A Tribute to Eric Holder

BY JAMES E. FELMAN

It occasionally happens in one’s career that we find a public servant who, to our way of thinking, simply stands out above the rest. For me, one of the best examples of that is Eric Holder. I will never forget having the opportunity to listen to one of his early speeches and having the feeling that I needed to pinch myself to believe that who I was seeing and hearing was indeed the attorney general of the United States. As I reflect now over the six years of his service, I find that my expectations were not only met but exceeded.

Most recently, I was heartened by the October 2014 announcement of the Department of justice (DOJ) that, effective immediately, it is DOJ policy that a defendant who enters a guilty plea cannot be required to waive a potential claim for ineffective assistance against the defendant’s counsel. The American Bar Association urged the DOJ to take this step in a resolution the House of Delegates passed last year. As explained in the report accompanying that resolution, prosecutors “should strive to uphold the most fundamental aspects of the criminal justice system, including competent and diligent defense counsel.” The report further recognized that “requiring as a condition of a plea agreement that a criminal defendant waives the right to challenge the failure of defense counsel to provide effective representation is incompatible with” a prosecutor’s special responsibility to be “a minister of justice and not simply that of an advocate.” Attorney General Holder commented that under this new policy, “no defendant will have to forego their right to able representation in the course of pleading guilty to a crime.” This was a truly commendable step, and I applaud Attorney General Holder for recognizing the importance of defendants’ right to the effective assistance of counsel and protecting it in this manner.

The department’s change in policy regarding ineffective assistance-of-counsel waivers is only one example of steps Attorney General Holder has taken to make the criminal justice system fairer. For example, in 2010, Attorney General Holder reversed the “Ashcroft memo” under which prosecutors were required to always charge the crime with the most severe possible sentence, and instead instructed that cases should be charged based on the individualized circumstances of the defendant. In August 2013, as part of his “Smart on Crime” initiative, Holder further revised the department’s charging policies to avoid triggering excessive mandatory minimums for low-level, nonviolent drug offenders. In September 2014, Attorney General Holder instructed federal prosecutors to no longer use enhancements under 21 U.S.C. § 851, which trigger longer sentences based on aggravating circumstances such as prior offenses, in order to gain leverage on defendants in plea negotiations.

In a major step to ensure accountability from law enforcement officers, Attorney General Holder announced in May 2014 that federal agents would be required to videotape interrogations of detained individuals in order to ensure suspects’ civil rights are respected during all interviews conducted by federal investigators. During his tenure, he also reformed the department’s rules for when evidence should be turned over to defendants.

Attorney General Holder launched the Access to Justice Initiative in 2010 to expand research and funding support to improve the delivery of indigent defense services. Under his leadership, the Justice Department also submitted briefs in watershed lawsuits in Washington State and New York over their inadequate funding of public defender programs. The department’s legal position in those cases—that public defenders with excessive caseloads are not

Published in Criminal Justice, Volume 29, Number 4, Winter 2015. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
providing adequate counsel to low-income defendants—
has helped shift the jurisprudence on this issue. Attorney
General Holder has also challenged states to commit more
funding to programs to ensure indigent defendants are
ably represented.

Attorney General Holder also worked with Congress to
support the Smarter Sentencing Act, which would statuto-
rily reduce certain mandatory minimums. He joined the ABA
and many others in successfully urging the US Sentencing
Commission in 2014 to implement a two-level reduction in
sentences for low-level drug offenders and to apply these
changes retroactively in most cases. These reforms have
helped contribute to the first yearly reduction in the fed-
eral prison population since 1980—with further reductions
projected to occur in the next two years. Attorney General
Holder has also encouraged adoption of more diversion and
drug court programs that prioritize treatment instead of incar-
ceration in order to ease our overburdened prison system and
reduce recidivism.

Along with taking steps to reduce incarceration,
Attorney General Holder worked to reduce barriers to
reentry for prisoners coming back into society. He led
interagency efforts that reduce unnecessary “collateral
consequences”—such as barriers to finding employment—
that are imposed on federal convicts even after they served
their time in prison.

Attorney General Holder’s tenure has been extraordinary
in other respects as well. Under his leadership, the Justice
Department has pursued enforcement of our country’s civil
rights laws at a historic level. This has included litigation to
protect voting rights, as well as working with Congress on
a bipartisan proposal to restore the Voting Rights Act. The
department has expanded its policy that bans the use of race in
federal law enforcement investigations to also prohibit the use
of characteristics such as ethnicity, religion, and sexual ori-
etation. Attorney General Holder has also advanced LGBT
rights, making the recommendation, which was accepted by
the president, not to defend Section 3 of the Defense of Mar-
riage Act in 2012, which had barred the federal government
from recognizing state-approved same-sex marriages. That
decision was ultimately vindicated by the Supreme Court’s
historic decision last June in the Windsor case. Since then,
Holder’s Justice Department has overseen the conferral of
scores of federal benefits to same-sex couples.

As a criminal defense attorney, I would be less than
candid if I did not acknowledge that I am not always in
agreement with the decisions of the attorney general, or
indeed the decisions of every prosecutor. But where a per-
son comes into the office of the attorney general and does
the sort of job that Eric Holder did, I feel compelled to speak
up. Thank you for your service, Attorney General Holder. It
was truly exemplary.
Hall v. Florida Reinvigorates Concept of Protection for Intellectually Disabled

But Are the States Sidestepping the Supreme Court’s Ruling?

BY SARAH E. WARLICK AND RYAN V.P. DOUGHERTY
I

n 1978, Freddie Lee Hall and accomplice Mack Ruffin kidnapped, raped, and murdered 21-year-old Karol Hurst as she was leaving a grocery store in Leesburg, Florida. Later the same day, while sitting in Hurst’s car outside a convenience store they intended to rob, the pair killed sheriff’s deputy Lonnie Coburn as he responded to a call about the two men. Hall was sentenced to death for the murder of Hurst. Ruffin was also sentenced to death, but later sentenced to life in prison.

By all accounts, Freddie Lee Hall had a difficult, abusive childhood and suffered from significant and obvious intellectual deficiencies throughout his life. Even the courts took note of this at various times during Hall’s long journey through the criminal justice system. Yet on multiple occasions Florida courts found him fit to die. In 2014, however, the US Supreme Court called the Florida courts’ decisions into question. In its May 27, 2014, decision in *Hall v. Florida* (134 S. Ct. 1986 (2014)), the Supreme Court reinforced its prior ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), that it is unconstitutional to execute the intellectually disabled, and narrowed the leeway previously granted to states to determine what it means to be intellectually disabled.

Although the Supreme Court’s May 2014 decision overturned the prior decisions of Florida’s courts, it did not rule that Hall was ineligible for execution. It did find that Florida’s bright-line IQ cutoff—requiring admissible proof of an IQ score of 70 or below—was unconstitutional. (See sidebar, *Freddie Lee Hall v. the Florida Courts.* Writing for the majority, Justice Kennedy found that Florida’s “rigid rule . . . creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.” (*Hall*, 134 S. Ct. at 1990.)

The Court reiterated its findings in *Atkins* that execution of the intellectually disabled serves no legitimate penological purpose, including the deterrent and retributive purposes of punishment, as the intellectually disabled “have a ‘diminished ability’ to ‘process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.” (*Hall*, 134 S. Ct. at 1993 (citations omitted).) Similarly, the “diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.” (*Id.*) Moreover, the intellectually disabled “face a special risk of wrongful execution” because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel.” (*Id.*)

Delving into the question of IQ scores, the Court found that medical and mental health professionals “define[] intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.” (*Id.* at 1994 (citations omitted).) The Court noted that the Florida statute, on its face, seems to comply with these criteria. As interpreted by the Florida courts, however, the statute “disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant’s abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.” (*Id.* at 1995.) As the Court observed, “[i]ntellectual disability is a condition, not a number.” (*Id.* at 2001.) The Court held that where an individual’s IQ score “falls within the test’s acknowledged and inherent margin of error,” he or she must be permitted to introduce evidence of intellectual disability, including evidence of adaptive deficits. “In using [IQ] scores to assess a defendant’s eligibility for the death penalty, a state must afford these test scores the same studied accommodation that it provides for other scientific evidence. It also relies on a purportedly scientific measurement of the defendant’s abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.” (*Id.* at 1996.)

The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. (*Id.*)

**Hall in the State and Lower Federal Courts**

There can be little doubt that the Supreme Court’s decision in *Hall* effectively redoubled the Court’s commitment to ensuring that the intellectually disabled are not unlawfully executed by narrowing the leeway granted to the states in *Atkins* to determine when an individual is intellectually impaired. The practical impact of the Court’s decision, however, even for Hall himself, is not entirely clear. The ruling simply permits Hall a new hearing to determine whether he is intellectually disabled, at which he will be able to present evidence of his IQ score while refusing to recognize that the score is, on its own terms, imprecise.” (*Id.*) The Court closed by noting that,

> [t]he death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world.

*SARAH E. WARLICK and RYAN V.P. DOUGHERTY* are both associates in the Washington, D.C., office of Arnold & Porter LLP. Warlick’s practice focuses on commercial litigation and internal investigations; she also maintains a diverse pro bono practice that includes cases involving adoption, reproductive rights, and the death penalty. Dougherty is in the firm’s litigation group; his practice focuses on environmental, product liability, and white collar defense. Published in Criminal Justice, Volume 29, Number 4, Winter 2015. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Thus far, defendants in state and lower federal courts have generally been unsuccessful in using the Court’s holding in *Hall* to their advantage. First, several courts have held that *Hall* does not apply to the criminal law in their respective states. Thus far, courts have held that *Hall* is inapplicable in California, Pennsylvania, and Texas. (Guevara v. Stephens, 2014 WL 3894303, at *7–8 (5th Cir. Aug. 11, 2014) (holding that Texas never adopted a bright-line cutoff rule like the one at issue in *Hall*); Roybal v. Chappell, 2014 WL 3849917, at *3 (S.D. Cal. Aug. 5, 2014); Commonwealth v. Hackett, 2014 WL 4064039, at *28 (Pa. Aug. 18, 2014) (Castille, J., concurring).)

Based on the Court’s Eighth Amendment jurisprudence and its rationale in *Hall*, this trend should perhaps not be surprising. But *Hall* appears to be limited even in states where it would be expected to apply. There are, according to Justice Kennedy, at most eight other states that have adopted bright-line IQ score cutoffs, through either statute or judicial opinion, including Alabama, Arizona, Delaware, Kansas, Kentucky, North Carolina, Virginia, and Washington (though Delaware, Kansas, North Carolina, and Washington “appear not to have considered the issue in their courts”). (*Hall*, 134 S. Ct. at 1997.)

In review of a habeas petition, the US District Court for the Eastern District of Virginia held that the petitioner’s original capital trial in Virginia state court did not violate *Hall*. (*Prieto v. Davis*, 2014 WL 3867554, at *41–43 (E.D. Va. Aug. 5, 2014).) This decision suggests that defendants may face an uphill battle even in states that were specifically identified by the Supreme Court in *Hall* as having an impermissible bright-line IQ cutoff. (*Hall*, 134 S. Ct. at 1996.) Here, the district judge held that *Hall* was not violated because the defendant was permitted to present evidence to the jury regarding the IQ test’s standard error of measurement, even though Virginia has a bright-line IQ score cutoff. The district court further stated that because the jury was not instructed on the cutoff, the petitioner had not suffered any prejudice.

The district court’s analysis in *Prieto* reveals another potential issue for habeas petitioners whose cases are being reviewed retrospectively by trial judges. Specifically, the district judge applied the facts in *Hall* regarding his background and adaptive deficits as if they were a legal standard. (*Prieto*, 2014 WL 3867554, at *44.) Reviewing the record of Prieto’s trial, the district judge stated, “A comparison of the facts in *Hall* with Prieto’s case reveals that Prieto’s adaptive behavior was not deficient under [Virginia law] and *Hall*. (Id.) In this way, the district court almost relied too heavily on *Hall*. The court’s analysis also reveals the inherent difficulty of analyzing adaptive behavior, which cannot be measured in a test. In his *Hall* dissent, Justice Alito predicted that this may be an issue in the application of the Court’s decision and may even work to the disadvantage of defendants. (*Hall*, 134 S. Ct. at 2006 (Alito, J., dissenting).) The analysis of a capital defendant’s alleged deficits in adaptive behavior in states affected by the *Hall* decision will be an important trend for practitioners to monitor going forward.

Second, lower courts have had to determine whether *Hall* applies retroactively to cases on collateral review. Thus far, courts in the Eleventh and Fourth Circuits have held that *Hall* does not apply retroactively—thereby limiting the group of individuals who can take advantage of the Supreme Court’s new rule—recognizing that it is a procedural rule for determining intellectual disability, rather than a new constitutional protection for a certain class of individuals. (*In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014); *Prieto*, 2014 WL 3867554, at *42.) By classifying the rule in *Hall* as a procedural rule, these courts’ retroactivity analysis has further emphasized the limited scope of the Supreme Court’s decision. In *Henry*, for example, the Eleventh Circuit stated that *Hall* “guaranteed only a chance to present evidence, not ultimate relief.” (*In re Henry*, 757 F.3d at 1161.)

But at least one federal court has applied the underlying reasoning of the Court’s decision in a manner that should be beneficial to defendants. The Sixth Circuit Court of Appeals applied *Hall* to the adaptive functioning prong of the test for intellectual disability. In *Van Tran v. Colson*, a habeas case from Tennessee, the Sixth Circuit held that the state court of appeals erred in its determination that Van Tran was not intellectually disabled because it did not rely on clinical methods and definitions. The court cited *Hall* for the proposition that “the Constitution requires the courts and legislatures to follow clinical practices in defining intellectual disability.” (*Van Tran v. Colson*, 2014 WL 4178299, at *15 (6th Cir. Aug. 25, 2014).)

This aspect of the Sixth Circuit’s opinion may create practical problems for state trial courts, at least in the opinion of Justice Alito, who raises several possible complications for a constitutional analysis pegged to scientific or clinical tests. For example, science often moves more quickly than the law, and closely tying the two may “lead to instability and continue to fuel protracted litigation.” (*Hall*, 134 S. Ct. at 2006 (Alito, J. dissenting.).) Additionally, the Court’s decision may put judges—professional lawyers—in the uncomfortable position of evaluating changes in psychological diagnoses or choosing between competing methods that may have different standards. (Id.) In the abstract this may not seem much different than a judge’s responsibilities in other unfamiliar subject areas, for example, technological disputes in a patent case, but when a judge’s scientific conclusion may result in the imposition of the death penalty, the practical implications of the Court’s decision must be a point of concern and attention as *Hall* continues to be applied in the lower courts.

Notwithstanding these difficulties, a concerted effort to focus on the scientific basis for the medical diagnosis of intellectual disability should serve the constitutional purpose of preventing these individuals from being put to death. Indeed, the Sixth Circuit in *Van Tran* used the Supreme Court’s decision in *Hall* to sharpen the analysis of intellectual disability by focusing on clinical definitions and
expert analyses. (2014 WL 4178299, at *16.) For defendants charged with the most serious of crimes in the justice system, an emphasis on objective, scientific tests would concentrate the jury on the defendant’s medical diagnosis, rather than, for example, the facts associated with the crime. Indeed, the court also stated that the lower court erred by emphasizing “too heavily in its analysis the facts of the crime, which are not relevant to the analysis of most of the areas of adaptive behavior.” (Id.)

Going forward, this latter point will no doubt be important. It may be difficult for sentencing judges and juries to understand that criminals who plan and execute crimes may still be intellectually disabled and therefore ineligible for the death penalty. Indeed, this was an issue in Hall’s case. As the Florida sentencing court put it, “[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store robbed.” (Hall, 134 S. Ct. at 1991 (citation omitted.).)

Conclusion

Certainly, while evidence of intellectual disability has often been important at sentencing for mitigation purposes, such evidence has taken on a new significance after Atkins and Hall. While IQ scores will likely remain an important part of the analysis of intellectual disability, it is likely that courts will continue to expand the significance placed on other evidence of intellectual disability and begin considering a wider range of factors when making death penalty determinations. It may be that expanding the emphasis on the clinical basis for the determination of intellectual disability will benefit future defendants seeking to establish intellectual disability under the law. At the same time, critics suggest that an increased emphasis on adaptive deficits is likely to introduce a heightened level of subjectivity that will be unworkable in the long run. Other critics suggest that pro-death penalty states and judges will find other ways to exploit the Atkins ruling. Only time will tell if these predictions hold any water. For now, at least, the Court has signaled that it does not intend to allow its Atkins ruling to be nullified by the lower courts.

Freddie Lee Hall versus the Florida Courts

Florida courts did not fail to take note of Freddie Lee Hall’s intellectual disabilities, finding during resentencing that there was “substantial evidence” to support the finding that Hall had been “mentally retarded his entire life,” that it was undisputed that Hall suffered from organic brain damage, and that he had learning disabilities. (State v. Hall, No. 78-52-CF (Fla. 5th Cir. Ct. Feb. 21, 1991) (Findings of Fact for Sentencing Order).) The Florida Supreme Court similarly accepted as fact that Hall was “mentally retarded” but found that his mental retardation was not a bar to execution. (Hall v. State, 614 So. 2d 473, 478 (Fla. 1993).) The dissenting opinion of the Florida Supreme Court argued that execution would constitute cruel and unusual punishment in contravention of the Eighth Amendment, noting that testimony established that Hall suffered from “organic brain damage, chronic psychosis, a speech impediment[,] and a learning disability”; was “functionally illiterate”; had “a short-term memory equivalent to that of a first grader”; was “raised under the most horrible family circumstances imaginable”; and “suffered tremendous physical abuse and torture as a child.” (Id. at 479 (Barkett, C.J., dissenting.)) His intellectual disabilities were apparent in school, where his fourth-, sixth-, seventh-, and eighth-grade teachers all described him as “mentally retarded.” His fifth-grade teacher remarked that he was “mentally maladjusted,” while another teacher stated that “his mental maturity [was] far below his chronological age.” (Id.) Judge Barkett described Hall as “a poster child for mental retardation claims because the record here clearly demonstrates that Hall is mentally retarded.” (Id.)

After the Supreme Court’s ruling in Atkins v. Virginia in 2002, Hall sought again to have his death sentence overturned. As part of those proceedings, the Florida courts, despite all of the prior findings and evidence to the contrary, determined that, for purposes of the death penalty, Hall was no longer “mentally retarded.” This remarkable about-face hinged on a 2001 Florida statutory provision that defined mental retardation to include “[1] significantly subaverage general intellectual functioning [2] existing concurrently with deficits in adaptive behavior and [3] manifested during the period from conception to age 18.” (See Fla. Stat. § 921.137(1).) In 2007, the Florida Supreme Court interpreted this statutory section to (a) bar anyone who could not show an IQ test score of 70 or below from demonstrating mental retardation and (b) prevent consideration of the standard deviations of error inherent in IQ tests. (See Cherry v. State, 959 So. 2d 702 (Fla. 2007) (per curiam.).) Where an individual could not show proof of an IQ score of 70 or below, he or she was not permitted to put forth any additional evidence of intellectual disability. Adaptive deficits, which may vary dramatically from person to person, might include deficits in oral language and communication skills, literacy, memory, handling money, problem solving, or other daily living skills. A person with intellectual disability might be prone to impulsive behavior, poor social or interpersonal skills, difficulty maintaining relationships, or lack of empathy, among other traits. Yet, under Florida law, an individual was not permitted to submit evidence of any of these deficits, which clinicians might consider important indicia of intellectual disability, unless he or she could also show an IQ score...
of 70 or below. In other words, if you could not show admissible proof of an IQ score of 70 or below, you were eligible for the death penalty in Florida, regardless of what other evidence you might have showing intellectual disability.

