichotomy” by concluding that KBR conducted its investigation to comply with regulations rather than to provide legal advice. The “but for” test articulated by the district court would preclude application of the attorney-client privilege unless the sole purpose of a communication was to obtain or provide legal advice. This, the circuit court emphasized, would “eradicate” the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which now represent “a significant swath of American industry.” (KBR, 756 F.3d at 759.)

Instead, the circuit court held that the attorney-client privilege applies so long as “one of the significant purposes of the [communication] was to obtain or provide legal advice.” (Id. at 760 (emphasis added).) KBR’s internal investigation was protected by privilege under this broader formulation of the primary purpose test.

The circuit court’s opinion also explained that the district court inappropriately distinguished Upjohn Co. v. United States, 449 U.S. 383 (1981). The fact that KBR used only in-house counsel to conduct its investigation, whereas outside counsel were consulted in Upjohn, was immaterial; a lawyer’s status as in-house counsel “does not dilute the privilege.” And although attorneys conducted the witness interviews in Upjohn, KBR’s nonattorney investigators were acting as agents of KBR’s attorneys, such that the witness interviews they conducted were shielded by the attorney-client privilege. (KBR, 756 F.3d at 758.) Finally, while KBR failed to advise employees who were interviewed that the purpose of the investigation was to provide legal advice, the employees knew the legal department was conducting the investigation and that it was confidential. Upjohn, the circuit court reasoned, does not require the use of “magic words.”

In essence, Upjohn was “materially indistinguishable” given that both cases involved an internal investigation managed by attorneys to gather facts and ensure compliance with the law after being informed of potential misconduct.

The aftermath: Barko strikes back. On remand, the D.C. Circuit allowed the district court to consider Barko’s other arguments as to why the documents were not protected by attorney-client privilege or the work product doctrine. (KBR, 756 F.3d at 764.) The district court subsequently issued two orders finding the privilege was inapplicable on three different grounds, and again ordered production of some of the same COBC materials considered by the D.C. Circuit.

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First, the district court found that KBR used the privileged COBC materials as a “sword” by making certain arguments that implicated their content, and thereby waived privilege. (United States ex rel. Barko v. Halliburton Co., No. 1:05-CV-1276, slip op. at 8 (D.D.C. Nov. 20, 2014), ECF No. 205.) The district court focused on KBR’s argument during the litigation that KBR (1) always investigates alleged misconduct, (2) always makes reports to the government if the investigation provides reasonable grounds to believe a violation occurred, and (3) made no such report after the COBC investigation at issue—thereby suggesting that no violation occurred. KBR advanced this argument in a Rule 30(b)(6) deposition, in seeking summary judgment, and in opposing one of Barko’s motions to compel. The district court found that KBR had “actively sought a positive inference in its favor based on what KBR claims the documents show” and thereby waived privilege. (Halliburton, No. 1:05-CV-1276, slip op. at 23.)

Second, the district court found that KBR waived privilege over the COBC reports when it allowed its own 30(b)(6) witness to review them before his deposition. Under Federal Rule of Evidence 612, an opposing party may examine the writings that a party uses to refresh the recollection of its witness “if the court decides that justice requires” it. (Halliburton, No. 1:05-CV-1276, slip op. at 23–24.) The district court concluded that the standard was satisfied here because (1) most of the statements in the report were not attorney opinions, (2) major discrepancies existed between the testimony and the documents, and (3) the witness heavily relied on the documents. (Id. at 25.)

Third, in a separate order, the district court found that certain parts of the investigative reports were only entitled to fact work product protection. (United States ex rel. Barko v. Halliburton Co., No. 1:05-CV-1276, 2014 WL 7212881 (D.D.C. Dec. 17, 2014).) KBR’s reports were comprised of two parts: (1) employee witness statements and (2) summaries prepared by the investigator. The district court held that attorney-client privilege protected the employee witness statements made to the investigator because he was acting as an agent of KBR’s in-house attorneys. (Id. at *7–8.) The privilege also protected the investigator’s summaries to the extent they revealed confidential employee communications.

However, attorney-client privilege did not apply to the investigator’s summaries of contracts and related contract performance because the privilege does not protect “communications only between lawyers, or their agents, alone.” (Id. at *14–15.) Instead, those summaries were only entitled to fact work product protection and had to be produced under the “substantial need” exception. The court noted that the investigator’s reports “do not give opinion[s] on witness credibility, demeanor, or evasiveness.” (Id. at *21.) The reports “do not label certain documents as relevant or irrelevant, and do not state that certain statements or records are prima facie indicators of fraud.” (Id.) Thus, the court concluded the reports were “far removed from the core of the work product protection for attorney strategy or opinions.” (Id.) Moreover, Barko demonstrated the substantial need necessary to overcome work product protection because of several factors, including the length of time that had passed since the events of the case, the inability to pursue discovery during the sealed qui tam action, and KBR’s false inference that the documents did not contain harmful evidence. (Id. at *21–22.)

**An uncertain future for KBR’s privilege.** As it did with the district court’s initial order, KBR is seeking review of these recent decisions. The D.C. Circuit heard oral argument on May 11, 2015. Although it is not clear how the court will ultimately rule, the forthcoming opinion will likely provide additional guidance to practitioners hoping to avoid similar disputes.

**Wal-Mart’s Internal Investigation Files**

Wal-Mart’s compliance issues in Mexico were splashed across headlines in April 2012 in a *New York Times* article titled “Vast Mexico Bribery Case Hushed Up by Wal-Mart after Top-Level Struggle.” Wal-Mart made headlines again when the Delaware Supreme Court granted shareholders access to privileged documents from a related internal investigation. (Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264 (Del. 2014).)

A **shareholder seeks privileged documents.** Responding to the provocative allegations published in the *New York Times*, a Wal-Mart shareholder, Indiana Electrical Workers Pension Trust Fund (IBEW), sought access to internal investigation documents during a derivative action. Specifically, IBEW requested documents pertaining to Wal-Mart’s allegedly insufficient investigation of reports that Walmex, its Mexican subsidiary, bribed public officials.

According to the *Times* article, Wal-Mart’s senior leadership rejected a proposal for a thorough investigation by outside counsel in favor of a more limited internal two-week “preliminary inquiry.” The preliminary inquiry concluded there was “reasonable suspicion to believe that Mexican and USA laws [had] been violated.” (Wal-Mart, 95 A.3d at 1268.) A Wal-Mart director suspiciously responded to this conclusion by ordering the prompt development of a “modified protocol” for internal investigations. As a result, control of the Walmex investigation transferred to one of its earliest targets, Walmex’s general counsel—who then conducted another inquiry and cleared himself and his fellow executives of any wrongdoing. (Id.)

The Delaware Court of Chancery ordered Wal-Mart to produce the privileged materials related to this investigation. Wal-Mart appealed this ruling to the Delaware Supreme Court.

**Delaware court upholds disclosure of privileged materials under the Garner exception.** The Delaware Supreme Court upheld the order compelling disclosure of Wal-Mart’s privileged documents to its shareholder, citing a shareholder exception recognized in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Under *Garner*, shareholders can access a corporation’s attorney-client privileged documents for good cause. (Wal-Mart, 95 A.3d at 1276 quoting *Garner*, 430 F.2d at 1103–04.) Whether “good cause” exists under *Garner* is based on a number of factors, including (1) the number of shareholders and the percentage of stock they...
First had to resolve which country's privilege laws would apply. Using the “touch base” analysis, the court sought to determine the country with the most direct and compelling interest in whether the communications should remain confidential. The court explained that the country with the “predominant interest” is either the place where the privileged relationship was entered into, or the place where the relationship was “centered at the time the communication was sent.” The court concluded that Chinese law applied to some documents and US law applied to others. (Id. at 489.)

Unlicensed Chinese in-house counsel not entitled to privilege. Because Chinese law did not recognize attorney-client privilege or the work product doctrine, the court found that BOC had to produce documents governed by Chinese law. As to the documents governed by US law, the court found that BOC was not entitled to assert attorney-client privilege over communications between BOC employees and certain Chinese in-house counsel who did not have a license to practice law. (Id. at 493–94.) Rejecting the “functional equivalency” test, the court held that attorney-client privilege only applies “where a lawyer—whose authority derives from [his or] her position as a member of the bar— is engaged to provide legal advice.” (Id. at 495.) Because it was not essential for the in-house counsel in China to be members of a bar or have some form of legal credentials, the court found that their communications with BOC did not amount to attorney-client communications. (Id.)

Uncertainty abroad. The court rejected the argument that foreign employees who act as the “functional equivalent” of lawyers are entitled to attorney-client privilege and work product protection under US law if they are not licensed members of a bar. This raises questions about the scope of privilege for attorneys of various degrees of credentialing in different legal systems across the globe. In addition, Bank of China reminds practitioners that choice of law issues pertaining to legal privilege can have substantial consequences.

Penn State’s Investigation of the Jerry Sandusky Scandal
In the wake of accusations against former Pennsylvania State University football coach Jerry Sandusky, Penn State retained a law firm to perform an independent investigation of his misconduct and the school’s response. When the law firm completed the report, Penn State disclosed it publicly.

A Pennsylvania court recently held that under these circumstances Penn State had not retained the law firm to provide “legal services.” Thus, communications between Penn State and the law firm were not subject to the attorney-client privilege. The court also held that the public disclosure of the report created a subject matter waiver over certain other privileged documents, (Paterno v. NCAA, No. 2013-2082 (Pa. Ct. Com. Pl. Jan. 7, 2014) [hereinafter Paterno Jan. 2014 Order], available at http://tinyurl.com/pm4ek2t.)

The Freeh firm’s investigation. The Penn State Board of Trustees hired the firm Freeh Sporkin and Sullivan, LLP (Freeh firm) to investigate any failures by Penn State

During the investigation, the Freeh firm provided periodic updates to the NCAA and the Big Ten at the direction of Penn State. (Paterno Jan. 2014 Order, supra, at 3.) Upon completion of this investigation, the firm created the Freeh Report, which Penn State publicly disclosed on July 12, 2012. (Id. at 4.) In subsequent civil litigation, the Estate of Joseph Paterno sought investigative documents related to the creation of the Freeh Report, and Penn State objected.

The Freeh firm was not retained to provide legal advice. To assess whether Penn State could successfully claim attorney-client privilege over its communications with the Freeh firm, the court focused heavily on the “Scope of Engagement” section of the firm’s engagement letter. This section states that the Freeh firm was engaged to serve as “independent, external legal counsel” to perform a “full and complete investigation” and to “provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.” (Paterno Sept. 2014 Order, supra, at 20.) The “Scope of Engagement” section also states that the results of the investigation would be provided to Penn State “and other parties as so directed by the Task Force.” The court noted that this section failed to state that the purpose of the engagement was to secure an opinion of law, legal services, or assistance in a legal matter—although the court failed to analyze the statement that the Freeh firm was retained as “external legal counsel.” (Id.)

The court contrasted this language from the engagement letter related to the Freeh firm with the section pertaining to the Freeh group. The latter section expressly stated that the Freeh group was retained “for the purpose of providing legal services.” The court concluded that the Freeh firm was not retained to provide legal services, and therefore, the attorney-client privilege did not apply to any communications between the firm and Penn State.

Penn State is appealing this decision with the support of an amicus brief from the Association of Corporate Counsel. In its brief, the Association of Corporate Counsel stressed that the lower court’s ruling created uncertainty over legal privilege that would significantly impair counsel’s ability to conduct internal investigations if it is allowed to stand.

Subject matter waiver. The court also found that Penn State waived attorney-client privilege over the publicly disclosed Freeh Report, as well as documents shared with the Big Ten Conference and the NCAA. Further, Penn State waived privilege over all documents addressing the same subject matter because the intentional disclosure was seen as an attempt to use privilege as both a shield and a sword. The court agreed with plaintiffs’ argument that “Penn State has done precisely that—by authorizing disclosure of the contents of the Report at a national press conference in an effort to demonstrate that Penn State addressed the problems that supposedly resulted in the Sandusky crimes, but denying access to the information underlying [the] Report’s conclusions.” (Paterno v. NCAA, No. 2013-2082, slip op. at 4 (Pa. Ct. Com. Pl. Nov. 20, 2014), available at http://tinyurl.com/prfwrqm.) Thus, the court concluded that subject matter waiver was appropriate.

Recommendations

While each case above involves unique and sometimes extraordinary facts, together they still serve as important reminders of some of the pitfalls surrounding legal privilege. Here are some practical steps attorneys and their clients can take to avoid similar disputes:

Attorneys should carefully manage and staff investigations. Internal investigations should be coordinated and closely managed by attorneys to ensure the full application of potential legal privileges. The legal purpose of any internal investigation should be documented, especially if there are other purposes at play. Recognize that some courts may still apply a stricter version of the “primary purpose” test and find communications are not protected by privilege where they have other, nonlegal purposes.

Careful consideration should go into the staffing and structure of any investigation involving nonattorney agents. Attorneys may use agents to assist with an investigation, although such agents should be monitored by counsel and the legal purpose of their work documented. Communications between attorney-agents and other company employees can be protected by the attorney-client privilege. However, consider that communications between attorneys and their agents alone may be protected only by the work product doctrine, not attorney-client privilege. (United States ex rel. Barko v. Halliburton Co., No. 1:05-CV-1276, 2014 WL 7212881, at *5 (D.D.C. Dec. 17, 2014).) The roles and responsibilities of any nonattorneys should be carefully delineated with future privilege assertions in mind.

Know the privilege law of the jurisdictions involved—especially foreign jurisdictions. In cases involving foreign activities and documents, counsel should carefully analyze choice of law issues, as well as the discovery and privilege rules of the foreign jurisdiction. Not all “attorneys” are created equal, and not every country grants attorneys the same legal privileges.

The court in Bank of China held that Chinese law did not even recognize an attorney-client privilege. Only when applying US law did the court reach the question of whether the unbarred Chinese “in-house counsel” could assert privilege (they could not). Recall that a few years ago, the European Court of Justice held that communications between in-house counsel and their corporate clients are not privileged in certain cases involving investigations by the European Commission. (Case C-550/07P, Akzo Nobel Chem. Ltd. v. Comm’n, 2010 E.C.R. 1-8301.)

Even within the United States there are significant
differences in how privileges are applied by courts. For a look at a particularly aggressive approach to privilege, peruse the decision in United States ex rel. Baklid-Kanz v. Halifax Hospital Medical Center, No. 6:09-cv-1002-Orl-31TBS, 2013 WL 1233699 (M.D. Fla. Mar. 27, 2013). There, the court held that the attorney-client privilege did not apply to e-mails if they had a business purpose in addition to a legal purpose, or if any nonattorney was included in the “to” line.

Companies should understand the variations in potentially applicable privilege laws and take them into account when deciding how to staff internal investigations and other sensitive matters. For attorneys working in jurisdictions with strict privilege protocols, such as those the court adopted in Halifax, special care should be taken to conform privilege communications to those standards.

**Take care not to use the privilege as a sword.** Keep the potential for at-issue waiver in mind when developing defense strategies and arguments. Remember that KBR waived privilege by arguing an *inference* that implicated privileged material—even where it did not disclose the privileged contents. Avoid directly or indirectly relying on privileged material to make your case.

That said, there are often important reasons for attorneys to present the findings from an internal investigation to a third party, such as when attempting to dissuade a regulator from bringing an enforcement action or imposing a certain penalty, or when trying to help quell a public relations uproar. In these situations, try to limit disclosures to the facts uncovered in the investigation and avoid disclosing or putting at issue any privileged opinions or conclusions in the process. (*Cf.* U.S. Dep’t of Justice, United States Attorneys’ Manual (USAM) § 9-28.720 (Aug. 2008) (“Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.”), available at http://tinyurl.com/psgxwflq.)

If possible, do not commit yourself to making public disclosures at the outset of an investigation. This approach mitigates against future arguments that the investigation was not intended to remain confidential, or was not conducted for a legal purpose.

Of course, any actual disclosures of privileged material to third parties carries the risk not just of privilege waiver over the disclosed material, but also of subject matter waiver over related documents. Counsel should carefully assess the often uncertain scope of subject matter waiver and factor that risk into any decision to waive privilege.

**Beware the limits of the work product doctrine.** The attorney-client privilege, when properly established, is virtually impenetrable save for a few limited exceptions such as the Garner doctrine. By contrast, the protection offered by the work product doctrine is less absolute. While opinion work product enjoys heightened protection, fact work product can generally be obtained by an opponent who demonstrates substantial need for the material and undue hardship to obtain its equivalent. To complicate matters, the line between fact and opinion work product is not easily drawn, and sometimes courts fail to draw it at all.

Moreover, the protection available to fact work product is difficult to assess when it is being created. The protection depends on the “substantial need” and “undue hardship” of an unknown adversary in the future. These factors, in turn, depend on the nature of the claims made by the future opponent, and the availability of other evidence on the same issue after the passage of an unknown amount of time.

In light of the uncertain protection afforded to fact work product, attorneys and their agents should make every attempt to prepare work product in a manner that lends itself to characterization as opinions, mental impressions, or legal analysis. Any material that may later be characterized as fact work product—even when intertwined with opinion work product—should be prepared with an eye toward the potential for its discovery by a future opponent.

**Don’t make the investigation a subject of investigation.** Before Wal-Mart, companies already had plenty of reasons to perform thorough internal investigations of suspected misconduct and implement appropriate remedial measures. Not the least of these reasons are the factors considered by the Department of Justice when deciding whether to charge a company criminally, which include the condoning of wrongdoing by corporate management, the effectiveness of the company’s compliance program, and remedial measures taken. (USAM, supra, § 9-28.300(A) (2), (5), (6); see also U.S. Sentencing Guidelines Manual § 8B2.1 (2014), available at http://tinyurl.com/p74rpuo.) Companies also have an inherent economic incentive to root out and prevent illegal activities to uphold their reputation and avoid costly enforcement actions and related litigation.

The Wal-Mart case provides yet another reason. A comprehensive response to reports of misconduct will help prevent shareholders from making a “colorable claim” of wrongdoing by a corporate board regarding the conduct of the investigation itself, and help preserve privilege over the investigation.

**Conclusion**

The attorney-client privilege has a noble and simple purpose: to allow attorneys and their clients to speak freely in pursuit of sound legal advice. It is a powerful shield. However, the protection offered by the privilege—and the frank communications it encourages—makes discovery of those same communications all the more alluring to one’s adversaries.

These competing interests ensure that a war over the scope of legal privilege will rage on indefinitely. Battles over the privilege continue to erupt across practice areas, industries, and countries, providing an endless variety of cautionary tales. The only guarantee in this war is that all attorneys and clients will benefit by closely studying it.
For years, federal and state prosecutors have touted their willingness to charge individuals as an essential deterrent to white-collar criminal action, often responding to criticism of prosecutions of corporate entities without any accompanying prosecution of related executives. And for years, those statements in large part remained just statements, without significant numbers of individual prosecutions backing them up. Despite ongoing criticism of the Department of Justice (DOJ) for its failure to prosecute major bank executives for their alleged role in the financial crisis, individual prosecutions have recently begun an inexorable rise, finally matching the rhetoric, particularly in the insider trading and foreign bribery spaces. While not all high-profile individual prosecutions have been successful, the increased risk of individual prosecution is undeniable.

At the same time, as the interconnected global economy magnifies the effects of corporate actions around the world, US prosecutors are not the only ones facing investigation and complicates the task of defending against those enforcement actions.

**Prosecutions of Individuals Rise to Match the Rhetoric**

Over the past five years, the Justice Department has been aggressive in both practice and rhetoric in pursuing charges against individual employees and executives accused of corporate misconduct. Between 2009 and 2013, DOJ charged more white-collar defendants than during any previous five-year period going back to at least 1994. (Eric Holder, Former Attorney Gen., Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), http://tinyurl.com/k6jrcas [hereinafter Holder NYU Remarks].)

The most visible example of this trend is the long string of insider trading cases brought by the US Attorney’s Office in the Southern District of New York. Since 2009, US Attorney Preet Bharara and his team have secured
convictions of more than 80 individuals, including senior executives of prominent hedge funds, for insider trading and related charges. It is true that the Second Circuit’s recent ruling in United States v. Newman, 773 F.3d 438 (2d Cir. 2014), may put some of those convictions at risk, given that the ruling vacated two insider trading convictions on the basis that the government failed to provide sufficient evidence to show that the defendants knew that an insider disclosed confidential information in exchange for a personal benefit. However, nearly all of the convictions remain intact thus far.

Moreover, DOJ has pursued individual defendants with increasing frequency in cases alleging antitrust violations and violations of the Foreign Corrupt Practices Act (FCPA). Since 2008, DOJ has charged nearly 90 individuals in FCPA and FCPA-related cases and has convicted more than 50 of them. (Leslie R. Caldwell, Assistant Attorney Gen., Speech at American Conference Institute’s 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), http://tinyurl.com/njfnztr [hereinafter Caldwell ACI Remarks]; Mike Koehler, A Focus on DOJ FCPA Individual Prosecutions, FCPA Professor (Jan. 20, 2014), http://tinyurl.com/o2e7aqr.) In the antitrust space, DOJ’s crackdown on price fixing by auto parts supply cartels has netted charges against nearly 50 executives. (Press Release, DOJ, Former Mitsuba Executive Agrees to Plead Guilty to Bid Rigging and Price Fixing on Automobile Parts Installed in U.S. Cars (Dec. 1, 2014), http://tinyurl.com/lvs28hr.)

And the DOJ investigation of manipulations of the London Interbank Offered Rate (Libor) has led to charges against nearly a dozen individuals, including senior executives of banks involved in calculating Libor. (Aruna Viswanatha, Two Ex-Rabobank Traders Charged in U.S. with Manipulating Libor, REUTERS (Oct. 16, 2014), http://tinyurl.com/o6xm9ju.)

Matching the increased rise in individual prosecutions, senior DOJ officials have continued their now well-worn rhetoric about DOJ’s interest in prosecuting individuals involved in financial fraud and other types of corporate misconduct. For instance, former Attorney General Eric Holder recently gave a speech at the New York University School of Law in which he discussed the importance of prosecutions of individuals:

[W]hen it comes to financial fraud, the department recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them. We believe that doing so is both important—and appropriate—for several reasons:

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First, it enhances accountability. Despite the growing jurisprudence that seeks to equate corporations with people, corporate misconduct must necessarily be committed by flesh-and-blood human beings. So wherever misconduct occurs within a company, it is essential that we seek to identify the decision-makers at the company who ought to be held responsible.

Second, it promotes fairness—because, when misconduct is the work of a known bad actor, or a handful of known bad actors, it’s not right for punishment to be borne exclusively by the company, its employees, and its innocent shareholders.

And finally, it has a powerful deterrent effect. All other things being equal, few things discourage criminal activity at a firm—or incentivize changes in corporate behavior—like the prospect of individual decision-makers being held accountable. A corporation may enter a guilty plea and still see its stock price rise the next day. But an individual who is found guilty of a serious fraud crime is most likely going to prison. (Holder NYU Remarks, supra.)

In a speech at the American Conference Institute’s (ACI’s) 31st International Conference on the FCPA, Assistant Attorney General Leslie Caldwell similarly emphasized the importance of the deterrent effect of prosecutions of individuals: “[O]ur record of success in FCPA prosecutions [of individuals] has allowed us to show—rather than just tell—corporate executives that if they participate in a scheme to improperly influence a foreign official, they will personally risk the very real prospect of going to prison.” (Caldwell ACI Remarks, supra.)

Civil enforcement agencies have also recently emphasized that if they see criminal activity by individuals, they will refer those individuals to DOJ for criminal prosecution. For example, Richard Cordray, director of the Consumer Financial Protection Bureau (CFPB), noted in a 2014 television appearance that “[t]here’s always officials and people in the company that make the decisions. . . . [R]eferring them criminally if that is appropriate, that’s part of what we’re doing.” (The Daily Show: Richard Cordray Extended Interview (Comedy Central television broadcast Jan. 8, 2014), available at http://tinyurl.com/m37s9y8.)

Indeed, the CFPB’s first publicly announced criminal referral resulted in an executive of a debt settlement company pleading guilty to charges of mail and wire fraud in April 2014. (Joseph Ax & Nate Raymond, Debt Settlement Firm Pleads Guilty in First CFPB Referral, REUTERS (Apr. 8, 2014), http://tinyurl.com/q4g59yh.) The Treasury Department has also expressed an interest in providing criminal referrals to DOJ when warranted. Under a new enforcement priority announced in March 2013, Treasury
Department officials stated that “[i]n the future . . . [i]f warranted [the Treasury Department] will refer to the Justice Department for possible prosecution cases involving individual bankers.” (Brett Wolf, *U.S. to Hold Bankers Responsible for Sanctions Violations*, Reuters (Mar. 22, 2013), http://tinyurl.com/lv86g6m.) And the Treasury Department has already made more than 100 criminal referrals of bank executives through the Office of the Special Inspector General for the Troubled Asset Relief Program. (Danielle Douglas, *SIGTARP Proves that Some Bankers Aren’t Too Big to Jail*, Wash. Post, Dec. 6, 2013, http://tinyurl.com/lsn9l4a.)