Over the course of 40 years, Hall had received IQ test scores ranging from 60 to 80. Experts agreed that the score of 80 was likely in error, as the test had been administered by a student rather than by a licensed practitioner. All of the remaining scores were low enough as to be within the range of scores expected of someone with intellectual disability. The trial court excluded two scores below 70 on evidentiary grounds. The result was that Hall’s lowest admissible IQ score was a 71—one point above the Florida cutoff.

Because he missed the cutoff by one IQ point, Hall’s petition for relief under Atkins was denied by the trial court on the basis that Hall was unable to show “significantly subaverage general intellectual functioning” under the Florida statute. The court did not consider the abundant evidence on his deficits in adaptive behavior or age of onset, such as evidence that he had long been considered “slow” or intellectually disabled by his family and teachers, or evidence that he could not read, that he had a speech impediment, or that his former lawyer considered him to have the mental capacity of a young child.

The trial court’s decision was upheld by the Florida Supreme Court, though two justices dissented, stressing that the consideration of intellectual disability needed to include “thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded, without application of an inflexible, often-times arbitrary, bright-line cutoff IQ score.” (Hall v. Florida, 109 So. 3d 704, 717–18 (Fla. 2012) (Labarga, J., dissenting).) In the second dissent, the judge lamented the fact that “[t]he current interpretation of the statutory scheme will lead to the execution of a retarded man in this case. Hall had been found by the courts to be mentally retarded before the [Florida] statute was adopted. Once the statute is applied, Hall morphs from someone who has been ‘mentally retarded his entire life’ to someone who is statutorily barred from attempting to demonstrate concurrent deficits in adaptive functioning to establish retardation... [T]his cannot be in the interest of justice.” (Id. at 720 (Perry, J., dissenting).)
Extraterritorial Search Warrants
Rule Change

BY DAVID R. BENEMAN AND DONNA LEE ELM

Current Federal Rule of Criminal Procedure 41(b) authorizes magistrate judges to issue search warrants, generally for property within the same district. Growth in warrants to search electronically stored information (ESI), particularly remote searches, has the Department of Justice (DOJ) seeking multidistrict—in fact, international—search warrants. DOJ explained that situations “where investigators can identify the target computer, but not the district in which it is located—is occurring with greater frequency in recent years.” (Letter from Mythili Raman, Acting Assistant Attorney General, to Hon. Reena Reggi, Chair, Advisory Comm. of Crim. Rules (Sept. 13, 2013) (on file with author), available at http://tinyurl.com/lhhhvlu.) Agents have the technology to remotely enter a computer or network and search for information. A “remote search” involves agents covertly planting sophisticated software on the target computer, or network, then searching the contents.

The searching agents rarely know the physical location of the ESI they are searching, in violation of current Rule 41(b), which generally limits searches to the district issuing the warrant. DOJ notes that “criminals are using multiple computers in many districts simultaneously as part of complex criminal schemes, and effective investigation and disruption of these schemes often requires remote access to Internet-connected computers in many different districts.” (Id.) DOJ’s objective in amending Rule 41(b) is to “remove an unnecessary obstruction currently impairing the ability of law enforcement to investigate botnets and other multi-district Internet crimes.” (Id. at 3.) Sought by DOJ is an expansion of Rule 41(b)(3) nationwide searching, as allowed in terrorism cases, to many forms of “garden variety” criminal investigations.

A proposed change in the federal criminal rule authorizing search warrants has serious implications in a globalized informational technology world. Allowing searches anywhere...
means that these search warrants will at times take law enforcement abroad, as many e-mail and cloud providers are globalized with servers throughout the world. The change would add a subsection (b)(6) to Rule 41, providing:

(6) a magistrate judge with authority in any district where activities related to crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if (A) the district where the media or information is located has been concealed through technological means; or (B) in an investigation of a violation of 18 U.S.C. 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts. [18 U.S.C. § 1030 is the federal computer fraud criminal statute.]

A subsection (f)(1)(C) amendment also calls for making “reasonable efforts” to serve the person whose data are being sought.

Expanding Multijurisdictional Search Warrants

The jurisdictional limitations placed on most federal search warrants are hampering the ability of federal agents to fully utilize recent technological advances in remote searching technology. So argues the DOJ in its September 13, 2013, letter to the Advisory Committee of Criminal Rules seeking amendments to Rule 41 on search warrants. The letter begins:

The Department of Justice recommends an amendment to Rule [41] of the Federal Rules of Criminal Procedure to update the provisions relating to the territorial limits for searches of electronic storage media. The amendment would establish a court-supervised framework through which law enforcement can successfully investigate and prosecute sophisticated Internet crimes, by authorizing a court in a district where activities related to a crime have occurred to issue a warrant—to be executed via remote access—for electronic storage media and electronically stored information located within or outside that district. The proposed amendment would better enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies, both which pose substantial threats to members public.

The Advisory Committee on Criminal Rules, supporting some expansion of Rule 41, issued a report on May 5, 2014, adopting DOJ’s reasoning. (Memorandum from Hon. Reena Reggi, Chair, Advisory Comm. of Crim. Rules, to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice and Procedure (May 5, 2014) (on file with author), available at http://tinyurl.com/lu8fd3w.) The report recognizes that, “[a] warrant for a remote access search when a computer’s location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device.” (Id. at 8.) The committee nonetheless voted to limit warrants granting remote multidistrict searches to two specific sets of circumstances. First, proposed Rule 41(b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software. Second, Rule 41(b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of the federal computer fraud statute if the media to be searched are protected computers damaged without authorization and are located in many districts. The report specifically avoids addressing Fourth Amendment and privacy concerns, leaving “constitutional standards to ongoing case law development.” (Id. at 9.)

A major weakness in the Rule 41(b)(6)(A) proposal is that it allows a multidistrict warrant when the location of the computer is unknown “because of the use of technology.” This “use of technology” standard is far too broad, as all ESI utilizes “technology.” Although the proposal provides one example of technology, “anonymizing software,” it does not limit these multi-jurisdiction warrants for remote searching to cases that show use of anonymizing software. The proposed standard can always be met because technology is used in every situation where a warrant for ESI is sought. The language of the amendment needs further work if multidistrict warrants are to be allowed for a limited class of computer-related crimes.

The proposal is unfortunately silent on the implications of international computer searching, and in this time of globalized information technology, searching for anonymous computers will often mean treading on foreign servers. DOJ suggests the amendment does not authorize courts to issue warrants for the remote search of electronic storage media located in a foreign country. However, DOJ recognizes that where the site of the computer being searched is unknown, the remote search might go abroad. DOJ suggests that when the media searched proves to be outside the United States, the warrant would have no extraterritorial effect, but the existence of the warrant would support the reasonableness of the search. Neither DOJ nor the Criminal Rules Committee adequately addresses the reality that many remote searches

David R. Beneman is the federal public defender for the District of Maine. He has served since 2005. Previously, he was a partner and shareholder with Levenson, Vickerson & Beneman in Portland, Maine, where his practice focused on criminal defense and individual rights.

Donna Lee Elm is the federal defender for the Middle District of Florida, supervising more than 30 lawyers who represent indigent criminal defendants from five offices throughout central Florida. She was first appointed to the office by the US Court of Appeals for the 11th Circuit in 2008. Elm is also a member of the magazine’s editorial board.

Published in Criminal Justice, Volume 29, Number 4, Winter 2015. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
will inevitably be of computers or networks located outside of the United States, precisely because the physical location of the computer is unknown. More discussion is needed to address the international legal and political ramifications of US law enforcement remotely searching foreign computers.

Criminal Discovery of Extraterritorial ESI

Like most changes in rules and law, this development has not occurred in a vacuum. Globalization of business and communication media, coupled with the explosion in the volume, pace, and portability of information exchanged/stored electronically, has resulted in digital evidence of crimes being spread throughout the world. (The Sedona Conference, Framework for Analysis of Cross-Border Discovery Conflicts 1 (2008) [hereinafter Sedona Conference].) Civil cases have been struggling with cross-borders discovery issues for years, but criminal cases are only recently grappling with them. Because unidentified computers can be anywhere in the world, the impact of this rule on cross-border searches must be considered.

Two criminal matters of first impression have brought the conflict-of-laws issue to a litigation head: In re Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corporation, 2014 WL 1661004 (S.D.N.Y. Apr. 25, 2014) (Microsoft’s challenge of a warrant for information stored in its servers in Ireland), and In re Warrant to Search a Target Computer at Premises Unknown, 958 F. Supp. 2d 753 (S.D. Tex. 2013) [hereinafter Premises Unknown] (the denial of a warrant seeking to install spyware on an unidentified computer whose location was not known). For years, Internet service providers such as Microsoft and Google complied with warrants secretly issued pursuant to the Stored Communications Act (18 U.S.C. §§ 2701–12), providing e-mails and other net—and cloud-based data to law enforcement. Microsoft is one of the first providers to balk at this process and is doing so in a very public way. Its change of heart may have been motivated by losses American technology companies faced abroad after Edward Snowden revealed their cooperation with the National Security Agency’s breadth of data-mining. (Steve Lohr, Microsoft Protests Order to Disclose Email Stored Abroad, N.Y. TIMES (June 10, 2014), available at http://tinyurl.com/incluxa.) The legal issues in those two cases have been addressed in civil cases for years.

History of Civil Cross-Border Discovery Challenges

America’s approach to civil discovery is the broadest in the world, and it has been met with some degree of resistance by foreign states that place a higher premium on privacy than we do. (Sedona Conference at 14.) Unlike in the United States, privacy is a fundamental right elsewhere. (Id. at 8 (the 30 members of the European Economic Area and a host of other developed nations, including Japan, Canada, and Australia, consider privacy a basic human right).) Constitutions of many other countries enshrine it, and data privacy statutes have been enacted in over 80 countries. (In re Vitamins Antitrust Litigation, 2001 WL 1049433 at *7–9 (D.D.C. June 20, 2001); Jeanne A. Thomas, Cross Border Transfers, in DATA LAW TRENDS & DEVELOPMENTS: E-DISCOVERY, PRIVACY, CYBERSECURITY & INFORMATION GOVERNANCE 29 (Crowell Moring, June 2014). Those European laws have their origins in no less than the European Convention on Human Rights. (Sedona Conference at 10–11.) Many countries have specific “blocking statutes" that serve to protect the country’s sovereignty and commercial enterprises from discovery in foreign litigation. (See, e.g., French Penal Code Law No. 80-538, Article 1A (prohibiting disclosure of “economic, commercial, industrial, financial, or technical documents . . . with a view to foreign judicial or administrative proceedings”).) What the United States considers “private" is far more limited than what foreign countries do. Here, privacy is recognized only in highly sensitive matters that are personal to individuals, such as their medical records, Social Security numbers, dates of birth, addresses and phone numbers, and banking records; most other countries, however, protect privacy of all manner of personal data, down to pen-register-like information, such as who sent or received e-mails. (Sedona Conference at 8–9.)

American courts have largely disregarded the Hague Evidence Convention’s procedures for accessing ESI in its signatory nations. (Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (Mar. 18, 1970).) The seminal case, Aeropostale, held that the convention’s provisions for securing discovery from other countries was not mandatory, though courts should engage in a “more particularized analysis” for comity’s sake when dealing with international discovery. (Societé Nationale Industrielle Aeropostale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522, 543 (1987).) Relying on Aeropostale, American courts ordered civil parties to produce ESI stored in foreign servers or face discovery sanctions that could prove fatal to their cases. (Sedona Conference at 17.) This stranded litigants in a “Hobson’s choice:” violating American court orders and facing discovery sanctions here, or violating foreign laws and risking civil or criminal sanctions there. Because Aeropostale considers the likelihood that sanctions will actually be levied—and given that foreign nations had never enforced their privacy laws—American courts had the luxury of ignoring them.

Thoughtful American voices have been raised against our violation of foreign data privacy laws. The ABA’s International Law Section issued Resolution 103 (calling for courts to “consider and respect the data protection and privacy laws of any foreign sovereign”), and the Sedona Conference published its practical guide to cross-border discovery. Americans are already at risk of violating foreign privacy laws, and certainly our courts should not condone or become complicit in international illegality. The era of litigants facing no realistic repercussions is coming to an end, as exemplified by a recent French criminal prosecution and conviction of a lawyer who disclosed ESI protected by French privacy laws. (See In re Advocate “Christopher X,” Cour de Cassation, French Supreme Court (2008).) Now that foreign countries are enforcing their laws, it is harder for US courts to discount their data protection and privacy statutes.
Dawn of Criminal Cross-Border Discovery Challenges

American criminal discovery differs substantially from its civil counterpart. Law enforcement needs a warrant (based on a probable cause showing to a judge) to seek ESI. Those who violate warrants can have outcomes far worse than civil litigants who refuse disclosure; the subjects of warrants face civil or criminal contempt penalties including imprisonment, while the possibility of prosecution for obstruction of justice is a realistic threat. Stored Communications Act (SCA) warrants are mandatorily secret, barring the entities served from informing those whose data are sought (thus who are most motivated to challenge it). (18 U.S.C. § 2703(b).) With warrant secrecy and the serious ramifications of noncompliance, it should come as little wonder that American companies waited so long before taking a stand against government criminal discovery of their customers’ overseas data. Perhaps the fact that they can also realistically expect to be prosecuted by foreign countries has informed their decision to resist warrants now.

In 2013, the US attorney in the Southern District of Texas sought a warrant targeting a computer being used to violate federal bank fraud laws. (See Premises Unknown, supra.) The e-mail account was known, but the location of the computer and who operated it was unknown. The government proposed installing, via the e-mail portal, software on this computer that would extract information providing its location and photographing its users, as well as gathering evidence of the crime. But the magistrate judge refused to issue the warrant, relying on the territorial limit to search warrants in Federal Rule of Criminal Procedure 41(b) (allowing search warrants to seize evidence “located within the district” where the warrant was issued). The government argued that because its agents would not need to leave the district (they would find the computer on the Internet and simply bring its information back to examine within the district), it would not violate the territorial limits of the rule. The judge disagreed, realizing that the warrant would authorize agents to “hack” the computer and “permit FBI agents to roam the world in search of a container of contraband, so long as the container is not opened until the agents haul it off to the issuing district.” (Id. at 755.) Noting that data “in the cloud” reside on a server at some earthly location, the judge would not exceed his district’s geographical limits. He did, nonetheless, suggest that it could be time to update the territorial limits element of Rule 41. (Id. at 760.) Absent an identified country’s laws to contend with, the court did not address the cross-borders discovery issue or comity.

A year later, a Southern District of New York judge issued a warrant under the SCA in a drug trafficking investigation that sought e-mails stored on Microsoft servers in Ireland. (See In re Microsoft, supra.) When Microsoft moved to quash, the judge side-stepped the territoriality limits of Rule 41, reasoning that “[t]he concerns that animate the presumption against extraterritoriality are simply not present here.” (Id. at *4.) He noted that agents would not physically invade the Ireland location nor would Microsoft’s Ireland employees have to contend with being raided and having their records rummaged through. Thus he apparently accepted the argument that had been rejected in Premises Unknown. The court also based its reasoning on the government’s theory that the SCA created a hybrid of subpoenas and warrants that does not implicate extraterritorial principles as conventional warrants do. (Id. at *5.) The court additionally expressed its concern that otherwise criminals might give false identifying information so as to have their e-mails stored in foreign servers beyond the reach of American law enforcement. (Id. at *8.)

Microsoft raised Ireland’s privacy and data protection laws in opposing the warrant. As in most previous civil cross-border discovery cases, the Microsoft court gave short shrift to Irish law, and even failed to consider American civil precedent such as Aeropostale that imposed some deference to comity. But the decision begs the question whether a warrant-quas subpoena can bypass Ireland’s privacy and data protection laws. After an adverse ruling, in mid-September 2014, Microsoft and the government joined to stipulate that the company be held in contempt to enable immediate appeal. That appeal is now pending in the Second Circuit.

Emergence of Proposed Rule Change

The proposed Rule 41 change must be understood in light of these developments. Indeed, it appears that DOJ sponsored this rule change in response to the adverse holding in Premises Unknown. While DOJ certainly has valid law enforcement concerns in proposing the amendment, it has not given adequate consideration to the international issues generated by the rule change.

Neither the Premises Unknown nor the Microsoft court squarely addresses the many complex and troubling comity and compliance hardship ramifications (foreign criminal prosecutions) that will visit those who comply with remote foreign searches certain to occur under the proposed rule. American criminal law, unlike its civil counterpart, has a rich jurisprudence history that is highly sensitive to protecting defendants from exposure to criminal liability (for instance, constitutional search and seizure laws, the right to silence, and the right to counsel), so changes in criminal rules that could produce penal liability should be approached with caution. As the rule has been opened for comment, hopefully, thoughtful discussion will extend to respect for foreign sovereigns as has been advanced by the ABA resolution and the Sedona Conference.

Public Comment Ends February 17

Comments on the proposed amendments, whether favorable, adverse, or otherwise, are welcomed by the Rules Committee and should be filed as soon as possible but no later than Tuesday, Feb. 17, 2015. All comments are made part of the official record and are available to the public. Comments concerning the proposed amendments must be submitted electronically by following the instructions at http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx.

Additional details on comments and the rule amendment process are available at http://www.uscourts.gov/rulesandpolicies/rules.aspx.
Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

[Miranda v. Arizona, 384 U.S. 436, 479 (1966)]
The Need for Reform

In 2010, the American Bar Association issued a policy statement urging “all federal, state, territorial and local legislative bodies and governmental agencies to support the development of simplified Miranda warning language for use with juvenile arrestees.” (Charles Joseph Hynes, Chair of the ABA Criminal Justice Section, Report to the House of Delegates, Recommendation 102B (Feb. 2010), available at http://tinyurl.com/aba-resolved-2010.) In an accompanying report, the American Bar Association cited the cognitive limitations of juvenile offenders as providing a compelling argument for more easily understood warnings and concluded that “clarifying the language of Miranda warnings will go a long way toward eliminating outcomes that frustrate legal practitioners and endanger and infuriate the public at large.” (Id. at 5.) Importantly, the American Bar Association recognized that some individuals could construe this call for reform as “an overtly defense oriented initiative.” On the contrary, however, the American Bar Association ultimately affirmed that all professional interests—including those of the government—are served when easily understood advisements promote the “legitimacy of a defendant’s valid waiver.” (Id. at 4.)

Misconceptions about General Miranda Warnings

When asked informally about the typical length of Miranda warnings, colleagues cautiously provided estimates that were often in the range of 50 to 60 words. When queried about the requisite reading level of these warnings, they gave descriptions that frequently included the words “easy” and “elementary school.” While very brief and easily read advisements are possible, the current reality is far different. The required reading levels for the following three representative examples are instructive. The first, comprised of seven words, is at the fourth-grade reading level; the second, comprised of 21 words, is at the tenth-grade reading level; and the third, comprised of 45 words, is at the twelfth-grade reading level:

I have the right to an attorney. (4th grade)

I have the right to the presence of a lawyer and to talk with a lawyer before and during any questioning. (10th grade)

I may have reasonable time and opportunity to consult with my attorney if I desire. (12th grade)

First, we may dispense with the brief “50 to 60 words” notion. When Miranda warnings and waivers are considered together, 98.9 percent exceed 60 words. One recent effort categorized the lengths of Miranda warnings as “short” (less than 125 words), “typical” (125 to 175 words), and “long” (more than 175 words). Even a “short” Miranda warning averaged 101 words when the accompanying waiver was considered. Naturally, “typical” and “long” versions had far greater averages (150 words and 201 words respectively). (Richard Rogers, Kenneth W. Sewell, Eric Y. Drogin & Chelsea Fiduccia, Standardized Assessment of Miranda Abilities (SAMA) Professional Manual (2012) [hereinafter SAMA Manual].)

Next, we can abandon the “easily understood” notion as well. Table 1 (see page 15) summarizes the astoundingly complex variations in grade reading levels across Miranda components. Two components (free legal services and continuing rights) average in the ninth- and tenth-grade reading levels, with the upper ranges requiring a college education. The reading levels increase gradually, with the longer lengths compounding greatly the problems with understandability.