**Political Climate**

Why has DOJ in recent years ramped up its prosecutorial focus on individuals to more than just words?

One reason has to be the political climate. Since the financial crisis of 2008, politicians and government officials have pressured DOJ to hold individual executives of financial companies, and not just companies themselves, responsible for the events leading to the crisis. Lawmakers such as Senator Elizabeth Warren have long criticized government agencies for failing to prosecute any senior executives for actions allegedly leading to the crisis, citing the hundreds of individuals, including senior executives, who were prosecuted after the savings and loan crisis in the 1980s. The criticisms persist even as government agencies have obtained record-high settlements from many of the banks allegedly involved in the conduct that led to the crisis. Senator Richard Shelby recently remarked that “it seems like the Justice Department seems bent on money rather than justice and that's a mistake.” (Ryan Tracy & Victoria McGrane, *Warren Faults Banking Regulators for Lack of Criminal Prosecutions*, Wall St. J., Sept. 9, 2014, http://tinyurl.com/lbjr7h8.)

Beyond cases related to the financial crisis, Congress also recently criticized senior Treasury Department officials about the lack of individual prosecutions, and the heavy focus on obtaining monetary fines from companies, for sanctions and Bank Secrecy Act and anti-money laundering violations. (*Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 113th Cong. (2013.).)

Judge Jed Rakoff of the US District Court for the Southern District of New York expressed similar criticisms in an article published early last year, writing that “if . . . the Great Recession was in material part the product of intentional fraud, the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years.” As with Senator Warren, Judge Rakoff drew a contrast to the plethora of individual prosecutions that resulted from the savings and loan crisis as well the prosecution of senior executives in other major financial frauds such as the “junk bond” bubble in the 1970s and the accounting frauds involving companies such as Enron and WorldCom in the 1990s. Judge Rakoff remarked that “[j]ust going after the company is also both technically and morally suspect.” (Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?,* N.Y. Rev. of Books, Jan. 9, 2014, http://tinyurl.com/momhx6qj.)

Some of this political pressure may be undeserved insofar as it rejects the positive effects, deterrent and otherwise, of the significant settlements the Justice Department and other regulators have reached in financial fraud cases, and the individual enforcement efforts of enforcement agencies beyond the Justice Department.

DOJ, for example, has extracted multi-billion-dollar settlements from many banks for alleged misconduct related to the sale of mortgage-backed securities, including a $16 billion civil settlement with Bank of America over packaging and sale of residential mortgage-backed securities, collateralized debt obligations, and mortgage loans—the largest settlement ever reached with a single company. J.P. Morgan paid $13 billion to settle similar claims, and Citigroup paid $7 billion. Many of the settlements included significant sums set aside for consumer relief, with independent monitors appointed to ensure that the money was appropriately distributed to those consumers it was meant to benefit.

Even beyond the mortgage space, DOJ last year obtained a settlement of nearly $9 billion as well as a guilty plea from French banking giant BNP Paribas for providing financial services to individuals and entities in Sudan, Iran, and Cuba in violation of US sanctions laws. The Justice Department also obtained a guilty plea and a $2.6 billion fine from Credit Suisse for assisting US taxpayers in evading US taxes. Until these convictions, DOJ had acquiesced to the refusal of banks to acknowledge criminal wrongdoing because of the potential loss of federal and state licenses critical to conduct their business at all.

State regulators, too, have actively pursued financial companies for alleged misconduct, including the action initiated by the New York Department of Financial Services (NYDFS) against Standard Chartered Bank over alleged compliance failures related to the anti-money laundering controls necessary to prevent sanctions violations, which resulted in more than $600 million in penalties. And recently, NYDFS forced the chairman and founder of Ocwen Financial Corporation to step down due to allegedly “serious conflict of interest issues” between Ocwen and companies with which it did business—a move that significantly affected the company’s stock price. (Press Release, NYDFS, NYDFS Announces Ocwen Chairman to Resign from Firm and Related Companies; Ocwen to Provide Direct Homeowner Relief and Undertake Significant Operational Reforms (Dec. 22, 2014), http://tinyurl.com/oey3f6ne.)

Critics of DOJ’s perceived lack of individual prosecutions also seem to be working from the premise that DOJ is the only enforcement game in town. Yet the Securities and Exchange Commission (SEC) and other federal and state agencies have also pursued numerous civil enforcement actions against individuals, including for misconduct allegedly related to the financial crisis and to financial fraud more generally. The SEC’s successful civil enforcement action last year against Fabrice Tourre, a Goldman Sachs
trader involved in packaging and selling mortgage-backed securities, broke a string of high-profile and embarrassing defeats for the SEC in litigated enforcement actions against individuals. And recently, the Financial Crimes Enforcement Network (FinCEN), acting with the US Attorney’s Office for the Southern District of New York, fined the chief compliance officer of money transmitter MoneyGram International $1 million and barred him from the financial industry because of his alleged responsibility for compliance failures related to money laundering controls.

Nevertheless, there remains the perception that individual employees and executives—not corporations—commit crimes, and that the individuals responsible for corporate crimes and the conduct that led to the financial crisis should be held criminally accountable. And this perception and the attendant political pressure is likely one reason DOJ has increased its attention to prosecuting individuals.

Experienced Prosecutors
Another potential factor in the rise of individual prosecutions is structural. Certain sections at Main Justice are increasingly hiring their staff from US attorney’s offices, bringing in prosecutors who already have extensive experience instead of more junior enforcement attorneys who expect to gain that experience on the job. As the longest-tenured head of DOJ’s Criminal Division in modern times, Lanny Breuer promised to make DOJ’s Fraud Section a destination for top prosecutors around the country. Judging by the substantial experience of new recruits to the Fraud Section gained during tenures in numerous US attorney’s offices around the country, Breuer made good on his promise. Moreover, one former head of the FCPA unit at the Justice Department made no secret of his plan to recruit assistant US attorneys specifically in order to increase prosecutions of individual corporate executives. (Aruna Viswanatha, Next for Corporate America: Body Wires and Wire Taps?, REUTERS (Sept. 12, 2014), http://tinyurl.com/oeEf3k5.) These prosecutors arrive with both the goal of building cases against individuals and the experience to make it happen.

Ramifications for Companies and Defense Counsel
What does the rise in individual prosecutions ultimately mean for companies and defense counsel? While defense counsel have been warning for years of the actual or impending threat of more executive prosecutions, that threat is finally materializing, bringing many challenges.

First, while companies always feel pressure to blame individual employees or executives for misconduct, that pressure is more likely to come with the implicit understanding that the employees or executives will themselves be facing prosecution. Recent remarks by senior Justice Department personnel suggest that in order to receive cooperation credit, companies will be encouraged to identify specific wrongdoers; or at least that a company that seeks to delay or thwart the identification of culpable employees likely will not receive cooperation credit. For instance, Assistant Attorney General Caldwell noted in a recent speech:

The sooner you disclose the conduct to us, the more avenues we have to investigate culpable individuals. And, the more open you are with us about the facts you learned about that conduct during your investigation, the more credit you will receive for cooperation.

But, if you delay notifying us about an executive’s conduct or attempt to whitewash the facts about an individual’s involvement, you risk [not] receiving any credit for your “cooperation.”

(Caldwell ACI Remarks, supra.)

Principal Deputy Assistant Attorney General Marshall Miller made similar remarks in a speech at the Advanced Compliance and Ethics Workshop late last year, noting that “[a] compliance program’s ability to uncover wrongdoing and the responsible individuals, coupled with a corporation’s decision to disclose that information to the government, is significant in our evaluation of the compliance program and the company’s overall posture with the government.” He further remarked that the penalties the Justice Department imposed on BNP Paribas and Credit Suisse were so tremendous not only because of the underlying conduct but also because those companies “insulated[ed] culpable corporate employees.” (Marshall L. Miller, Principal Deputy Assistant Attorney Gen. for the Criminal Div., Remarks at the Advanced Compliance and Ethics Workshop (Oct. 7, 2014), http://tinyurl.com/m6fg6eb.)

Moreover, these comments are all consistent with the policy stated in DOJ’s Principles of Federal Prosecution of Business Organizations, which encourages prosecutors to bring charges against individual executives even in the face of a corporate guilty plea: “Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.” (DOJ, U.S. ATTORNEY’S MANUAL (USAM) § 9-28.200, available at http://tinyurl.com/qc5shv.)

Because the Justice Department’s posture will pit the interests of company employees and executives directly against the interests of the corporate employer, this posture may strain relationships among defense counsel for companies and for individuals. Indeed, in connection with its settlement of FCPA and related charges against Alstom, DOJ remarked favorably that Alstom had assisted in its prosecution of individuals. (Press Release, DOJ, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://tinyurl.com/m9hmtpa.) It would not be surprising if companies begin to feel pressure, for example, from their boards of directors, to lodge accusations against minor individuals based upon minimal evidence in an attempt to get cooperation credit by serving up scapegoats to the government.

Second, companies can also expect that going forward, DOJ will rely less on corporate disclosures to build cases
and will resort to investigative techniques more commonly associated with prosecutions of individuals, such as informants, body wires, and wire taps. In its investigation of potential manipulation of the foreign currency markets, federal investigators turned several bank employees into informants and were able to use them to gather information against their colleagues. (Arnab Sen, Investigators Turn Bankers into Informants in Forex Probe, Reuters (Sept. 15, 2014), http://tinyurl.com/mlk4j2m.) Also, in its investigation into potential FCPA-related violations of oil and gas company PetroTiger, the Justice Department was able to bring charges against the founder of the company through evidence obtained from a body wire attached to the founder’s business partner. (Viswanatha, Next for Corporate America, supra.)

The Justice Department is also focused on “thinking creatively about ways to incentivize witness cooperation and encourage whistleblowers at financial firms to come forward” because to successfully prosecute individuals, prosecutors often need evidence “that can only be attained from a cooperating witness.” (Holder NYU Remarks, supra.) As one example, Holder has asked Congress to increase the size of potential recovery to whistleblowers under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 to mirror that of whistleblower recovery provisions in the False Claims Act, which allow a whistleblower to recover up to one-third of funds obtained by the government as a result of the whistleblower’s information.

The well-known impacts of the government’s renewed emphasis on whistleblowing will be amplified by the increased threat of individual prosecution. Company employees with any information about potential wrongdoing now face the possibility of being personally prosecuted if they fail to come forward as an informant or whistleblower. Even if employees might previously have preferred to report potential misconduct through internal company channels, they face much greater rewards by going outside the company, whether by avoiding prosecution through acting as an informant or by potentially recovering millions as a whistleblower.

While these changes raise new concerns for individual employees and executives, we should not expect the Justice Department to be wholly successful in its increased attempts to prosecute individuals. Companies and individuals assess the costs and benefits of litigating against the government differently; some individuals may take on the government and hold it to its burden of proof at trial, at times exposing the expansive and sometimes tenuous nature of the government’s claims. The most recent example is the Second Circuit’s ruling vacating two insider trading convictions. We also cannot forget that DOJ lost the first case related to the financial crisis that it brought to verdict when a jury in the Eastern District of New York found Bear Stearns traders not guilty of securities fraud. And DOJ and the SEC have lost or settled FCPA-related actions against individuals on the eve of trial, including the SEC’s action against the former CEO of Noble Corporation, even when the companies that employed those individuals settled the government’s actions for significant sums. It is virtually unheard of for a corporation to take on the government at a criminal trial. The only corporation to do so in recent memory was W.R. Grace, the chemical company charged with environmental crimes in connection with asbestos pollution from a mining operation in Libby, Montana. In 2009, W.R. Grace and five senior executives were acquitted of all charges.

**Coordinated Prosecutions**

Along with the rise in individual prosecutions, another trend is increased cooperation among regulatory and law enforcement authorities across the globe. The Justice Department and other federal agencies have increasingly been working collaboratively with their counterparts in the United Kingdom, Europe, Asia, and elsewhere in investigating leads, gathering evidence, and building cases—and even in dividing up cases so that an individual prosecution will be brought in the most favorable forum.

**FCPA.** International cooperation has been extremely important in the FCPA context, where many of the documents and witnesses sought by the government reside overseas. The SEC’s Director of Enforcement Andrew Ceresney recently remarked that there had been a “tremendous increase in cooperation” from other governments when tackling corruption, noting that over the “past five years, [the United States has] experienced a transformation in [its] ability to get meaningful and timely assistance from [its] international partners.” (Andrew Ceresney, Co-Director, SEC Div. of Enforcement, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), http://tinyurl.com/mpjt6w9.)

Much of this cooperation can be attributed to the United States’ efforts in international forums such as the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery, which is made up of representatives from 41 member countries. While one goal of the working group is to pass anti-bribery legislation in member countries, the working group also serves as a vehicle to develop relationships between law enforcement in member countries and coordinate efforts to investigate and prosecute foreign corruption. (Mythili Raman, Acting Assistant Attorney Gen., Keynote Address at the Global Anti-Corruption Congress (June 17, 2013), http://tinyurl.com/kaw7ram.) In addition to the OECD Working Group, regulators and law enforcement from around the world have also met in training forums regarding anti-corruption laws to build relationships and exchange ideas regarding best practices in targeting foreign corruption. For example, in the fall of 2014, DOJ and the SEC hosted approximately 200 judges, prosecutors, investigators, and regulators in Washington, D.C., in such a forum. (Caldwell ACI Remarks, supra.)

The Justice Department clearly benefited from these efforts to build international relationships in its recent prosecution of Marubeni Corporation, a Japanese trading company, and Alstom S.A., a French power and transportation company. Both companies were charged with
violating the FCPA for bribing Indonesian government officials in a scheme that allegedly spanned Indonesia, the United States, Japan, Singapore, Switzerland, France, the United Kingdom, and elsewhere. In announcing its settlements, DOJ noted that it was aided by significant cooperation from law enforcement authorities in many of those countries. Following the convictions, Assistant Attorney General Caldwell emphasized that it was through international cooperation that US prosecutors were able to gain access to evidence and individuals located overseas. And notably, as a consequence of the Marubeni/Alstom investigations, the Indonesian government also initiated a parallel prosecution of the government officials who were implicated in the bribes. (Id.) Accordingly, through international collaboration, prosecutors targeted both the individuals who paid bribes and those who received bribes.

Another recent example of international collaboration in the FCPA context is the Justice Department’s prosecution of former executives of PetroTiger. DOJ charged two former executives with participating in a scheme to bribe government officials in Colombia in exchange for a lucrative oil services contract. The Justice Department worked closely with Colombian law enforcement in building its case, and Colombian authorities initiated a parallel prosecution against a PetroTiger employee in Colombia. (Id.)

The SEC’s recent settlement with the clinical diagnostic and life science research company Bio-Rad Laboratories is another example of international collaboration on anti-corruption matters. In announcing the settlement for Bio-Rad’s improper payments to foreign government officials, the SEC noted the assistance of the Bank of Lithuania, the Financial and Capital Market Commission of Latvia, and the British Virgin Islands Financial Services Commission. (Press Release, SEC, SEC Charges California-Based Bio-Rad Laboratories with FCPA Violations (Nov. 3, 2014), http://tinyurl.com/nhd4pvt.)

In some instances, US prosecutors have been willing to accept a multinational company’s resolution with a foreign law enforcement agency, suggesting their awareness of the need to avoid the perception of imposing “double jeopardy” on global corporations. Such was the case with Dutch oilfield company SBM Offshore N.V., which agreed to pay $240 million to the Dutch Public Prosecutor’s Office to resolve an investigation into payments it allegedly made to win contracts in several countries around the world. DOJ jointly investigated this case with Dutch authorities but declined to prosecute the company after the announcement of the settlement, building goodwill with foreign law enforcement.

**Libor.** Collaboration by international law enforcement has not been limited to the FCPA context, but is also apparent in the investigations into manipulations of Libor. DOJ and the Commodity Futures Trading Commission have worked closely with the UK Financial Conduct Authority and Serious Fraud Office (SFO), the German Federal Financial Supervisory Authority, the Swiss Financial Market Supervisory Authority, and other law enforcement agencies to investigate and prosecute banks and individuals charged with manipulating the global benchmark interest rate. Since the Libor scandal began, nine banks have been fined by US or European regulators and enforcement authorities, resulting in billions of dollars in fines.

As in the FCPA context, the various international authorities involved in the Libor investigation have collaborated in gathering information and evidence. But in the Libor context, there has also been a concerted effort to divide prosecutions of individuals by jurisdiction based on the forum believed to be the most friendly to the government’s case. Indeed, US and UK prosecutors at times appear to be tackling the investigation as if they were one large global enforcement agency. According to reporting by the *New York Times*, as part of this effort, the Justice Department charged Rabobank trader Paul Robson, a British citizen, in federal court in Manhattan for wire fraud and related charges, while the SFO handled the prosecution of three former Barclays traders—two of whom are US citizens—because of prosecutors’ assessments of the evidence and the government’s burden in the different forums. (Matthew Goldstein & Ben Protess, *U.S. and Britain Join Forces in Bank Misbehavior Cases*, N.Y. TIMES, Feb. 24, 2014, http://tinyurl.com/axdbhgu.)

To be sure, attempts at collaboration between international law enforcement have not always been smooth sailing in recent years. The Justice Department and the SFO clashed over their mutual pursuit of Tom Hayes, a former UBS trader, who is viewed by prosecutors in both countries as being involved in manipulating the yen Libor. In December 2012, the UK government blocked a Justice Department request to interview Hayes, a British citizen residing in England. Then, without notifying its US counterparts, the British authorities arrested Hayes despite being on notice that the US prosecutors had intended to file a sealed complaint in US district court against him. Amid high tensions, at least one senior official in the Justice Department’s Criminal Division made several trips to London to repair the fractured relationship between the two agencies. More recently, UK authorities criminally charged a former Barclays employee despite being aware that the employee had been given immunity by US authorities in exchange for cooperation. However, despite these occasional clashes, US and UK authorities continue to work together on the Libor investigations. (Id.; David Enrich & Evan Perez, *U.S. and U.K. in Tussle over Trader*, WASH. J., Mar. 14, 2013, http://tinyurl.com/p2alz6s.)

**Ramifications for Companies and Defense Counsel**

What lessons does this increased multijurisdictional cooperation hold for companies and defense counsel?

First, companies may increasingly face difficulties in withholding documents and evidence located overseas on the basis that such evidence is outside the Justice Department’s jurisdiction. If the Justice Department continues to leverage relationships with foreign law enforcement, (continued on page 46)
TRUE COOPERATION: DOJ'S "RESHAPED CONVERSATION" AND ITS CONSEQUENCES

BY GARY G. GRINDLER AND LAURA K. BENNETT
In reaching a decision as to the “proper treatment of a corporate target,” the US Department of Justice (DOJ) directs prosecutors to consider nine factors in its “Principles of Federal Prosecution of Business Organizations.” (U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-28.300 (2008) [hereinafter USAM], available at http://tinyurl.com/73uustj.) One of these factors is “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.” Earning cooperation credit is crucial to companies facing millions of dollars in potential penalties as well as other consequences in DOJ investigations, particularly for companies where a high penalty might impact the company’s ability to remain in operation. This stark contrast in the range of potential penalties is evident in Alstom’s December 2014 Foreign Corrupt Practices Act (FCPA) settlement. As part of the settlement, Alstom agreed to pay over $772 million as a criminal penalty, the largest FCPA fine in history. In a recent speech, Patrick Stokes, deputy chief of DOJ’s Fraud Unit, stated that if Alstom had self-disclosed its conduct and cooperated with the investigations, DOJ would have sought a penalty as low as $207 million—73 percent less than what Alstom paid. (Jimmy Hoover, Feds Say Sky-High Fines Show Perks of FCPA Self-Reporting, Law360 (Mar. 12, 2015), http://tinyurl.com/p4bxlc5.)

While the DOJ principles direct prosecutors to consider several factors when evaluating whether a company cooperated with an investigation, recent speeches by DOJ officials have suggested that prosecutors are now prioritizing a single form of cooperation over the other eight factors: whether a company is willing to engage in “true cooperation,” a phrase not found in the DOJ principles but referenced by three top DOJ officials and defined by one of them as a framework in which companies have made securing evidence of individual culpability “the focus” of their internal investigations. (See Marshall L. Miller, Principal Deputy Assistant Attorney Gen., for the Criminal Division, Remarks at the Global Investigation Review Program (Sept. 17, 2014), http://tinyurl.com/nblwzrm [hereinafter Miller GIR Remarks].) Another DOJ official openly acknowledged that the department is “seeking to reshape the conversation about corporate cooperation to some extent.” (See Sung-Hee Suh, Deputy Assistant Attorney Gen., Remarks at the PLI’s 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice (Jan. 20, 2015), http://tinyurl.com/pyrx6hq [hereinafter Suh PLI Remarks].) As this article will explain, there are serious questions as to whether giving greater weight to this factor is consistent with the DOJ principles and whether it may actually inhibit a company’s ability to identify the relevant facts for presentation to DOJ and its foreign counterparts and its ability to identify remediation measures that will ensure compliance with the law. This article will also describe why requiring companies to build cases against individual employees can be problematic, particularly when the relevant facts and evidence are located in certain foreign jurisdictions where data privacy or labor laws limit a corporation’s ability to disclose employee names or provide certain categories of evidence.

DOJ Principles

As noted, the DOJ principles state that when evaluating the proper treatment of a corporate target (such as whether to bring charges or negotiate plea or other agreements), prosecutors should consider, among eight other factors, “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.” The comments section following this list of factors notes that “[t]he factors listed . . . are not an exhaustive list of potentially relevant considerations. Some of these factors may not apply to specific cases, and in some cases one factor may override all others. . . . In most cases, however, no single factor will be dispositive.” (USAM § 9-28.300(B) (emphasis added).)

The DOJ principles provide additional guidance on what constitutes effective cooperation. It states that “[i]n gauging the extent of the corporation’s cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation’s willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.” (Id. § 9-28.700(A).) The DOJ principles also address whether companies must waive attorney-client privilege in order to be viewed as cooperating: “Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.” (Id. § 9-28.720.) The DOJ principles provide examples of the types of relevant questions that the government seeks to answer: “[f]or example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it?” (Id.) Finally, the DOJ principles note that “a corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive credit for cooperation.” (Id.)
DOJ’s Recent Statements Regarding “True Cooperation”

In the past year, three DOJ senior officials have used public speaking engagements to introduce a new, apparently essential standard for a corporation to receive leniency: “true cooperation,” where the emphasis is providing DOJ with the evidence needed to pursue charges against culpable employees. In a 2014 speech, DOJ Principal Deputy Assistant Attorney General Marshall L. Miller bluntly emphasized the need for companies to gather evidence against their employees as the critical factor in determining whether they will receive leniency in corporate criminal investigations. Miller stated, in no uncertain terms:

If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation. Make those efforts the last thing you talk about before you walk out. And most importantly, make securing evidence of individual culpability the focus of your investigative efforts so that you have a strong record on which to rely.

(Miller GIR Remarks, supra.)

Miller likewise stated that “whether that cooperation exposed, and provided evidence against, the culpable individuals who engaged in criminal activity” is “in many ways the heart of effective corporate cooperation.” Miller added that even if misconduct is voluntarily disclosed, DOJ will not reward a company for “true cooperation” if a company avoids identifying the individuals who are “criminally responsible.” Miller went even further, stating that “even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals.” (Id.)

The DOJ principles, which discuss the need to provide relevant facts, do not say that securing evidence of individual culpability must be “the focus” of an internal investigation or that providing evidence against culpable individuals is “the heart” of effective corporate cooperation. And as this article will discuss, in the case of foreign employees, whether incriminating facts and evidence are truly at a company’s disposal is sometimes quite complicated.

Leslie Caldwell, assistant attorney general for DOJ’s Criminal Division, subsequently made similar public statements emphasizing the need to name names of culpable employees but appeared to somewhat dial back on the statements previously made by Miller. In a November 2014 speech, Caldwell stated that DOJ does not expect companies to “boil the ocean” in conducting investigations, but it does expect companies to provide “useful facts” about the individuals “responsible for the misconduct, no matter how high their rank may be” in order to “receive full credit for cooperation.” (Leslie R. Caldwell, Assistant Attorney Gen., Speech at American Conference Institute’s 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), http://tinyurl.com/njfnztr [hereinafter Caldwell FCPA Speech].)