The seemingly obvious solution is to simply tell defendants their Miranda warnings. However, oral advisements create
Table 1

Differences in Reading Grade Levels for Short, Typical, and Long General *Miranda* Warnings

<table>
<thead>
<tr>
<th>Miranda</th>
<th>Short (&lt; 125 words)</th>
<th>Typical (125–175 words)</th>
<th>Long (&gt; 175 words)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Average</td>
<td>Range</td>
<td>Average</td>
</tr>
<tr>
<td>1. Silence</td>
<td>3rd grade</td>
<td>Grades 1 to 12</td>
<td>3rd grade</td>
</tr>
<tr>
<td>2. Evidence against you</td>
<td>5th grade</td>
<td>Grades 4 to 11</td>
<td>5th grade</td>
</tr>
<tr>
<td>3. Attorney</td>
<td>8th grade</td>
<td>Grades 1 to 14</td>
<td>9th grade</td>
</tr>
<tr>
<td>4. Free legal services</td>
<td>10th grade</td>
<td>Grades 4 to 17</td>
<td>10th grade</td>
</tr>
<tr>
<td>5. Continuing rights</td>
<td>9th grade</td>
<td>Grade 3 to 18</td>
<td>10th grade</td>
</tr>
<tr>
<td>Waiver</td>
<td>5th grade</td>
<td>Grades 1 to 15</td>
<td>7th grade</td>
</tr>
<tr>
<td>Total warning</td>
<td>7th grade</td>
<td>Grades 3 to 18</td>
<td>8th grade</td>
</tr>
</tbody>
</table>

Table 2

Differences in Reading Grade Levels for Short, Typical, and Long Juvenile *Miranda* Warnings

<table>
<thead>
<tr>
<th>Miranda</th>
<th>Short (&lt; 125 words)</th>
<th>Typical (125–175 words)</th>
<th>Long (&gt; 175 words)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Average</td>
<td>Range</td>
<td>Average</td>
</tr>
<tr>
<td>1. Silence</td>
<td>4th grade</td>
<td>Grades 2 to 11</td>
<td>4th grade</td>
</tr>
<tr>
<td>2. Evidence against you</td>
<td>7th grade</td>
<td>Grades 4 to 18</td>
<td>6th grade</td>
</tr>
<tr>
<td>3. Attorney</td>
<td>8th grade</td>
<td>Grades 1 to 18</td>
<td>9th grade</td>
</tr>
<tr>
<td>4. Free legal services</td>
<td>10th grade</td>
<td>Grades 4 to 18</td>
<td>11th grade</td>
</tr>
<tr>
<td>5. Continuing rights</td>
<td>7th grade</td>
<td>Grade 3 to 14</td>
<td>9th grade</td>
</tr>
<tr>
<td>Waiver</td>
<td>5th grade</td>
<td>Grades 1 to 16</td>
<td>7th grade</td>
</tr>
<tr>
<td>Total warning</td>
<td>8th grade</td>
<td>Grades 3 to 18</td>
<td>9th grade</td>
</tr>
</tbody>
</table>

Published in Criminal Justice, Volume 29, Number 4, Winter 2015. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
more problems than they solve. Even well-educated adults under no stress have trouble remembering even 50 percent of verbally presented material. More to the point, directly comparing oral and written Miranda warnings for recently arrested defendants yields a particularly telling result: regardless of the reading grade level, oral warnings generally fail at a much higher rate—typically twice that of written warnings. (Richard Rogers, A Little Knowledge Is a Dangerous Thing . . . Emerging Miranda Research and Professional Roles for Psychologists, 63 AM. PSYCHOL. 776 (2008).)

**Juvenile vs. General Miranda Warning Misconceptions**

Many jurisdictions have specialized Miranda warnings intended only for juvenile offenders. Overall, a recent survey yielded more than 300 uniquely worded juvenile (i.e., youth-specific) Miranda warnings. Juvenile advisements occasionally provide explanations (e.g., defining the role of the judge). More often, they include additional content, such as the right to consult with a parent, guardian, or interested adult. Moreover, these advisements often caution juvenile suspects that they can be tried as adults, depending on their age and the nature of the charges against them. (Richard Rogers, Hayley L. Blackwood, Chelsea E. Fiduccia, Jennifer A. Steadham, Eric Y. Drogin & Jill E. Rogstad, Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?, 39 CRIM. JUST. BEHAV. 229 (2012).)

The simpler-for-juveniles myth is easily shattered. As presented in Table 2 (see page 15), reading levels for understanding juvenile Miranda warnings tend to increase in difficulty. In most instances, the upper ranges require more than a college education. Consider for the moment the absurdity of asking younger juvenile offenders to understand and apply to their own circumstances college-level warnings (i.e., those greater than grade 12). Taking a broader perspective, half of juvenile advisements require more than a ninth-grade reading level. (SAMA MANUAL, supra.)

The markedly increased lengths of juvenile advisements also assail the simpler-for-juveniles myth. In contrast to the general Miranda warnings (with an average of 95 words), juvenile advisements add 42 extra words for an average of 137 words. Some advisements go to extraordinary lengths to inform juvenile suspects. When the total material (i.e., juvenile warnings, waivers, and ancillary information) is considered, 40 percent of juvenile versions exceed 300 words.

**Individual Miranda Warning Components**

This section provides a straightforward analysis of Miranda warnings, organized by their individual components, each as a separate subsection. Because juvenile Miranda warnings sometimes include additional content—such as transfer to adult court—they are addressed in the appropriate subsections but placed in separate paragraphs.

**The right to silence.** Rogers and his colleagues surveyed the free recall of Miranda warnings from a cross-section of persons from Dallas County, Texas, and found that most respondents were able to express the first Miranda component: the right to silence. However, one-third of these respondents recognized that their own Miranda knowledge was generally poor; for this subset, free recall of the right to silence was much lower at 73 percent. This finding is startling—we assumed everyone would recall the first component but would fail on later components that are less frequently mentioned in police dramas. (Richard Rogers, Chelsea E. Fiduccia, Eric Y. Drogin, Jennifer A. Steadham, John W. Clark & Robert J. Cramer, General Knowledge and Misknowledge of Miranda Rights: Are Effective Miranda Advisements Still Necessary?, 19 PSYCHOL. PUB. POL’Y & L. 432 (2013) [hereinafter Rogers et al., General Knowledge and Misknowledge of Miranda Rights].)

Speaking the right to silence and knowing the right to silence are two very different matters. Of those 87 percent accurately recalling this first component, about one in five failed to appreciate that this right is protected and cannot be used as incriminating evidence. If custodial suspects are to render informed decisions, then some explanation of the term “right” should be considered. Prior research with several hundred pretrial detainees found that one-third failed to understand their “right” as it applied to their right to silence. (Richard Rogers, J. E. Rogstad, Nathan D. Gillard, Eric Y. Drogin, Hayley L. Blackwood & Daniel W. Shuman, “Everyone Knows Their Miranda Rights”: Implicit Assumptions and Countervailing Evidence, 16 PSYCHOL. PUB. POL’Y & L. 300 (2010).)

In Berghuis v. Thompkins, 560 U.S. 370 (2010), the Supreme Court of the United States affirmed that a binding invocation of the right to remain silent must actually be communicated and cannot simply be inferred from the suspect’s continued silence. The paradox of breaking silence to assert silence may confuse many suspects (not to mention social scientists and legal scholars). When questioned directly, most juveniles (71 percent) and adult respondents (69 percent) were unaware that questioning could continue indefinitely until they explicitly asserted their right to silence. (Nathan D. Gillard, Richard Rogers, Katherine R. Kelsey & Emily V. Robinson, An Investigation of Implied Miranda Waivers and Powell Wording in a Mock-Crime Study, LAW & HUM. BEHAV. (in press.).) In light of Thompkins, should custodial suspects be clearly and specifically informed about how to exercise the right to silence?

In particular, juvenile suspects may simply not understand the “rules of the game” that apply to asserting their right to silence. Rogers and his colleagues posed the following scenario to juvenile detainees:

*Suppose you don’t want a lawyer. You just want to remain silent without the police asking more questions or making more comments. What do you need to do to make this happen?*

Only 29 percent were aware that they needed to communicate their right to silence affirmatively. A second scenario was posed to the same juvenile detainees:

*Published in Criminal Justice, Volume 29, Number 4, Winter 2015. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.*
Suppose the police tell you about your Miranda rights. They ask you if you want to talk to them and you say nothing. They keep asking questions. You finally admit to knowing something about the crime but say nothing else. How does something like this affect your right to silence?

In light of Thompkins, the pivotal issue is whether juvenile detainees could appreciate the long-term consequences of their admissions, specifically that courts may determine that they implicitly waived their right to silence in acting against their own self-interests. Interestingly, nearly two-thirds (66 percent) of juvenile detainees accurately reasoned that their admissions could be construed as a waiver of their right to silence. (Richard Rogers, James A. Steadham, Chelsea E. Fiduccia, Eric Y. Drogin & Emily V. Robinson, *Mired in Miranda Misconceptions: A Study of Legally Involved Juveniles at Different Levels of Psychosocial Maturity*, 32 Behav. Sci & L. 104 (2014) [hereinafter Rogers et al., *Mired in Miranda Misconceptions*].)

Perhaps misinformed by countless courtroom dramas, nearly half of pretrial detainees falsely believe that interrogating officers were prevented from using “off-the-record” disclosures as incriminating evidence.

As a closely related issue, most *Miranda* warnings do not mention the consequences of asserting the right to silence. Only about 4 percent of general *Miranda* warnings address the consequence of asserting the right to silence or the right to counsel, specifically the cessation of further questioning as an outcome. (Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Daniel W. Shuman & Hayley L. Blackwood, *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 Psychol. Pub. Pol’y & L. 63 (2008).) As a function of what psychologists call temporal discounting, many suspects may waive their rights and immediately confess simply to “get done” with the unpleasantness of continued interrogation. (SAMA Manual, *supra*). A central issue is whether suspects should be informed of the alternative means of minimizing questioning. Simply put, an assertion of rights terminates most questioning.

Juvenile detainees may face an additional challenge when dealing with authorities concerning the right to silence. Based on their past experiences with authority figures (e.g., parents and teachers), the “rules of the game” are not always static and may change according to the circumstances. How does this apply to the right to silence? As initially noted over three decades ago, 21 percent of juvenile offenders wrongly believe that the police can unilaterally revoke their right to silence and order them to talk. (Thomas Grisso, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981).) Revocable rights provide no guarantees whatsoever. In our recent research involving 64 juvenile detainees, 13 percent were convinced that the police could, in fact, strip them of their right to silence. (Richard Rogers, Getting It Wrong About Miranda Rights: False Beliefs, Impaired Reasoning, and Professional Neglect, 66 Am. Psychol. 728 (2011).)

Evidence against you. For members of the public claiming average or better-than-average *Miranda* knowledge, more than 80 percent can easily recall the second *Miranda* component, namely that any statements to the police can be used as evidence against them. (Rogers et al., *General Knowledge and Misknowledge of Miranda Rights, supra*, at 432.) For those reporting less knowledge, recall is a hit-or-miss proposition (51 percent had correct recollection). Of course, these data do not address simple recognition, which survey data on *Miranda* rights suggest can be much higher than recall. (Belden, RussoNello & Stewart, Inc., INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY (2001).) However, a rational analysis of *Miranda* waivers requires a working knowledge of *Miranda* components, which is unlikely to be achieved on the basis of recognition alone.

The good news is that most adults—detainees, college students, and members of the public—clearly grasp the basic message regarding the perils of speaking with the police. These percentages are consistently high, exceeding 95 percent. Even among persons without free recall of this *Miranda* component (26 percent of the general public), nearly all (94 percent) clearly recognized the risks of talking to law enforcement personnel. Most detainees are also clearly aware that individuals cannot retract statements once they are verbalized, even if those accounts are obviously not true. This component of the *Miranda* warning is clearly a success story for nearly all adults. With respect to juvenile offenders, the findings—while good, at 80 percent—still leave considerable room for improvement.

The only substantive issues for the evidence-against-you component involve serious misbeliefs about what may constitute exceptions to this admonition. For example, about 20 percent of adult detainees wrongly believe that unsigned waivers afford them complete protection from incriminating evidence. The percentage is slightly higher (27 percent) for juveniles involved in the criminal justice system. Perhaps misinformed by countless courtroom dramas, nearly half of pretrial detainees (46 percent of adults, and 42 percent of juveniles) falsely believe that interrogating officers were prevented from using “off-the-record” disclosures as incriminating evidence. Moreover, this misbelief extends to 38 percent of undergraduates and 34 percent of the public at large. For revisions of *Miranda* warnings, stakeholders are...
likely to be divided on how much effort should be placed on correcting serious misconceptions about their applicability. As observed with juvenile warnings, additional explanations may overwhelm youth with too much information, thereby reducing their overall comprehension. Still, the fact that more than one-third of adults—regardless of the sample—fail to understand that all admissions to police can be used as incriminating evidence could undermine this admonition by perpetuating the misbelief that some statements are safeguarded. The missing but crucial piece of information pertains to the practical effects of this misconception. For instance, how often do misinformed suspects disclose incriminating information as part of an interrogation? More broadly, do they understand that this admonition extends beyond the interrogation room to all subsequent interactions with law enforcement, which typically include jail personnel?

**Right to counsel.** Most members of the public are aware of their right to counsel and are able to recall accurately the basic elements (i.e., the availability of legal expertise) of this *Miranda* component. (Rogers et al., *General Knowledge and Misconceptions*, supra, at 432.) However, most respondents were unable to recall critical details as they apply to the right to counsel. Less than 1 percent recalled that they could confer with their attorney before questioning was initiated, and none (0 percent) recalled that these communications were private and confidential. If suspects erroneously believe that attorney-client communications are not privileged and confidential, then the value of legal consultation is virtually nullified. If they wrongly assume that pre-questioning preparation is not available, then the perceived role of counsel may be reduced from an active consultant to a passive witness.

Juvenile suspects may wrongly believe that defense attorneys, as officers of the court, can be required to divulge incriminating information to the judge. This misperceived lack of allegiance jeopardizes the client-attorney relationship because it critically undermines confidentiality and thus effective advocacy. A dramatic difference has been found in this misperception as a function of whether the attorney was court-appointed. While about 19 percent of juvenile offenders inaccurately believed that the judge is entitled to a defense attorney’s disclosures regarding his or her client’s guilt, this percentage increased dramatically to 56 percent with regard to court-appointed counsel. The allegience of defense attorneys to juvenile suspects may also be questioned if counsel is perceived as being on the “same side” as the police. A small but appreciable proportion (16 percent) of juvenile offenders wrongly espouses this belief. Clearly, the perceived value of counsel is virtually eliminated if they are seen as working in concert with law enforcement, presumably to the serious detriment of their juvenile clients. (Rogers et al., *Mired in Miranda Misconceptions*, supra, at 104.)

In *Davis v. United States*, 512 U.S. 452 (1994), the Supreme Court of the United States specified that requests for counsel must be worded in clear, unambiguous language. By this standard, asserting that “I might want a lawyer” is not sufficiently precise as to require the cessation of questioning until counsel can be appointed. In an apparent application of the conventions for ordinary conversation, most adult suspects (69 percent) and many juvenile suspects (51 percent) mistakenly equated “I might want a lawyer” (i.e., enabling police to continue questioning) with “I want a lawyer” (i.e., compelling police to cease questioning if they wish the evidence to be admissible). Interestingly, it does not appear that imprecise communications can be attributed to limited education in offender groups. On the contrary, 61 percent of the educated general public and 53 percent of undergraduates drew the same inaccurate conclusion. (Rogers et al., *Mired in Miranda Misconceptions*, supra, at 104.) To improve *Miranda* warnings, stakeholders must weigh the relative infrequency but potentially life-altering consequences of imprecise assertions of constitutional safeguards against the effects of “too much” information in the context of “intelligent” *Miranda* waivers.

Legal advice beyond simple admonishments (e.g., “Do not answer any questions”) may have limited value if law enforcement are present or are believed to be recording attorney-client interactions. As previously noted, privileged communications are essential to effective collaboration with counsel. Critically, nearly twice as many juveniles (28 percent) as adults (17 percent) harbor inaccurate beliefs regarding nonconfidential communications that occur prior to questioning.

Depending on the jurisdiction, juvenile *Miranda* warnings may broaden the right to counsel to include a right to the presence of parents, guardians, custodians, and “interested adults.” Whereas the purpose of counsel in providing legal expertise is relatively clear, the purpose of involving other adults—most with parental authority—is not explicit. To what extent are detained juveniles aware that these adults, mostly parents and guardians, are intended to protect the rights of these children? On this point, nearly one-third (31 percent) of juvenile detainees believe that their parents have a legal responsibility to assist the police in prosecuting them. (Rogers et al., *Mired in Miranda Misconceptions*, supra, at 104.) Under such instances, the parents are not perceived as advocates for their children, but rather as legally mandated adversaries. The clarification of parent/guardian roles would thus appear essential to an intelligent waiver of *Miranda* rights. Of course, the argument could be advanced that juveniles could simply choose not to request parental involvement. However, such an argument misses a critical

**Nearly one-third (31 percent) of juvenile detainees believe that their parents have a legal responsibility to assist the police in prosecuting them.**
point: the police may involve parents on their own initiative to assist in the questioning.

As a parallel issue, do parents and guardians recognize their advocacy role in protecting the legal rights of children in their care? It is unclear how often and in what fashion police officers discuss pre-interrogation and interrogation with those adults. If the message—implied or explicit—focuses on assistance in “getting to the bottom of this,” then parents’ presumed allegiance is to law enforcement. Regarding documentation, parents and guardians are sometimes asked to sign parental/guardian waivers on behalf of juvenile suspects. A review of these waivers reveals that they strongly emphasize parental consent and cooperation with interrogation, as opposed to advocacy for youths in custody. (Richard Rogers, Hayley L. Blackwood, Chelsea E. Fiduccia, Jennifer A. Steadham, Eric Y. Drogen & Jill E. Rogstad, Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?, 39 CRIM. JUST. BEHAV. 229 (2012) (hereinafter Rogers et al., Perfunctory Rituals).)

Many parents of juvenile arrestees fail to grasp their role as an advocate for their child’s legal rights—and more generally for their child’s best interests. Perhaps analogous to school disciplinary situations, parents tend to side with authorities. One study found that most parental input was completely contrary to their children’s best interests, as reflected in their calling for a confession in the majority of cases (57 percent) and in their exhorting children more generally to “tell the truth” in an additional one-third of cases. (Jodi L. Viljoen, Jessica Klaver & Ronald Roesch, Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys and Appeals, 29 LAW & HUM. BEHAV. 253 (2005).)

Clearly, the involvement of parents and guardians does not support a primary objective of protecting juveniles. Stakeholders have at least two options in revising juvenile Miranda warnings in this regard. They may attempt to clarify the role of parents and guardians as legal “advocates” for their youth. Perhaps a simpler and more effective approach would be to remove the provision of parents, guardians, and interested adults from the right-to-counsel component. Although the original purpose was to provide broader representation than that found with general warnings, the reality is far different. However well-meaning the motivation of parents and guardians, their lack of legal expertise—coupled with conflicted roles (e.g., parental authority versus child advocacy)—undermines their usefulness to Miranda comprehension and waiver decisions. The simplest solution would be to just remove the provision pertaining to parents, guardians, and interested adults.