In an earlier speech, Caldwell appeared to stop slightly short of Miller’s previous statements by stating:

We are not asking that you become surrogate FBI agents or prosecutors, or that you use law enforcement tactics like body wires. And we do not need to hear you say that executive A violated a particular criminal law. All we are saying is that we expect you to provide us with facts. We will take it from there.

(Leslie R. Caldwell, Assistant Attorney Gen. for the Criminal Division, Remarks at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), http://tinyurl.com/q34uoq9 [hereinafter Caldwell Ethics Remarks].)

But Caldwell echoes Miller’s cautions about consequences for lack of details concerning individual culpability:

[If] you delay notifying us about an executive’s conduct or attempt to whitewash the facts about an individual’s involvement, you risk receiving any credit for your “cooperation.” This does not mean that we expect you to use law-enforcement style techniques to investigate your employees. To the contrary, it simply means that when you do an internal investigation, and you choose to cooperate with us, you should understand that we will expect to hear not just what happened, but who did what, when, and where.

(Caldwell FCPA Speech, supra.)

Caldwell did not explain how she would define “whitewashing” the facts about an individual’s involvement, but presumably this means something less than making false and misleading statements about the facts.

In January 2015, Deputy Assistant Attorney General Sung-Hee Suh also made similar points about the need to demonstrate “true” cooperation in order to earn cooperation credit. Importantly, Suh explicitly acknowledged in her speech that DOJ is “seeking to reshape the conversation about corporate cooperation to some extent.” She explained that “a corporation’s willingness to cooperate in the investigation of its culpable executives” is a “key consideration” under the DOJ principles. She noted that if a corporation does elect to cooperate with the department, it should be mindful of the fact that the department does not view voluntary disclosure as true cooperation, if the company avoids identifying the individuals who are criminally responsible for the corporate misconduct. Even the identification of culpable individuals is not true cooperation, if the company intentionally fails to locate and provide facts and evidence at their disposal that implicate those individuals.

(Suh PLI Remarks, supra.)
She warned that the DOJ will “be looking long and hard at corporations who purport to cooperate, but fail to provide timely and full information about the criminal misconduct of their executives.” (Id.)

The comments quoted above suggest that securing evidence against individuals may not only be dispositive of whether a company will receive significant cooperation credit (in contrast to the language of the DOJ principles that state that a single factor will generally not be dispositive), but may also be the most heavily weighed factor in deciding whether to prosecute the company, enter into a nonprosecution or deferred prosecution agreement, or reduce the fine or penalty to be imposed.

Potential Fifth Amendment Concerns
If companies begin internal investigations with a primary focus on building the facts and evidence related to individual culpability, there may be unexpected and counterproductive consequences. Such a “prosecutorial” climate could have an immediate chilling effect on employee cooperation. For example, employees with some knowledge of the relevant facts, including employees who might initially be considered “subjects” instead of “targets” of the investigation, as defined by the US Attorneys’ Manual, might be intimidated and unwilling to assist their employers in collecting the relevant facts because of the uncertainty of their status. This is underscored by the fact that many times proof of a white-collar crime may not be clear and the related facts are often subject to varying interpretations or ambiguous. If employees feel that they are potentially in harm’s way, they may be less willing to participate in voluntary interviews or to be fully candid and forthcoming in interviews, which could limit a company’s ability even to identify, much less gather information about, truly culpable individuals. If this were to happen, a company might find it more difficult to unearth and report all relevant facts to enforcement authorities, and its good-faith attempts at remediation could also suffer. This would be particularly unfortunate in investigations where the available documentary evidence by itself paints an incomplete picture of the facts or there is a credible explanation of unclear facts that could have been uncovered with the benefit of fulsome employee cooperation.

In addition, where the investigative climate is designed primarily to build a case against culpable company personnel rather than simply to find the facts in an objective, nonprosecutorial manner, potentially culpable officers and employees are more likely to engage separate counsel and to do so earlier in the process, even if the employees and the company think at that point that there has not been a violation of law. Retention of separate counsel typically adds significant additional time and expense to the investigation, as each individual’s counsel needs time to review relevant materials and prepare their client to discuss the facts. This could delay the time it takes for the company to disclose the facts to the government and, in the case of nonculpable employees, could introduce an unnecessary chill between the company and its otherwise valued employees. Moreover, if employees who are represented by separate counsel are considered by DOJ to be “subjects” before the relevant facts are known, the good-faith legal advice they frequently will receive from their personal counsel is to refuse to be interviewed by either the company or the government. All of this could result in the government incorrectly assuming that the company is stonewalling and attempting to hinder the investigation.

Furthermore, if DOJ is saying that securing evidence against individual employees should be “the focus” of the internal investigation and “the heart” of “true” corporate cooperation, then there are potential Fifth Amendment issues given that companies, in effect, can often pressure their employees to participate in interviews or risk termination. Litigants and the legal community have begun to recognize that there is an important question regarding whether corporate cooperation under this framework transforms internal employee interviews into state action and therefore raises Fifth Amendment concerns. We discuss three cases below:

United States v. Stein: In United States v. Stein, the Southern District of New York suppressed statements made by the defendants when their employer, KPMG, conditioned the payment of their legal fees, and in some cases their continued employment, upon their participation in government proffer sessions. (440 F. Supp. 2d 315 (S.D.N.Y. 2006).) In Stein, DOJ had threatened KPMG with an indictment, which the firm believed “would be fatal to the organization.” To avoid indictment, KPMG conditioned payment of its employees’ legal fees for individual counsel on full cooperation with the government, which included agreeing to meet with DOJ prosecutors for proffer sessions. KPMG later argued to the government that it should not be indicted because it had cooperated in numerous ways, including by terminating for noncooperation two employees who asserted their Fifth Amendment right not to testify.

The court cited Supreme Court precedent to explain the applicable legal standard: “[A]ction by a private entity is fairly attributable to the government where there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.” (Id. at 334 (internal quotation marks omitted).) The court explained that this nexus exists either (1) where the state has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice [by the private actor] must in law be deemed to be that of the State; or (2) where the private entity has exercised powers that are traditionally the exclusive prerogative of the State. In other words, state action will be found where the government commands or

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significantly encourages a private entity to take the specific action alleged to violate the Fifth Amendment, as well as where the government is entwined in the management or control of specific conduct at issue. (Id. (alterations in original) (emphasis added) (footnotes omitted) (internal quotation marks omitted).)

The court was persuaded by two pieces of evidence that KPMG’s actions became state action: (1) the then-current version of the DOJ principles, known as the Thompson Memorandum, “which quite specifically tells a company under investigation, as was KPMG, that a failure to ensure that its employees tell prosecutors what they know may contribute to a decision to indict and, in this case, likely destroy the company”; and (2) the US Attorney’s Office’s (USAO’s) “close involvement in KPMG’s decision making process.” (Id. at 336–37.) The court therefore held that “the government, both through the Thompson Memorandum and the actions of the USAO, quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights.” (Id. at 337.)

**United States v. Ferguson:** In 2007, an employee filed a motion seeking to exclude statements he made during two interviews conducted by government agents, claiming that his employer, General Reinsurance Corporation (Gen Re), coerced his participation in the interviews in violation of his Fifth Amendment rights. (United States v. Ferguson, 75 Fed. R. Evid. Serv. (Callaghan) 240 (D. Conn. Nov. 30, 2007).) In this case, the court held that Gen Re was not a state actor. It was not persuaded that the Thompson Memorandum had forced the company to pressure its employee to cooperate, holding that “[p]rivate entities do not become state actors merely because the government influences their decisions, such as through binding regulations”; rather, “the transformation of a private entity into a state actor requires a nexus between the state and the specific conduct of which plaintiff complains.” (Id. ¶ 31 (internal quotation marks omitted).)

The court distinguished *Stein*, noting that, unlike *Stein*, the employee in this matter does not allege facts that would show that the government used the Thompson memo and Gen Re’s fear of prosecution in the same coercive manner employed by the *Stein* prosecutors. Without allegations that would prove significant government influence over Gen Re, the Thompson memo alone, or in combination with the other evidence, does not transform Gen Re into a state actor. (Id.)

The court also noted that, unlike *Stein*, there were not meetings between prosecutors and Gen Re to determine how best to pressure employees into cooperation and Gen Re did not make open threats about not paying legal fees if employees did not cooperate.

**United States v. Carson:** In *United States v. Carson*, the defendants sought to suppress statements they made to company counsel during an internal investigation, alleging that the company’s lawyers were state actors. The court denied the motion. (Order Denying Defendants’ Motion to Suppress Defendants’ Statements, United States v. Carson, No. 8:09-cr-00077 (C.D. Cal. May 22, 2012), ECF No. 774.) It noted that DOJ was not involved in the interviews by company counsel nor did it provide input on which employees to interview or what they should be asked. The court also found that the facts established “no more than a unilateral determination” on the part of the company to cooperate with the government and that the company had a separate business interest in investigating possible criminal conduct within its operations.

The court also distinguished the *Stein* matter factually, noting that in *Stein*, the government coerced KPMG to withdraw defense expenses for its employees, which had not happened in this matter. The court also noted that *Stein* involved employee statements that were made directly to the government, a factor that “certainly enhanced” the court’s finding of coercion. It also stated that the fact that DOJ’s policies “encouraged disclosure of wrongdoing and cooperation is no basis to conclude that every corporation doing so ipso facto converts the corporation and its lawyers into a government agent.” The court cited the *Ferguson* case for the point that “[c]ooperation with the Government does not convert the party cooperating into a state actor.”

It is clear from this series of cases that courts are reluctant to hold that a company’s investigative interviews of its employees may implicate the Fifth Amendment, likely due to the concern raised by the court in *Carson* that such a holding could mean that every company’s internal investigation could be transformed into state action when cooperating with the government. But it is important to note that *Carson* and its predecessors were decided before the recent DOJ speeches that openly acknowledge a new era in which DOJ is “seeking to reshape the conversation” about corporate cooperation, complete with new standards about “true cooperation” and reminders about the stark penalties for failing to cooperate. DOJ argued in *Carson* that the government had not “deliberately coerced” or “significantly encouraged” anything with respect to the company’s internal investigation and employee interviews, and therefore it was not state action and thus the Fifth Amendment did not apply. A future defendant could argue that these recent DOJ speeches constitute “significant encouragement” for companies to conduct employee interviews designed solely to secure evidence of criminal misconduct, which could arguably make their interviews attributable to the state for purposes of the Fifth Amendment. Perhaps this is why recent DOJ speeches seek to emphasize that “the Criminal Division does not dictate how a company should conduct an investigation,” but in these speeches, DOJ simultaneously notes the severe consequences of “guilty pleas and landmark monetary penalties” when a company is deemed to have not properly
cooperated. (Leslie Caldwell, Assistant Attorney Gen. for the Criminal Division, Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement (Apr. 17, 2015), http://tinyurl.com/k66fpfw.)

The potential Fifth Amendment issue becomes particularly significant in light of the fact that the US government has occasionally brought obstruction of justice charges against employees who have lied to company counsel during internal investigations. (See, e.g., United States v. Ring, 628 F. Supp. 2d 195, 223 (D.D.C. 2009); United States v. Kumar, No. 04-cr-00846 (E.D.N.Y. June 28, 2005).) In one case, prosecutors used a broad obstruction statute under Sarbanes-Oxley, 18 U.S.C. § 1519, to bring obstruction charges against an employee who lied to a company’s lawyer as part of an internal investigation before a federal investigation had even begun. (United States v. Ray, No. 2:08-cr-01443 (C.D. Cal. Dec. 15, 2008); see also T. Marcus Funk, § 1519: DOJ Fires Its Anti-Obstruction Cannon, Law360 (Oct. 15, 2010), http://tinyurl.com/pq5ecem.) Under these circumstances, while outside counsel may not be a “surrogate FBI agent or prosecutor,” counsel inevitably become the conduit of information from and about potentially culpable employees if the company follows DOJ’s admonition that this is the heart of any internal investigation if cooperation credit is sought. The court in Stein aptly noted that, with respect to false statements made to private attorneys representing corporations that are under investigation and cooperating with the government, there is “more than a little tension between [the DOJ’s] assertion that the acts of companies cooperating with it are not state action when the cooperator is induced to coerce third parties for the government’s benefit but are sufficiently related to government action that obstruction of the cooperator obstructs the government.” (440 F. Supp. 2d at 337 n.114.)

If, pursuant to DOJ guidance, lawyers for a company structure their investigations to focus on individuals, a serious question also arises as to whether the standard Upjohn warning provided at the onset of every employee interview is sufficient. (See Upjohn Co. v. United States, 449 U.S. 383 (1981).) As it has evolved, the standard Upjohn warning explains that the company may “disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying” the employee. (See ABA WCCC WORKING GRP., UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES 3 (2009), available at http://tinyurl.com/oady7nw.) It does not explain that DOJ now publicly insists that the focus of an investigation should be on identifying culpable employees or does it indicate what might happen to an employee after the contents of the interview are disclosed to the government.

The Supreme Court in the Upjohn decision recognized that lower-level employees often possess information needed by a company’s lawyers. In addition to company policies that often require employees to comply with company investigations, courts have likewise noted that “an employee, like any other agent, owes the employer a duty to disclose to the employer any information pertinent to the employment. This includes an obligation ‘to assist [the] employer’s counsel in the investigation and defense of matters pertaining to the employer’s business.’” (United States v. Stein, 463 F. Supp. 2d 459, 461 (S.D.N.Y. 2006) (alteration in original) (quoting In re Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001)).) This dynamic, where employees, whether located in the United States or in a foreign nation, are duty bound to disclose information and, per DOJ’s admonitions, companies must focus on securing evidence of individual employee culpability, gives rise to a question of whether the Upjohn warning should be modified to address the possible Fifth Amendment issues.

The first modification to the Upjohn warning might be to indicate that it is highly probable that the company will disclose the information provided by the employee if there appears to be evidence that the employee is culpable. The second way the Upjohn warning might be modified would be to include a Miranda-like warning notifying employees that their statements could be used by prosecutors to file personal charges against the employee, including obstruction charges if anything said turns out to be false. (See Miranda v. Arizona, 384 U.S. 436 (1966); Sehyung Daniel Lee, The Benefits of a Miranda-Type Approach to Upjohn Warnings, ABA SECTION OF LITIG. (Apr. 30, 2012), http://tinyurl.com/ks38p8.) But this would have an enormous chilling effect, which, as previously noted, may hinder a company’s ability to gather the relevant facts or even to identify the truly culpable individuals. And while the threat of losing one’s job may not meet the standard for “compulsion” for legal purposes, there are practical similarities between an interview pursuant to a corporate internal investigation and an FBI custodial interview that make this dynamic troubling, even if the attorneys are not legally considered state actors. If enhanced Upjohn warnings are given and a subject corporation is unable to provide DOJ with facts from a number of employees who refused to be interviewed, will DOJ conclude that the company is not providing true cooperation or, at worst, obstructing the investigation?

DOJ officials have discounted these concerns by analogizing the corporate environment to an organized crime family. Miller has suggested that requiring companies to build cases against their employees is not significantly different than tactics used in “mob” cases:

This principle of cooperation is not new or unique to companies. We have applied it to criminal cases of all kinds for decades. Take, for example, organized crime cases. Mob cooperators do not receive cooperation credit merely for halting or disclosing their own criminal conduct. Attempted cooperators should not get reduced sentences if they refuse to provide testimony or fail to turn over evidence against other culpable parties. A true cooperat—whether a mobster or a company—must forthrightly provide all the available facts and evidence so that the
most culpable individuals can be prosecuted. (Miller GIR Remarks, supra.)

But this view is overly simplified and misconstrues the nature of the legal issues typically unearthed through corporate internal investigations, which often are not egregious or blatant, unlike the criminal activity in a mob. Moreover, in mob cases, the government is not demanding that the target interview others in order to find out who may have violated the law. Furthermore, as the Supreme Court in Upjohn noted, there is a “vast and complicated array of regulatory legislation confronting the modern corporation,” and therefore the legal issues that are typically the subject of corporate internal investigations are not clear-cut and the facts and liability of individual employees may be difficult to ascertain. (See 449 U.S. at 392.) With rare exceptions, corporations are not criminal enterprises, and the employment arising from it is nearly always legitimate and beneficial to the marketplace. Of course employees sometimes commit improper acts in the hope of earning promotions or bonuses, or in a misguided effort to improve the company’s bottom line. But in most cases any misconduct is confined to a small segment of the company, and in many cases violations occur despite a company’s best efforts and significant expenditures of resources to ensure compliance with applicable law. Therefore, the decision for a company to build a case against its employees in the name of cooperation is simply not the equivalent of a mobster turning on a fellow accomplice.

Foreign Employees: Collecting Evidence, Disclosing Names

As discussed above, there are several reasons why internal investigations that place primary emphasis on securing evidence against employees can be problematic regardless of where the employees are located. However, in several foreign countries, there are also significant legal restrictions on the ability of an employer to collect and disclose an employee’s personal data, including his or her name or e-mails, to third parties such as the United States government without receiving permission from the individual employee. For example, countries within the European Union are subject to the European data protection directive, which restricts the ability of companies to transfer their employees’ personal data outside the European Union and also to the United States government without their permission or the application of a relevant exemption. (See Council Directive 95/46/EC, arts. 7, 13, 1995 O.J. (L 281) 31 (EU).) Even tighter restrictions are intended to be finalized in 2015 as part of the new General Data Protection Regulation. (Pulina Whitaker & Clare Lynch, The General Data Protection Regulation, *King & Spaulding Client Alert* (Oct. 22, 2014), available at http://tinyurl.com/k52yph8.) Potential sanctions for breaching the new regulations will be substantial: the data protection authority will be able to impose fines up to the greater of (1) 5 percent of its annual global turnover, or (2) EUR 100 million. (Id.)

DOJ officials have acknowledged data privacy restrictions in their remarks, but they have expressed skepticism that these restrictions actually limit a company’s ability to identify employees responsible for the misconduct. Miller warned that:

Corporations are often too quick to claim that they cannot retrieve overseas documents, e-mails or other evidence regarding individuals due to foreign data privacy laws. Just as we carefully test—and at times reject—corporate claims about collateral consequences of a corporate prosecution, the department will scrutinize a claimed inability to provide foreign documents or evidence. We have forged deepening relationships with foreign governments and developed growing sophistication and experience in analyzing foreign laws. A company that tries to hide culpable individuals or otherwise available evidence behind inaccurately expansive interpretations of foreign data protection laws places its cooperation credit at great risk. We strongly encourage careful analysis of those laws with an eye toward cooperating with our investigations, not stalling them. (Miller GIR Remarks, supra.)

Caldwell has likewise expressed skepticism about the notion of data privacy preventing disclosure of the names of culpable foreign employees and the evidence (such as e-mails) associated with them:

We find that global companies are increasingly hasty to invoke foreign data privacy laws to avoid providing evidence to the department. While we recognize that some of these laws pose real challenges to data access and transfer, many do not. As a result, we are looking closely—with an ever more skeptical eye—to ensure that these claims are honest and not obstructionist. A company that reads foreign data protection laws expansively, to restrict its disclosure of documents, when it could be read more narrowly, is in dangerous territory if it wants to receive full cooperation credit. (Caldwell Ethics Remarks, supra.)

In her November 2014 speech, she warned companies not to “hide behind” data privacy laws:

The Criminal Division investigates and prosecutes a large volume of international cases and through these cases, we have developed an understanding of these laws. We will not give full cooperation credit to companies that hide behind foreign data privacy laws instead of providing overseas documents when they can. Foreign data privacy laws exist to protect individual privacy, not to shield companies that purport to be cooperating in criminal investigations. (Caldwell FCPA Speech, supra.)
In a May 2015 question-and-answer session, it was reported that Caldwell told the audience that “companies should weigh the benefits of cooperating with US investigators against the seriousness of a foreign jurisdiction’s own data privacy enforcement” given that “many countries have data privacy laws that are covered in dust.” (Josh Kovensky, Caldwell Discusses DOJ’s Evolving Thinking, JUST ANTI-CORRUPTION (May 13, 2015), available [subscription only] at http://tinyurl.com/nav3vk8.) Thus, DOJ officials appear to be taking the position that if certain foreign data protection laws can be read expansively or narrowly, an expansive reading puts the company “in dangerous territory.” But, of course, US lawyers assisting foreign companies are generally not qualified to advise or opine on foreign data privacy laws, and instead are largely dependent on the advice they receive from lawyers licensed to practice in the relevant countries as to whether it is permissible to disclose foreign employees’ names and e-mails to the US government. Is DOJ suggesting that if a reputable foreign law firm provides legal advice on what data can and cannot be shared under local laws in a way that DOJ would construe as an “expansive reading,” the company should second-guess this advice and seek an opinion from another law firm and push that firm to reach the narrow reading? Or that companies should disregard foreign laws if they are dusty? The subject company clearly needs to be able to rely on legal advice when it transfers information and data to the United States. The goal, of course, should be to identify the correct reading of the law. Given that DOJ states that it has a “growing sophistication and experience in analyzing foreign [data privacy] laws,” it should be willing to provide meaningful guidance on the laws at issue to US companies. Also, given that DOJ has “forged deepening relationships with foreign governments,” DOJ should be willing to provide the position being taken by the relevant foreign regulator if it disagrees with the position being taken by the subject company. Subject companies are entitled to have solid legal advice on which to rely in order to avoid liability and penalties for alleged violations of data privacy restrictions. This is the most appropriate way to reach the “honest” and accurate result.

In addition, DOJ’s comments do not address the possibility that evidence located in foreign countries may not be at a company’s disposal in the same way it is in the United States due to differences in workers’ rights. For example, many European countries have restrictions against monitoring employees at work, notification requirements to relevant data protection authorities, and applicable works councils or trade unions that limit or slow down a company’s ability to interview its employees and collect personal data. These employees also have rights to object to the processing of their personal data. (Council Directive 95/46/EC, art. 14.) Employees in these jurisdictions often have greater employment protections, such as protection against dismissal if they refuse to cooperate with an internal investigation, and the use and collection of personal data must be balanced with the individual’s fundamental data protection and data privacy rights. (Council Directive 95/46/EC, arts. 6, 7.)

**Settlements Cited by Justice Department as Examples**

Both Caldwell and Miller provided examples of recent settlements in their speeches to demonstrate the value received when cooperation credit is earned and the consequences when it is not. However, as explained below, these settlements as described publicly do not provide clear guidance as to what the company did to make the securement of evidence of individual culpability “the focus” of the internal investigation. The settlements also do not explain how relevant data privacy issues were resolved. Four of these cases (PetroTiger, Alcoa World Alumina, BNP Paribas, and Deutsche Bank) are described below.

**PetroTiger:** DOJ announced in January 2014 that it had brought charges against three of PetroTiger’s executives for making improper payments in violation of the FCPA. (Press Release, DOJ, Foreign Bribery Charges Unsealed against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), http://tinyurl.com/nkh2ar3.) Both Caldwell and Miller referenced this matter as an example of the benefits of cooperation. Miller noted that the improper conduct was “brought to the attention of the department through voluntary disclosure by PetroTiger, which cooperated fully with the department’s investigation. Notably, no charges of any kind were filed against PetroTiger, and no non-prosecution agreement was entered.” (Miller GIR Remarks, supra.) Likewise, Caldwell said that “PetroTiger is a fine example of the kind of cooperation we expect. The company self-reported and fully disclosed the relevant facts to us, even though those facts implicated two CEOs and a top in-house counsel. PetroTiger itself has not been charged.” (Caldwell FCPA Speech, supra.)

This settlement demonstrates that the company provided “relevant facts” about the three executives but does not demonstrate if or how securing evidence of individual culpability was the focus of the internal investigation. In addition, the criminal complaint against the company’s CEO suggests that the relevant documents were located in the United States (specifically New Jersey), so data privacy was likely not an issue. (Complaint, United States v. Sigelman, No. 13-2087 (D.N.J. Nov. 8, 2013), available at http://tinyurl.com/ospz32a.) More specific descriptions of what types of evidence were provided to DOJ about the three indicted executives would be instructive for companies looking to model their investigations after a company that avoided being charged by earning cooperation credit.

**Alcoa World Alumina:** Alcoa pleaded guilty to a violation of the FCPA in January 2014 and paid a total of $384 million in penalties to DOJ and the Securities and Exchange Commission (SEC). (Press Release, DOJ, Alcoa
World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (Jan. 9, 2014), http://tinyurl.com/kku8lgj.) Caldwell cited Alcoa as an example of the benefits of corporate cooperation and noted:

The department publicly commended Alcoa for its cooperation, which included conducting an extensive internal investigation, making proffers to the government, voluntarily making current and former employees available for interviews, and providing relevant documents to the department. Alcoa’s cooperation was mentioned specifically as a factor that lowered the size of the criminal fine. In fact, absent cooperation, Alcoa could have faced a fine of more than $1 billion. (Caldwell Ethics Remarks, supra.)

However, it is worth noting that Alcoa’s $384 million settlement amount is the sixth largest in FCPA history, so its cooperation only helped so much. (Richard L. Cassin, With Alstom, Three French Companies Are Now in the FCPA Top Ten, FCPA Blog (Dec. 23, 2014), http://tinyurl.com/mkehwaj.) In addition, the company’s cooperation is only one of several factors listed in the plea agreement as reasons for the lowered penalty, so the weight accorded to cooperation is unclear. The plea agreement lists other persuasive reasons for a lower fine, including the company’s current financial condition and the fine imposed by SEC. (Plea Agreement, United States v. Alcoa World Alumina LLC, No. 14-7 (W.D. Pa. Jan. 9, 2014), available at http://tinyurl.com/kvbc99z.) What Alcoa did to present facts about the culpability of company officers and employees is not discussed.

To date, no Alcoa employees have been charged in connection with this matter. To the extent DOJ’s praise stems from Alcoa voluntarily making employees available for interviews, that form of cooperation is fairly common in corporate investigations and not the same as the company making extensive efforts to secure evidence of individual culpability the focus of their investigation. In fact, Caldwell noted in a separate speech that facilitating “the department’s interviews of current and former employees, including foreign personnel...is the minimum we expect and need from cooperation.” (Leslie R. Caldwell, Assistant Attorney Gen., Speech at the New York City Bar Association’s Fourth Annual White Collar Crime Institute (May 12, 2015), http://tinyurl.com/lkvbxyq [hereinafter Caldwell White Collar Speech].) Did Alcoa provide information about employee culpability and, despite that, was there insufficient evidence to indict anyone? Nothing DOJ lists in its press release as examples of Alcoa’s cooperation seems particularly unusual, as companies almost always provide this kind of cooperation, so it is unclear why this meets the new standard for true cooperation.

Finally, and importantly, in terms of foreign data privacy, the relevant employee (named “Executive A” in the plea agreement) was based in Pennsylvania, so it is possible that there were not any applicable foreign data privacy restrictions.

**BNP Paribas:** BNP Paribas paid $8.9 billion to settle allegations that it had conspired “to violate the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA) by processing billions of dollars of transactions through the U.S. financial system on behalf of Sudanese, Iranian, and Cuban entities subject to U.S. economic sanctions.” (Press Release, DOJ, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), http://tinyurl.com/k6pqy53.) Both Caldwell and Miller cited the BNP Paribas matter as an example of the consequences when companies do not properly cooperate. Caldwell stated:

Since it is difficult for me to publicly discuss some of the most positive results of cooperation, perhaps I can illustrate the point in reverse. In the plea agreement with BNP Paribas, the department highlighted the bank’s lack of cooperation with the government investigation as a crucial factor in the decision to require a guilty plea and record monetary penalties. Significantly, BNP affirmatively hampered the department’s ability to prosecute individual executives and employees for their criminal misconduct. To be sure, the breadth of the pervasive criminal misconduct in that case played a large part in the resolutions. But, had the bank fully cooperated with the government investigation from the outset and provided the facts about the involvement of its employees, the bank would have been in a much better position on its day of reckoning. (Caldwell Ethics Remarks, supra.)

In a May 2015 speech, Caldwell further explained that BNP “not only failed to cooperate with our investigation at the outset, but affirmatively hindered the investigation by dragging its feet, based in part on assertions regarding data privacy laws.” (Caldwell White Collar Speech, supra.) Neither the plea agreement nor DOJ’s public statements provide more detail on exactly how BNP Paribas “affirmatively hindered” DOJ’s efforts to prosecute individuals and to our knowledge, it has not been publicly reported exactly how BNP dragged its feet and what the bank’s explanation for that conduct was. But it might not be a coincidence that BNP Paribas is based in France, which has very strong data protection laws, and therefore it could be the case that some of the delays were outside BNP Paribas’s control. (Sarah Pearce, Data Protection in France: Overview, Practical L. (July 1, 2014), http://tinyurl.com/phlp688.) In fact, in the subsequent question-and-answer session following
her May 2015 speech, Caldwell herself is reported to have stated, “we understand when the company says we can’t give you these documents because of the French data privacy law. We understand that there really is a robust French data privacy law.” (Josh Kovensky, Caldwell Discusses DOJ’s Evolving Thinking, JUST ANTI-CORRUPTION (May 13, 2015), available [subscription only] at http://tinyurl.com/nav3vk8.) Without providing more details, it is confusing when the DOJ criticizes a company for dragging its feet based on assertions regarding data privacy laws while simultaneously acknowledging that the country in which the company is based has a robust data privacy law.

Deutsche Bank: The settlement examples that DOJ has provided in its speeches generally demonstrate that cooperation is valuable, but still do not provide specifics of what was done to convince DOJ that “the heart” of the company’s cooperation was the provision of evidence of individual culpability, and they are silent as to the challenges that these companies faced in navigating foreign data privacy restrictions. DOJ has seemingly heard these concerns and responded by recently providing greater details of its cooperation analysis in an April 2015 deferred prosecution agreement with Deutsche Bank. (Deferred Prosecution Agreement, United States v. Deutsche Bank, (D. Conn.) Apr. 23, 2015, http://tinyurl.com/pzwoa7a.) In this matter, Deutsche Bank paid a $775 million penalty for LIBOR manipulations and price fixing, which is the largest penalty imposed by the Department of Justice to date in its LIBOR investigation. (Caldwell White Collar Speech, supra.) As Caldwell described, the Deutsche Bank DPA provides a “detailed description of what Deutsche Bank did right in terms of cooperation, and where they fell short.” (Id.) These shortcomings include allegedly purposefully withholding certain information from the DOJ and committing various data preservation, collection, and production errors, including inadvertently destroying relevant audio recordings, as well as not being proactive in its investigation and disclosure. (Id.) However, Caldwell only stated generally that the bank received “some credit for cooperation” for its “eventual provision to us of information about the conduct of specific individuals” without describing what exactly that entailed. (Id.)

In the Deutsche Bank matter, data privacy did not appear to be an impediment to the production of data to DOJ. But in some cases, companies will ultimately not be able to give DOJ the data it has requested related to individuals due to foreign data privacy restrictions. Miller has asserted that “when prosecutions of culpable individuals are prevented, the government’s interest may only be vindicated by prosecuting the corporation itself.” (Miller GIR Remarks, supra.) There are plenty of times where the prosecution of a company’s culpable employees is prevented through no fault of the company that has fully cooperated—does this mean that DOJ is obligated to punish the corporation, even in cases where the corporation was also a victim of a rogue employee’s unauthorized conduct or where the evidence as to “subject” employees is unclear? With the Alcoa example, was DOJ unable to make a case against individuals while also concluding that the company did not “whitewash” the facts about an individual’s involvement, or are those prosecutions forthcoming? We encourage DOJ to provide complete answers to these important questions.

Conclusion: Is It Worth It?

This shift in how DOJ prioritizes one factor in its approach to corporate cooperation—with senior DOJ officials now suggesting that serving up culpable employees is “the heart” of effective cooperation—still leaves outside and in-house counsel with uncertainties as to the benefit the company will receive from such cooperation. The shift may be the result of enormous public pressure on government enforcement authorities to bring cases against individuals in white-collar matters. (Peter J. Henning, Pursuit of Individuals in Corporate Misconduct Still Arduous, N.Y. TIMES, Sept. 22, 2014, http://tinyurl.com/lwj23lj.) “Securing extensive evidence” of individual culpability essentially hands the case to the government with less follow-up required. While DOJ suggests that it does not expect companies to reach a legal conclusion “that executive A violated a particular criminal law,” that may essentially be all that is left for DOJ to do after companies have built a case factually against an employee in order to earn cooperation credit. Should companies that conduct internal inquiries before DOJ or a foreign nation initiates a formal investigation resolve all inferences in favor of a conclusion that the law has been violated and that subject employees were responsible for the violation? If there are two or more ways of viewing the evidence, must companies serve up their employees as having committed a crime in hopes that they will not be prosecuted?

With the DOJ principles already stating that companies should identify “relevant actors” and disclose relevant facts, DOJ appears to be ratcheting the standards up a notch by expanding what it means to provide names and facts. What should a company do if the focus on individuals in certain foreign nations may result in arrests of foreign-based employees or the execution of search warrants before all of the key facts are known? Companies and their counsel must weigh the likelihood of the government learning about the potential misconduct with the rewards they will obtain if they voluntarily disclose and cooperate. In our view, a fair reading of the DOJ principles would instruct DOJ to evaluate whether companies have reasonably gathered and disclosed the most relevant facts encompassed by the scope of the investigation. If those facts happen to exonerate or implicate individual employees or simply tell the factual story in a circumstance that is not clear, then those facts should be disclosed and the company should receive cooperation credit.
Dear Mr. President: You Are a Federal Inmate’s Last Chance for Hope

BY JEFFREY LAZARUS

I want to introduce you to Andre. Anyone who has practiced criminal defense has probably represented someone a lot like Andre. Born to a 15-year-old single mother and largely raised by his grandmother, Andre had a rough childhood. He grew up in a predominantly African American area of Cleveland called Hough—a neighborhood that gained national attention in the late 1960s for race riots that saw numerous buildings burned to the ground, left scores injured and four dead. Crime, drugs, gangs, and violence ran rampant then, and, years later, the mayhem continued with schools, churches, banks, and stores vandalized or set on fire. This is the neighborhood into which Andre was born and where he was raised.

For Andre, the evils of Hough were unavoidable. As a youngster, he could not go to school, play with his friends, or go to the corner store without seeing drugs or violence. It was a part of his life. As Andre became a teenager in the late 1980s, it was easier to find crack cocaine than a book. With few adult male role models around, it was not long before Andre started to look up to local drug dealers and gang members who, in exchange for money, began to rely on Andre to run small errands related to their drug businesses. It was commonplace, even expected, in this neighborhood for a 14-year-old to be involved in some aspect of the drug trade.

By age 16, Andre had moved up the ranks, and was selling drugs on the street corner. This allowed him to buy groceries, clothing, and shoes, and have other status symbols. While his new-found wealth and popularity seemed like a dream come true, it had its dark side. Andre was arrested for state drug violations and went to juvenile court, which offered him few services and no rehabilitation. By the time he turned 18, he had almost no education and no employment skills or prospects.

At age 19, he was arrested for selling crack cocaine to an undercover officer and released on bond. While that case was pending, he was arrested again for possession of crack cocaine. He was found holding 4.5 grams of crack in the first case, and 3.2 grams in the second. He now had two separate, low-level felonies. He pleaded guilty to both, and the cases were consolidated for the purposes of sentencing; he received one year in state prison and was released a week after his twentieth birthday.

Andre returned to his home and family and to the same neighborhood with the same problems. He spent months trying to find a legitimate job because he didn’t want to go back to prison. But he learned a bitter lesson—a 20-year-old from the Hough neighborhood with no education, no prior work experience, and a parole officer is not the most marketable employee. After nearly a year of minimum wage jobs, he could not resist the allure of the drug game. Every day he saw neighborhood addicts who were trying to give money away, so he started selling crack again. Shortly, Andre reclaimed his street corner as his territory. It was not long until Andre became the target of an investigation, and, in 1994, the FBI raided...
Andre was charged in federal court with possession of crack cocaine with the intent to distribute. (21 U.S.C. § 841(a)(1).) Because he had over 50 grams of crack, he was immediately subject to a statutory range of 10 years to life. However, because he had two prior drug felonies—the state cases that were consolidated for sentencing purposes—the government filed a notice enhancing his statutory sentencing range to mandatory life. (21 U.S.C. § 841(b)(1)(A) (1994).) Because there is no parole in the federal system “life means life”; if convicted, Andre now will die in prison. With nothing to lose, Andre opted for a trial—it lasted two days and he was convicted. In 1995, the 22-year-old was sentenced to life in prison. Andre took a stab at appeals, habeas corpus petitions, and even sentence reduction motions. (18 U.S.C. § 3582(c)(2); 28 U.S.C. § 2255.) Like many other young African Americans serving outrageous sentences for crack cocaine offenses, Andre challenged the disproportionate nature of his sentence. Specifically, he claimed that federal sentencing laws for crack cocaine, as compared to powder cocaine, were both irrationally harsh and had an unfair impact on African Americans. His motions were all denied.

In 2010, after Andre has served 15 years of his life sentence, Congress passed and President Obama signed new legislation in order to “restore fairness” to the federal crack cocaine law by enacting the Fair Sentencing Act (FSA). (Pub. L. No. 111-220 (2010); 124 Stat. 2372.) The FSA sought to equalize the disparities between crack and powder cocaine sentences by raising the thresholds of the amounts needed to trigger the mandatory minimums. Were Andre sentenced under the FSA, his 60 grams of crack cocaine (with two prior drug felonies) would subject him to a mandatory minimum sentence of 10 years instead of mandatory life. (Pub. L. No. 111-220, § 2.)

This legislation, however, did not explicitly state whether it would apply retroactively to those already serving harsh sentences. As a result, all federal courts have refused to grant relief to defendants sentenced prior to the passage of the FSA. (See United States v. Blewett, 719 F.3d 482 (6th Cir. 2013); United States v. Powell, 652 F.3d 702, 710 (7th Cir. 2011); United States v. Baptist, 646 F.3d 1225, 1226–28 (9th Cir. 2011); United States v. Bullard, 645 F.3d 237, 248–49 (4th Cir. 2011); United States v. Goncalves, 642 F.3d 245, 252–55 (1st Cir. 2011); United States v. Doggins, 633 F.3d 379, 384 (5th Cir. 2011); United States v. Reevey, 631 F.3d 110, 115 (3d Cir. 2010); United States v. Diaz, 627 F.3d 930, 931 (2d Cir. 2010); United States v. Lewis, 625 F.3d 1224, 1228 (10th Cir. 2010); United States v. Brewer, 624 F.3d 900, 909 n.7 (8th Cir. 2010); United States v. Gomes, 621 F.3d 1343, 1346 (11th Cir. 2010).) Thus, even though the FSA has eroded the old sentencing scheme, which the FSA declared to be wrong and unfair, Andre languishes in prison under the old penalties, for the rest of his life.

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A Common Story

Andre’s story, while compelling, is not unique. There are currently more than 200,000 individuals in the Bureau of Prisons facilities. (By the Numbers: Population Statistics, Fed. Bureau of Prisons, www.bop.gov/news/quick.jsp (last visited May 6, 2015).) About 15 percent of all federal prisoners, roughly 30,000 individuals, are serving sentences for crack cocaine offenses. (Blewett, 719 F.3d at 485 (citing Memorandum from the U.S. Sentencing Comm’n to Chair Patti B. Saris et al., Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retrospectively 12 (May 20, 2011), available at http://tinyurl.com/qcl5a7t.) About 83 percent of federal prisoners serving crack cocaine sentences are African American. (U.S. Sentencing Comm’n 2011 Annual Report, Ch. 5, at 37, available at http://tinyurl.com/kwhlecq.) Thousands of these prisoners are incarcerated for life or for 20, 10, or five years under mandatory minimum crack cocaine sentences imposed prior to the passage of the FSA. In fact, in the eight months before the passage of the FSA, nearly 4,000 defendants received mandatory minimum sentences for crack cocaine. (Id.)

These inmates, like Andre, have no possibility of sentencing relief from the federal courts. While Congress has the power to make the FSA retroactive, it has not done so. Luckily, our third branch of government has taken up an initiative to aid these inmates. Last year, President Obama decided to take an “important step toward restoring fundamental ideals of justice and fairness” by announcing a clemency initiative. (James M. Cole, Deputy Attorney Gen., Remarks Prepared for the Press Conference Announcing the Clemency Initiative (Apr. 23, 2014), http://tinyurl.com/p2yl9ww.) Clemency is a power conferred upon the president under Article II of the Constitution, and allows the president to reduce or commute an inmate’s sentence. The impact of the president’s decision is truly groundbreaking. Defense lawyers are keenly conscious of those clients who were sentenced to serve far too much time. The clemency initiative, while a little unorthodox, provides a real and achievable way to set that injustice right.

The criteria for who will be considered are relatively straightforward. On January 30, 2014, then-Deputy Attorney General James Cole announced the president’s plan to the New York State Bar Association. On April 23, 2014, Cole detailed the six criteria for the initiative. The inmate must:

1. currently be serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today;
2. be sentenced for a nonviolent, low-level offense without significant ties to large-scale criminal organizations, gangs, or cartels;
3. have served at least 10 years of the sentence;
4. not have a significant criminal history;
5. have demonstrated good conduct in prison; and
6. have no history of violence prior to or during the current term of imprisonment.

(Press Release, DOJ, Announcing New Clemency Initiative, Summer 2015)
Thus, many inmates serving pre-FSA crack cocaine sentences will be able to show they would be subject to a lesser statutory mandatory minimum or none at all. However, the clemency initiative is not limited to inmates convicted based on crack cocaine crimes. Those sentenced for other drug offenses, or even non-drug-related offenses, may qualify. Many defendants sentenced under the career offender provision (U.S. SENTENCING GUIDELINES MANUAL § 4B1.1) or the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)) have valid arguments as to why they might not receive these sentencing enhancements today. Many enhanced sentences are a function of an inmate’s prior state convictions, and changes to the respective state law since sentencing may have an effect on the inmate’s designation if sentenced today. Furthermore, recent US Supreme Court opinions, or changes in federal circuit precedent, may allow the argument to be made that the inmate would not be subject to sentencing enhancements if sentenced today.

**Criterion two:** The offense for which the inmate is incarcerated must be a nonviolent, low-level offense without significant ties to large-scale criminal organizations, gangs, or cartels. This requires a detailed review of the offense for which the inmate is currently serving. Look at the inmate’s specific conduct, not just the statutory definition of the offense; it is about the “offender” not the offense generally. If a co-conspirator or co-defendant in the offense committed any violent acts, these are not disqualifying. It would be disqualifying if the inmate used, attempted to use, made a credible threat to use, or directed the use of physical force against another. Also, possession of a firearm in commission of the offense is not a disqualifier, but operation of a firearm is considered violent. To answer these questions, one should take a close look at the documents in the district court record, such as the plea agreement, the indictment, the presentence report, any transcripts, and the sentencing memoranda.

**Criterion three:** The requirement that any inmate has served at least 10 years of the sentence to qualify for clemency seems straightforward. Keep a few things in mind. First, the Bureau of Prisons keeps records detailing when the inmate’s custodial sentence began. These records should be requested in evaluating eligibility. Second, any pretrial detention on the instant case prior to the imposition of the sentence will count toward this 10-year requirement. Third, federal inmates can earn some credits to their sentences. For example, inmates are eligible to receive up to 54 days of “good time credit” for each year of incarceration, equating to approximately 18 months over a 10-year sentence. (18 U.S.C. § 3624(b).) Additionally, inmates can receive up to a year off their sentences if they are admitted and complete the Bureau of Prisons’ residential drug abuse treatment program (RDAP). (18 U.S.C. § 3621(e).) The Bureau of Prisons records will detail how many of these credits the inmate has earned. Fourth, keep in mind that if an inmate has not yet served 10 years, President Obama may grant clemency up to the point he leaves the White House on January 20, 2017.
Criminology

These infractions. The progress report provides a short clemency. Any clemency petition would need to address any rules infractions will be detailed in an inmate's progress report, and should be investigated in order to seek clemency. If the inmate has become substantially rehabilitated, thereby completing by the inmate, can be powerful support for why combat drug addiction. Each of these courses, if completed, would, however, offer two additional criteria that should be in any petition. First, include a release plan for the inmate. The president wants to know how the inmate will transition back into society—how he or she will demonstrate rehabilitation and refrain from falling back into a life of crime. The inmate needs a plan of action: Where will the inmate live? With whom will the inmate live? How will the inmate find work that will offer sufficient financial support? And how will the inmate apply the skills learned in prison? This can be an arduous task.

Likely, the attorney preparing the petition will need to locate the inmate's family and friends in order to find out where the inmate will live upon release. The family members should be asked if they can help the inmate secure employment. See if the family knows of someone who

What's Next?
The above six criteria are relatively straightforward and provide a workable outline for a clemency petition. I would, however, offer two additional criteria that should be in any petition. First, include a release plan for the inmate. The president wants to know how the inmate will transition back into society—how he or she will demonstrate rehabilitation and refrain from falling back into a life of crime. The inmate needs a plan of action: Where will the inmate live? With whom will the inmate live? How will the inmate find work that will offer sufficient financial support? And how will the inmate apply the skills learned in prison? This can be an arduous task.

An inmate will also be disqualified if the inmate has been sanctioned for violent conduct in prison. It is no surprise that a federal prison commonly has fights, but understanding the inmate's role in the fight is crucial. The Bureau of Prisons' reports will contain information about the charge and will include findings of fact and evidence relied upon. Understanding the full story behind any infractions is required.

In order to effectively and properly petition for clemency, it is necessary to investigate the inmate's prior convictions. Looking solely at the presentence report is a recipe for failure, so getting the actual court records from the convictions is the only way to uncover the truth. The journal entries, indictment, and police reports may reveal substantial mitigation in support of clemency.

Criterion five: If the inmate's behavior in prison reflects his or her behavior in the community, the inmate may not be a good candidate for clemency. This criterion suggests the president is looking to make commutations only to those who have made real efforts toward rehabilitation. Therefore, a full investigation of the inmate's institutional conduct is necessary. The Bureau of Prisons prepares a progress report for every inmate, known as the Inmate Skills Development Plan, which details the individual's progress in the institution. It lists the education courses taken, the work history in prison, and disciplinary conduct. Some inmates have completed a significant number of education courses, such as earning their GED, college credits, or even a college degree. Other inmates have taken courses in trade, vocational, or business skills, and some basic life needs classes. The prison also offers courses to combat drug addiction. Each of these courses, if completed by the inmate, can be powerful support for why the inmate has become substantially rehabilitated, thereby warranting a commutation.

The other side of the coin is that many inmates violate the rules of the prison and are disciplined. The history of any rules infractions will be detailed in an inmate's progress report, and should be investigated in order to seek clemency. Any clemency petition would need to address these infractions. The progress report provides a short description of the infraction, and the sanction imposed, but few other details. In some cases, the lawyer seeking clemency will need to obtain more detailed reports regarding the infraction in order to make a case for clemency. The inmate will need to sign a release to allow the Bureau of Prisons to disclose such reports. After an investigation, some infractions can be properly mitigated, and some will be revealed to be quite serious. Doing such an investigation is absolutely necessary, and could make all the difference in securing a commutation.

Criterion six: Inmates must not have any violence in their prior history or during their current term of imprisonment. This criterion seems to be a bit redundant and engulfs some of the prior criteria, but it only reinforces how much emphasis President Obama places on commuting the sentences of only those who are deserving. First, go back to the inmate's prior criminal convictions. If there is a “crime of violence” or a “violent felony” as defined by federal law, the inmate may be disqualified if his or her conduct was, in fact, violent. (See 18 U.S.C. § 924(e)(2); U.S. SENTENCING GUIDELINES MANUAL § 4B1.1.) Look not just to the conviction itself, but the defendant’s own conduct. For example, a prior conviction for burglary is a crime of violence under federal law, but the crime can be committed in a way that is violent or nonviolent. Find the necessary documents and determine what role the inmate played in committing the offense and what the inmate's conduct was like during the offense—much as in criterion two and four. This may require going back to the state or municipal court and getting the indictment, plea transcript, sentencing transcript, police reports, or other pleadings filed.

An inmate will also be disqualified if the inmate has been sanctioned for violent conduct in prison. It is no surprise that a federal prison commonly has fights, but understanding the inmate's role in the fight is crucial. The Bureau of Prisons' reports will contain information about the charge and will include findings of fact and evidence relied upon. Understanding the full story behind any infractions is required.
will hire the inmate, then contact that person to find out if there is a job waiting upon the inmate’s release. Because the inmate will be discharged to supervised release, family members will need to indicate whether they will help meet the demands of the supervised release officer. Once this information is secured, see if you can get support letters that can be attached to the petition.

The second tip I offer is to tell a good story. The president will likely be reviewing tens of thousands of petitions, and the petition needs to explain why the inmate is unique. What is so special about this inmate’s circumstances that warrant clemency as opposed to others? It could be the inmate’s life history, the irregularity of the court case, or even the inmate’s rehabilitative efforts. Something has to set the inmate apart and make him or her a good candidate.