**Free legal services.** Free legal services for indigent defendants constitute the fourth component of Miranda warnings. Recall of this component depends on the self-appraised Miranda knowledge of the public: 23 percent for the low self-appraisal group, to 69 percent for the high self-appraisal group. Overall, accurate recall is slightly less than 50 percent, suggesting broad deficits in the public’s working knowledge of free legal services. Regarding the basic issue, more than 95 percent of adults realize that an absence of money does not preclude access to legal expertise; the percentages range from 96 percent for pretrial detainees to 97 percent for the general public to 99 percent for undergraduates. (Rogers et al., General Knowledge and Misknowledge of Miranda Rights, supra, at 432.)

Beyond basic understanding (i.e., availability of counsel to indigent suspects), the majority of general and juvenile Miranda warnings do not specify who will assume financial responsibility for the costs that may be associated with appointed counsel. This point of ambiguity may leave suspects in doubt as to whether their families will be required to cover resulting legal expenses. This matter is particularly important in juvenile cases, as parents are routinely made responsible for expenses in virtually all areas of their children’s lives. Indeed, a dramatically higher percentage of juvenile detainees than their adult counterparts believe their families will be financially responsible for legal costs: 55 percent of juvenile detainees. (Rogers et al., Mired in Miranda Misconceptions, supra, at 104.) By comparison, this point of view was espoused by only 18 percent of adult defendants. (Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, K. S. Harrison & Daniel W. Shuman, The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis, 32 LAW & HUM. BEHAV. 124 (2008) (hereinafter Rogers et al., Language of Miranda Warnings).) The remedy for this fundamental misperception is very easy to implement: simply add the word “free” or the phrase “at no charge” to this component of the Miranda warning.

**Continuing legal rights.** In surveys of the general public, an incredibly minimal proportion of respondents—less than 1 in every 125 persons—recalled this component. Even respondents who were highly confident in their Miranda knowledge consistently failed to recall their continuing legal rights (97 percent). (Rogers et al., Mired in Miranda Misconceptions, supra, at 104.)

Most general Miranda warnings (81 percent) include this fifth component, apprising custodial suspects about the ongoing nature of their Miranda rights. (Rogers et al., Language of Miranda Warnings, supra, at 124.) Correspondingly, the occasional omission of this component from general Miranda warnings is difficult to defend. Without it, it would be unreasonable to expect defendants to stumble fortuitously onto this important safeguard.

The fifth component of Miranda warnings is sometimes expressed using abstruse and legalistic language. For example, being told that you can “withdraw your waiver” may be perplexing for two reasons: (1) the use of a legalistic phrase and (2) failure to specify what is the “waiver” in question. Regarding the latter, many waivers are not described as “waivers” (e.g., “Would you like to tell us your side of the story?”). Without knowing clearly what was being waived in the first place, how can suspects be expected to retract that waiver intelligently?

The prevalence of legalistically worded waivers is appreciable, occurring in approximately 25 percent of general Miranda warnings. (Id.) Fortunately, in juvenile warnings they have a much lower percentage, i.e., 7 percent, although their effects in creating confusion are presumably greater than with adult suspects. (Rogers et al., Perfunctory Rituals,
supra.) Importantly, again, this confusion can easily be remedied by the use of simple, clear language.

Substantial numbers of both adult and juvenile defendants wrongly believe that once they start talking, their right to silence is permanently relinquished. The misbelief continues even when subjects have recently been Mirandized—for 25 percent of juvenile detainees and 32 percent of adult defendants. (Richard Rogers, Chelsea E. Fiduccia, Emily V. Robinson, James A. Steadham & Eric Y. Drogin, Investigating the Effects of Repeated Miranda Warnings: Do They Perform a Curative Function on Common Miranda Misconceptions?, 31 BEHAV. SCI. & L. 397 (2013).) Although many of those encountering the criminal justice system are able to correctly paraphrase the fifth component, the apparent difficulty lies in correctly applying this information to their own cases. The challenge for future researchers lies in determining how changes in the language of Miranda warnings would assist suspects in applying this knowledge to their own circumstances.

Juvenile Offenders with General Immaturity

Professors Elizabeth Cauffman and Laurence Steinberg were among the first researchers to tackle maturity of judgment as it applied to the decision-making abilities of juvenile offenders. They argued that maturity of judgment encompasses both cognitive abilities and the lesser-studied emotional and social influences, such as relating to authority figures. According to their model, three psychosocial factors influence the maturity of judgment: (1) responsibility (e.g., self-reliance and independence), (2) perspective (e.g., understanding one’s decisions from another vantage point), and (3) temperament (e.g., inhibiting impulsive decisions). (Elizabeth Cauffman & Laurence Steinberg, (In)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 BEHAV. SCI. & L. 741 (2000).) Within this model, only responsibility appears to be directly related to Miranda abilities. (Lori H. Colwell, Keith R. Cruise, Laura S. Guy, Wendy K. McCoy, Krissie Fernandez & Heather H. Ross, The Influence of Psychosocial Maturity on Male Juvenile Offenders’ Comprehension and Understanding of the Miranda Warning, 33 J. AM. ACAD. PSYCHIATRY & L. 444 (2005).) Two conclusions can therefore be drawn from the Cauffman and Steinberg approach:

1. Models of maturity are often complex and multifaceted; and
2. Legal professionals do not have any simple tools that easily screen for maturity.

From a more straightforward perspective, researchers have helped to identify key concepts of maturity as they related to juvenile offenders. (Randall T. Salekin, Richard Rogers & Karen L. Ustad, Juvenile Waiver to Adult Criminal Courts: Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment, 7 PSYCHOL. PUB. POL’Y & L. 381 (2001).) In survey samples of child clinical and forensic psychologists, five variables stood out as representing emotional and intellectual maturity. For ease of use, issues related to immaturity are summarized in the form of questions:

3. Is the juvenile offender able to see alternative actions and their consequences?
4. Does the juvenile offender have awareness of his or her own weaknesses?
5. Does the juvenile offender think about the consequences of his or her actions?
6. Does the juvenile offender have adequate decision-making skills?
7. Is the juvenile able to delay immediate gratification in order to attain a future goal?

For investigators and defense counsel, the five items capture two themes: Did the Miranda waiver consider the “big picture” (i.e., choices and consequences)? Did the juvenile give himself or herself a chance to decide about the waiver (i.e., not “jump the gun” out of personal weaknesses)? In a national survey of juvenile judges, a broadened construct (i.e., maturity plus criminal sophistication) was viewed as a core component in their decisions to transfer juvenile offenders to adult courts. (Dia N. Brannen, Randall T. Salekin, Patricia A. Zapf, Karen L. Salekin, Franz A. Kubak & Jamie Decoster, Transfer to Adult Court: A National Study of How Juvenile Court Judges Weigh Pertinent Kent Criteria, 12 PSYCHOL. PUB. POL’Y & L. 332 (2006).)

The easiest approach would be to use age as a proxy for maturity and refer for Miranda evaluations any youth who is 13 years or younger. Over 15 years ago, Professor Thomas Grisso considered this very issue regarding competency to stand trial, citing research to support youths 13 years or younger as likely incompetent regarding their legal rights, including “the automatic exclusion of confessions based on the unassisted waiver of Miranda warnings by youths younger than 14.” (Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 PSYCHOL. PUB. POL’Y & L. 3, 23 (1997).)

### Juvenile Miranda Screen for Clinical Issues

<table>
<thead>
<tr>
<th>Name: ___________________________</th>
<th>Date: ________</th>
</tr>
</thead>
<tbody>
<tr>
<td>Docket number: _________</td>
<td></td>
</tr>
</tbody>
</table>

**Mental health issues**

- [ ] Depressed
- [ ] Withdrawn
- [ ] Anxious

**Developmental and maturity issues**

- [ ] Did not understand the consequences of his or her decisions
- [ ] Easily influenced by others
- [ ] Immature compared to other adolescents the same age
- [ ] Appeared to make risky decisions

**Cognitive issues**

- [ ] Difficulties comprehending what was told
- [ ] Difficulties expressing oneself
- [ ] Difficulties paying attention
- [ ] Difficulties remembering information
Thus, defense attorneys could simply use age (ideally, 13 years or younger) as a proxy for general immaturity and greater deficits in cognitive abilities.

**Juvenile Offenders with Immaturity Plus Impairment**

Defense counsel are often aware of psychological issues that can further complicate the legal abilities of juvenile offenders. Highly experienced attorneys—those averaging more than 1,000 juvenile cases in their careers—were asked to identify those cases in which they themselves had questioned the competency of youthful defendants. Although the survey focused on competency to stand trial, the concerns raised by counsel are clearly relevant to *Miranda* comprehension and reasoning. (Jodi L. Viljoen, Kaitlyn McLachlan, Twila Wingrove & Erika Penner, *Defense Attorneys’ Concerns About the Competence of Adolescent Defendants*, 28 BEHAV. SCI. & L. 630 (2010).) The following is a summary of the greatest concerns:

- Mental health issues were found in 60 percent or more of the cases and included the juveniles being (1) depressed, (2) apparently withdrawn, and (3) anxious.
- Developmental and maturity issues were involved in 60 percent or more of the cases: youths (1) did not understand the consequences of their decisions, (2) were easily influenced by others, (3) were immature compared to other adolescents their age, and (4) appeared to make risky decisions.
- Cognitive issues were found in 80 percent or more of the cases, which included difficulties (1) comprehending what one was told, (2) expressing oneself, (3) paying attention, and (4) remembering information.
- The Juvenile *Miranda* Screen for Clinical Issues (see page 20) provides a simple template for defense attorneys to use in screening juvenile defendants. Importantly, most of these potential indicators are readily observable, which holds especially true for cognitive issues. Without specialized training, counsel and staff alike can easily ascertain whether a juvenile is having major difficulties with communication, attention, and short-term memory that likely affected any *Miranda* decision. Several developmental and maturity issues are also readily discernible, such as being easily influenced by others and making risky or impulsive decisions.

Several important conclusions can be drawn from the above-noted 2010 survey by Viljoen and colleagues. First and foremost, the problems experienced by juvenile offenders were not subtle and difficult to discern. On the contrary, these children manifested generally pervasive problems that would have been difficult to ignore. Second, the problems typically spanned multiple domains. Therefore, counsel could easily apply these criteria to establish issues of maturity coupled with mental health and clinical issues. These combined findings should assist in identifying juvenile offenders whose *Miranda* abilities merit further evaluation.

**Conclusions**

The implications of current research on juvenile *Miranda* warnings and waivers are clear for defense counsel and prosecutors alike. All legal practitioners are invested in arriving at the appropriate adjudication of offenses, and in identifying those persons actually responsible for the transgressions in question. Invalid statements thwart the goals of all lawyers and of the criminal justice system in which they function. Equally concerning, invalid waivers are associated with greater risks of false confessions.

Key to reducing the systemic and societal costs that are embodied in invalid statements is the correction of misconceptions about *Miranda* warnings. Longer warnings are not better warnings. Currently tailored juvenile warnings are not reliably “easier” than those fashioned with adult suspects in mind. An assumed familiarity with the stock language used in many *Miranda* warnings does not necessarily equate with an understanding of the terms these warnings contain, and serious misbeliefs abound. Even vocabulary skill is not the gatekeeping issue. Immaturity and impairment are distinct but related issues that bear special attention in determining the appropriate fashion in which to advise children of their right against self-incrimination.

Again, the American Bar Association has asserted that for juvenile suspects, “clarifying the language of *Miranda* warnings will go a long way toward eliminating outcomes that frustrate legal practitioners and endanger and infuriate the public at large.” We hope that as legal practitioners become more conversant with current research on these matters, they will work together to address readily identifiable problems with currently applied juvenile warnings and waivers.
THE CASE FOR MAKING
CELL PHONE
TRACKING DATA
AVAILABLE AT TRIAL

BY LEONARD DEUTCHMAN
Try to think back to a time that seems so distant as to feel almost mythical—1995. Much of America’s attention was focused on the murder trial of O.J. Simpson. One of the subjects discussed in great detail before the court and by the 80 million legal expert talking heads that covered the trial for the broadcast and cable channels was the use of DNA evidence in criminal trials (now the subject is covered in a 15-second exchange of snappy dialogue in Law and Order: Whatever, CSI: Wherever, NCIS, and any number of other police procedural).

The prosecution sought to use DNA evidence to implicate Simpson as the murderer, while the defense spent weeks discrediting it. The defense team that did so great a job discrediting the DNA evidence also helped found The Innocence Project, which now focuses on overturning criminal convictions, largely through the use of the same type of DNA evidence that the team argued in the Simpson murder trial was unreliable.

Today, we are starting to see what I hope is the beginning of a similar turnaround regarding the acceptance of cell phone tracking data as trial evidence. State and federal courts have produced numerous opinions in which criminal defense attorneys insist that phone users enjoy a “reasonable expectation of privacy” under the Fourth Amendment as it pertains to the caller’s data generated by cell phone carriers. Most courts have rejected that position, but many have not, and the US Supreme Court, when it has spoken in concurring opinions, has tended to side with the defense position. There are other criminal defense attorneys, however, who have recently used such data to exonerate defendants (just as The Innocence Project uses DNA data), and in so doing have discarded some of the privacy arguments that would exclude such evidence from criminal trials.

This article will discuss the legal and technical issues swirling around cell phone tracking, arguing that we should get over our bad selves and recognize that a great deal of what has been called cell phone “privacy” is not privacy at all. There is far more to be gained than lost in the criminal justice system if cell phone and cell phone tracking information can be routinely gathered and analyzed.

**Technical Background**

Cell phones communicate by sending data to, and receiving it from, cell phone towers—some disguised as those dismally fake “trees” along the highways. A call, text, or e-mail is relayed to or from the phone to the nearest cell tower; it is that contact with the nearest cell tower that keeps the user’s phone in contact with the system.

At the same time, cell phones are constantly “checking in” with the nearest tower. This allows the carrier to recognize quickly the phone when the user wants to send data from the phone or locate the phone to forward data to the phone. Absent this constant tracking, each phone interaction would take substantially longer, as the carrier would have to search across its entire system, as well as other systems with which it works, in order to locate the phone.

This phone tracking information generates considerably more data than the metadata generated by all of a user’s call activity. Imagine a cell phone user with 50 to 100 e-mails, texts, and phone calls each day. Now imagine how many cell towers that user’s phone will “ping” as it automatically checks in over the course of that same day—the latter number easily dwarfs the former.

As is typical with regard to digital information that is not purposely saved by a user, cell tracking information is neither retained nor wiped from the carrier’s system; rather, it simply resides within the system until the system needs the space. The less time that elapses between when a user travels and generates “check ins” at various cell towers, and when that information is sought, the more likely it will still reside within the carrier’s system.

By assembling, in chronological order, the cell tracking information for a particular phone, one can put together a picture of a user’s movements, making the assumption that the user was in possession of the phone. Cell tracking information can, generally, place the user’s phone to within 400 feet (or closer) of a tower, which means that it cannot establish whether the user was in the front or back yard, the store on the corner or the one just next door, but it certainly can place a user at or near the scene of a crime, or several miles away from it, at a particular time. Applications exist to map from the tracking information the user’s movements over time.

**Value as Evidence**

It should be clear that cell tracking information can provide valuable evidence in a criminal matter where identification of whether the defendant is the perpetrator is at issue. Cell tracking information cannot place someone exactly at a crime scene, but it can put the suspect (or anyone carrying the suspect’s cell phone) within a few hundred feet of it or, conversely, miles away. Where defense attorneys have traditionally challenged eyewitness testimony and increasingly seek to introduce evidence that purports to show its unreliability, cell tracking evidence would induce guilty pleas, narrow the issue before the trier of fact to the degree of the crime or injury, or exonerate the suspect; in other words, it would be invaluable in obtaining proper verdicts and outcomes as well as moving cases more quickly through the criminal justice system.

**Jurisprudential and Philosophical Issues**

It’s not surprising that law enforcement has turned to cell tracking information. Equally unsurprising is that defense counsel have challenged the admission of such evidence, usually by attacking as unconstitutional the legal means by which it was obtained from carriers. Typically, defense counsel’s position is that such data cannot be obtained without a warrant supported by probable cause. Normally, the data is obtained using a court order that requires less than a showing of probable cause—the government’s position being that such order is sufficient under the Fourth Amendment to respect the rights of the cell user.

**Leonard Deutchman** is vice president and general counsel of LDiscovery, LLC, a firm with offices in McLean, Virginia; New York City; Philadelphia; Chicago; Atlanta; San Francisco; and London that specializes in electronic discovery, data hosting, managed review, collections, and digital forensics.
Many courts have ruled on the issue, and there is nothing close to consensus. In re Cell Tower Log Info., No. M-50, 2014 BL 153122 (S.D.N.Y. May 30, 2014), summarizes some of the case law well. Review of the legal and practical issues makes clear why no judicial consensus has been reached. Justice Harlan’s concurring opinion in Katz v. United States, 389 U.S. 347 (1967), instructs that to find an area is protected under the Fourth Amendment, the court must find that the subject evinced a subjective expectation of privacy in the area and that such expectation of privacy was “objective” in that society deemed it “reasonable.” This has long been accepted as the test for determining whether a subject enjoyed a reasonable expectation of privacy under the Fourth Amendment in the place searched. There is, however, one key flaw in the test on an institutional level: How can the courts, set up to be anti-majoritarian so as to be in the best position to review unpopular assertions of rights, determine what a societal consensus is, particularly when reviewing a controversial matter such as the gathering of cell phone data? By definition, the legislative branch is in the best position to voice the majority’s opinion, if not a societal consensus, on an issue. Thus Katz, for all of its wisdom, is an intellectual dead end when the issue is whether cell phone data is private to the user.

Justice Alito, in his concurring opinion in Riley v. California and United States v. Wurie, 189 L.Ed. 2d 430 (2014), which held that the warrantless search of cell phones incident to arrest violated the Fourth Amendment, noted Katz’s weakness in this area. The majority opinion had found that (1) a person’s cell phone was protected under the Fourth Amendment; (2) there was little to no risk that evidence would be destroyed or rendered inaccessible if the phone was not searched soon after arrest, and any such risk could easily be removed by simple steps the police could take; and (3) there was little difficulty in obtaining a search warrant for the phone. Justice Alito concurred with the Court’s opinion but only because no legislation had yet addressed the issue. He noted that after the Court had decided Katz in 1967, an opinion pertaining to telephone searches that held that “electronic surveillance”—a wiretap—constituted “a search even when no property interest is invaded,” Congress responded with legislation in 1968, and since then electronic surveillance has been governed primarily by the statute and “not by decisions of this Court.” Should Congress respond with legislation that addressed cell phone searches based upon findings that differed from the Court’s, e.g., that there was a great risk that evidence would be destroyed or rendered inaccessible if the phone was not searched soon after arrest, that such risk could not easily be removed, that there was difficulty in obtaining a search warrant for the phone, etc., he would defer to the majority opinion, i.e., Congress, as to what was “reasonable.”

The legislation to which Justice Alito alluded is the Wiretap Act, 18 U.S.C. § 2510 et seq., which distinguishes between intercepting the contents of telephone calls and either tracking in real time or obtaining from providers the historical records of “pen register” information, such as when number contacted and other number, the time, the date, duration of the call, and the identity of the owners of the numbers sending and receiving the call. (The term “pen register” originated when telephone operators would enter that information, in pen, in a register when connecting the parties.) The contents of a phone call are protected by the Fourth Amendment; thus, a wiretap order required probable cause and the interception required steps be taken to ensure that only those conversations for which there was probable cause to intercept were, in fact, intercepted. By contrast, pen register information was seen by the Wiretap Act to enjoy no Fourth Amendment protection. All that the Act required was that a court issue the order upon averment by law enforcement that it was sought in conjunction with an ongoing criminal investigation.