The next question is what to do with these six criteria and how to make a final petition. The petition should begin with an “executive summary,” which is a short introduction and a brief overview of how the inmate meets the six criteria. I also suggest including a table of contents as to the rest of the documents that will be submitted in the petition. You will next want to include DOJ’s form for a petition for commutation, available at http://tinyurl.com/o99vnn7.

The next step is compiling a memorandum in support of clemency. This is really the meatiest part of the petition. It is here that the story of the inmate is told, and the life history and details of the case are exposed, and the six criteria are thoroughly discussed along with the release plan. This isn’t a legal brief, but citations to the record, statutes, guidelines, and relevant case law will help. The remainder of the petition consists of the support documents. You should include a copy of the docket for the underlying case, a copy of the presentence report, the appellate court opinions, opinions relating to any postconviction petitions, and any relevant orders by the district court. You may want to look at district court proceeding transcripts, as any statements made regarding the egregious nature of the inmate’s sentence may be beneficial. If there are issues in the petition relating to the inmate’s prior convictions, the relevant documents should be included. The Inmate Skills Development Plan, and any relevant institutional reports, should be included as well. Finally, any support letters should be attached to the petition. With mixed results, I have even requested the sentencing judge author a letter in support of clemency to attach to the petition. In the end, the petition with all accompanying documents will be quite lengthy. The petition needs to include everything that President Obama will need to make his decision.

There are literally thousands of inmates who are serving lengthy federal prison sentences, who, if sentenced today, would receive a substantially lower sentence. Seeking clemmation from the president is their only hope for relief. These inmates need help to achieve this goal. A number of groups—the American Bar Association, the American Civil Liberties Union, Families Against Mandatory Minimums, the Federal Public and Community Defenders, and the National Association of Criminal Defense Lawyers—have joined under a working group they call Clemency Project 2014, which identifies potential clemency petitioners and then both recruits and trains lawyers to assist the inmates in their clemency efforts. If you are interested in working on these clemency petitions, or just want more information about the group, go to www.clemencyproject2014.org.

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Prosecutions Accelerate (continued from page 31)

as it did in the Marubeni/Alstom and PetroTiger investigations, we can expect that it may have an easier time accessing foreign-located documents and evidence through requests made directly to foreign sovereigns. Companies may need to recalibrate their assessment of the likelihood that DOJ will be able to obtain that evidence through alternate means.

Similarly, increased collaboration with foreign law enforcement means that the Justice Department may have an easier time accessing foreign-located documents that are protected by foreign data privacy laws. Where companies often face difficulty in transferring overseas documents to US counsel due to strict data privacy regimes, law enforcement in other countries may not face such restrictions. Companies should be aware that documents produced to a foreign regulator may be shared with the Justice Department regardless of otherwise strict data privacy regimes.

We can expect that documents will indeed be shared if collaboration between international law enforcement keeps increasing. Companies should be aware that increased cooperation among global law enforcement agencies means the playing field increasingly is tilted—DOJ’s access to documents may be unencumbered by jurisdictional issues or data privacy laws, while company counsel must be prepared to find ways to quickly review documents and develop relevant facts despite limitations on access.

Second, if the US and UK authorities see successful results from dividing up prosecutions, we can expect to see more of this type of forum shopping in the future. When companies are involved in multiagency, multijurisdictional investigations, employees and executives at risk of prosecution may need to engage foreign criminal counsel earlier in every jurisdiction investigating. If they are prosecuted, there is no guarantee that it will be by law enforcement in the country in which they reside.

Conclusion

Ultimately, the trends discussed in this article are here to stay. DOJ will continue to focus on prosecuting individuals for financial fraud and other white-collar crimes, especially if the political climate remains the same. DOJ will also continue to increase its collaboration with foreign law enforcement to pursue individuals and companies overseas. We can expect that DOJ will combine these initiatives to achieve its goal to reach and prosecute foreign executives to the fullest extent possible.
Prosecutorial Conflicts of Interest and Excessive Use of Force by Police

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Investigations into the deaths of Michael Brown and Eric Garner raised important questions about prosecutorial conflict of interest when investigating allegations of excessive force by police. Both Brown and Garner were unarmed and in both instances died at the hands of the police.

In Ferguson, Missouri, after Officer Darren Wilson shot and killed Brown, several witnesses stated that Brown had his hands in the air and was surrendering when Wilson fired several times, with at least six shots hitting Brown. Wilson stated that Brown was coming toward him and that Wilson feared for his safety and the safety of others. Rather than arrest Wilson, the police on the scene permitted Wilson to return to the station by himself. The following day, police investigators took a statement from Wilson with Wilson’s defense attorney present. As the investigation proceeded, some witnesses stated that, consistent with Officer Wilson’s claim, Brown was not surrendering but was advancing toward Wilson when Wilson shot and killed Brown. In the face of contested versions of what occurred, the head prosecutor for St. Louis County announced that all of the evidence would be presented to the grand jury, which would then decide whether Officer Wilson would be charged.

On Staten Island, New York, Officer Daniel Pantaleo placed Garner in a banned chokehold after Pantaleo and several other officers brought Garner to the ground while arresting him for selling single cigarettes contrary to law. A video of the incident, viewed widely over the Internet and on television, showed Garner gasping for breath and saying “I can’t breathe” multiple times, while officers and eventually an emergency medical team stood by passively. Garner was pronounced dead on arrival approximately an hour later at the hospital. The medical examiners determined that Garner was killed due to the chokehold and ruled Garner’s death a homicide. The head prosecutor for Staten Island decided to refer the matter to the grand jury and that the grand jury would decide if Officer Pantaleo would be charged.

Both grand juries met for several weeks. In both instances the grand juries heard from the officers responsible for the deaths of the unarmed suspects. Wilson testified that he was in fear for his own safety and the safety of others when he shot Brown, whom Wilson said was moving toward him and not surrendering. Pantaleo testified that he did not intend to harm Garner, and that he was trying to use a wrestling move and not a chokehold. Both grand juries returned no true bills, deciding against indicting each officer. According to the grand jury transcript in the Brown case, which was released, the prosecutors presenting the case did not argue that the evidence supported a finding of probable cause and an indictment on any of the possible charges presented. The head prosecutor in the Garner case has resisted a lawsuit seeking release of the grand jury transcript, so it is unclear whether the prosecutors presenting the evidence asked the grand jury to return an indictment.

Thousands protested the grand jury decisions in Missouri and New York. Many across the country called for special prosecutors to reexamine the deaths of Brown and Garner, claiming that the local prosecutors work too closely with the police not to show favoritism, consciously or unconsciously, to police officers. Some legal commentators, such as Paul Butler at Georgetown and Monroe Freedman at Hofstra, argued that the prosecutors had personal and professional interests in maintaining good relationships with the police, and an indictment of a fellow police officer might lead some on the police force not to cooperate with the prosecutors. In their view, the head prosecutors committed the “most serious of ethical violations, which was their conflict of interest in participating in the indictment of a police officer in their own jurisdiction.” (Monroe Freedman & Paul Butler, Ferguson Prosecutor Should Have Bowed Out, Nat’l L.J., Dec. 8, 2014, at 30.)

Concern about prosecutorial conflict of interest in handling allegations of excessive force by police is widespread. Many say that independent

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review by special prosecutors in such cases is necessary in order to increase public confidence in the criminal justice system. Some, like Butler and Freedman, argue that without a special prosecutor there is unequal justice, that is, different justice for police officers than for others in the community.

Do current conflict of interest rules require a prosecutor to withdraw from investigating and evaluating charges against police when there are allegations of excessive use of force? Is a special prosecutor required in such cases? Is a special prosecutor desirable and consistent with other overarching goals of the criminal justice system? In this column, we examine these issues.

**Special Conflict Rules for Prosecutors?**

It is helpful at the outset to note that an ethics rule specifically addressing conflict of interest for prosecutors does not exist. Model Rule 3.8, entitled “Special Responsibilities of a Prosecutor,” does not address prosecutorial conflict of interest. Because no state has enacted an ethics conflict of interest rule specifically for prosecutors, Model Rule 1.7, the conflict of interest rule generally applicable to all lawyers, governs conflict of interest for prosecutors.

Model Rule 1.7(a)(2) states that a conflict of interest exists when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer” (emphasis added). Similarly, the Restatement (Third) of the Law Governing Lawyers does not have a conflict of interest provision specifically dealing with prosecutors. Instead, like the Model Rules, the Restatement has a general risk rule applicable to all lawyers, including prosecutors. Restatement section 121 defines a conflict of interest as occurring whenever there is a “substantial risk” that the lawyer's representation of a client will be “materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person” (emphasis added). A substantial risk is defined as “more than a mere possibility,” but need not be “immediate, actual, and apparent.” (Restatement (Third) of the Law Governing Lawyers § 121 cmt. c(iii).) The Restatement explains that there must be a “significant and plausible” risk of adverse effect on the representation of the client. (Id.) In sum, both the Model Rules and the Restatement focus on the risk that various incentives may adversely affect a lawyer's representation of his or her client.

**Does the Prosecutor-Police Relationship Trigger Conflict of Interest?**

Conflict of interest rules emphasize avoidance of unacceptable risks to a lawyer's representation of his or her client. In our view, the ethics rules and other authorities, such as the Restatement and the Criminal Justice Standards, require local prosecutors to withdraw and allow the state attorney general or a special prosecutor to handle investigations of the police. Withdrawal is required because there is significant and substantial risk of impairment to the prosecutor's ability to represent the government's interests, and there is no good reason for taking this risk.

The risk of impairment to the prosecutor's ability to represent the government's interests is substantial for several reasons. First, the prosecutor works closely with the police and depends on police cooperation both in pending cases and in future cases. Second, the prosecutor has a past relationship of working with the police. This close working relationship and the familiarity between the prosecutor and the police are exactly the type of factors that underlie the development of a bias in favor of the police. Maintaining this close relationship is in a prosecutor's self-interest. The working relationship between the prosecutor and the police, the resulting favorable bias toward the police, and the prosecutor's own self-interest in maintaining a good working relationship with the police are very likely to contribute to an ethical blindness on the part of the prosecutor to appreciate the substantial risk that the prosecutor's representation of the government may be adversely affected during an investigation into wrongdoing by the police.

Is there any justification for a prosecutor to take such a risk by investigating local police? In some conflict of interest areas, the risk of a potential conflict may be offset by a justification for taking the risk. For example, a contingency fee is permitted in a civil case even though there is a risk that a lawyer may pursue the lawyer's self-interest in earning a fee with little effort by poorly representing the client and seeking a quick settlement. The justification for taking this risk is that the client would otherwise be unable to afford to retain a lawyer at an hourly rate. Unlike the contingency fee example or other areas where the risk of a potential conflict of interest is offset by some justification for taking the risk, there does not appear to us to be any justification for a prosecutor to ignore the substantial risk of a conflict of interest in investigating local police. There are clear and practical alternatives—referral to the state attorney general or appointment of a special prosecutor. And the use of these alternatives is unlikely to be terribly costly because cases involving excessive force resulting in death, like the Brown and Garner cases, do not occur with great frequency in most jurisdictions. For example, in the more than 20 years from 1991 until the Michael Brown case, in St. Louis County there were only five cases involving a police officer causing a death presented to grand juries.
Is More Guidance for Prosecutors Needed?

As the Brown and Garner cases illustrate, prosecutors do not always appreciate the conflict of interest presented when investigating local police for killing an unarmed person. While current ethics rules provide the basis for a prosecutor in such a situation to withdraw and to request the state attorney general or a special prosecutor to handle the case, some prosecutors do not withdraw. It appears that prosecutors need more guidance on this matter, and there are at least three possible approaches for providing that guidance—a change to the ethics rules, changes to special prosecutor procedures, or advisory ethics opinions.

One possible approach would be to add a new section to Model Rule 3.8 requiring withdrawal in this situation. Or, language addressing this conflict and requiring withdrawal could be added to the comments to Model Rule 1.7. Comment [11] to Model Rule 1.7, for example, addresses the personal conflict of interest when a lawyer is related to an opposing lawyer. Comment [11] states that lawyers related by blood or marriage may not represent clients in the same matter without informed consent of each client because “there may be a significant risk that client confidences will be revealed and that the lawyer’s family relationship will interfere with both loyalty and independent professional judgment.”

Another approach would be to enact a statute establishing a bright-line rule requiring either referral to the state attorney general or appointment of a special prosecutor. Each state has its own process for appointing special prosecutors, and the procedures vary greatly from state to state. These procedures are typically established by statute, and some of the variance among the states is explained by the constitutional status of the prosecuting attorneys. Depending on the state, the attorney general, the district attorney, or both may have prosecuting authority under the constitution.

Currently, most special prosecutor statutes do not specifically require a prosecutor to withdraw from investigating deadly use of force by local police. At least one court has refused to appoint a special prosecutor under a state special counsel statute based on allegations that a prosecutor works too closely with local police to investigate them fairly. In *McCall v. Devine*, 777 N.E.2d 405, 407 (Ill. App. Ct. 2002), the Illinois Court of Appeals affirmed the trial court’s decision to dismiss a mother’s petition for a special prosecutor to investigate and prosecute police officers for the shooting death of her son. The petition alleged that there were gross conflicts of interest in the State’s Attorney investigating and prosecuting officers in the Chicago police department . . . [because]

the State’s Attorney and the Chicago police department have a relationship of “cordiality, compatibility, support, [and] fidelity” and that this relationship makes it impossible for the State’s Attorney office to conduct an “independent, unbiased, honest and impartial investigation into the shooting death of [her son].” (Id. at 408.)

The petition claimed that the relationship was based on the fact that “well over 90% of the criminal cases prosecuted by the Cook County State’s Attorney’s office have been investigated and brought to the Cook County State’s Attorney’s office by Chicago police officers.” (Id.) The court of appeals agreed with the trial court that the petition failed to allege specific facts concerning the relationship that would make the prosecutor biased toward the police, and the fact that the prosecutor worked closely with the police was insufficient to trigger the appointment of a special prosecutor under the Illinois special prosecutor statute. (Id. at 413.) The *McCall* case focused solely on the special prosecutor statute, and did not consider Illinois state ethics rules.

At the present time only one state, Connecticut, addresses a prosecutor’s conflict of interest in investigating deadly use of force by police. Connecticut prohibits a prosecutor from considering charges against a police officer or other law enforcement officer in the same jurisdiction when there has been use of deadly physical force by a police officer resulting in a death. Connecticut General Statutes section 51-277a provides that whenever a law enforcement officer uses deadly force upon another person and the person dies, the Connecticut Division of Criminal Justice shall conduct the investigation and “the Chief State’s Attorney may . . . designate a prosecutorial official from a judicial district other than the judicial district in which the incident occurred to conduct the investigation or may . . . appoint a special assistant state’s attorney or special deputy assistant state’s attorney to conduct the investigation.” This statute ensures that neither the agency investigating the deadly use of force nor the prosecutor in charge of the investigation is from the same jurisdiction as the law enforcement officer who used the deadly force. Presently, there are bills pending in Missouri and approximately a dozen other states that would require the appointment of a special prosecutor or referral to the state attorney general to investigate whenever a police officer uses deadly force resulting in injury or death.

Another approach, which we believe is preferable to both changing ethics rules and enacting special prosecutor statutes, is for ethics authorities to issue (continued on page 53)
Supreme Court Cases of Interest

BY CAROL GARFIEL FREEMAN

There have been few decisions of criminal justice interest since those discussed in the spring issue of *Criminal Justice*. Only one order is worthy of comment. In *Bower v. Texas*, No. 14-292 (Mar. 23, 2015), Justices Breyer, Ginsburg, and Sotomayor dissented from the denial of cert in a capital case involving the Texas law on consideration of mitigating evidence. Bower was caught in a procedural tangle in his effort to have the Court’s decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), applied to his case. The dissenting justices thought that although this was “a case-specific legal error,” intervention was appropriate because “the error here is glaring, and its consequence may well be death.”

Although the Affordable Care Act and marriage equality cases are generally the most anticipated decisions for the end of the 2014 term, two important criminal justice cases are still undecided as of publication. These include *Ohio v. Clark*, No. 13-1352, *Cert. Alert*, 29:4 *Criminal Justice* at 45 (Winter 2014) (application of Confrontation Clause to statements about abuse made by child to teacher); and *Glossip v. Gross*, No. 14-7955, *Cert. Alert*, 30:1 *Criminal Justice* at 34 (Spring 2015) (constitutionality of Oklahoma’s execution protocol). *Elonis v. United States*, No. 13-983, *Cert. Alert*, 29:3 *Criminal Justice* at 36 (Fall 2014) (is subjective intent to threaten by Facebook posts necessary for conviction under 18 U.S.C. § 875(c)), was reversed and remanded in a June 1, 2015, decision. These decisions, and all other decisions of criminal justice interest, will be reviewed in the fall issue of *Criminal Justice*.

Note that in the future this column will cite cases by name, Supreme Court docket number, and date of order or decision. The decisions themselves and other information about the cases are available on the Court’s website, www.supremecourt.gov, and readers can refer to them in any accepted format.

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

**Capital Cases**

*Hurst v. Florida*, No. 14-7505, *cert. granted* limited to question posed by the Court, Mar. 9, 2015, decision below at 147 So. 3d 435 (Fla. 2014), *reh’g denied*, Sept. 4, 2014.

Whether Florida’s death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002).


1. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

3. Whether the trial court’s decision not to sever the sentencing phase of the co-defendant brothers’ trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an “individualized sentencing” determination and was not harmless in any event?


1. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court held in this case, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

**Crimes and Offenses**

The Hobbs Act defines extortion, in relevant part, as “the obtaining of property from another, with his consent, . . . under color of official right.” 18 U.S.C. § 1951(b)(2). This Court has held that a public official violates that statute when he “obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts.” Evans v. United States, 504 U.S. 255, 268 (1992).

The question presented, on which the Fourth and Sixth Circuits explicitly disagree, is:

Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone outside the conspiracy?

Procedure

Henry Montgomery has been incarcerated since 1963. Montgomery is serving a mandatory life sentence for a murder he committed just 11 days after he turned seventeen years of age.

In light of Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 83 L. Ed. 2d 407 (2012), which holds that mandatory sentencing schemes “requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole” . . . violate the Eighth Amendment’s ban on cruel and unusual punishment, Montgomery filed a state district court motion to correct his illegal sentence. The trial court denied Montgomery’s motion, and on direct writ application, the Louisiana Supreme Court denied Montgomery’s application, citing State v. Tate, 2012-2763 (La. 11/5/13), cert. denied, 134 S. Ct. 2663, 189 L. Ed. 2d 214 (2014), which held that Miller is not retroactive on collateral review to those incarcerated in Louisiana.

The question thus presented here is whether Miller adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison?

In addition to the question presented by the petition, the parties are directed to brief and argue the following question: “Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in Miller v. Alabama, 567 U.S. __ (2012)?”

DECIDED CASES

Fourth Amendment
Rodriguez v. United States, No. 13-9972 (Apr. 21, 2015). In a 6–3 decision, the Court held that a completed traffic stop cannot be prolonged (over objection) to enable a dog sniff of the car. Late at night, Rodriguez’s car was seen to travel slowly onto the shoulder and then back onto the road. Officer Struble, whose K-9 dog was with him, stopped the car for the violation of driving on the shoulder. After a records check of Rodriguez and his passenger, and learning that they had gone to Omaha to look at another car and were traveling back to a small town, the officer gave Rodriguez a warning. Although the traffic stop had been completed, the officer did not consider Rodriguez free to leave, and asked whether he could walk his dog around the car. Rodriguez refused and was ordered out of the car. After another officer arrived, the dog walked around the car twice, alerted, and a search revealed a bag of methamphetamine. The events to this point took less than 30 minutes. The magistrate judge, whose conclusions were adopted by the trial judge and affirmed by the court of appeals, found no probable cause to search the car other than the dog sniff, and no reasonable suspicion for the detention other than the traffic violation. He concluded that the seven- to eight-minute delay between the completion of the stop and the dog sniff was a “de minimis Fourth Amendment violation.” Reversing, the Supreme Court concluded that detention of the car for further investigation, after completion of the questioning, document review, warrant checks, and paperwork incident to the traffic stop, constituted an unreasonable seizure in violation of the Fourth Amendment. The routine traffic stop is analogous to an investigatory stop allowed by Terry v. Ohio, 392 U.S. 1 (1968). The “tolerable duration of police inquiries” is determined by the time “reasonably” needed to deal with the traffic violation that justified the stop. (Illinois v. Caballes, 543 U.S. 405 (2005).) To ensure safety on the roads, it is reasonable to delay the stop for records checks of the driver’s papers and to determine if there are any open warrants. Requiring the driver to step out is appropriate for the safety of the officer. The dog sniff, which is designed to ferret out additional wrongdoing, is not “an ordinary incident” of a traffic stop. Prolonging the stop simply to enable the dog sniff is unreasonable and a violation of the Fourth Amendment. The case was remanded for review by the court of appeals of the finding of the trial court that there was no independent suspicion to justify the further detention of the car after the traffic warning had been delivered to the driver. Opinion by Justice Ginsburg, with whom Chief Justice Roberts and Justices Scalia, Breyer, Sotomayor,
and Kagan joined. Justice Thomas filed a dissenting opinion concluding that the stop was lawfully executed and, in Part III, that the further detention for the dog sniff was not unreasonable. Justice Alito joined this opinion in full. Justice Kennedy wrote separately to explain that he joined Justice Thomas’s opinion except for Part III. Justice Alito wrote separately expanding on the evidence that to him provided reasonable suspicion that the car contained drugs.

**Sixth Amendment**

**Woods v. Donald**, No. 14-618 (Mar. 30, 2015). The Court, per curiam, granted cert and summarily reversed a decision of the Court of Appeals for the Sixth Circuit that had affirmed the grant of habeas to a state prisoner. The defendant (Donald) argued that he had been denied the right to counsel at a “critical stage” of the proceedings when his lawyer had been absent during an apparently brief discussion of telephone calls between codefendants. Before a recess, counsel had announced that he did not “have a dog in this race” and reiterated that when he returned during a discussion of the telephone calls. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may grant habeas only when the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” the Supreme Court, or was “based on an unreasonable determination of the facts.” Donald and the lower courts relied on United States v. Cronic, 466 U.S. 648 (1984), to conclude that Donald received per se ineffective assistance of counsel. However, no decision of the Court dealt with the precise question (whether a brief absence from the courtroom during testimony regarding codefendants constitutes per se ineffective assistance), and the state court’s ruling was not an unreasonable application of the Court’s decisions. The case was remanded for further proceedings.

**Fourth Amendment**

**Grady v. North Carolina**, No. 14-593 (Mar. 30, 2015). Grady was convicted in two cases of sexual offenses. After he served the second sentence, he was ordered to appear for a hearing to determine whether he should be subjected to satellite-based monitoring as a recidivist sex offender (N.C. Gen. Stat. Ann. §§ 14-208.40(a)(1), 14-208.40B (2013)). Grady argued that the requirement that he wear tracking devices at all times for the remainder of his life violated the Fourth Amendment. He argued that the placing of the tracking device constituted a “search” under the Fourth Amendment. The state courts rejected this argument, the intermediate court relying on one of its earlier cases that had distinguished United States v. Jones, 565 U.S. 945 (2012), as involving a motion to suppress rather than a civil matter. The Court, per curiam, granted cert, vacated the judgment of the Supreme Court of North Carolina (which had dismissed Grady’s appeal from the intermediate court), and remanded for further proceedings. Jones and Florida v. Jardines, 569 U.S. 1 (2013), hold that a physical intrusion into a subject’s premises to obtain information constitutes a Fourth Amendment search. Therefore, attaching a device to a person’s body, without consent, to obtain information also constitutes a search. The protections of the Fourth Amendment are not limited to civil matters. And the program plainly is designed to obtain information, as it involves “monitoring” of the individual, tracking his location, and reporting if he violates any required schedule or location restrictions. The case was remanded for further proceedings that presumably would determine whether the search would be unreasonable, considering “the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.”

**Crimes and Offenses**

**Yates v. United States**, No. 13-7451 (Feb. 25, 2015). In 2007, John Yates and his two-man crew were fishing in the Gulf of Mexico. A conservation officer on routine patrol boarded the boat and found 72 red groupers that were slightly smaller than federal requirements. He segregated these fish, told Yates to keep them segregated until he returned to port, and gave him a citation for possession of undersized fish. In port, the segregated fish seemed to be larger than those the officer had measured on the boat; one of the crew admitted that Yates had told him to throw those fish over the side. Four years later, Yates was prosecuted for violation of 18 U.S.C. §§ 1519 and 2232(a). Section 2232(a) prohibits the destruction or removal of property to prevent seizure and carries a maximum sentence of imprisonment for five years. Yates did not challenge his conviction on this count. He did challenge his conviction on § 1519, which applies to 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, obstruct or influence” a federal investigation; punishment is a fine or imprisonment for up to 20 years. The government’s argument that the fish constituted a “tangible object” within the meaning of this statute was rejected by five of the nine justices. The opinions focus on statutory
interpretation and should be read for an understanding of how different results can come from reading the same words. Justice Ginsburg wrote the plurality opinion for herself, Chief Justice Roberts, and Justices Breyer and Sotomayor. Section 1519 was enacted as part of the Sarbanes-Oxley Act, which was intended to prohibit destruction of documents that would be evidence of financial wrongdoing. Among other aspects of the statute, its purpose, the use of the words “tangible object” following “record” and “document,” the title of the section (“destruction, alteration, or falsification of records in Federal investigations and bankruptcy”), and its placement with sections dealing with financial fraud persuaded the plurality that the words “tangible object” do not apply to all tangible items but only to items that can be “used to record or preserve information.” Justice Alito, concurring in the result, relied heavily on the canons of statutory interpretation directing that each item in a list carries a similar meaning, so that “tangible object” following “record” and “document” implies something similar rather than fish or antelopes. His opinion suggests that a hard drive containing an e-mail might be the kind of “tangible object” included in §1519. Focusing on the acts prohibited by the statute, although one might alter, destroy, or conceal a fish, one could not falsify or make a false entry in a fish. Justice Alito also noted the title of the section, which describes destruction, alteration, or falsification of “records,” strongly suggesting that the section deals with files and not fish. Justice Kagan wrote the dissenting opinion for herself and Justices Scalia, Kennedy, and Thomas.

**Ethics (continued from page 49)**

advisory opinions to provide guidance to prosecutors that Model Rule 1.7 requires prosecutors to withdraw in cases such as the Brown and Garner cases. Ethics opinions are frequently used to address application of general ethics standards to recurring specific factual situations. To provide guidance and a blueprint for state ethics committees, we believe that the ABA Standing Committee on Ethics and Professional Responsibility should issue a formal ethics opinion addressing a prosecutor’s conflict of interest when investigating excessive use of force allegations against the police and requiring withdrawal. State ethics committees or ethics counsel should also address this type of conflict of interest and require withdrawal. We believe that ethics opinions on this issue would both provide much-needed guidance to prosecutors and could also provide a stronger basis for possible discipline against prosecutors who ignore this type of conflict.

At least one state ethics opinion on this topic currently exists. The Missouri Legal Ethics Counsel issued Missouri Advisory Ethics Op. 970074 (1997), which addresses the issue of whether a municipal prosecutor may prosecute cases against municipal employees, including police officers. The opinion states that the municipal prosecutor “has a conflict of interest under [Missouri Rules of Professional Conduct] Rule 4-1.7(b), when the defendant is a police officer. The conflict derives from the necessity that Attorney, as municipal prosecutor, be able to rely on, and work with, the members of the police department in Attorney’s role as municipal prosecutor.” The ethics opinion continues that the prosecutor may not have a conflict regarding non-policeman municipal employees if the attorney does not work with the person regularly. Unfortunately, the opinion, which is only one paragraph long, does not provide detailed analysis or reasoning to support its conclusions. Also, it is aimed at municipal prosecutors who prosecute minor offenses in Missouri, and not county prosecutors who would consider possible felony charges against a police officer using deadly force against an unarmed suspect.

**Conclusion**

As the above discussion indicates, current conflict of interest rules require a prosecutor to withdraw from investigating and considering charges against police when there are allegations of excessive use of force. While a prosecutor should seek the appointment of a special prosecutor or refer the case to the state attorney general to avoid conflict of interest and ameliorate the type of public doubts triggered by the investigations into the recent deaths of Michael Brown and Eric Garner, the current standard in the ethics rules relies primarily on the prosecutor to make that decision. We believe the ABA and states need to issue ethics opinions to provide much-needed guidance to state prosecutors. Such ethics opinions would lead to the appointment of a special prosecutor in such situations and will both avoid a conflict of interest and further other overarching goals of the criminal justice system. As Justice Frankfurter stated, “Justice must satisfy the appearance of justice.” (Offutt v. United States, 348 U.S. 11, 14 (1954).) Prosecutors complying with their ethical obligation to withdraw and request a special prosecutor to investigate alleged excessive use of force by the police will help to instill not only an appearance of justice, but justice itself.
With Former Prison Warden, We Go Behind the Bars

BY ARTHUR L. BURNETT, SR.

The Anatomy of Prison Life by Charles L. Hinsley presents the penetrating and compelling insight and perspective of a person who, over a period of 20 years, rose from a counselor to warden in one of the most secure prison systems in America. Hinsley, former warden with the Illinois Department of Corrections, cogently brings to our attention what life in prison is really like, not only for the inmates but for the correctional staff responsible for maintaining America’s prison system—a job that is, in many respects, more dangerous than serving in the military. In a down-to-earth manner, Hinsley demonstrates that the first and primary obligation of the correctional staff should be to maintain order and safety of both staff and inmates to prevent assaults, disruptive disturbances, and deaths. He shows the reality of the conditions of prison life, and the substantial role that gangs exert.

For there is no way to convey the tremendous life threatening pressures and varied complexities that correctional officials and their staff face every day while managing a prison. It is literally a life or death situation, for both staff and inmates alike in many of our overcrowded prisons. This aspect of prison life is oftentimes not spoken about publicly and usually goes unmentioned until a sensationalized incident happens, such as Attica . . . or other prison incidents across the country.

The author tells us of incident after incident that shows that on a daily basis “prison life is extremely unpredictable and dangerous.”

Beyond controlling for the daily security concerns, Hinsley also focuses on gangs in prison and their efforts to control and manipulate their prison environment in order to challenge the efforts of the correctional staff to protect against inmate violence, retaliation, snitch problems, and other acts that undermine the safety and security in prison.

Gangs make use of the complaints process to gain some advantage or privilege, often pressing frivolous constitutional claims in courts. Hinsley notes the difficulty of determining factual credibility between contesting versions from inmates and prison administrative staff, while fulfilling the legal requirement of balancing constitutional liberty interests against the need to maintain security. Indeed, the problem of determining the facts may be far more difficult in dealing with these claims than when dealing with private citizens in the general public at large.

The author’s recitation of episode after episode presents the serious question of whether the security and restraint issues in prison administration are so pervasive that it deprives prison administration of the opportunity to design and implement programs that rehabilitate inmates and prepare them for return to society to be productive individuals. Staff must devote 80–90 percent of its time to control and security, is there sufficient time and are resources available to prison management to implement such programs? Or does this constant conflict in prison between inmates and correctional staff hardens the attitudes and values of the inmates to the point that it prepares them to be predators and recidivists upon return to society? Should legislators rethink the efficacy of long mandatory sentences without regard to the personal characteristics of the individual offender or does such legislation make the offender more antisocial and hardened to societal norms? Is this an argument against long mandatory sentences and for restoring parole and supervised release options after the punitive aspects of a sentence has been met, or at least a transitional stage to community supervision and preparation for job skills to enable that individual to become a productive law-abiding member of the community?

In sentencing offenders, should judges take into consideration the realities of prison life in determining the length and duration of sentences they impose? Should a judge in light of the conditions repeatedly described in this book impose a 10-year sentence when a three-year sentence would serve the punitive purpose of the crime situation? This is a book that every judge who handles criminal cases and sentencing should read and reflect upon in performing the sentencing function. Indeed, it would be immensely valuable to include it in the curriculum of the National Judicial College, which provides training programs for state judges and also in the curriculum of the Federal Judicial Center for United States district court judges and magistrate judges.

At one point, the book quotes an inmate serving eight years for a robbery who states that prison conditions are such that he would not wish it upon his “worst enemy.” While the book may be heavy

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reading for our teenaged youth, it could be a valuable educational tool to use in mentoring programs and youth presentations to demonstrate that going to prison is “no simple right of passage” or easy “walk.”

The author notes that approximately 98 percent of those who go to prison will live to get out of prison—at which point the issue becomes how functional will they be mentally, emotionally, spiritually, academically, and socially when they are released, and what resources will be available to help them successfully transition back into society. In this context, the author observed:

Bear in mind that our cultural social structure has contributed greatly to the plight by which many persons, and particularly the poor and persons of color, have become entrapped by the institutionalization of a capitalistic system of the haves versus the have-nots, not to mention the racial discrimination that has been a fundamental and perpetual practice of American society.

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The War on drugs campaign during the early ’80s and ‘90s greatly contributed to the overcrowded conditions in our nation’s prisons. This led to increased violence within our prisons and became a major contributing factor why many prison systems implemented super maximum security prisons as a way to help manage their agencies.

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The rampant violence and incessant disruptions that occurred in our prisons facilities had simply become out of control. We desperately needed to reverse the trend of who was running our prisons and put the administration back in control.

From the author’s perspective, the issue now is how do we give prison administration sufficient resources to maintain security, defuse the influence of prison gangs, protect against disruptions, assaults, and death of staff members and inmates, and, at the same time, offer inmates sufficient skills, training, and education so that they will be employable upon release and have a positive attitude as to complying with societal laws and norms? Can we convince legislators to provide sufficient funding for this two-fold aim? Are legislators willing to rethink the conditions of imprisonment so as to transition prisoners in stages to less confined yet supervised circumstances until they are stable enough to function on their own as law-abiding residents in the general society? This would greatly reduce the current rate of 60–70 percent who reoffend and return to prison within three years.

The author notes that:

[the] implementation of job preparedness and skill development training programs in prisons . . . has taken on a much more urgent and critical tone. It has become more accepted now that self-improvement programs not only help prepare inmates for returning to society, but also help stabilize the order of prison life and contribute to the enhancement of both prison and public safety. More credibility has been given to the fact that when inmates believe they have a chance to improve their conditions through different learning opportunities and skill development, they tend to steer away from the negativity that is so prevalent inside prisons. This also offers them the same kind of hope when they are in free society trying to stay out of trouble and improve their lives. They will be much more likely to put forth an effort to improve themselves if they believe that there is someone or some support service willing to help them make the change.

This lofty view, however, may be difficult to achieve and does not mean that a prison should become a community college or a technical school, but it should begin to move in this direction, as funding and security allow.

In this connection, it is noted that the Second Chances Reauthorization Act of 2013 was introduced November 13, 2013, as a bipartisan bill in both the Senate and the House of Representatives. The Act (S. 1690 /H.R. 3465) would extend prison reentry programs for an additional five years, including demonstration grants, mentoring, substance abuse and family based programing. If enacted, it would expand the number of grant programs available to work with former inmates once released from prison. The bill should be reviewed to see if some in-prison programing—pre-release—can be included. On December 9, 2013, US Senator John Cornyn of Texas introduced a bill (S. 1738) that would provide for in-prison programs for nonviolent, low-level offenders in the federal prison system to complete work, education, skill training, or rehabilitation programs

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The 2014 Department of Justice Inspector General Report

BY PAUL C. GIANNELLI

In 1997, the inspector general (IG) of the Department of Justice (DOJ) issued a report regarding deficiencies at the FBI crime laboratory. (Office of Inspector Gen., U.S. Dept of Justice, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (1997).) Although the report focused mainly on the explosives unit, the investigation also included a review of the work of one hair-and-fiber examiner (Michael Malone).

The 1997 report documented numerous deficiencies, including (1) inaccurate testimony, (2) testimony beyond the competence of examiners, (3) improperly prepared laboratory reports, (4) insufficient documentation of test results, (5) inadequate record management and retention, and (6) failure to resolve serious and credible allegations of incompetence. For example, in the Oklahoma City bombing case, the report found that an examiner’s conclusion about the identity of the explosive charge was “speculation” and “tilted in such a way as to incriminate the defendants.”

The report’s recommendations included (1) seeking accreditation of the FBI laboratory by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB); (2) requiring that examiners in the explosives unit have scientific backgrounds in chemistry, metallurgy, or engineering; (3) mandating that each examiner who performs work prepare and sign a separate report instead of a composite report “without attribution to individual examiners”; (4) establishing report review procedures by unit chiefs; (5) preparing adequate case files to support reports; (6) monitoring court testimony in order to preclude examiners from testifying to matters beyond their expertise or in ways that are “unprofessional”; and (7) developing written protocols for scientific procedures.

Task Force

In 1988 DOJ established a task force to ensure that remedial action was taken to address the issues raised by the 1997 IG report. Among other things, the task force identified 13 FBI examiners who had been criticized in the 1997 report and reviewed cases in which they had testified using “scientifically unsupportable analysis and overstated testimony.” (Office of Inspector Gen., U.S. Dept of Justice, An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory, at i (2014).)

2014 IG Report

A new IG report, published last year, reviewed the work of the task force. This report reached five findings that are discussed below.

Failure to expeditiously identify capital cases. According to the 2014 IG report, the task force took nearly five years to identify the 64 death row defendants whose cases involved one or more of the 13 criticized examiners. Moreover, state authorities were not notified that the convictions of these defendants could be affected by involvement of the 13 examiners. For example, Benjamin Boyle was executed four days after the 1997 IG report was issued but before the task force identified and reviewed his case. The prosecutor believed that the lab’s analysis and testimony was material to the conviction. “An independent scientist who later reviewed the case found the FBI Lab analysis to be scientifically unsupportable and the testimony overstated and incorrect.” (Id. at ii.)

The task force referred only eight of the 64 death penalty cases for review by independent scientists, and the independent scientists’ reports were forwarded to capital defendants in only two cases. According to the 2014 report, “The Department should have handled all death penalty cases with greater priority and urgency.” (Id.)

Examiner misconduct. The 2014 report found that the task force did not review all cases that involved Michael Malone. He was the FBI Lab examiner whose misconduct was identified in the OIG’s 1997 report and who was known by the Task Force as early as 1999 to be consistently problematic. Malone’s faulty analysis and scientifically unsupportable testimony contributed to the conviction of an innocent defendant ([Donald] Gates), who was exonerated 27 years later, and the reversal of at least five other defendants’ convictions because of Malone’s unreliable analysis and testimony. (Id.)

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Surprisingly, Malone, who retired from the FBI in 1999, had been performing background investigations as an active contract employee of the FBI since 2002. When his contract employment was brought to the attention of the FBI and DOJ, he was terminated in June 2014.

**Pre-1985 cases.** In order to manage its review, the task force eliminated most cases that pre-dated 1985. According to the 2014 report, “[t]he decision not to review these categories of cases devalued the liberty of and collateral consequences potentially suffered by the defendants in these cases whose convictions may have been supported by unreliable FBI Lab analysis or testimony.” *(Id. at iii.)* The report concluded that “the Department fell short of the Task Force’s articulated mission to ensure that defendants’ rights were not jeopardized by the conduct of any of the 13 examiners when it excluded categories of cases from the Task Force’s review.” *(Id.)*

**Notification to prosecutors.** The 2014 report found that DOJ failed to ensure that prosecutors made appropriate and timely disclosures to affected defendants, particularly in cases where the prosecutor determined that Lab analysis or testimony was material to the conviction and the report of the independent scientists established that such evidence was unreliable. Some federal and state prosecutors failed to disclose the independent scientists’ reports or did so months or years after they received them from the Task Force. As a result, some defendants learned very late—or perhaps never—that their convictions may have been tainted. The Department should have required federal prosecutors, and strongly encouraged state prosecutors, to disclose the independent scientists’ reports to defendants when the reports concluded that material Lab evidence was unreliable. *(Id.)*

**Inadequate resources.** In addition, the IG found that the department failed to adequately staff the task force and did not consistently maintain the project as a high priority: “In our view, 8 years was much too long for the Task Force and the FBI to complete the case reviews.” *(Id.)*

**Failure to follow up.** The 2014 report concluded that DOJ “failed to require prosecutors to notify the Task Force of their disclosure determinations to enable the Task Force to track disclosures of independent reports to affected defendants.” *(Id.)* Furthermore, prosecutors disclosed the reports in only 13 of the 402 case files we reviewed. As a result of the Department’s failure to incorporate a tracking component in the case review process, the Task Force was unable to determine whether effective notification to defendants or their counsel had been achieved. In addition, the Task Force’s communications to prosecutors did not emphasize the importance of acting swiftly to disclose the reports, particularly in death penalty cases. *(Id.)*

**Conclusion**
This was not the first time that the FBI laboratory failed to satisfy its duty to correct past mistakes. The problem also arose in the bullet-lead cases. *(See Paul C. Giannelli, Daubert and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research, 2011 U. Ill. L. Rev. 53.)*

in order to earn up to half of their remaining sentence in home confinement or a halfway house. Such an approach may not only be more progressive and humanitarian, but may achieve far better results in reducing recidivism and making living in our communities safer for all of us.

*The Anatomy of Prison Life, Behind the Walls of the Illinois Department of Corrections* (Linguistic Freedom Publications 2013) should prove invaluable in supporting the enactment of this legislation. The National African American Drug Policy Coalition, Inc., will be closely monitoring this proposed legislation. *Anatomy of Prison Life* brings to our attention the need for such legislation to move us forward in improving in-prison conditions as to security and safety and at the same time improving the rehabilitation function of the penal system to prepare individuals to return to society with a positive attitude, desire, and commitment to be law-abiding and productive in their post-prison lives, thus achieving a far greater degree of public safety than we do today. The resulting effect of this policy commitment could serve to reduce the amount of funding needed to incarcerate individuals, and also reduce the mass incarceration of the residents in this nation, restricting it to the truly violent and dangerous offenders—to those whose conduct and behavior justify their continued imprisonment for the safety of us all.
Ten Tips for Witness Preparation

BY MICHAEL D. DEAN

Lawyers frequently focus too much of their attention on preparing themselves for “their” case. We are often so concerned with our own performance that we fail to give adequate attention to helping other people with theirs. Witnesses usually make up the majority of the evidence at trial; however, most of them have never before had to testify in court. Unfortunately, many attorneys push through witness prep sessions clarifying facts and outlining the topics that will be covered without talking to witnesses about the subjective experience of giving testimony. Below are 10 points that all attorneys should cover with key witnesses prior to trial to help them get through the unfamiliar process.

1. Show your key witnesses the courtroom. As litigators, the courtroom is our daily environment. Sure, trials and litigation will always be accompanied by the competitive jitters. But the courtroom is still a place where we have established a certain level of comfort beyond that of the general public. For example, for a victim of a crime, a hearing or trial will be a nerve-racking experience. Not only will he or she be the center of attention while being subjected to examination by at least two attorneys, any discomfort will be compounded by the presence of the individual who committed the crime. A brief visit to the courtroom will not alleviate all of the tension. However, it will make the courtroom a more familiar environment come the day of trial. Have the witness sit in the witness chair and ask him or her a couple of questions. Identify each of the court employees who will be present and describe their respective roles. If possible, introduce the witness to the bailiff and court reporter. Doing so will give the witness a sense of comfort when he or she sees a familiar face on the day of testimony.

2. Let the witness know it is not necessary to volunteer information. The witness is sworn to tell the whole truth as it pertains to the questions asked. There is no obligation to go outside the scope of the question and provide information not requested. The witness should understand that there are rules that determine what information may be given to the jury. While the witness should not be concerned with understanding the rules of evidence or the reason for them, the witness should know that questions are phrased in a manner to ensure compliance with what is admissible. The witness should also know that the court operates in an adversarial system. As such, it is up to the opposing party to dig out the information that supports his or her theory of the case.

3. Prepare the witness to discuss uncomfortable facts and to be confronted with weaknesses in his or her testimony. The opposing party will usually always have something to work with. Witnesses should be informed that weaknesses exist and that this is all right. Weaknesses will be brought up and the witness should be prepared to acknowledge them. Let your witness know that arguing the case and defending the case theory is the job of the attorney. Beating around the bush, answering a question with an explanation, or being evasive and argumentative is irritating to a jury. It wastes time and highlights the weakness for the jury all the more. Let the witness know to answer weaknesses directly and honestly and leave it to you to have the witness expand or explain the weaknesses during redirect.

In addition, many criminal cases require the witness to discuss embarrassing facts or events. This is especially true in sex crimes such as rape and child molesting. The victims of such cases must sit before 12 strangers from the public and recount sometimes horrendous and incredibly personal stories. When dealing with victims of such cases, you should have a frank discussion with the victim about the information that he or she will have to disclose on the stand. Get the witness used to discussing awkward, uncomfortable “anatomy” language and to any physical demonstrations his or her testimony will require. If the witness is young, consider requesting the appointment of a guardian ad litem to assist with preparing the child for the experience.

4. The witness should be assertive and confident with responses. Litigating attorneys are by and large assertive, Type A personalities. By being the examiner, the attorney holds a position of significant control over the proceedings. Witnesses, on the other hand, may be young and inexperienced, elderly and vulnerable, or just plain timid. Consequently, the witness may be reluctant to challenge the attorney’s characterizations during questioning. The witness may also be reluctant to ask for clarification or to tell the attorney that he or she does...
not understand what is being asked. The witness needs to be encouraged to be assertive and confident in his or her responses and to speak up when confused. You will probably not be able to change your witnesses’ personal traits. However, bringing this to their attention will at least alert them to be on the lookout for the undesirable behavior.

5. The witness should treat the examining attorney with respect. Some opposing counsel will be aggressive and pushy during cross-examination. The good thing is that juries generally do not like aggressive tactics. Juries view the pairing of the attorney and the witness to be a “mismatch” and will naturally sympathize with the underdog. However, if the witness is not cooperative, pushes back, or is evasive, the default sympathy granted to the witness will evaporate. The witness needs to understand the importance of hanging on to the initial advantage by always being courteous to opposing counsel. This is so even if the attorney gets nasty trying to prod the witness into becoming unlikeable. The witness should turn the proverbial cheek and meet hostility with even more cordialness. This will only underscore the favorable light in which the jury will view the witness’s testimony.

6. The examining attorney controls the pace of the questions, but does not control the pace of the answers. Witnesses should take their time. One tactic employed by some attorneys during cross-examination is to attempt to frustrate and confuse a witness by bombarding him or her with a succession of rapid questions. While the examining attorney does wield a great deal of control over the proceedings, the control is not unlimited. The attorney may not ask another question until the witness responds to the first. Let your witnesses know that they are not required to provide answers with the same rhythm and pace as the examiner. The witness needs to understand that, above all else, the most important part of testimony is to provide complete and truthful responses. To do so, it may be necessary to take time to mentally process the question and be sure he or she is telling the “whole truth.” The witness should not be tempted to shorten responses or to provide an answer quicker than it takes to make sure the information is accurate. Instruct your witnesses to allow a pause before giving a response to the question.

7. Witnesses should not answer a question unless they are certain that they understand it completely. A witness cannot honestly answer a question when the witness does not understand it. A witness swears to tell the truth, and by guessing the meaning of the question, the witness has taken a serious risk that he or she has violated that oath. Make sure the witness understands that it is his or her obligation to bring it to the examining attorney’s attention if clarification is needed. Failure to understand the question may easily result in the jury being left with a false impression of the true evidence. In the same vein, witnesses sometimes hear the majority of a question, think that they know what is going to be asked, and then interrupt the examiner with an answer. This appears rude, is rash, and carries a serious risk that the witness is wrong about the question. Listen, comprehend, pause, respond.

8. Witnesses should review all prior statements and documents, but should not try to memorize facts. Witnesses are people, and people are not perfect. Memories fade over time. Your witnesses need to understand that they are not expected to be perfect on the witness stand. The witness’s memory of an event is always going to be better immediately after the event than it will be when testifying about it a year or two later. Contrary to a witness’s fears that forgetting or being inconsistent on a collateral fact will destroy his or her credibility, a jury will actually likely be suspicious of a witness who seems to remember too well.

That being said, the course of an investigation and discovery has likely resulted in a witness’s account being preserved in tangible material. While a jury may expect and understand something less than perfection, the witness should still attempt to honestly revive a fading memory as much as possible. Witnesses should be provided a copy of any written statements whether verbatim or paraphrased in a police report. In addition, if the witness gave a video- or audio-recorded statement, the witness should be afforded an opportunity to watch or listen to that media prior to testifying. The witness should be clearly instructed that these materials are not being provided to “instruct” the witness on what he or she is to say. Instead, the witness needs to understand that the purpose is to honestly revive a fading recollection due to a lapse in time.