The differing treatments of data depending upon whether it enjoyed Fourth Amendment protection carried over to the Electronic Communications Privacy Act (ECPA), later supplemented by the Stored Communications Act (SCA), 18 U.S.C.A. §§ 2701–2712, which addressed sent, receiving, and storing electronic data. Analogizing telephone conversations to e-mail and text messages, the ECPA and SCA require a search warrant, supported by probable cause, to obtain such data. For “transactional” records, however, such as subscriber information and when, as well as to and from whom, messages were sent, the ECPA and the SCA require a court order supported only by a showing of “reasonable grounds,” i.e., a lesser showing than probable cause and wholly a statutory creation. Cell tracking information is regarded as “transactional” information, which means that law enforcement obtains it through the issuance of a court order supported by a showing of reasonable grounds, not probable cause—unless state laws demand more than the ECPA and the SCA.

The treatment of data differs depending upon whether it was “content,” such as the speakers in a telephone conversation or the body of an e-mail that is generated by the user or “transactional” data generated by the carrier. This is based in part on a well-accepted rule of Fourth Amendment jurisprudence—that a user enjoys no Fourth Amendment protection in records created by a third party, even in support of the user’s constitutionally protected data or communications. In United States v. Miller, 425 U.S. 435 (1976), the Court held that while a bank holds a right of privacy in its records, the account holder does not. In Smith v. Maryland, 442 U.S. 735 (1979), the Court held that while the carrier had a right of privacy in the above-discussed pen register information, the user did not.

With such long-accepted precedents, one would think that determining whether a user enjoyed Fourth Amendment protection of cell tracking information would be easy—just as with the pen register and bank records, the carrier would have a right of privacy in cell tracking information but the user would not, and that the ECPA’s and the SCA’s protection of transactional information are, indeed, more than what the Fourth Amendment requires. Many courts agree, but others have held the opposite. In United States v. Jones, 132 S. Ct. 945 (2012) (referenced above), the Court found suppression of GPS tracking evidence proper because the search warrant obtained to plant a GPS device on Jones’ car was executed just outside the geographical area and the time...
period permitted by the warrant. Justices Alito and Sotomayor found in concurring opinions that because the GPS tracking was lengthy and could provide a “comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations,” it constituted a “search” under the privacy theory of the Fourth Amendment. In United States v. Davis, 754 F.3d 1205 (11th Cir. 2014), the circuit court followed the concurring opinions in Jones. As the case law summarized in In re Cell Tower Log Info., supra, makes clear, however, many circuit and district courts have rejected Justices Alito’s and Sotomayor’s reasoning in Jones.

How, then, did we get from the well-accepted third-party doctrine of Miller and Smith v. Maryland to the cacophony of judicial voices we now have? There are several reasons. First, the older cases, Miller and Smith, dealt with far more “traditional” zones of privacy. Banks had been around for hundreds of years and accessible to average Americans for about a century; telephones had been accessible to average Americans for about 40 years when Katz was decided, about 50 years when Smith was. Whatever issues of privacy either case raised had been discussed in courts and in society in general for decades before the decisions were issued.

Second, in both areas, Congress jumped in immediately, passing laws governing the secrecy of bank records and making it clear that law enforcement did need a court order to use a pen register and that private citizens would be committing a felony if they tried to do the same. Thus, the “objective” component of the Katz test, i.e., what society accepted as “reasonable,” was satisfied when Congress spoke on behalf of society; as well, Justice Alito’s concern in his concurrence in Riley, supra, that Congress was in the best position to determine what society accepted as “reasonable” was also assuaged.

By contrast, today the public discussion regarding cell phones and all of the issues surrounding them is replete with misinformation. Most people have no clue that cell tracking information exists, and those who do typically believe it is generated only when someone sends or receives a cell phone call. More important, while the earlier issues concerned privacy as it related to the telephone call, the present debate concerns a byproduct of cell phone technology—tracking a person’s movements in public. (The misinformation regarding the NSA’s analysis of cell phone data, which does not include the routine interception of cell phone calls but, rather, involves data mining of pen register information only, i.e., of the sender’s telephone number, the recipient’s telephone number, and the date, time, and duration of the call in order to look for connections between callers and detect terrorist networks, deserves its own article.)

The ability of cell phone tracking to follow a person’s public movements does nothing to disturb his or her privacy because all of those movements are in public and so enjoy no right of privacy. What such tracking does disturb is anonymity, something to which no one, until recently, has claimed as a constitutional right.

Consider such famous individuals as the actor Leonardo DiCaprio or the singer Beyoncé walking unnoticed through a crowd of thousands to deposit something in a public trash can. Impossible. They would be recognized immediately and mobbed. But consider Eric Robert Rudolph, who did just that at the 1996 Summer Olympics in Atlanta when he deposited bombs in trash cans. The fact that no one recognized him rendered him anonymous, but no one would argue that he had a right to move through that crowd “privately.”

The problem that anonymity presents is that, while no one has ever enjoyed a right to it, it has become so much a part of how we live our lives over the past 50 years that, in terms of the “objective” factor in Katz, i.e., what society is prepared to accept as “reasonable,” anonymity has become to feel like privacy. Before the rise of the city, when most people lived in small towns, the standard complaint was that everyone knew everyone else’s business; there was not much privacy, and no anonymity. With the growth of the city and, following it, the crowded suburbs, anonymity became the norm—the cheating spouse, for example, who could not go anywhere in the world of Peyton Place without being recognized, could travel a few blocks in a city or a few miles in the sprawling suburbs for a tryst with little fear of being recognized by anyone.

It is hard to argue that the accident of historical circumstances—whether it is the Old West, where a stranger could not come into town without the sheriff asking him to state his business, or contemporary New York, where people living in the same apartment building never meet (the experience I had with two roommates in Berkeley in the late 1970s)—can create a right of privacy under the Fourth Amendment. What cell tower tracking data does create, however, in many (Justices Alito and Sotomayor included) is a fear, expressed so well by Justice Scalia in Kyllo v. United States, 553 U.S. 27 (2001), that technology may advance so as to defeat privacy by making it possible to overcome the physical barriers that create private spaces or by simply “reading” artifacts outside of such a space so as to be able to discern what lies within it. In Kyllo, police did the latter; they used a long-range “thermal imager” to determine what heat had been emitted from a home, without ever having to enter the home, and used that information to establish in a search warrant affidavit probable cause to believe that marijuana was being grown in the home. In finding the warrantless use of the imager a violation of the Fourth Amendment, Justice Scalia expressed his concern that science could develop such devices so that they could perform “virtual” searches of private areas, i.e., searches that never physically penetrate the barriers that define the private space but, Nevertheless, gather sufficient evidence to allow someone external to the space to “see” what is inside.

While a person’s movements in public, by definition, do not occur behind a physical barrier that helps define a private space, there has always been, de facto, a limitation on police resources, i.e., the limited number of personnel, which has prevented the protracted surveillance of the public movements of individuals and thus created a subjective “freedom” from surveillance. Indeed, the American myth that one could always “move West” and “start over” was based upon reality, part of which was that those with criminal records or
wanted on criminal charges could escape their reputations or actions by moving to the West because law enforcement possessed neither the personnel nor the technical resources to identify and locate such persons. Cell tracking information threatens that “freedom” from surveillance by allowing law enforcement to collect such information, enter it into a database, and thus be able to track the movements of all citizens without anything close to probable cause. The spirit of Big Brother, then, hovers over all discussions of, and complaints about, obtaining cell tracking information without probable cause.

What the “Big Brother” concern ignores, of course, is that the same technology that has grown to track the public movements of cell phone users also provides users the freedom to move about using “smart” phones that function as cameras, computer storage units, and devices that send and receive e-mail and texts, as well as access the Internet and numerous other services, in addition to working as telephones. This freedom has allowed users to conduct business (personal as well as commercial) in public that previously had been conducted in private spaces. Combine the freedom provided by smart phones with that provided by advancements in providing faster and safer cars, cheaper and more accessible plane travel, high-speed Internet access, and so on, and you can see that, from law enforcement’s point of view, cell tracking information is but one way to try to keep pace with an increasing mobile population.

It is doubtful that the philosophical disagreements expressed within the judiciary regarding the privacy of cell tracking information will be resolved soon. A better, and more likely, resolution will have to come from Congress.

Practical Issues
In addition to the legal issues that cell tracking information presents, there are several practical issues. First and foremost is the cost of experienced personnel and equipment. In law enforcement, despite the proliferation of digital evidence, the number of qualified personnel (detectives and analysts) as well as the tools they need, which are constantly evolving, always lags far behind the number available. As well, given the demand for those who possess the required skills and the relatively low pay in the field of law enforcement, the likelihood that qualified personnel will pursue a career in law enforcement is diminished; also acting as a disincentive is the fact that investigative personnel are sworn law enforcement officers who must start at the lowest rank and work their way up.

The evidence itself presents a fundamental problem: it is not actively retained by carriers but, rather, simply resides in their systems until the space it occupies is needed, at which point it is overwritten. In practice, this means that the more time that elapses between when the data is created and when it is requested, the less likely it is that it will remain on the carrier’s system.

As a result of these practical problems, it is generally the practice of law enforcement to seek cell phone tracking information only in the most important of cases, e.g., homicides, aggravated assaults with serious injuries, and sexual assaults, and then only when law enforcement possesses the appropriate personnel to know how to ask for, and interpret, such evidence. In Philadelphia, for example, it’s reported that such evidence is sought only in homicide and sexual assault matters.

The number of matters for which cell tracking information would be invaluable would greatly exceed homicides, aggravated assaults, and sexual assaults. In virtually every armed robbery, the issue is the suspect’s identity, and a considerable number of aggravated assaults not leading to serious injuries, simple assaults, and property crimes also turn on showing that the accused was the perpetrator (as opposed to self-defense, consent, and other defenses).

Cell Tracking Information/DNA: Common Ground?
While prosecutors and defense attorneys argue Fourth Amendment issues regarding obtaining cell tracking information from carriers, it should be evident to both sides that the value of that evidence is such that they can agree it should routinely be made available from carriers—the quicker, the better. Such information can very quickly tell a defense attorney whether the client protesting that he or she was wrongly identified and miles from the scene is a victim of a mistaken witness or overzealous law enforcement or simply a liar trying to manipulate counsel and the system; it can also tell law enforcement whether they caught the right guy or was he or she telling the truth when claiming to be nowhere near the scene of the crime.

On May 22, 2014, the Philadelphia Inquirer reported that a man, held without bail for two years while awaiting trial in a capital homicide matter, was released after court granted the district attorney’s office a motion to drop all charges.

Published in Criminal Justice, Volume 29, Number 4, Winter 2015. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
From the start, the defendant had claimed he was 180 miles from the crime scene at the time of the murder. His attorneys, Anthony J. Voci Jr. and Judith Rubino, both former prosecutors, approached the assigned prosecutor, Jude Conroy, also a friend and former colleague (all longtime friends and former colleagues of the author), and asked detectives to reinvestigate by obtaining cell tracking information. Luckily, the carrier still possessed that information more than two years after commission of the crime. The information confirmed the defendant’s alibi.

There is no good reason why such matters should not persuade criminal defense counsel to abandon its broad-based attack upon cell tracking information and, as with DNA evidence à la The Innocence Project, agree that it should be easily obtained and insist that it be done in all cases so the exonerated may go free and those implicated by the evidence stand trial. Should that occur, the practical problems attendant to obtaining cell tracking information will be greatly reduced. Obtaining such evidence once the telephone number of the suspect’s cell phone is established (usually following arrest) will increase the probability that the carrier will still possess the relevant data. Obtaining such data should be made routine and result in a standardized “fill in the blanks” court order, application, and supporting affidavit under the ECPA and the SCA, which will not require highly trained detectives or prosecutors to complete (reducing the cost of obtaining such evidence.) Standardized collection of such data should also increase its priority within the criminal justice system and help law enforcement obtain the funds necessary to enter the data into databases that will make it easy to follow, and will encourage federal and state cooperation (as exists now for performing forensic examinations of computers and other digital devices) in developing and maintaining such databases.

It should be noted that nothing in the above suggestion prohibits a defense attorney from arguing and presenting evidence that a cell phone did not track the client’s movements because the client was not in possession of or physically proximate to the phone. Indeed, were that the case, the client would have no Fourth Amendment interest in any cell tracking data gathered by the phone while it was moving, and so the constitutional issue would be moot. As for the client’s relevance argument, the client’s testimony, the record of telephone calls (which, presumably, would be between persons with whom the client was less likely to speak), texts (“Hey Client, how are you”; “This isn’t Client, it’s Client’s sister; I have Client’s phone”), and the cell tracking data for the time period before and after the time of interest, which should show the phone going to places the client was less likely to go to, should create reasonable doubt as to the client’s possession of the phone if, indeed, the client did not possess the phone. Thus, the absence of any Fourth Amendment impediment to the government’s admission of cell tracking evidence does not remove the government’s burden of establishing relevance, more specifically, of establishing that the evidence revealed the defendant’s movements because (1) it was scientifically reliable, and (2) the defendant was in possession of, or in close proximity to, the cell phone.

One hopes that, as more matters such as the Philadelphia one just discussed are pursued and their results revealed, the attitude by the criminal defense bar towards cell tracking information will shift, as with DNA evidence, from that which must be excluded at all costs to that which should be without question part of every case involving identification testimony where such evidence is available. Digital devices are a crucial part of our lives now; we cannot, and should not, continue to ignore the evidence they create or create barriers to obtaining that evidence.
FOREIGN EVIDENCE AND TOLLING THE STATUTE OF LIMITATIONS

BY DAVID FARNHAM

My introduction to 18 U.S.C. § 3292 (Suspension of limitations to permit United States to obtain foreign evidence) came when I was brought in to the ongoing federal prosecution of the chief executive officer of a foreign pharmaceutical firm (see United States v. Ratti, 365 F. Supp. 2d 649 (D. Md. 2005)). The § 3292 issues arose when the government obtained a 12-count indictment based largely on the strength of statements made by the defendant pursuant to a proffer agreement that had been presented to the grand jury in violation of that agreement. The government then obtained a superseding 13-count indictment from a different grand jury; although this one did not use the defendant’s statements, 12 of the counts were identical to those in the original indictment—only the thirteenth count was new. In addition, the government requested assistance from Italy and Romania in obtaining records and witness interviews, but while the request to Italy was transmitted by the Department of Justice’s (DOJ) Office of International Affairs (OIA), the Romanian request was not. Nonetheless, it was represented to the court that both requests had been formally made through the DOJ and, on the strength of that representation, the court suspended the running of the statute of limitations. At the point I joined the case, it was in danger of being dismissed largely because of these § 3292 issues.

Section 3292 (see sidebar for the full text) was enacted as part of the Comprehensive Crime Control Act of 1984 (CCCA). The CCCA also added a complementary provision to the criminal code: 18 U.S.C. § 3161(h)(9) allows for a period of up to one year to be excluded from the calculation of the time following the return of an indictment under the Speedy Trial Act. Both § 3292 and § 3161 address the situation where evidence is located overseas, and they were enacted to address the difficulties and delays inherent in obtaining evidence from foreign countries. As the legislative history noted:

The use of offshore banks to launder the proceeds of criminal activities and to evade taxes has become an increasing problem for federal prosecutors. . . . Once funds are traced to offshore banks, federal prosecutors face serious difficulties in obtaining records from those banks in both the investigative and trial stages of a prosecution. . . . The procedures that must be undertaken in other countries in order to obtain the records generally take a considerable period of time to complete. . . . The delays attendant in obtaining the records from other countries create both statute of limitations and Speedy Trial Act problems. (House Report 98-907 (1984), reprinted in 1984 U.S.C.C.A.N. 3578.)

There are three things that all of the authorities that have addressed § 3292 agree on:

• when § 3292 is triggered, the statute of limitations is suspended as of the date the official request is made to the foreign country and not the date of the government’s application to the court for the tolling order;
• the foreign evidence need not be pivotal to the eventual indictment; and
• the period of suspension ends when the foreign government takes “final action” on the request.
**Questions**

But what constitutes “final action,” and every other material issue, is up for grabs—or at least for argument—depending on your venue. What constitutes final action and who decides when final action has been taken? Is the foreign government’s understanding and statement to that effect controlling, or is final action dependent on whether the prosecution is satisfied with the response? Is final action dated from the receipt by the government of the foreign evidence? May the government’s application be made ex parte or is the target entitled to notice? Must the government make its application to suspend the statute of limitation before that statute has run, or does the application effectively “revive” a statute that has expired? Can the application be made after the foreign evidence has been received? Must the request to the foreign government name the target as to whom the prosecution seeks to suspend the statute of limitations? Similarly, must the request list the specific charges as to which the prosecution seeks to suspend the statute? Can the statute be suspended if the same evidence that is sought from the foreign government could have been acquired domestically? Does § 3292’s language “before which a grand jury is impaneled to investigate the offense” require that a grand jury be impaneled specifically to investigate the offenses? What is the government’s burden of proof to establish that the request was actually made, and what evidence satisfies it? Does the government have an obligation to exercise some diligence to ascertain the status of a pending request?

**Answers**

The first indication that a district court will have that the tolling of the statute of limitations is an issue will come when the prosecution files its application for an order to that effect. The statute is silent as to whether the application is to be made ex parte or on notice, but the government will make its application without notice. With the exception of one judge in Boston (see In re Grand Jury Investigation, 3 F. Supp. 2d 82 (D. Mass. 1998)), courts have upheld the ex parte procedure: Ninth Circuit (DeGeorge v. U.S. District Court for the Central District of California, 219 F.3d 930, 937 (9th Cir. 2000)); Maryland (Ratti, 365 F. Supp. 2d at 655); District of Columbia (United States v. Neill, 940 F. Supp. 332, 335 (Neill I), vacated on other grounds, 952 F. Supp. 831 (D.D.C. 1996) (Neill II)); Western District of New York (United States v. King, 2000 WL 362026, at *20 (W.D.N.Y. Mar. 24, 2000)); and the Southern District of Florida (United States v. Trainor, 277 F. Supp. 2d 1278 (S.D. Fla. 2003)).

The rationale is that since the statute requires some ongoing grand jury investigation or activity, grand jury secrecy rules extend to the application.

DAVID FARNHAM retired after 30 years as a federal prosecutor in various divisions of the US Department of Justice, most recently in the National Security Division. He was formerly in private practice and in the Enforcement Division of the Securities and Exchange Commission. He is currently preparing a course on corporate and white collar crime and pursuing of-counsel opportunities.

The first indication that the defense will have that the statute of limitations was suspended is when the indictment is reviewed. “Notice” will likely derive from a comparison of the latest date of the charged offense conduct with the date of the indictment because the government is not required to allege in the indictment any of the facts that supported the suspension of the statute of limitations. Only one district court has dismissed an indictment as untimely filed because it failed to allege the facts that supported the tolling of the statute. In United States v. Titterington, 2003 WL 23924932 (W.D. Tenn. May 22, 2003), the court accepted the defense argument that the statute of limitations is jurisdictional and, thus, the challenged indictment was untimely. The Sixth Circuit reversed and held—as has every other federal circuit—that the statute of limitations is not jurisdictional, but rather provides an affirmative defense. (United States v. Titterington, 374 F.3d 453 (6th Cir. 2004).)

**Filing the challenge.** Once the defense learns that the statute of limitations was tolled, there arise a number of potential challenges both to the suspension itself and to the length of its term. The first issue is the timing of the government’s application: there is a split in authority over whether the government can file its application for the court after the statute of limitations has run. In other words, does the court’s order merely suspend a time period that is currently running, or does it resurrect, Lazarus-like, a period of limitations that had already run? The Second Circuit established the first position, whereas the Ninth Circuit takes the “resurrection” approach. Two members of a panel of the Third Circuit have, in dicta, sided with the Ninth Circuit. Given that the government has complete control of the Mutual Legal Assistance Treaties (MLAT) process and the timing of its application, one might be forgiven for thinking that this issue would no longer arise, especially in light of internal DOJ guidance to prosecutors to ensure that they apply before the statute has run; but one would be wrong. And in fact, one district judge in the Ninth Circuit has opined that if she were not bound by mandatory precedent and was free to adopt either theory, she would have followed the Second Circuit’s logic that once the statute has run, it is dead and cannot be resurrected. The reasoning of the Second Circuit is based on a commonsense interpretation of the language of § 3292, whereas the Ninth Circuit viewed that language through the filter of its consideration of the Constitution’s ex post facto clause in an earlier case.

In United States v. Kozeny, 541 F.3d 166 (2d Cir. 2008), the court interpreted “suspend” as meaning to cause to stop, at least for a time, something that is in operation or in effect at that time, and noted that the statute of limitations could only be in operation or effect if it is currently running. If the statute has already run and has expired, then it cannot still be “running,” and therefore a court can suspend the running of the statute only if it has not already expired. The court noted that interpreting the statute to allow for an expired statute of limitations to be restarted would be to revive it, rather than to suspend it, and there was no logical reading of the word “suspend” as used in § 3292 that could support...

The Ninth Circuit took an entirely different approach, and reached the contrary—and counterintuitive—conclusion that even after the statute of limitations has run out, it can be resurrected by the government’s application. In United States v. Jenkins, 633 F.3d 788 (9th Cir. 2011), the court reached its decision by analogizing to its earlier decision in United States v. Bischel, 61 F.3d 1429 (9th Cir. 1995), which addressed issues regarding the Constitution’s ex post facto clause, rather than by a reasoned examination of §3292’s language. Interestingly, the opinion does not mention Afshari, refers to Kozeny only in passing as an example of a disagreement between the circuits, and elevates dicta in a footnote in United States v. Hoffecker, 530 F.3d 137, 163 n.4 (3d Cir. 2008), to the level of a circuit conflict with Kozeny. The less-than-convincing nature of the Ninth Circuit’s reasoning is perhaps best reflected in an opinion from within that district that, like Jenkins, wrestled with the circuit’s earlier ex post facto ruling. In United States v. Daniels (2010 WL 2680649, at *4 (N.D. Cal. July 6, 2010), the court said that if it “[w]ere . . . writing on a blank slate, it might well adopt Kozeny’s approach and dismiss [the] counts as time barred.” While the district court in Daniels was constrained by Bischel, the Jenkins court was free to reexamine the issue in light of Kozeny’s analysis, but it failed to do so. The only other court to accept the “resurrection” interpretation is the District Court for the District of Columbia, in Neill I, 940 F. Supp. at 336. But Neill I cited Bischel for the proposition that the statute of limitations were tolled by the official request to the United Kingdom, and “not by the government’s application to the court.” No other court has adopted the novel concept that the request, rather than the court’s order following the government’s application, tolls the statute. For if that were the case, what is the purpose of requiring the government to apply for an order? And what is the effect of the order, and what becomes of the court’s role to assess that the request was not only made, but was made on sufficient indicia that evidence relating to the offenses under investigation was then located overseas? The court clearly confused the retroactive dating of the beginning of the period of suspension, which is specially provided for in §3292(b) and on which all courts agree, for an automatic tolling of the statute. Yet, when addressing the government’s contention that the statute was tolled for offenses that were not listed in the request, the court quoted the statute’s operative language that upon application “the district court . . . shall suspend the running of the statute of limitations . . . if the court finds by a preponderance of the evidence” that the official request was made. (id. (emphasis added.) The court made no attempt to reconcile these divergent positions.

What then to make of this split in authority addressing whether the government may file its application after the statute of limitations has already run? Kozeny and its progeny proceed on the basis of a reasoned examination of the statute’s context and unambiguous language; whereas Jenkins takes the position that the court’s hands were bound by Bischel, and even two district judges within the Ninth Circuit have expressed a preference for the Second Circuit’s approach. Clearly, even in the Ninth Circuit, the issue should be raised and the court invited to rethink whether it truly is bound by Bischel and whether that portion of Jenkins should be reexamined. The Third Circuit’s dicta in Hoffecker is not controlling, and given its offhand mention in a footnote that states that it is irrelevant to the case, it should not be particularly persuasive to anyone who actually examines the statute. In the District of Columbia, Neill I is likewise not controlling because it was reversed on other grounds, and its reasoning is likewise unpersuasive. Should a prosecutor ignore DOJ’s written guidance to file the application before the statute runs—and I realize that some readers will find this shocking, but prosecutors do occasionally ignore such “guidance”—there is helpful language in the Kozeny line of cases that might debunk the prosecution’s reliance on Jenkins.

Assuming that the government makes its application before the statute has otherwise run, there is another potential timing issue that can be raised: did the government make its application before it had received all of the foreign evidence it requested—that is, before the foreign government took final action? This is a rare, but not unknown, occurrence. To be clear, the period of suspension will end whenever the foreign government takes final action, but the question here is whether the court may order such suspension where the government files its application after that final action has occurred. There is again a split in the authorities, with the Ninth Circuit taking a position that ignores the plain language of the statute and the Third Circuit applying the language of the statute as it is written. In United States v. Miller, 830 F.3d 1073, 1076 (9th Cir. 1987), the court characterized as a piece of “ingenuity” the assertion that the word “is” as used in §3292 (an application “indicating that evidence of an offense is in a foreign country”) means “is,” as in the present tense. In deciding what the meaning of “is” is, the Ninth Circuit opined that §3292 simply made more sense if it is read to allow the government the time to sift through the evidence it received before making its application. Why that made sense is not apparent, nor is it clear why the court’s preference should override Congress’s
unambiguous use of a present-tense verb.

Taking the contrary view that “is” actually means “was,” the Third Circuit in United States v. Atiyeh, 402 F.3d 354, 362 (3d Cir. 2005), held that the district court’s order tolling the statute of limitations was not effective and that the statute had continued to run. In Atiyeh, the government had received all of the evidence it requested from Canada and Antigua two months and 16 months, respectively, before it filed its application. For that reason, the government was unable to “indicate that evidence of an offense is in a foreign country.” However, in an attempt to renegotiate the meaning of “is,” the government argued that “is” could mean “was”; in other words, the government’s argument was that it only had to indicate that evidence had been in a foreign country at some point in time, whether past or present. The court found no basis in the language, the structure, or the purpose of § 3292 for such an interpretation. (Id. at 363.) The government offered a second theory to avoid the problem: that the originals of the documents remained overseas, even though all of the requested copies had been received, and that therefore there currently is evidence overseas. The court rejected those readings of the statute, and also rejected Miller’s argument that the government needed time to review the voluminous evidence it had received before making its application. (Id. at 365, 366.) Finally, the government asked the court to affirm the suspension of the statute on the basis of “equitable tolling” because it had relied in good faith on the court to affirm the suspension of the statute on the basis of “is,” the government argued that “is” could mean “was”; this would penalize the Government for lack of omniscience as to who was involved in the foreign country. The alternative interpretation (i.e., “is”,) counsel should keep Ratti in mind because even when the government provides a facially inadequate notice, its defects might be made up in other ways to satisfy the “evidentiary value” standard. On the other hand, if an application cannot be so supplemented, then its failure to include verifications or affidavits might render it vulnerable to a challenge.

The language of the government’s request to the foreign country, like the language of its application to the court, might also provide fodder for more challenges. Let us assume that the government was initially investigating one or two individuals, but not your client, and that when it moved for an order of suspension, the government named those other individuals, but not your client. Or that the government listed offenses other than those that were subsequently returned in the indictment. A challenge that your client was not listed will fail, and the few courts that have ruled on this question (District of Columbia, Neill II; Maryland, Ratti; and the Central District of California, Afshari) all agree that while § 3292 is offense-specific, it is not person-specific. The statute refers to offenses for which evidence is sought, and the government cannot be expected to know in advance the universe of individuals whom that evidence will inculpate. The alternative interpretation (i.e., that the statute is person-specific) “would penalize the Government for lack of omniscience as to who was involved in offenses under investigation.” (Neill II, 952 F. Supp. at 833–34.) But while agreeing that § 3292 is offense-specific, the courts have allowed varying degrees of elasticity to inform their interpretation of the offenses under investigation.

The government’s application in Ratti was captioned “In Re Grand Jury Investigation of Roussel Uclaf, S.A. and Biochemical Opos S.p.A.,” and made reference only to corporate criminal activity related to introducing adulterated drugs into interstate commerce, making false statements within the jurisdiction of a federal agency, and conspiracy. (365 F. Supp. 2d at 656.) But Luigi Ratti was charged initially only
with wire fraud. The court noted that the charged wire fraud counts were related to the general scheme to defraud that was under investigation, and drew additional support from the language of the request to Italy: the Italian authorities were asked to enquire of various witnesses whether they knew if Luigi Ratti had been involved with potentially illegal manufacturing practices and any resulting cover-up. Although the request’s query regarding Ratti’s activities seems more relevant to determining whether Ratti had been a target, the court accepted the view that the query brought Ratti’s conduct within the larger scenario of Roussel Uclaf’s activities. (Id.) Interestingly, although Ratti’s counsel relied on Neill II to challenge that the wire fraud charges were not part of the investigation, the Ratti court also relied on Neill II to hold that the wire fraud charges were closely related to the offenses under investigation at the time of the request.

Although the government prevailed in Ratti, an examination of Neill II’s analysis indicates that Ratti’s counsel may have had the better interpretation of that case’s holding. In Neill II, the court held that a request for foreign bank records in an investigation of bribery and money laundering could suspend the statute of limitations with respect to criminal tax charges that were not mentioned in the request. In a commonsense way, tax charges may be viewed as closely related to other financial crimes, such as money laundering; but that was not the basis for Neill II’s holding, which cited a supplemental government pleading that established that at the time of its request, the grand jury was also investigating tax evasion. The government made no showing in Ratti that wire fraud had been part of its grand jury investigation at the time it requested materials from Italy.

Ratti’s interpretation of Neill II has not been reexamined by other courts, which have instead simply adopted it. A court in the District of North Dakota found Ratti’s reasoning persuasive in United States v. Schwartzendruber, 2009 WL 485144, at *5 (D.N.D. Feb. 25, 2009), and held that tax fraud was “intimately related to the wire fraud, money laundering, and conspiracy to commit money laundering offenses that were under investigation.” In United States v. Arrington, 2013 WL 5963140, at *5–6 (D. Neb. Nov. 7, 2013), the court cited Schwartzendruber to hold that a request that referenced an investigation of a scheme and artifice to defraud involving foreign bank deposits was sufficiently specific and “suggested that wire and mail fraud were being investigated.” These cases have stretched the language of the request to Italy: the Italian authorities were asked to produce evidence of an offense is in a foreign country,” which would allow for a suspension provided that evidence of some offense is overseas; rather the limiting phrase, ignored by those cases, should guide the analysis. Although the cases are consistent, the issue remains whether they are correct or should be reexamined. On a related note, the scant authority on the issue whether a grand jury must be specifically impaneled to investigate the relevant offenses for the tolling to occur hold that only minor grand jury-related activity is required. In DeGeorge, the Ninth Circuit declined to issue a writ of mandamus sought in part because the district court had ruled that the phrase “the district court before which a grand jury is impaneled to investigate the offense” was merely jurisdictional, indicating which court could issue the order. However, some prior grand jury-related action would appear necessary under DeGeorge’s rationale to establish which district had jurisdiction: in DeGeorge, the government had issued a related grand jury subpoena one day before making its application to the district court. A similar situation arose in Schwartzendruber, supra, where several grand jury subpoenas had been issued before the government made its application.

Final action. Determining when the foreign government has taken final action presents opportunities to argue that the facts establish a shorter period of suspension than the government needed to return a timely indictment. What constitutes final action? Who determines when it has occurred? As with other general terms in § 3292, there is room for interpretation. In a troubling case, the Ninth Circuit sanctioned a government request for documents that also stated that at a later time it would request certified copies for use at trial. The court, in United States v. Hagege, 437 F.3d 943, 954–56 (9th Cir. 2005), basically permitted the government to extend the suspension period by requesting that the Israeli authorities provide documents in uncertified form and “when the time for trial in the United States approaches, the United States requests that some or all of the non-certified evidence be resent to the United States in certified form.” There is nothing wrong with the government requesting certified records so that they can be introduced at trial, but what Hagege sanctioned was materially different, in that the government specifically requested that uncertified copies be sent because certified copies were not required for the investigation (id. at 947), while retaining the right to request certified copies later. This is a classic case of having one’s cake and eating it too: the government received uncertified copies quickly
to assist its investigation, but by simply noting that it would ultimately require that some of those materials later be resubmitted in certified form, it stretched the length of time that was excluded from the statute of limitations. The Ninth Circuit focused on the fact that the government had always said that certified copies would be required for trial to hold that the submission by the Israelis of the initial batch of uncertified copies did not constitute final action, but it missed the larger point of a deliberate abuse of the process by the government to gain more time to complete the investigation. Under \textit{Hagege}, the government could stretch the suspension of the statute of limitations up to the three-year statutory cut-off, when a much shorter period of time was actually required to obtain certified records for use at trial. \textit{Hagege} established the principle that “final action” means a dispositive response to each item in the official request, including a request for certification (\textit{id. at 954–56}), but it did so by ignoring the reality that Israel took final action on the request when it sent the uncertified copies, and it should have required the government to make a subsequent request for those documents it wanted in certified form. Merely announcing that the prosecution would ask for all or some of the materials to be resubmitted in certified form “when the time for trial . . . approaches” is only a notice that there will be a subsequent request; it did not constitute a request that Israel certify any of the materials.

The problem with \textit{Hagege} is that it has been interpreted as holding that the submission of the uncertified documents was merely “interim communications,” and not final action. (\textit{Jenkins}, 633 F.3d at 801.) But \textit{Jenkins} involved a request that called only for certified copies, and thus final action would only occur when they were received. \textit{Jenkins} did not involve a request for uncertified copies accompanied by a notice that the government would later identify specific documents that it required in certified form. The two situations are not analogous.

Another problem in determining when final action has occurred is deciding what weight to give to the foreign government’s assessment that it has taken final action. In \textit{United States v. Meador}, 138 F.3d 986, 993–94 (5th Cir. 1998), the Fifth Circuit rejected the government’s argument that final action occurred when the government was satisfied with the foreign government’s response, and instead adopted “a strict, bright-line standard for ‘final action.’” That bright line was the German government’s letter stating that it “had ‘completely satisfied’ the government’s official request and considered its ‘function to be concluded.’” The Eleventh Circuit rejected \textit{Meador} and adopted the Ninth Circuit’s approach in \textit{United States v. Torres}, 318 F.3d 1058, 1064 (11th Cir. 2003). But \textit{Torres} presented an unusual situation, in that the authorities on the Isle of Man mistakenly stated that they were providing all of the requested materials and closing their file, when they had in fact failed to provide several categories of documents that were plainly listed in the original request. In \textit{Torres}, the government had acted as if the Isle of Man had taken final action because it filed a supplemental request for the omitted documents. If the government thought that the Isle of Man’s partial response was not final action on the original request, it might have been expected instead to communicate its opinion to the foreign authority and ask for the missing documents called for by the existing request.

The Third Circuit’s approach to this issue requires clarification. In \textit{Atiyeh}, 402 F.3d at 362–63, the court indicated that final action required that all requested information be received. But in \textit{Hoffecker}, 530 F.3d at 160, the court noted that the government had filed its application upon receipt of only part of the requested material, which apparently reflected an understanding of final action more in keeping with the Fifth Circuit’s \textit{Meador} approach. The \textit{Hoffecker} court declined to clarify the issue. In \textit{Ratti} the issue was even murkier because although the Italian authorities provided some material, they did not state that they viewed their role as complete, nor did they communicate anything subsequently; moreover, the material provided clearly did not constitute everything that had been requested. Thus, under either test, there had been no final action by the submission of the partial response. The question arises whether, in the face of silence from the foreign government, the prosecution has some obligation to follow up and attempt to ascertain the status of the request. In \textit{Ratti}, the court held that there is no such obligation: “the Court holds that the Government is not otherwise precluded from proceeding in this case based on any failure to exercise due diligence in its pursuit of evidence in Italy.” (365 F. Supp. 2d at 659.) The court then held that “[t]he maximum 3 year extension of limitations applies to each offense charged.” (\textit{id.}; accord \textit{Arrington}, 2013 WL 5963140, at *5.)

Another troubling issue is whether the government should be allowed to effect a suspension of the statute when the evidence is available both overseas and in the United States. If the evidence could be obtained domestically, it would seem to be an abuse for the government to also request it from a foreign country and to extend the statute of limitations. In \textit{DeGeorge}, the Ninth Circuit rejected the challenge “that all the evidence the government used in its eventual grand jury proceeding against him was available in the discovery records from the [related] civil trial, filed in the same building in which the United States Attorney’s office is located.” (219 F.3d at 939.) The court’s opinion depended on the fact that other evidence not available domestically had been requested, although it was not used against \textit{DeGeorge}. (\textit{id.}) The lesson would seem to be that the evidence that exists only overseas need not be relevant to the eventual charges, but there must be a request for evidence that is not already available on another floor of the courthouse. That limitation could still be raised in a challenge in the Ninth Circuit, but not in the Second. In \textit{United States v. Lyytle}, 667 F.3d 220, 225 (2d Cir. 2012), the court rejected the defendant’s argument that the request to Hungary for bank records could not effect a tolling of the statute because the relevant Hungarian bank had offices in the United States and the records could therefore have been obtained by a routine subpoena duces tecum. Although the court correctly noted that § 3292 does not require that the evidence be available only overseas, it ignored the purpose of the statute: as noted in the legislative history, the purpose was to alleviate the problems encountered by the government in obtaining evidence it needed from foreign countries. That purpose is
not served when the evidence is available domestically. The court’s sanction of the government’s choice not to at least pursue the domestic avenue in effect gives the government a license to improperly extend the statute of limitations, and arguably to engage in an abusive tactic.

A final example of the complexity of the issues flowing from § 3292 is provided by *Bohn*. In that case, the United States made a request pursuant to an MLAT that had not been ratified, and the government filed its tolling application knowing that the MLAT was not in force. The Sixth Circuit found that OIA’s transmittal letter, which accompanied the actual request, constituted an “official request” under § 3292. The problem with that interpretation of the catch-all statutory language “or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country” is that in *Bohn*, OIA’s letter was merely a cover letter, and the request for assistance was specifically predicated on an MLAT that was not in effect, and was legally nonexistent.

**Conclusion**

The confusion regarding the application of § 3292, and the disagreements between those few courts to have addressed that application, refute any notion that the defense has little recourse when the government applies for an order suspending the statute of limitations to obtain foreign evidence. To the contrary, depending on the venue of the prosecution, there are a number of challenges that might be raised. Even in those jurisdictions where a particular issue might seem to have been finally settled, a close examination of the factual context and thus the actual holding of adverse opinions might successfully elicit reexamination. The final interpretation of § 3292 has not yet been written.

---

**Language of the Statute**

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense—

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term “official request” means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.
A basic principle codified in Rule 3.7 of the Model Rules of Professional Conduct is that a lawyer generally cannot be both an advocate and a witness in the same case.

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

The rule applies to all lawyers in civil and criminal cases and is equally applicable to prosecutors and defense lawyers. Some courts, however, have expressed a special concern that a government lawyer comply with the rule because it “expresses an institutional concern, especially pronounced when the government is a litigant, that public confidence in our criminal justice system not be eroded by even the appearance of impropriety.” (United States v. Prantil, 764 F.2d 548, 553 (9th Cir. 1985).)

In the typical criminal case it is unthinkable that the prosecuting attorney or the defense lawyer would seek to take the witness stand even if co-counsel were present to conduct an examination. But both prosecutors and defense counsel must recognize that it is possible for a lawyer to violate the ethical rule without ever officially becoming a witness.