9. “I don’t know” and “I don’t recall” are acceptable answers. Some witnesses feel that if they are asked a question, they are supposed to know the answer. The witness should know that it is very common for information to be sought that the witness does not have. It is all right that the witness cannot honestly give the other party what he or she seeks. All witnesses aside from experts are able only to testify about facts within their own personal observations, or inferences from their observations. If the witness does not have personal knowledge of the event in question, he or she may be in dereliction of his or her oath to respond in any way other than

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Informant Privilege

BY STEPHEN A. SALTZBURG

Law enforcement agencies nationwide regularly rely on informants to provide information that enables officers to conduct arrests and searches, or to obtain warrants for such activities. Other times, informants are key witnesses whose trial testimony is vital to prosecutors seeking to prove a defendant’s guilt. At the same time, prosecutors often seek to keep the identities of informants secret to protect them from retaliation, claiming a privilege in order to protect some informants’ identities in the face of defense discovery demands. Courts must decide when the privilege applies (a question of state or federal evidence/procedure law) and when due process concerns (a question arising under the Fifth and Fourteenth Amendments) override it.

The analysis of informant privilege focuses on three cases: one recent court of appeals decision and two older Supreme Court decisions. It is simply coincidence, but in all three cases the crimes occurred in Chicago.

The Recent Case
The clash between prosecution and defense regarding informants is highlighted in United States v. Sierra-Villegas, 774 F.3d 1093 (6th Cir. 2014). Sierra-Villegas was convicted of possession with intent to distribute methamphetamine and conspiracy. He was arrested shortly after the failure of a massive drug sale to an undercover officer in Chicago, coordinated in part by a confidential informant. The defendant’s four co-conspirators agreed to plea bargains, and three testified against him at trial. In this case, the defendant was able to deduce the identity of the informant because the government relied on the recorded conversation between the defendant and the informant. In response to this evidence, the defense filed a motion, which the government opposed, to compel the government to confirm the informant’s identity and to permit him to testify. The trial judge relied on informant privilege to deny the motion.

Testifying in his own defense at trial, the defendant claimed that he did a substantial amount of business with the informant that was unrelated to drugs, such as joint ownership of race horses and plans to purchase a bar. The defendant asserted that the recorded conversation with the informant concerned the bar purchase rather than drugs. He explained that his travel to Chicago did not involve drugs and denied that drugs found in his Kansas City house were his.

The defense argued that the informant’s identity was important and that the defense should be permitted to call the informant as a witness to attack his credibility given that the government relied on the recording. The government, seeking to avoid disclosure of the informant’s identity or to have the defense introduce evidence that might reveal his identity, stipulated to the informant’s horse racing activities and to the defendant’s prior interaction with the informant at the informant’s racing track. The district court held that the privilege applied and that the defendant had not made a sufficient showing to overcome the privilege. The Sixth Circuit agreed.

In order to understand the circuit court’s reasoning, it is important to look back on two important US Supreme Court cases.

Roviaro v. United States
The United States Supreme Court addressed the question of whether the government may protect the identity of its informants in two cases decided a decade apart. The first was Roviaro v. United States, 353 U.S. 53 (1957). Albert Roviaro was indicted in 1955 on two counts by a federal grand jury in Illinois. The first count charged that in Chicago on August 12, 1954, he sold heroin to a “John Doe”; the second count charged that on the same date and in the same city, Roviaro “did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law.” (Id. at 55.)

Roviaro moved for a bill of particulars, and among the items requested were the name, address, and occupation of “John Doe.” The government objected that Doe’s identity as an informant was privileged, and the district court denied the motion. Roviaro waived his Sixth Amendment right to a jury trial and was tried before the district judge. The government relied on the testimony of two federal narcotics agents, Durham and Fields, and two Chicago police officers, Bryson and Sims. All four of the law enforcement officers were familiar with Roviaro and could identify him by sight. Their testimony described the narcotics transaction that led to the two charges.
On the day of the charged offenses, the four officers met in Chicago with the informer. One FBI agent and both police officers testified to the fact that Doe was an “informer” and a “special employee” who had been known to the federal agents for several years. The officers searched Doe and his Cadillac automobile to be certain that no drugs were present. Then Officer Bryson secretly hid in the trunk of the car with a device that enabled him to raise the trunk lid from the inside. Doe drove his Cadillac to a meeting with Roviaro. He was followed by Agent Durham in one car and Agent Fields and Officer Sims in a second car.

Doe waited at the meeting place for an hour until Roviaro arrived in a Pontiac with an unidentified man. Roviaro immediately entered Doe’s Cadillac and sat beside him in the front seat. Doe then drove the Cadillac on a circuitous route while the officers attempted to follow. Only Agent Durham managed to tail the Cadillac to where it stopped. Once stopped, Durham left his car for the sidewalk where he was able to observe Roviaro walk a few feet to a nearby tree, pick up a small package, and deposit it in the Cadillac before waving to Doe and walking away. Durham immediately approached the Cadillac, recovered a package from the floor, signaled for Bryson to exit the trunk, and walked down the street in time to observe Roviaro get back into the Pontiac parked nearby and depart.

Bryson testified that from his position in the trunk he heard a conversation between Doe and Roviaro in the Cadillac in which Roviaro greeted Doe, directed him where to drive, directed Doe to pull over and cut off the motor to “lose a tail,” and then directed him to continue on. Bryson also testified that he heard Roviaro ask Doe about money Doe owed him and tell Doe that he had brought “three pieces this time.” Bryson added that, when he heard Roviaro order Doe to stop the car, Bryson raised the lid of the trunk slightly and observed the same conduct that Agent Durham described and heard Roviaro say, “Here it is,” and “I’ll call you in a couple of days.” After hearing Durham’s signal to come out from the trunk, Bryson said that he found Durham holding a small package containing a white powder in three glassine envelopes.

The powder turned out to be an opium derivative that ultimately proved to be heroin. Not long after discovering the package, the officers arrested Roviaro and took him along with Doe to Chicago police headquarters. Doe denied that he knew or had ever seen Roviaro when the two confronted each other.

In cross-examining the officers, Roviaro’s defense counsel sought to learn the identity of Doe, but the district judge barred him from doing so and the defense was unable to learn Doe’s identity or to have him produced at trial. The judge ultimately convicted Roviaro on both counts.

The United States Court of Appeals for the Seventh Circuit affirmed the convictions in a short opinion. (United States v. Roviaro, 229 F.2d 812 (7th Cir. 1956).) The court reasoned that there was no suggestion that Doe had anything to do with the possession charged in count 2 of the indictment, and Roviaro suffered no harm from nondisclosure of the informant on count 1 because the district judge had imposed a general sentence on both counts together. When the case reached the Supreme Court, the government did not defend the nondisclosure of Doe’s identity as to count 1 and limited its defense of nondisclosure to count 2.

Justice Burton’s opinion for the Supreme Court made a number of points:

1. “What is usually referred to as the informer’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. Scher v. United States, 305 U.S. 251, 254 [1938]; In re Quarles and Butler, 158 U.S. 532 [1895]; Vogel v. Gruaz, 110 U.S. 311, 316 [1884]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.” (Roviaro, 353 U.S. at 59.)

2. “The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.” (Id. at 60 (footnotes omitted.).)

3. “We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.” (Id. at 62.)

4. “A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the...
defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” (Id. at 60–61.)

In the end, the Court rejected the government’s argument regarding count 2.

The materiality of John Doe’s possible testimony must be determined by reference to the offense charged in Count 2 and the evidence relating to that count. The charge is in the language of the statute. It does not charge mere possession; it charges that petitioner did “fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law . . . .” While John Doe is not expressly mentioned, this charge, when viewed in connection with the evidence introduced at the trial, is so closely related to John Doe as to make his identity and testimony highly material.

. . . . The fact that petitioner here was faced with the burden of explaining or justifying his alleged possession of the heroin emphasizes his vital need for access to any material witness. Otherwise, the burden of going forward might become unduly heavy.

The circumstances of this case demonstrate that John Doe’s possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner’s opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner’s identity or on the identity of the package. He was the only witness who might have testified to petitioner’s possible lack of knowledge of the contents of the package that he “transported” from the tree to John Doe’s car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.

Finally, the Government’s use against petitioner of his conversation with John Doe while riding in Doe’s car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain, or amplify Bryson’s report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner’s knowledge of the contents of the package or might have tended to show an entrapment. (Id. at 62–64.)

The Court emphasized that Doe was the only participant in the events other than Roviaro and the only witness who could amplify or contradict government witnesses, and that one of the officers testified that Doe denied knowing Roviaro or ever seeing him before he saw him at the Chicago police station. The Court held that the district judge committed prejudicial error in permitting the government to withhold Doe’s identity.

Justice Clark dissented and disagreed with the majority as to what the record demonstrated: “The short of it is that the conviction of a self-confessed dope peddler is reversed because the Government refused to furnish the name of its informant whose identity the undisputed evidence indicated was well known to the peddler.” (Id. at 66 (Clark, J., dissenting).)

Justice Burton reasoned that Doe’s denial of knowing or seeing Roviaro meant that the Court could not assume that Roviaro knew Doe’s identity. Justice Clark rejected this reasoning and argued that Doe’s statement at the police station was simply an attempt to avoid looking like he was “squealing” and that Roviaro was fully aware of who Doe was.

McCray v. Illinois

A decade after Roviaro, the Court decided McCray v. Illinois, 386 U.S. 300 (1967). McCray was convicted of illegal possession of narcotics found on his person at the time of the arrest. He moved to suppress the narcotics, and the motion was denied following an evidentiary hearing.

At trial, Officer Jackson testified he and two fellow Chicago police officers had a conversation in their unmarked police car with an informant on the morning of the arrest. Jackson stated that after the informant told them that he knew McCray and that McCray was selling narcotics that were on his person, Jackson and the informant drove to McCray’s location so the informant could identify McCray. The informant then departed the scene on foot. Jackson testified that he and his partner arrested McCray, put him in a patrol car, and searched him, finding heroin in a cigarette package.
Jackson stated that he had known the informant for approximately a year, and during this time the informant had supplied him with accurate information about narcotics activities that led to arrests and convictions “fifteen, sixteen times at least.” On cross-examination, Jackson named individuals convicted of narcotics offenses based on information supplied by the informant. When Jackson was asked for the informant’s name and address, the state’s counsel objected and was sustained by the court. Another officer gave essentially the same account as Jackson.

The Illinois courts affirmed McCray’s conviction. The Supreme Court granted review and observed that the informant privilege was well-settled law in Illinois and other states and generally recognized by the common law. Justice Stewart’s opinion reasoned that because a magistrate considering a warrant application often relies on representations by police as to information provided by informants and has authority to require the informant to be produced if the magistrate doubts the credibility of what the officer represents in an affidavit, there is no reason to have a different approach when an arrest and search are warrantless and a hearing is held after the fact to determine the constitutionality of police action.

Justice Stewart observed that Roviaro involved a trial, not a suppression hearing as in McCray, and that even Roviaro did not require disclosure of an informant’s identity in every trial. He concluded for the majority that “[n]othing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury.” (McCray, 386 U.S. at 313.)

The decision was 5–4, with Justice Douglas writing the dissent. He argued the following: “There is no way to determine the reliability of Old Reliable, the informer, unless he is produced at the trial and cross-examined. Unless he is produced, the Fourth Amendment is entrusted to the tender mercies of the police.” (Id. at 316 (Douglas, J., dissenting.).)

**Back to Sierra-Villegas**

At first blush, the facts of Sierra-Villegas seem to resemble Roviaro more than McCray, given that the Roviaro Court had said that “once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable,” and the informant in Sierra-Villegas had prior relations with Sierra-Villegas and participated in the criminal activity. The court of appeals referred to the quoted language as dictum and explained the need to protect against disclosure of informants’ identities in some circumstances even when they are known to participants at trial:

Although the Government has pointed to no specific threat to the CI [confidential informant], it is clear that the CI could potentially be harmed by disclosure. Without further disclosure, only Sierra-Villegas and his alleged co-conspirators know who the CI is. Anyone else will have to rely on Sierra-Villegas’s or the co-conspirators’ word, which is very different from relying on the government’s word. The Government suggests that contributing to a $500,000 meth bust “breeds a lot of resentment” and that the informant might be involved in further investigations. While one cannot infer that the CI would necessarily face retribution or other harm on these grounds alone, it is perfectly plausible that he might. The Government also notes that the website whosarat.com documents publicly disclosed informants. There is no information on the record suggesting that informants are harmed by their publication on this website, but publication—particularly with proof—may be harmful in itself and may lead to a wide range of threats. The government’s interest in protecting the flow of information to law enforcement includes the need to protect informants from vague and speculative threats, and even from reputational harms. This need will more easily give way to a defendant’s need to present an effective defense than the need to protect an informant from a ruthless mob bent on uncovering his identity, but the need still suffices for the application of the qualified privilege. (Sierra-Villegas, 774 F.3d at 1099.)

The defendant made two arguments as to why the informant’s identity and testimony was relevant to his defense. He argued first that it was relevant so that he could impeach the informant. The court of appeals rejected the argument because the informant did not testify at trial and the trial judge repeatedly instructed the jury to give no weight to statements by the informant. His second theory was that the informant might have “framed” him “by intentionally using common drug code words during his telephone call with Sierra-Villegas even when the CI knew that Sierra-Villegas thought the conversation was about something else.” The court of appeals responded to this argument by observing that “[t]estimony to this effect would have been relevant, but Sierra-Villegas was unable to provide more than speculation that the CI’s testimony might support a framing theory,” and “[m]ere speculation alone is not enough to overcome the privilege.” (Id. at 1100.)

The court recognized that the role of an informant in each case must be carefully examined when a defendant seeks to overcome a claim of informant privilege:
In some cases, the context makes it obvious that a confidential informant might provide testimony helpful to the defendant, but that is not the case here; the call itself was already in evidence, and it is unclear what context the CI could provide that would color its interpretation. Under these circumstances, Sierra-Villegas did not provide more than speculation suggesting the CI’s testimony could substantiate the framing theory.

(Id.)

The decision might well indicate that the burden on the defense to show a genuine nonspeculative need for disclosure of an informant’s identity and/or production of the informant as a witness has increased since Roviaro. A look back at the Roviaro Court’s reasoning about why the informant’s identity should have been disclosed (Doe’s “testimony might have disclosed an entrapment” and “[h]e might have thrown doubt upon petitioner’s identity or on the identity of the package”) suggest that in 1957 the fact that the defendant could not say what the informant would testify to without confronting the informant did not mean that the defense need for disclosure of the informant’s identity and production of the informant as a witness was insufficient to overcome the claim of informant privilege.

Lessons

1. Roviaro and McCray remain good law. They can be summarized (albeit with a bit of generality) as requiring an informant to be identified and produced when he or she was actually involved in crimes charged and is in a position to support or contradict law enforcement and/or the defendant on the merits of one or more charges. But Sierra-Villegas demonstrates that even though an informant is part of the criminal activity, a defendant who is unable to offer a plausible theory of how the informant’s identity and/or testimony would be helpful to the defense will be unable to overcome the privilege claim.

2. The privilege belongs to the government. If it chooses to disclose the identity of an informant, the informant typically has no standing to complain. And, if the government discloses identity, it will waive the privilege.

3. The fact that a defendant might suspect the identity of an informant or actually know who he or she is does not require the government to confirm the defendant’s suspicion or knowledge. In Sierra-Villegas, the defendant knew who the informant was, and the court of appeals nonetheless held that there was good reason to prevent him from being named so that the world would not know that the government confirmed his informant status.

4. If the informant has provided information that is only relevant to assessing probable cause when a warrant is sought or when police act warrantlessly, the government will not have to disclose the informant’s identity unless the magistrate considering a warrant application or conducting a suppression hearing requires production because of doubts about the credibility of the officer who represents what the informant said or did.

5. The privilege is not a constitutional privilege. A jurisdiction can refuse to recognize it and could decide to abolish it. But, the requirements of due process can override any claim of informant privilege as demonstrated by Roviaro. Sierra-Villegas is a reminder that when informant privilege is claimed, courts engage in a test balancing the need to protect the informant’s safety against the defendant’s need for evidence.

Boot Camp, Esq. (continued from page 59)

“ ldon’t know.” In addition, it is routine for time to have affected the witness’s memory. There may very well be information sought by the examining attorney of which the witness once had knowledge, but no longer recalls. Juries understand that they are working with human beings who are subject to making mistakes and forgetting. The occasional “I don’t recall” makes the witness more human and in a way makes the witness’s account of what he or she does recall all the more credible.

10. The witness should correct incorrect testimony immediately upon realizing the mistake. Let your witnesses know that it is okay to correct prior testimony once the witness realizes that he or she was previously incorrect about a fact. This should occur at the earliest instance of realizing the mistake. Thus, the witness is completely justified in interrupting the opposing attorney, or even the witness’s own response to a present question, to bring the mistake to the jury’s attention. This action will positively reflect the character of the witness who is willing to own up to his or her mistake without having to be directed to it by someone else.
Requiem for a Heavyweight: Monroe H. Freedman

BY J. VINCENT APRILE II

On February 26, 2015, the legal community lost a giant in legal ethics and civil rights when Monroe H. Freedman, 86, a law professor at and former dean of Hofstra’s law school, passed away. During his 42 years as a law professor, Monroe repeatedly demonstrated his deep understanding of the adversary process, particularly in criminal cases, and the proper role of legal ethics in that context. Perhaps more than any other legal ethicist, Monroe appreciated the role of a criminal defense attorney as a zealous advocate dedicated to representing, protecting, and understanding his or her client against the resources of the government. But equally important, while teaching his law school students, Freedman, through his books, articles, lectures, expert affidavits and testimony, and personal availability, never hesitated to disseminate his knowledge, analyses, and insights to criminal law practitioners in this nation’s courts as well as those in other courts around the world.

Monroe Freedman never feared challenging conventional wisdom concerning the rules of professional responsibility and their application to the litigation process in an effort to make those ethical principles pragmatic, effective, and responsible.

In 1966, Monroe published an article raising and answering the three hardest ethical questions facing a criminal defense lawyer. (Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV. 1469 (1966).) The three questions are:

1. Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
2. Is it proper to put a witness on the stand when you know he or she will commit perjury?
3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give the client will tempt him or her to commit perjury?

Monroe presented the thrust of this article at a continuing legal education program to an audience that included 45 members of the District of Columbia Bar, several judges not in attendance were obviously enraged by Freedman’s analysis, and, in their opinions, his lack of ethics, and complained to the district’s Committee on Admissions and Grievances, seeking Monroe’s disbarment or suspension. Following four months of proceedings, the committee decided to “proceed no further in the matter.” (Id. at 1469 n.1.) One of the judges who sought disciplinary action against Monroe was Warren Burger, who later became chief justice of the United States Supreme Court.

In 1975, Monroe published his first ethics book, Lawyers’ Ethics in an Adversary System, identifying and resolving the most challenging ethical issues facing a lawyer within the context of litigation. Publisher Bobbs-Merrill Co. received an American Bar Association Silver Gavel Award Certificate of Merit that recognized the book as “outstanding” in examining “the most difficult ethical problems a lawyer faces.”

In 1990, Monroe with Abbe Smith published another book, Understanding Lawyers’ Ethics, which has become required reading in many US law schools as well as in legal education programs in Canada.

Professor Freedman was selected as the 1998 recipient of the American Bar Association’s Michael H. Franck Professional Responsibility Award to honor his lifetime of original and influential scholarship in the field of lawyers’ ethics. The award noted that, “[a]lthough many of [Professor] Freedman’s ideas were first considered controversial, they have since become an integral part of the law governing lawyers.” Criminal law practitioners who cited Monroe’s positions on ethical issues were for years confronted by judges who questioned Monroe’s works as too liberal, too far from their understandings of the ethical rules in play. But slowly Monroe’s well-explained resolutions of these issues gained acceptance not only by practitioners, but also by many courts.

In 2005, Monroe published his lecture, “An Ethical Manifesto for Public Defenders,” exhorting a public defender, who, due to heavy caseloads and inadequate resources, is unable to provide competent and conflict-free representation to his or her indigent client, to take the following actions in accordance with counsel’s ethical obligations: (1) decline the representation; (2) if ordered by a defender supervisor to take the case, report the supervisor’s unethical conduct to the proper disciplinary authority; (3) if required to obtain the court’s permission to withdraw and the court refuses, report the judge to the proper judicial disciplinary authority; (4) place on the court record the factual basis for counsel’s inability to provide competent, conflict-free representation to this client; (5) inform the client of any plea offer, explaining that due to a lack (continued on page 69)
The Lowest Sentence, the Best Place, the Earliest Release: Part 2

BY ALAN ELLIS

Approximately 97 percent of all federal criminal defendants plead guilty. Seventy-five percent of those who proceed to trial are convicted. There is, therefore, almost a 99 percent chance that a person charged with a federal crime will ultimately face a judge for purposes of sentencing, and 87.6 percent will be sentenced to prison. Thus, for most offenders, “How much time am I going to do?” and “Where am I going to do it?” are key concerns. In the last issue of Criminal Justice (Spring 2015), this column offered tips to help attorneys obtain the lowest possible sentence. This column offers tips to help attorneys have their clients designated to the best possible facility.

1. Once a defense attorney understands how the system works, there are four things he or she can do to ensure that a client serves time in the best possible facility. First, counsel should ensure the accuracy of the information on which the Bureau of Prisons (BOP) will rely to make its designation decision. Second, counsel should score the client and search for public safety factors (PSFs) to determine the appropriate security level. PSFs (such as “sex offender,” “deportable alien,” or “greatest severity”) can preclude camp placement for otherwise qualified defendants. Third, counsel should consult with the client to determine which facility the client prefers at the appropriately calculated security level and then ask the sentencing judge to recommend that facility to the BOP, as well as to provide reasons in support of that recommendation. Finally, if the defendant is not already in custody, counsel should always request self-surrender.

2. Make sure the presentence investigation report (PSR) is corrected. The BOP relies almost exclusively on the information contained in the PSR to decide where a defendant will do time, as well as to make other important correctional decisions, such as whether a defendant is eligible for the BOP’s drug treatment program. It is for good reason that the PSR is known as the “bible” by prisoners and BOP staff alike. If defense counsel objects to inaccurate information at the time of sentencing and the judge sustains those objections, defense counsel must make sure that the PSR is corrected before it is sent to the BOP or, at a minimum, that formal findings are made by the judge pursuant to Federal Rule of Criminal Procedure 32(c)(1) and attached to the PSR before it is forwarded to the BOP. A finding made in the “Statement of Reasons” (sealed) section of the judgment will also suffice.

3. It is important for counsel to make sure that the PSR’s criminal history score is accurate. The addition of one criminal history point may not change a defendant’s score, but it can negatively impact prison designation. Because the BOP now uses criminal history points to calculate an individual’s security level (see BOP Program Statement 5100.08: Inmate Security Designation and Custody Classification (2006), available at http://tinyurl.com/2aojrdy), the points can affect the type of facility to which the offender may be assigned, even if the judge sentences below the guideline range.

4. It is important for defense counsel to make sure that the PSR adequately documents any drug abuse (illegal as well as prescription) or alcohol. Many defense lawyers and defendants tend to downplay substance abuse problems under the mistaken belief that revealing such problems can harm the client. Unless a client’s substance abuse problem is adequately documented in the PSR, he or she may not qualify for the BOP’s Residential Drug Abuse Program (RDAP) and will not get the chance to earn up to a one-year reduction in sentence pursuant to 18 U.S.C. § 3621(c)(2), which permits such a reduction for nonviolent inmates who successfully complete an RDAP in a BOP facility.

5. It is important to ensure that the PSR lists the correct client address. Because “release residence” is defined by the BOP as the defendant’s legal address that’s listed on the PSR, the BOP will attempt to house your client near that address. If that address is not only far from family and friends who want to visit your client, but also far from the area to which your client intends to relocate upon release, you should consider requesting that another address be used.

6. Do not “oversell” medical and mental health issues to the probation office. Because the BOP operates on a care level system, inaccurate clinical information may result in an unfavorable placement (e.g., farther from home) in the BOP’s attempt

(continued on page 68)
Detecting Fraud Using Benford’s Law

BY WILLIAM C. DIMM

A great deal of e-discovery involves hunting for evidence using keywords, but numbers can also lead to critical information. This article shows how an observation made by an astronomer over a century ago can be used to identify numbers that have been fabricated for fraudulent purposes.