An Illustrative Case

One case that illustrates how this can happen is United States v. Rangel-Guzman, 752 F.3d 1222 (9th Cir. 2014). The defendant was charged with and convicted of importation of marijuana. The first paragraph of the court’s opinion summarizes the case in a very catchy way, which is not unusual in opinions by Chief Judge Alex Kozinski:

It is said that every dog has its day. Unfortunately for Kevin Rangel-Guzman, the drug detection dog at the Otay Mesa Port of Entry was having a fine day on September 5, 2011, when Rangel-Guzman and a friend attempted to re-enter the United States. The dog alerted to their vehicle, and Customs and Border Protection officers conducted a search. Officers found 91.4 kilograms of marijuana, hidden in a compartment behind the backseat. Good dog! (Id. at 1223)

On these facts it is easy to believe that the defense of Rangel-Guzman was a challenge. It turns out that both he and his friend gave statements to border agents after their arrest. At trial, Rangel-Guzman testified to a very different account from the one he provided to the agents. He claimed at trial that (1) his Aunt Martha and a cousin invited him a month before the arrest to a wedding in Tecate, Mexico, so (2) he took a bus from Los Angeles to Tijuana and either a bus or taxi to Tecate and (3) returned to Los Angeles the same way; then (4) he decided to go back to Mexico to “have a good time,” at which point (5) Aunt Martha loaned him a car that (6) he and his friend drove to his cousin’s house in Tecate and (7) took a side trip by cab before (8) returning to Tecate to pick up the car. In short, his defense was “I didn’t know there was marijuana in the car.”

The Problem

Prior to trial, the assistant US attorney who prosecuted the case had a meeting attended by Homeland Security Agent Baxter, Rangel-Guzman, and Rangel-Guzman’s attorney. When Rangel-Guzman’s trial testimony departed from what he had said in the meeting, the prosecutor questioned him in a way that made clear that she believed he had made statements in the meeting inconsistent with his testimony. She interrogated him as follows:

You told us that you and your mother ran into Martha . . . You told us that four or five months before . . . That’s what you told us last week . . . Don’t you remember that I was shocked that you were saying it was four to five months before you got arrested? (Id. at 1224.)

Although the prosecutor clearly was referring to her reaction to what Rangel-Guzman said during the pretrial
meeting, defense counsel failed to object. For the first time on appeal, appellate counsel argued that the prosecutor improperly vouched and violated the advocate-witness rule. The absence of a timely trial objection left Rangel-Guzman with the chance for only plain error review.

The court of appeals explained that it held government lawyers to a high standard when it came to the advocate-witness rule:

We have previously found error where a prosecutor’s actions might have “take[n] advantage of the natural tendency of jury members to believe in the honesty of . . . government attorneys” even when those actions didn’t “fit neatly under either the advocate-witness rule or the vouching rule.” United States v. Edwards, 154 F.3d 915, 922 (9th Cir. 1998).

(Rangel-Guzman, 752 F.3d at 1225.)

The court concluded that the prosecutor “became her own rebuttal witness” as it described her cross-examination:

The prosecutor made a number of statements that used variations on “but you told us” and “I asked you and you said,” as well as assertions of fact about what had occurred during the meeting: “Well, we went over and over it, Mr. Rangel,” “[D]o you remember last week I specifically asked you multiple times who accompanied you to the Quinceanera?” And she left no doubt about her personal feelings during the meeting: “Don’t you remember that I was shocked that you were saying that it was four to five months before you got arrested [that you met Martha]?”

(Id.)

Avoiding the Problem
The court explained how prosecutors can avoid the advocate-witness problem, and its advice is equally applicable to defense counsel:

When a prosecutor interviews a suspect prior to trial, the “correct procedure” is to do so “in the presence of a third person so that the third person can testify about the interview.” United States v. Watson, 87 F.3d 927, 932 (7th Cir. 1996). Here, Agent Baxter was present for the interview, so he could have taken the stand and testified that Rangel-Guzman had made the prior inconsistent statements. See United States v. Hibler, 463 F.2d 455, 461 (9th Cir. 1972).

(Rangel-Guzman, 752 F.3d at 1225.)

Relying on the cases cited above, the court found that the prosecutor violated the advocate-witness rule:

Instead of calling Baxter, the prosecutor became her own rebuttal witness. By phrasing the questions as she did, she essentially testified that Rangel-Guzman had made those prior inconsistent statements. Doing so clearly took “advantage of the natural tendency of jury members to believe” in a prosecutor, Edwards, 154 F.3d at 922, and required the jury to “segregate the exhortations of the advocate from the testimonial accounts of the witness,” Prantil, 764 F.2d at 553. And, because the prosecutor wasn’t actually a witness, Rangel-Guzman had no opportunity to cross-examine her about the accuracy or truthfulness of her account.

There can be no doubt that the AUSA was asking the jury to choose whether to believe her or the defendant. This was highly improper and unfair to the defendant.

(Rangel-Guzman, 752 F.3d at 1225.)

The Remedy and Lessons Learned
The government conceded that the prosecutor had violated the advocate-witness rule in her cross-examination, and the court commented favorably on the government’s response to the violation:

After oral argument before us, the United States Attorney “concede[d] that [the] cross-examination of defendant was error” and advised us that she “has instituted—in addition to existing training—a semi-monthly training update for the Criminal Division regarding pre-trial and trial phases . . . in which prosecutorial error may occur.” We commend the United States Attorney for the Southern District of California for her forthrightness and hope that her example will be followed by prosecutors across the circuit.

(Id.)

The court also chose to emphasize the importance of trial judges enforcing the advocate-witness rule:

We recognize the difficulty in identifying errors absent an objection. And we understand the district court’s reluctance to intervene when the opposing party, perhaps strategically, declines to do so. But the prosecutor’s invocation of her own personal knowledge during cross-examination was unquestionably improper. Even absent objection, the court should have recognized this and put
a stop to it. See Henderson v. United States, 133 S. Ct. 1121, 1129–30, 185 L. Ed. 2d 85 (2013). (Rangel-Guzman, 752 F.3d at 1225.)

In the end, the court found that the prosecutor’s erroneous questioning did not violate Rangel-Guzman’s substantial rights. The court concluded that there was no reason to believe that the jury would have believed his “convoluted tale” had there been no improper cross-examination. This, of course, is an application of the plain-error standard, which demands more of an appellant than can be delivered in most cases. The lesson for defense counsel is to make proper objections when there is a violation of the advocate-witness rule. A proper objection might have ended the improper examination and, even if it did not, the standard on appeal would have been more favorable to the defendant/appellant.

So, there is something that all involved in criminal cases can learn from this case:

1. Prosecutors can violate the advocate-witness rule without ever taking the witness stand.
2. Trial judges must be alert to protect against violations of the rule.
3. Defense counsel also must be alert to detect violations, must make timely and proper objections, and must understand that they violate their duty to clients when they fail to recognize that a cross-examination has become a kind of rebuttal that makes the prosecutor a witness.
Avoid an Investigation: Automate FCPA Compliance

BY SONNY CARPENTER

Consider a chief executive officer (CEO) or a chief financial officer (CFO) of a major multinational corporation working in the headquarters office at a large US city. Unbeknownst to either of them, one of their sales representatives 6,000 miles away in Kazakhstan is handing an envelope full of cash or a brand new tablet computer to a local government official in order to generate business for the corporation, violating the Foreign Corrupt Practices Act (FCPA). Who is liable? Is it the employee giving the bribe or the CEO/CFO 6,000 miles away? Because the government has the ability to impose “control person” liability, it is less than perfectly clear whether liability will stop with the sales rep or if it will reach the C-level executives. Because of this uncertainty, corporate officers can no longer remain in the dark.

Now more than ever, the regulators are enforcing compliance through automated software and creative legal means. The Securities and Exchange Commission (SEC) applies control person liability as a mechanism to hold corporate executives, board members, and companies liable for violations. One of the ways the government automates investigation of potential violations is by using the SEC’s accounting quality model, or “RoboCop,” to sift through corporate filings quickly. With technological advances in screening for risk and government enforcement tools such as control person liability, how is it possible for executives in the C-suite to ensure compliance with the law and internal controls? The solution lies in technology and automation. Corporations now must uncover inappropriate conduct faster and more efficiently to prevent intrusive government investigations.

Control Person Liability
Recent cases have confirmed that in its FCPA actions, the government has been targeting boards of directors, their members, and other corporate officers. (See SEC v. Nature’s Sunshine Prods., Inc., No. 02-09 Civ. 0672 (D. Utah July 31, 2009) (naming the company’s COO and CFO as defendants for the corrupt actions of the company and its employees under the defendants’ supervision).) Section 20(a) of the Securities Exchange Act of 1934 (Exchange Act) places “control persons,” such as the CFO or COO, in the crosshairs of a government investigation for corporate misconduct about which they should have known. Actions by other employees, such as bribing foreign officials, can be imputed to the control person, making that individual liable, so long as he or she should have known of the infraction. In Nature’s Sunshine, the SEC charged that the COO and CFO were control persons responsible for the illegal acts of their subordinates, whom they did not properly supervise. (Id.)

Although not a new section under the Exchange Act, the SEC’s use of § 20(a) to vigorously enforce the FCPA is a new way to ensure that corporate officers do not hide behind the veil of ignorance. More than ever, these control persons must keep an eye out for the FCPA “red flags” and be able to act quickly to ameliorate possible problems. Understandably, a robust compliance program must be implemented in a manner that not only protects the corporation but also provides the control persons with the ability to address potential FCPA problems. To protect themselves and to prevent violations, large businesses and their control persons are increasingly seeing the need to use technology and automation to ensure consistency of compliance monitoring across various divisions and offices.

Compliance Enhanced by Technology
The FCPA, which prohibits businesses from participating in corrupt activities, has three main components: prohibiting bribery of foreign officials, requiring maintenance of accurate books and records, and requiring implementation of internal controls. It is highly enforced, with the Department of Justice (DOJ) and the SEC leading the charge against corruption and bribery. A 2012 collaborative FCPA guide published by the DOJ and the SEC explicitly demonstrates the high priority the government places on FCPA enforcement. (DOJ CRIMINAL DIV. & SEC ENFORCEMENT DIV., FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.) A combination of increased oversight, these new guidelines, advances in technology, and an increasingly global marketplace have come together to make FCPA compliance a primary focus of the government and, consequently, corporate officials. As such, the compliance programs of corporations must be as robust as the government’s enforcement efforts.

For example, take the case of a large private multinational company newly acquired by a public corporation. The acquiring company needs to determine quickly and efficiently any potential FCPA issues with the target company. Relying on internal spreadsheets,
accounting records both computerized and manual, and outdated due diligence on outside business partners is not enough to ensure that a company is fully compliant with the requirements of the law. The DOJ and SEC guide offers “hallmarks of effective compliance programs” whereby efficiency and a wide-reaching culture of compliance are key components of these measures. (Id. at 57–62.) Commencing an internal investigation to find holes in the newly acquired company’s compliance procedures is the first step in protecting oneself from the government. However, in these days of big data, immediate global communications, and instantaneous financial transactions, the corporation and its officers must incorporate new technologies into their compliance regimen to continually cull through the data to find threats that could become FCPA or other corruption concerns.

A technology platform can enable companies to monitor automatically various FCPA compliance areas such as training, accounts payable/receivable, purchasing, and third-party due diligence, thus, minimizing human error. A poll taken of attendees at a 2012 FCPA conference in Washington, D.C., revealed that the majority have no system to monitor high-risk third parties. (Marie-Charlotte Patterson, Technology for minding your compliance P’s and Q’s: Spotlight on the FCPA, INSIDE COUNS. (May 2, 2013), http://tinyurl.com/nkdhwe.) Others indicated that they have no technology in place to help monitor, manage, and report on FCPA risks. (Id.) The sheer amount of information generated at large corporations demands a technical solution; otherwise there is a greater chance that the current internal controls will not catch FCPA risks. Large companies generate large amounts of data, and corporations need to have measures to constantly sift through the information to discover whether any corporate actions violate the law.

Some ways that technology solutions can assist in ensuring FCPA compliance include:

- Implementation of crawling software to continuously monitor key control areas to generate real-time information, cutting down on human error.
- Creation of red-flag analysis programs to monitor activity within traditionally suspect general ledger accounts such as travel, entertainment, political contributions, consultant fees, and petty cash. These analyses must include reviews of accounts in all corporate offices.
- Implementation of automated triggers to identify high-risk transactions such as duplicate payments, round-dollar amounts, cash distributions, and multiple payments to the same entity over a short time period.
- Adoption of a method to identify business conducted in or communications made to areas with a high corruption index or countries on the Office of Foreign Assets Control list.
- Automated monitoring of training programs to ensure completion and employee acknowledgment of FCPA guidance.
- The use of electronic audit trails to record access and changes.
- Electronic Sarbanes-Oxley monitoring to ensure the segregation of duties for various company personnel, including an alert system when the segregation is violated.

### Conclusion

The reality of today’s regulatory environment mandates that companies apply policies and procedures to reduce the risk of an FCPA violation. Applying technology to these FCPA compliance procedures is the best way to ensure that the company intelligently manages these procedures. Automating the enforcement of the company’s policies as much as possible will reduce inconsistencies and missed data due to human error. Corporate executives, therefore, must have their current compliance procedures reviewed, determine the extent of the gaps in their compliance measures, and implement technological solutions before a government investigation reveals misconduct that should have been discovered earlier. These technological implementations will allow corporations to stay ahead of government investigators should they come knocking. In the event a violation occurs, the control persons can show the government that they and the company took appropriate precautions to detect FCPA violations.
Misstatements concerning scientific evidence are sometimes attributable to a prosecutor’s summation during closing argument. It is axiomatic that an attorney’s argument must be based on evidence adduced at trial. (See Darden v. Wainwright, 477 U.S. 168, 181–82 (1986) (‘‘The prosecutors’ argument did not manipulate or misstate the evidence.’’).)

Hair Evidence

Five days before he was due to be executed, Ron Williamson got lucky. A federal judge granted him habeas corpus relief overturning his conviction for murder. (Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okla. 1995), aff’d sub nom. Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997).) An expert had testified that the crime scene samples were consistent with the defendant’s hair. What does the term ‘‘consistent with’’ mean? The probative value of this conclusion would, of course, vary if the hair of only 100 people was consistent with the crime scene exemplar as opposed to several million individuals. As one hair examiner has written: ‘‘If a pubic hair from the scene of a crime is found to be similar to those from a known source, [the courts] do not know whether the chances that it could have originated from another source are one in two or one in a billion.’’ (B.D. Gaudette, Probabilities and Human Pubic Hair Comparisons, 21 J. Forensic Sci. 514, 514 (1976).)

However, the expert in Williamson went beyond ‘‘consistent with’’ testimony at Williamson’s trial; he elaborated: ‘‘there . . . could be another individual somewhere in the world that would have the same characteristics.’’ (904 F. Supp. at 1554.) (Actually, there could have been a million others; we simply do not know.)

In final argument, the prosecutor proclaimed: ‘‘[T]here’s a match.’’ (Id. at 1557.) Even the state appellate court misunderstood the testimony, writing: The ‘‘hair evidence placed [petitioner] at the decedent’s apartment.’’ (Williamson v. State, 812 P.2d 384, 397 (Okla. Crim. App. 1991).) Williamson was later exonerated by DNA. (John Grisham, The Innocent Man (2006) (examining the Williamson case).)

DNA Evidence

In Mitchell v. Gibson, 262 F.3d 1036, 1063 (10th Cir. 2001), a rape-murder case tried in 1992, the expert testified that Mitchell’s sperm had been detected on anal and vaginal swabs taken from the victim. The expert made this statement despite two key facts: (1) pretrial DNA testing performed by the FBI (at the expert’s request) established the absence of sperm on the swabs and (2) sperm found on the victim’s panties matched the DNA of her boyfriend. The FBI report, however, was not turned over to the defense, although, as the Tenth Circuit subsequently noted, ‘‘The results thus completely undermined [the expert’s] testimony.’’ (Id. at 1064 (emphasis in original).) The court went on to observe:
[The expert] thus provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false and misleading by evidence withheld from the defense. Compounding this improper conduct was that of the prosecutor, whom the district court found had “labored extensively at trial to obscure the true DNA test results and to highlight Gilchrist’s test results,” and whose characterization of the FBI report in his closing argument was “entirely unsupported by evidence and . . . misleading.”
(1d.)

Conclusion

The ABA Criminal Justice Standards state: “The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.” (Criminal Justice Standards: Prosecution Function, Argument to the Jury § 3-5.8(a) (3d ed. 1993).) The same rule applies to the defense. (Id. § 4-7.7.)

Published in Criminal Justice, Volume 29, Number 4, Winter 2015. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
Federal Rules Published for Public Comment

BY DAVID A. SCHLUETER

Under the Rules Enabling Act, 28 U.S.C. §§ 2071–77, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees who draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference’s Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States, they are forwarded to the Supreme Court of the United States, which reviews the rules, makes any appropriate changes, and, in turn, forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. That process—from initial drafting by the advisory committee to effective date—typically takes three years. In August 2014, the Standing Committee approved the publication of proposed amendments to three Federal Rules of Criminal Procedure: Rules 4, 41, and 45. The public comment period for those proposals closes on February 15, 2015. The text of the proposed amendments is available at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx. Comments may be sent electronically to rules_comments@ao.uscourts.gov.

Criminal Rule 4. Arrest Warrant or Summons on a Complaint. There are several proposed changes to Rule 4. First, the proposed changes to Rule 4(a) would fill a gap that currently exists with regard to those cases where an organizational defendant fails to appear in response to a summons. The amendment would clarify that in the case of an individual defendant who refuses to appear, the court may issue a warrant on its own motion. If requested by an attorney for the government, the court must issue a warrant. In the case of an organizational defendant who fails to appear, the court may “take any action authorized by United States law.”

Second, a proposed amendment to Rule 4(c)(2) would authorize the service of a criminal summons on organizations outside the United States.

Third, proposed amendments to Rule 4(c)(3) address the question of how service of a summons may be made on organizational defendants. Rule 4(c)(3)(C) would be changed to parallel Federal Rule of Civil Procedure 4(h) and provide that if service has been made in the United States to an officer or to a managing or general agent of the organization, there is no need for a separate mailing of the summons to that organization. This amendment is intended to address those cases where an organization has committed a domestic offense but has no place of business or mailing address within the United States. Rule 4(c)(3)(D), a new provision in the rule, would address the procedures for service of a criminal summons on an organizational defendant outside the United States. The proposed amendment would recognize that a foreign jurisdiction’s law might permit service of a summons on an organizational defendant through an officer, or a managing or general agent, just as can be done in the case of an organizational defendant in the United States. In addition, the new language would provide a nonexhaustive list of possible means of service of process, which would provide “notice” to the organization.

Rule 41. Search and Seizure. In an attempt to address some of the search and seizure issues that have arisen under the Computer Fraud and Abuse Act (CFAA), the Advisory Committee has proposed amendments to Rule 41. First, an amendment to Rule 41(b) would add a new subdivision (6), which would authorize a magistrate judge in any district “where activities to a crime may have occurred” to issue a warrant to use “remote access to search electronic storage media and to seize and copy electronically stored information located within or outside the district” if (1) technological means have been used to conceal the district where the media or information is stored (Rule 41(b)(6)(A)) or (2) there is an investigation into a violation of 18 U.S.C. § 1030(a)(5) (damaging a “protected computer”) and the media are “protected computers that have been damaged without authorization and are located in five or more districts” (Rule 41(b)(6)(B)). The term “protected computer” is defined in 18 U.S.C. § 1030(e)(2) and the term “damage” is defined in 18 U.S.C. § 1030(e)(8). The proposed Committee Note for this amendment states that the amendment is designed to eliminate the burden of obtaining multiple warrants in many districts by allowing a single magistrate judge to monitor the investigation. The note also observes that the amendment does not address constitutional questions, such as how much specificity is required in obtaining the warrant in these types of cases.