Before the days of computers, scientists looked up values of mathematical functions in tables to do calculations. In 1881, astronomer Simon Newcomb noticed that early pages of a set of logarithm tables were more worn than later pages, implying that numbers starting with low digits, such as one or two, were encountered more frequently than numbers starting with high digits, such as nine. He hypothesized a probability distribution for the leading digit of naturally occurring numbers. (Simon Newcomb, Note on the Frequency of Use of the Different Digits in Natural Numbers, 4 AM. J. MATH. 39 (1881), available at http://www.jstor.org/stable/2369148.) Physicist Frank Benford rediscovered the phenomenon in the same way in 1938, and analyzed numbers from 20 different sources to confirm the expected probability distribution. (Frank Benford, The Law of Anomalous Numbers, 78 PROC. AM. PHILOS. SOC’Y 551 (1938), available at http://www.jstor.org/stable/984802.)

People fabricating numbers for fraudulent purposes, such as creating fake invoices or accounting transactions, are often oblivious to Benford’s Law, so their numbers fail to obey the expected probability distribution, making it possible to detect the fraud. Table 1 shows the probabilities predicted by Benford’s Law. People generating fake data often make the mistake of assuming each possible leading digit should have the same probability. In 1999, accounting professor Mark Nigrini published an article recommending the use of Benford’s Law to detect accounting fraud. (Mark J. Nigrini, I’ve Got Your Number: How a Mathematical Phenomenon Can Help CPAs Uncover Fraud and Other Irregularities, J ACCOUNTANCY, May 1, 1999, http://tinyurl.com/mdzh7dk.) He has since published an entire book on the topic. Forensic accountant Darrel Dorrell claimed in an interview in 2009 that evidence based on Benford’s Law has been admitted in criminal cases at the federal, state, and local levels in the United States. (From Benford to Erdös, RADIO LAB (Oct. 9, 2009), http://tinyurl.com/kqybr6j.) He also said that when he gives lectures on Benford’s Law at conferences, at most, 5 percent of attendees have previously heard of it.

It is worth considering why the probabilities turn out the way they do. Many quantities involve an arbitrary unit of measure. In accounting transactions, that unit could be dollars but it could just as easily be yen, euros, pesos, or any other currency. The probability distribution for the digits used to indicate naturally occurring amounts of economic value should not depend on the arbitrary currency used to quantify that economic value—you should get the same probability distribution if you convert all transactions from dollars to yen. This is known as “scale invariance.”

Suppose you convert from dollars to a currency that is worth half as much, which means that all prices would be multiplied by two. A widget that costs $10 would cost 20 units of the new currency. Any values starting with a one when expressed in dollars would start with either a two or three in the new currency (e.g., $199 would be 398 in the new currency). Scale invariance implies that the probability of a value starting with a one must therefore equal the probability of a value starting with a two or three. So scale invariance says the probability of a

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Irregularities, J ACCOUNTANCY, May 1, 1999, http://tinyurl.com/mdzh7dk.) He has since published an entire book on the topic. Forensic accountant Darrel Dorrell claimed in an interview in 2009 that evidence based on Benford’s Law has been admitted in criminal cases at the federal, state, and local levels in the United States. (From Benford to Erdös, RADIO LAB (Oct. 9, 2009), http://tinyurl.com/kqybr6j.) He also said that when he gives lectures on Benford’s Law at conferences, at most, 5 percent of attendees have previously heard of it.

It is worth considering why the probabilities turn out the way they do. Many quantities involve an arbitrary unit of measure. In accounting transactions, that unit could be dollars but it could just as easily be yen, euros, pesos, or any other currency. The probability distribution for the digits used to indicate naturally occurring amounts of economic value should not depend on the arbitrary currency used to quantify that economic value—you should get the same probability distribution if you convert all transactions from dollars to yen. This is known as “scale invariance.”

Suppose you convert from dollars to a currency that is worth half as much, which means that all prices would be multiplied by two. A widget that costs $10 would cost 20 units of the new currency. Any values starting with a one when expressed in dollars would start with either a two or three in the new currency (e.g., $199 would be 398 in the new currency). Scale invariance implies that the probability of a value starting with a one must therefore equal the probability of a value starting with a two or three. So scale invariance says the probability of a

<table>
<thead>
<tr>
<th>Leading Digit</th>
<th>Probability (percent)</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>30.1</td>
</tr>
<tr>
<td>2</td>
<td>17.6</td>
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<tr>
<td>3</td>
<td>12.5</td>
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<td>4</td>
<td>9.7</td>
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<td>5</td>
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<td>5.8</td>
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<tr>
<td>8</td>
<td>5.1</td>
</tr>
<tr>
<td>9</td>
<td>4.6</td>
</tr>
</tbody>
</table>
Federal Sentencing (continued from page 66)

7. After your client is sentenced, make sure you carefully review the judgment. If you requested that the judge recommend a particular facility and you proposed language in support for the court to use, ensure it is in the judgment. Often the clerk prepares the judgment and doesn’t get it right. To overcome this, our law office submits a written proposed recommendation to the prosecutor in advance of sentencing and, once we receive the prosecutor’s nonobjection, we submit it to the court and the clerk at sentencing noting that the government does not object to the recommendation being placed in the judgment.

8. After sentencing, keep checking the BOP locator (www.bop.gov/inmateloc). Once your client’s name appears, it will only be a matter of days until the client is “designated.” Upon designation, the US marshal and/or pretrial services is supposed to notify the defendant of his or her designated facility and, if left up to the BOP, the surrender date, place, and time. If you or the client do not receive this notification, it is imperative that you contact the US marshal or the defendant’s pretrial service office. Otherwise, if your client unknowingly fails to surrender on the appointed date, an arrest warrant may very well issue.

9. In scoring for designation and placement, BOP counts detainers. The type of detainer can increase an inmate’s security level. BOP treats unresolved charges as a detainer, even when none has been lodged. This results in additional security points and possibly placement at a more secure institution, particularly for individuals who otherwise qualify for minimum-security placement. Accordingly, where a client is sentenced and has a case that may resolve soon thereafter with a sentence to run concurrent with and to be absorbed within the instant sentence or no additional term of imprisonment, counsel should ask the court to (1) hold the judgment in abeyance until after the pending case’s disposition and (2) direct US Probation to amend the PSR to reflect the resolution before it sends the report to the bureau. If the court refuses such a request, counsel should obtain a certified copy of the disposition (if state), and forward it to the US Marshall and Designation and Sentence Computation Center (DSCC) of the Bureau of Prisons before the client’s designation package is processed. If federal, there is no need to have it certified, as DSCC can confirm on PACER, if the case information and document number are included.

Because the values don’t span several orders of magnitude—there are no adults with a height starting with a one when measured in feet. It does not apply to lottery numbers because they have limited range and are not naturally occurring. It does not apply to psychologically manipulative prices because they are not naturally occurring. For example, an item that should cost $101.50 might be priced at $99.99 to achieve higher sales due to irrational purchasing habits of consumers, which breaks the scale invariance argument because the price is impacted by the currency, causing a value that naturally should start with a one to start with a nine instead. On the other hand, monthly invoices from a consulting company that might perform anywhere from a few hours to thousands of hours of work for a client in a month would be expected to follow Benford’s Law.

Benford’s Law can point out potential fraud, but one must always consider the specifics of the situation to determine whether there is a reasonable explanation for any deviation from the expected probabilities.

Scale invariance must work for any amount of scaling, not just a factor of two. For example, scaling by a factor of five means that the probability of a number starting with one should equal the sum of the probabilities of starting with five through nine, which is also seen to be true for the values in table 1. The probability for a number to start with a particular digit or sequence of digits can be derived from the scale invariance requirement and some calculus, but that is beyond the scope of this article.

Benford’s Law tends to work for positive, naturally occurring numbers that span several orders of magnitude (i.e., differing numbers of digits, or differing powers of 10 when written in scientific notation like 3.15 x 10^2) and are not artificially limited in range. It does not apply to heights of adult humans, because the values don’t span several orders of magnitude—there are no adults with a height starting with a one when measured in feet. It does not apply to lottery numbers because they have limited range and are not naturally occurring. For example, an item that should cost $101.50 might be priced at $99.99 to achieve higher sales due to irrational purchasing habits of consumers, which breaks the scale invariance argument because the price is impacted by the currency, causing a value that naturally should start with a one to start with a nine instead. On the other hand, monthly invoices from a consulting company that might perform anywhere from a few hours to thousands of hours of work for a client in a month would be expected to follow Benford’s Law.
of knowledge about the case, counsel can provide no legal advice whatsoever on the prosecution's offer; and (6) if the client elects to accept the offer, put on the record that no advice has been provided to the client regarding the plea because that would violate counsel's ethical obligations to provide competent, conflict-free representation. (Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VA. U. L. REV. 911, 922–23 (2005), available at http://scholar.valpo.edu/vulr/vol39/iss4/4.) Monroe explained that, “by honoring their ethical obligations, public defenders would cease to be an essential part of a fraudulent cover-up of the denial of fundamental rights to countless poor people who are caught up in a criminal justice system that is unethical, unconstitutional, and intolerably cruel.” (Id. at 923.) Again Monroe explained in pragmatic terms that ethical obligations can be a sword if wielded properly, empowering public defenders to fight back against the circumstances that often made their representation pro forma.

Monroe’s vast number of accomplishments cannot be delineated here. But Monroe was much more than a law professor and an acclaimed author. He was a force in legal ethics and the law at so many levels. The comments of Dan Goyette, the longtime chief public defender and executive director of the Louisville-Jefferson County [Kentucky] Public Defender Corporation, illustrate in a microcosm the range of service Monroe provided to attorneys around the country:

“I count myself as extremely fortunate to have known Monroe for most of my professional life and to have had the benefit of his wise counsel and his example as a principled lawyer and zealous advocate. I invited Monroe to be the keynote speaker at the Louisville Bar Association’s Annual Dinner in 1988 when I was installed as President. He gave a memorable speech using the novel and movie *Shane* to describe the role and function of a criminal defense lawyer. It was brilliant—at once entertaining, insightful, educational, and inspiring—and, needless to say, it resulted in a standing ovation. Monroe continued to be an inspiration, mentor, and tremendous resource over the years, never failing to respond to a request for help. Whether it involved consulting on a difficult case, clarifying an ethical issue for a journalist writing a story about a controversial legal matter, or defending a public defender for simply doing her job, Monroe always came through with advice that was knowledgeable and well-reasoned, and also informed by his unerring moral compass. Monroe was truly one of a kind, an exceptionally thoughtful and giving man, as well as a remarkably gifted lawyer.

Goyette’s experience is not atypical; it is the norm when reviewing Monroe’s contributions to lawyers wrestling with ethical dilemmas and related problems. Monroe’s legacy will not only endure, but it will also continue to grow as many lawyers throughout the country reveal the assistance Monroe generously provided over the years behind the scenes with no fanfare, no public recognition, and no compensation.

With Monroe’s passing, a monumental question arises. Who will come forward and be able to provide all that Monroe has given the legal community for so many years? There is a real possibility that no one will be able to fill Monroe’s shoes. As Goyette mused, “Shakespeare said it best, ‘“[We] shall not look upon his like again.’ While that is a sad prospect for those who must continue on after his passing, we are grateful for the mark he made on us and on our profession during the 86 years of his extraordinary life.”

Monroe was a true heavyweight in the arena of legal ethics who used his varied pugilistic skills to strike stunning blows for realistic and moral applications of legal ethics, particularly in the context of criminal cases, to ensure justice. Despite the conventional forces that repeatedly challenged his teachings, Monroe retires as the undefeated heavyweight champion of legal ethics, used as both a sword and a shield.
Chair’s Counsel Felman (continued from page 1)

advance the cause of justice on these issues. Some courts have already found guidance in the work of our task force, and I feel certain that more courts will find our work helpful in the future. I am again feeling both proud and lucky to have been afforded the opportunity to work with the incredible array of talent on our task force and to have had the full support of the Section in our efforts.

There are many other things over the year that stand out to me that I had little to do with other than that they happened while I was chair. But I am still very proud of them. We launched the National Inventory of Collateral Consequences of Conviction at a well-organized and attended summit in Washington. We finally passed the revised Prosecution and Defense Function Standards after years of work. We took a categorical stand against the sentencing of juveniles to life in prison without the possibility of parole. We established a new Task Force on Criminal Justice Discovery Standards to address the ongoing need for reform of our criminal discovery rules. We continued our first-rate CLE programming, passed many other items of significant policy, supported the filing of important amicus briefs, and awarded the first Raeder-Taslitz Award to Section Delegate Steve Saltzgub in memory of two of our beloved former colleagues, Myrna Raeder and Andy Taslitz.

On a lighter note, those of you who know me well will not be surprised to learn that another aspect of my year as chair that stands out to me is the volume of e-mails I received. I tried to get my Outlook software to count the number of messages I received over the year, but unfortunately my efforts in that regard resulted in the program locking up and crashing. I will confess that there were days that I wanted to propose a new misdemeanor offense proscribing REPLY ALL (a.k.a. “RA”) e-mails without just cause. If I actually accomplish little else as chair, I would feel content if I caused even a small percentage of those reading this final column to hesitate before hitting the RA button.

In closing, I want to thank my three law partners, Stuart Markman, Katherine Yanes, and Kristin Norse. The fact is that they made my year possible by “holding down the fort” and engaging in the actual practice of law while I flew around the country giving talks and sitting in meetings (and responding to e-mails) at an average collectable billing rate of $0.00. I also want to thank my colleague and good friend Cynthia Orr, who shared the year as chair of the Section. This was the first time the Section has had two chairs, and from my perspective at least it was an unqualified success.

So for all of the above reasons and so many more, I feel blessed, honored, and so very thankful to have had this opportunity to serve my year as Section chair.

JAMES E. FELMAN is a 2014–2015 chair of the Criminal Justice Section. He practices federal and state complex criminal and civil defense law with Kynes Markman & Felman in Tampa, Florida, and is active in criminal justice reform.

Chair’s Counsel Orr (continued from page 1)

analysis by the premier forensic science lab in the country, the FBI lab. In 2013, it revealed that its hair microscopy reports, testimony, and training were flawed in thousands of federal and state cases. It reviewed them and notified stakeholders to correct these mistakes. But 22 capital murder cases have been identified thus far, and 14 persons have died or been executed. As a consequence of the Cameron Todd Willingham case, where local junk fire science sent an innocent man to his death, the Texas Forensic Science Commission, created through the efforts of Judge Barbara Hervey, established science-based fire investigations and testimony in Texas. We must obtain the same scrupulous review of forensic evidence in criminal cases that is currently employed in civil cases. This would certainly help prevent the admission of junk science and might prevent decades of its use.

I was excited to see the first resolution presented by the National Association of Criminal Defense Lawyers (NACDL), from whence I came, and hope to see the objectives it promoted ultimately sent to and approved by the ABA House of Delegates. It is a work in progress. CJS is a place where divergent views are debated to consensus.

This year I created two new committees. The Law Enforcement Committee is chaired by Sheriff Susan L. Pamerleau, an esteemed former two-star general from San Antonio, Texas. She was recently joined by Anthony Holloway, chief of the St. Petersburg (Florida) Police Department. The committee is engaged in developing protocols for body cameras, building community trust, and providing input to the other new committee I established—the Mental Health Committee. The mental health community is underserved, and too many mentally ill persons occupy our jails and prisons.

I was also very pleased to see the ABA Prosecution and Defense Function Standards pass the House of Delegates this year, as I was on the task force formed in 2006 to revise these Standards. To say that they were rigorously vetted is an understatement. I thank the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), NACDL, and the ABA Standing Committee on
Ethics and Professional Responsibility for their contributions and continuing participation. Kevin Scruggs ably saw them through with Shamika Dicks and our reporter, Rory Little, and task force chair, Judge Jack Tunheim. The Standards will serve our profession and the courts as a touchstone. I am also delighted that Susan Hillenbrand is joining us again, to engage in a harmonization of all of the Criminal Justice Standards—a Herculean task that Ron Goldstock (this year’s Charles R. English Award recipient) is spearheading after having seen the Monitors Standards through. As a consequence, the Juvenile Justice Standards are being incorporated into the “Standards” family. I am pleased that they have been officially elevated and will receive the additional vetting provided by the regular Standards process under the leadership of John Cline, Standards Committee chair. The chair of the Juvenile Justice Standards Task Force is Judge Ernestine Gray and its reporter is Professor Kristin Henning.

The Task Force on Criminal E-Discovery has also begun its work with an eye toward developing modern discovery standards. This is a daunting task. But in light of the continued problems with wrongful convictions, prosecutorial misconduct, ineffective assistance of defense counsel, and forensic lab and evidence debacles, it is time for relevance-based discovery in criminal cases like that achieved in Texas. (See Cynthia E. Hujar Orr & Robert Rodery, The Michael Morton Act: Minimizing Prosecutorial Misconduct, 46 St. Mary’s L.J. 407 (2015).)

It was a great honor to be able to address the White Collar Crime Institute and attend the CJS programs in Amsterdam, London, and Shanghai. Through each program, the ABA Criminal Justice Section invested in diversity and collegiality. Our roundtable with diversity bars also built better relationships.

Of course, I cannot let this opportunity pass without recognizing Steve Saltzburg and Neal Sonnett, our House of Delegates representatives. They are overgenerous with their time, advice, and efforts. They are so highly respected, they are often called upon by ABA leadership to problem-solve in the House. They both lead by serving. More importantly, they have my undying admiration, respect, and friendship. Steve saw his arduous work on the National Inventory of the Collateral Consequences of Conviction rolled out at the National Summit this year with important luminaries and stakeholders presenting the utility of the inventory. ABA President William Hubbard opened the summit, and we came away resolved to eliminate the unnecessary and wrongheaded collateral consequences affecting returning citizens and persons. The Texas legislature has pending legislation that will decriminalize truancy, a good first step.

This year, CJS had the very good fortune of President Hubbard championing criminal justice issues. Most recently, his letter to Congress asking for decriminalization and an end to overincarceration received national attention.

Our executive director, Jane Messmer, is in a class by herself. Her brilliant ideas, indefatigable spirit, diplomacy, and leadership serve CJS and us very well. I always look forward to time with Jane, whether it is Section business or a rare opportunity to socialize. Among her many accomplishments are the addition of the Section’s media and public relations capabilities through Rabiah Burks. Rabiah is a pro. Jane is also remarkable in her ability to coordinate two chairs. Jessica Barnes is masterful at meeting logistics. We are lucky to have her. Kyo Suh manages our many excellent publications. Carol Rose and Stacey Brown arrange and publicize our meetings with aplomb. Patrice Payne and Regina Ashmon engage our liaisons, keep our committees staffed, and make sure the Council functions without a hitch. MaryAnn Dadisman is the always cheerful editor of Criminal Justice magazine, and Bruce Nicholson is our able legislative counsel. Michael Gradess keeps us informed via e-mail and furnishes us with the necessary documents to perform our work. And Jane has welcomed Jack Hanna, our retired director, to drop in from time to time. What a delight.

I am also indebted to my partners Gerald Goldstein and Van Hilley for tolerating my absences as I participated in activities as chair. And I am grateful to my staff, Loretta Sorensen and Marissa Hernandez, for holding down the fort and getting me where I needed to be with such good humor.

The most enjoyable part of serving as chair has been engaging in intelligent debate and collegial discourse, and hearing new and exciting ideas. I am grateful for the wisdom and friendships I have gained through these experiences. Because of Jim’s genial nature and our partnership, we have had the most pleasant year. I plan to continue to enjoy these meetings with my colleagues for as long as they will have me.

The Section chairs who came before Jim and me, including those who are no longer with us, left a wonderful legacy and laid the foundation upon which we further built. I hope that I have been a good steward of their work and contributed in a lasting way as well.

CYNTHIA HUJAR ORR is a 2014–2015 chair of the Criminal Justice Section and a criminal defense lawyer with Goldstein, Goldstein & Hilley in San Antonio, Texas, where her practice focuses on white-collar crime. In addition, she is active in criminal justice reform.
CJS Chair James Felman Testifies Before U.S. Sentencing Commission

BY KYO SUH

Section Chair Jim Felman (middle in the photo) testified on behalf of the American Bar Association, during a public hearing on the proposed 2015 amendments to the Federal Sentencing Guidelines before the U.S. Sentencing Commission on March 12 in Washington, D.C. Felman presented the work of the ABA Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes, which issued its final report in November 2014. For more information, visit the Task Force website at www.americanbar.org/groups/criminal_justice/economic_crimes_taskforce.html.

Successful White Collar Crime Institute in New Orleans

The 29th Annual National Institute on White Collar Crime was held on March 4–6 in New Orleans. Criminal law experts, including representatives from the Department of Justice, weighed in on topics such as sentencing in white-collar crime cases, investigation and prosecution of international corruption, enforcement of securities and tax fraud, cybercrime, money laundering, and asset forfeiture. For highlights of the conference, visit www.youtube.com/user/ABACriminalJustice.

Stakeholders Comment on Collateral Consequences at National Summit

In celebration of the completion of the “National Inventory on the Collateral Consequences of Conviction,” the ABA Criminal Justice Section hosted the “National Summit on Collateral Consequences” on February 27, 2015, in Washington, D.C. This one-day summit was held at the law offices of Jones Day near Capitol Hill, and featured expert presentations on a flagship Section issue.

The program featured an assortment of perspectives from, among others, James Cole, former deputy US Attorney General; US District Judge Paul L. Friedman of the District of Columbia; Amy Solomon, senior advisor to the US Department of Justice’s Assistant Attorney General; DC Superior Court Judge Michael L. Rankin; and ABA President William C. Hubbard. Video highlights can be found on our “Collateral Consequences” playlist on www.youtube.com/user/ABACriminalJustice.

Errata

In the Federal Rules Alert column, in the spring 2015 issue (volume 30, number 1), at page 40, the last sentence of the commentary on Criminal Rule 12(b)(3) is in error. That last sentence should read: “But the court may still consider the motion if the party shows good cause.”

Upcoming Events

FOURTH ANNUAL INTERNATIONAL WHITE COLLAR CRIME INSTITUTE
Oct. 12–13, London, UK

For its fourth straight year, the Criminal Justice Section will host a one-and-a-half day conference that will feature top-flight legal practitioners from across the globe tackling such topics as corporate espionage and cybercrimes, international money laundering and sanctions, cross-border evidentiary concerns, whistleblowers, deferred prosecution agreements, and international internal investigations.

INAUGURAL GLOBAL WHITE COLLAR CRIME INSTITUTE
Nov. 19–20, Shanghai, China

The goal of the conference is to bring the energy and excitement of our previous international white collar crime conferences to Asia and create unique opportunities for our participants to network and explore the legal complexities of white collar crime in the growing Chinese legal market.
### Criminal Justice in the 21st Century: Calibrating the Scales of Justice!

#### Keynote Speakers Include:
- **ABA President Paulette Brown**

#### Schedule At-A-Glance

**Thursday, October 22**
- Committee Roundtable/Orientation
- Committee Meetings
- Academic Workshop
- Town Hall: The New Frontier-Surveillance Technology and the Law (CLE)
- Opening Reception

**Friday, October 23**
- 8th Annual Fall Institute: Criminal Justice in the 21st Century: Calibrating the Scales of Justice! (CLE)
- Inaugural CJS Awards Luncheon
- CJS Fall Leadership Welcome Reception

**Saturday, October 24**
- CJS Council & Committee Meetings

**Sunday, October 25**
- CJS Council Meeting

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**Inaugural CJS Awards Luncheon
Friday, October 23**

The Inaugural Criminal Justice Section Awards Luncheon will be held during the CJS 8th Annual Fall Institute on October 23, 2015 in Washington, DC. Five awards will be presented at the luncheon to the recipients listed below (in order of appearance):

- **Charles R. English Award:** Ronald Goldstock, Commissioner, Waterfront Commission of New York Harbor, Larchmont, NY
- **Frank Carrington Crime Victim Attorney Award:** Lenore Anderson, Executive Director, Californians for Safety and Justice, Oakland, CA
- **Livingston Hall Juvenile Justice Award:** Mark Friedenthal, Assistant Public Defender, Office of the Public Defender, Baltimore MD
- **Raeder-Taslitz Award:** Professor James Coleman, Duke University School of Law, Durham, NC
- **Norm Maleng Minister of Justice Award:** Pearl Kim, Assistant District Attorney, Office of the District Attorney, Delaware County, Media, PA

To register visit: [http://ambar.org/cjsfall2015](http://ambar.org/cjsfall2015)
Immigration Relief: Legal Assistance for Noncitizen Crime Victims

By Elizabeth Anne Campbell, Rachel Gonzalez Settlage, Veronica Tobar Thronson

A significant challenge in assisting noncitizen victims of crime is understanding myriad statutes, regulations, and agency guidance that populate this practice area. *Immigration Relief* synthesizes, explains, and guides the reader through all of the crucial components that govern this legal domain.

In addition, the book provides tools such as:

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- helpful checklists; and
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