Second, a proposed amendment to Rule 41(f)(1)(C) would address the question of how to provide notice of a warrant to use remote access to search electronic media and seize or copy electronically stored data. Under the amendment, the officer executing the warrant must make reasonable attempts to serve a copy on the person whose property was searched or seized. The proposed amendment would also provide that service could be accomplished by any means, including...
electronic means that are reasonably designed to reach that person. (For more on this topic, see the feature article, Extraterritorial Search Warrants Rule Change, on page 9.)

**Rule 45. Computing and Extending Time.**

Rule 45, which governs computing and extending time for filings, cross-references Federal Rule of Civil Procedure 5. A proposed amendment to Rule 45 would eliminate the cross-reference to Federal Rule of Civil Procedure 5(b)(2)(E), which currently allows for an additional three days where service is by electronic means. The Committee Note explains that the civil rule was amended in 2001 to allow for electronic service and included electronic service as one of the modes of service where three additional days were allowed. At that time, there were concerns about possible delays in electronic service, for example, where incompatible services were being used. Those concerns, the Committee Note explains, have been alleviated. In addition, adding the three days at the end of the specified time for filing often complicates the counting methods. Finally, the Committee Note indicates that eliminating the reference to Civil Rule 5(b)(2)(E) means that the three additional days cannot be retained by consent to service by electronic means.
Questioning Adverse Witnesses Without Opportunity to Prepare

BY MICHAEL D. DEAN

It is one thing to cross-examine a witness for whom one has plenty of materials to prepare. Deposition transcripts, police reports, prior handwritten or recorded statements, or even basic business records provide a wealth of material to plan the questioning of an adverse witness. These materials guarantee the safety of the water upon which we are about to tread. If the witness denies a fact, it is sourced. Through proper preparation, the attorney is able to quickly confront and impeach the witness by retrieving the record containing the desired fact. The witness is stuck in a position at variance with a previous statement, or, at the very least, one that contradicts a more reliable source of information.

However, there are situations where thorough preparation and bulletproof fact-sourcing are not possible. Take, for example, a sentencing hearing. Opposing counsel is usually not required to provide an advanced witness and exhibit list for this proceeding. On the date of the hearing, several witnesses of whom you have never heard are called to the stand. You have no idea what the witnesses are being called to say. You are left in a position where you must decide whether to sit through the testimony aimed at destroying your case or cross-examine without any preparation.

Cross-examination without knowing the content of a witness’s testimony is one of the most difficult tasks one may face as a litigator. It would be nice if there were a safe, error-proof way to execute the task, but there is not. Cross in this situation will always carry risk. Although the cross-examiner is not as well equipped as he or she would be in other settings, there are still effective ways to approach the problem and minimize the threats. Here are 10 things to keep in mind.

1. Only cross-examine if you are prepared to accept any answer. Possibly the worst part about cross-examining a witness without preparation is the uncertainty. You do not have preparation materials. You have not interviewed the witness in advance. You have only the witness’s direct testimony as raw material for further development. Even then, you are stuck with your memory and your notes of what was said. For these reasons, you will not know with absolute certainty what responses the witness will give. This is especially true if you are thinking about cross-examining on a topic that was not touched on during direct. So ask yourself this: are you prepared to accept the worst possible answer? This may depend on many things: How important is the topic? Even if important, is your case already such a loser that it cannot possibly get much worse? The circumstances have to be weighed in their totality, but only cross-examine if your judgment deems the worst answer to be a tolerable risk. If not, simply say, “No cross.”

2. When possible, cross on indisputable facts, or indisputable truths. There are certain facts that are likely beyond dispute. Of course the flip side is that when a fact is truly undisputed there is little to gain by eliciting it from the witness (short of the benefit of highlighting it for the judge or jury). Indisputable facts are those that are so well established by the evidence that denial of the fact by a witness only causes him or her to lose credibility. For example, in a self-defense case, it is an indisputable fact that the defendant was responsible for the injury or death of another. If a character witness is called to state that the defendant is a nonviolent, peaceful person, the fact that the defendant brutally beat and maimed another human being is not up for debate.

Indisputable facts do not just come from the quality of the evidence in the case; they may come directly from the witness. If you are examining a witness who has committed to a particular fact during direct, that fact will be indisputable for that particular witness. Think about the undeniable inferences and deductions that can be drawn from such facts. Build a line of questioning around these inferences and deductions, milking the fact of all of its undeniable corollaries.

In addition to indisputable facts, you may also have indisputable truths. These are logical points that can be made based on pure reason. You have no fear of a witness disagreeing with such truths because to do so is illogical and irrational. Denying the truth will only damage the witness’s credibility. Again, the downside is that you are likely only going to point to the obvious or to the uncontested. Still, it may help to highlight the fact or to walk the fact-finder through a pattern of logic that may not have been noticed. As a simple example, consider the cross-examination of a defendant’s spouse. It is an indisputable truth that the witness has a close relationship with the defendant. It is indisputable that the two have exchanged vows. It is indisputable that the witness has pledged his or her undying

MICHAEL D. DEAN is chief deputy prosecuting attorney for Union County, Indiana, and a former Wayne County (Indiana) public defender. He is also a member of the Criminal Justice magazine editorial board and a member of the Criminal Justice Section’s Book Board.
support and love for the defendant. The witness may claim the relationship has become rocky since marriage, but the relationship, the vows, and the often holy unity cannot be denied.

3. **Use the undeniable fact.** Akin to the indisputable truth and indisputable fact is the undeniable fact. This is a piece of information that the witness will not deny because it is in the witness’s own personal interest to agree. In other words, the witness has personal reasons that are so compelling that denying the fact would place the witness in a negative light. Pride is the key reason behind this. Nobody likes to look bad, and if the witness is a professional or expert witness, pride is often unavoidable. For example, assume you are cross-examining a detective who failed to follow certain investigatory steps. The detective failed to collect items of evidence that could be considered exculpatory and are now unavailable. Or items that were collected were never sent to the lab for DNA or fingerprint testing. You may begin your cross by asking if the witness considers himself or herself competent. Ask the witness if he or she is thorough. Ask whether the detective thinks it is equally important to examine evidence that may exclude a suspect. Ask if the detective takes his or her job seriously. Confirm the detective knew that a prosecutor would be relying on his or her work to successfully prosecute the case. Confirm that the detective believes that a criminal defendant is entitled to be treated fairly in the justice system. The detective will acknowledge all of these things because not doing so makes the detective appear incompetent, unfair, and untrustworthy. After you obtain all of the admissions, then you may proceed down the list of all investigative steps that were not followed in the case.

4. **Always appear as if you expected the answer.** People can read body language. They may not know that they are doing it, but the ability is innate. If you are thrown off by a response, it will be noticed. Your sudden lack of confidence in your tone, sinking in your chair, blushing, or any number of other signs tell the fact-finder that you have been defeated. Worse, it tells the witness that you have been defeated. The witness’s confidence will rise and he or she will be more difficult to control. If the answer is unknown, then no answer should surprise you. You have accepted the calculated risk by choosing to cross. If it doesn’t pay off, move on.

5. **Do not dig yourself into a hole.** If you do not instantly have a way to impeach an answer that you do not like, the witness will soon catch on. It will be noticed that you have no real means of disputing the truth of the answer provided. Your body language may signal to the witness that he or she “got you.” Do not continue to ask the question several different ways. You will only get the same response and will look incompetent. Once the negative response is received, immediately move to a new line of questioning.

6. **If the risk is acceptable, begin cross as if you are in a deposition.** Questions are asked differently in a deposition than they will typically be asked in cross-examination. However, once the decision has been made to cross-examine into an area where little or no information is known, it is difficult to lead. You are first seeking facts that you can turn into bite-sized, leading follow-up questions. You may have to ask several open-ended questions in order to obtain the starting information. Of course, this is usually not advised for cross. But, in the situation where you have no initial information, and you have already decided that you could tolerate the worst response, there is no reason not to move forward this way. Of course, the risk is that the line of questioning may evolve into one where you clearly would not continue to tolerate the possible damaging answer. You can always stop and move to another line; however, your opponent may pick up where you left off.

7. **Always start with a goal.** Do not just begin asking questions to see where it will lead. In a courtroom, your questioning should be focused on a desired point—even if you are initially exploring with open-ended questions to see if the point can be made. Your goal should be extracting facts that, when put together, will lead the fact-finder to a particular conclusion. Rarely does a hostile witness concede or agree with our final conclusion or “goal.” The goal should be the final impression left on the fact-finder based on the series of preceding questions. In other words, lead the fact-finder to a conclusion without asking the hostile witness to agree with it.

Hopefully, some facts will come out during direct examination that support your goal. If this doesn’t occur, you may have to work with plain common sense. A witness looks foolish and loses credibility if he or she disagrees with a fact he or she has already provided or that is one of pure common sense and
logic. In the rare instance that you have no clear supporting facts available at your fingertips, you may choose to hypothesize. Hunch or suspicion may tell you that a particular fact or conclusion is out there. With no facts immediately available, you have to mine for them by asking open-ended questions of the witness. While you want to exude confidence in any cross-examination, you must take a more humble approach in this instance. You do not want to ask a strong leading question giving the impression that you are certain of the answer. It is damaging if you do not get the answer you expect. When taking this approach, you must first determine that the information sought is worth the risk and that you are able to tolerate any answer. Confidence may be boosted when a previous witness has testified to the fact that you seek. If the witness denies it, it is a win-win scenario. Somebody must have been wrong or dishonest. You may then ask the witness the hypothetical, “If somebody testified differently, you would disagree?”

8. When available, force a Hobson’s choice. Although this may be a misnomer, a Hobson’s choice is frequently thought of as a dilemma. One is presented with two or more options, each of which is equally unattractive (e.g., do you want to be burned alive or buried alive?) Here, this refers to a question where the witness is forced to conced a helpful fact no matter what answer is given. An example is: “You do not want your wife to go to prison, do you?” Saying “yes” suggests to the judge that the wife should go to prison and would force the witness to betray his spouse on the stand. The obvious answer that will be given will force the witness to appear biased.

9. Make your questions as clear and concise as possible. It is your fault if you ask a poor question. If you ask a poorly worded question, the witness has wiggle room and an ability to play games. Unclear questions, even when actually understood by the witness, present an opportunity for the witness to try to flip the question to embarrass the examiner, hoping the examiner will back down and withdraw the question. Unclear questions also provide the witness time to prepare a response. People who lie will frequently delay before answering. This is done to think about the response they want to give and whether it will make sense with previous responses. Jerry Sandusky did this during his infamous telephonic interview when he was asked whether he was attracted to children. His response was not immediate. Instead, he stopped and reflected on the question and even restated the question himself before answering it. The fact-finder will not have sympathy for a witness who feigns a lack of understanding or fails to give a direct answer to a simple, clear question. Thus, if you do not get a simple, straightforward answer, you may be more firm with the witness—the “kid gloves” can come off.

10. Be calm and pace yourself. Cross is often an uncomfortable encounter for both the witness and the attorney. This is because it is often an adversarial match-up. Do not let this cause you to rush. Instead, pace yourself. You have likely written your questions, or at least an outline to work from. Ask clear, simple questions one at a time and do not move to the next question until you obtain a direct answer on the present one. An evasive response does not count. If your witness provides an answer to a question you did not ask, ask the question again—an “asked and answered” objection is not appropriate until the question has, in fact, been answered. You may also request a response to be stricken if it is nonresponsive.

The key to a good cross-examination is usually good preparation. In cases where this is not possible, the young attorney can still apply logic to minimize risk and maximize favorable facts. Following these 10 points will help you do exactly that.
Supreme Court Cases of Interest

BY CAROL GARFIEL FREEMAN

As of October 20, the Court had added six cases to the nine cases related to criminal justice on its docket for the current term. Four of the criminal justice cases were set for argument during October, two during November, and two more during December. (Cert. Alert, 29:3 CRIM. JUST. at 36 (Fall 2014).) The argument in Holt v. Hobbs, No. 13-6827, on October 7, which challenged state policy regarding facial hair of prisoners, generated a good deal of commentary in the press and may well be decided before this column is published. Reports of any other decisions during the first months of the term, additional certs granted, and argument calendars for January and later will appear in the spring issue of Criminal Justice.

Justice Scalia, joined by Justices Ginsburg and Thomas, dissented from the denial of cert in Jones v. United States, 2014 WL 1831837 (Oct. 14, 2014) (No. 13-10026). Defendants had been convicted of distributing drugs but acquitted of participating in a conspiracy to distribute drugs. Nevertheless, the trial judge found that they had participated in the conspiracy and sentenced them accordingly to terms far above the sentences that the guidelines would have recommended otherwise. This presents a “strong case” that the sentences violated the Sixth Amendment because the increased sentences were based on facts impermissibly found by the trial judge. (Cunningham v. California, 549 U.S. 270 (2007); Apprendi v. New Jersey, 530 U.S. 466 (2000)). Without this finding, the sentences would be substantively unreasonable. Because the Court has not specifically held that a sentence based on a fact found by a trial judge is substantively unreasonable, courts of appeal have assumed that such sentences are permissible if they fall within the statutory maxima. The dissenting judges conclude that this is wrong, the current cases present the issue directly, and the Court should grant cert to hold either that the Sixth Amendment is violated when a sentence is enhanced because of a judge-found fact or, alternatively, that all sentences within the statutory maxima are substantively reasonable.

Cert was granted in one case that was remanded for further proceedings in light of Burrage v. United States, 134 S. Ct. 881 (2014). The decision last term in Burrage held that “at least where use of [a] drug distributed by the defendant is not an independently sufficient cause of the victim’s death,” conviction for a drug-related death is improper “unless such use is a but-for cause of the death or injury.” (Id. at 892.) In other words, conviction where multiple factors are involved requires a finding that death would not have occurred “without the incremental effect” of the controlled substance.” (Id. at 888.) The current petitioner, Volkman, a doctor, had been convicted of four counts of unlawful distribution of a controlled substance leading to death. Justices Alito and Thomas explained their decision to join in the order to vacate and remand the case because in affirming his conviction, the Sixth Circuit had not focused on the issue of but-for causation. (Volkman v. United States, 2014 WL 5311447 (No. 13-8827) (Oct. 20, 2014).)

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

CERTIORARI GRANTED

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

Fourth Amendment


I. To resolve a split between the Ninth and Sixth Circuits are facial challenges to ordinances and statutes permitted under the Fourth Amendment?

II. To resolve a split between the Ninth Circuit and the Massachusetts Supreme Court, does a hotel have an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest supplied information is mandated by law and that ordinance authorizes the police to inspect the registry? If so, is the ordinance facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry?


CAROL GARFIEL FREEMAN has been a staff lawyer with the US District Court for the District of Columbia, a deputy district public defender in Maryland, and an assistant US attorney for the District of Columbia. She is a regular columnist for Criminal Justice magazine and has been a Section vice-chair for publications, chair of the Book Board, and chair and member of the editorial board of the magazine.
This Court has held that, during an otherwise lawful traffic stop, asking a driver to exit a vehicle, conducting a drug sniff with a trained canine, or asking a few off-topic questions are “de minimis” intrusions on personal liberty that do not require reasonable suspicion of criminal activity in order to comport with the Fourth Amendment. This case poses the question of whether the same rule applies after the conclusion of the traffic stop, so that an officer may extend the already-completed stop for a canine sniff without reasonable suspicion or other lawful justification.

Procedure


Whether, under the “three strikes” provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), a district court’s dismissal of a lawsuit counts as a “strike” while it is still pending on appeal or before the time for seeking appellate review has passed.


“The general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated.” *Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting United States v. La Fatch, 565 F.2d 81, 83 (6th Cir. 1977))). 18 U.S.C. § 922(g) makes it “unlawful for any person * * * who has been convicted in any court of [ ] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm.”

The question presented is whether such a conviction prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer non–contraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all allow lower courts to order such transfers or sales; the Third, Sixth, Eighth and Eleventh Circuits, by contrast, bar them.


Whether a state court’s rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an “adjudicat[ion] on the merits” within the meaning of 28 U.S.C. § 2254(d), so that a federal court may set aside the resulting final state conviction only if the defendant can satisfy the restrictive standards imposed by that provision.

In addition to the question presented by the petition, the parties were directed to brief and argue the following question:


Sixth Amendment—Confrontation Clause


In all fifty States, certain individuals—most often, teachers, social workers, and medical professionals—have a mandatory duty to report suspected child abuse that they notice in the course of their work. In this case, the Ohio Supreme Court held both that this mandatory reporting duty turned daycare teachers into “agents of the state for law-enforcement purposes” and that a child’s out-of-court statements to the teachers qualified as “testimonial” under the Confrontation Clause. It did so even though there was no police involvement in the encounter between the teachers and child. Several other state supreme courts, by contrast, have rejected arguments that these mandatory-reporting statutes turn an individual subject to them into “agents of the state for law-enforcement purposes” and that a child’s out-of-court statements to the teachers qualified as “testimonial” under the Confrontation Clause. It did so even though there was no police involvement in the encounter between the teachers and child. Several other state supreme courts, by contrast, have rejected arguments that these mandatory-reporting statutes turn an individual subject to them into “law enforcement,” and have held instead that a child’s statements to the individual were non-testimonial and thus not subject to the Confrontation Clause.

The two questions presented are:
Does an individual’s obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

Do a child’s out-of-court statements to a teacher in response to the teacher’s concerns about potential child abuse qualify as “testimonial” statements subject to the Confrontation Clause?

DECIDED CASES

Habeas
Lopez v. Smith, 2014 WL 4956764 (Oct. 6, 2014) (No. 13-946). Defendant was convicted of murdering his wife based on substantial evidence that he was the actual perpetrator. The defense argued that the defendant had been physically unable to strike the fatal blow because of a rotator cuff injury, and also suggested that a former employee had committed the crime to obtain money he owed defendant. At a conference after the evidence had closed, the prosecutor requested an instruction on aiding and abetting, which was granted. The jury’s guilty verdict did not disclose the theory on which it was based. The state court affirmed the conviction, stating that the charging document was sufficient and, together with the preliminary hearing testimony, adequately alerted the defendant that he could be convicted as an aider and abettor. Defendant prevailed on federal habeas. The court of appeals concluded that he had been deprived of due process because the state had tried the case on the theory that he was the actual perpetrator although the conviction might have been based on the theory that he was merely an aider and abettor. In addition, the appellate court viewed the state court’s decision that he had received adequate notice of the two possible theories of guilt as a determination of fact rather than a legal conclusion. The Supreme Court, per curiam, granted cert and reversed.

A state prisoner seeking federal habeas may obtain relief only if the state court’s decision on a federal issue was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. . . .” (28 U.S.C. § 2254(d)(1).) Under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, lower courts cannot rely on their own precedent to determine that a particular constitutional principle is “clearly established.” In this case there is no “clearly established” Supreme Court precedent establishing the rule the defendant sought (that the notice of one theory was constitutionally inadequate because the state tried the case on a different theory). Moreover, the question whether the notice was adequate was one of law rather than of fact. In granting relief, the Ninth Circuit improperly relied on its own precedent rather than on a decision of the Supreme Court. The case was remanded for further proceedings.
CJS Fall Institute Highlights

BY KYO SUH

The CJS Seventh Annual Fall Institute took place on October 23–24 in Washington, D.C. The events started with White Collar Crime Town Hall on October 23. Attendees had an option of a full day or half day of CLE on federal sentencing and cybersecurity on Friday, October 24. “White Collar Sentencing: A View from the Bench” featured a distinguished panel of judges, including the Hon. Patti B. Saris, chair of the US Sentencing Commission and chief judge of the District of Massachusetts. The program also featured panels on data and privacy issues, including “Cyber Breaches in Prosecutors’ Offices—What’s Your Action Plan?” and “Cyber Attack: When the Feds Come Knocking.”

Saltzburg Receives Inaugural Raeder-Taslitz Award

Professor Stephen A. Saltzburg was honored with the ABA Criminal Justice Section’s inaugural Raeder-Taslitz Award at the CJS Leadership and Awards Reception at the Law Offices of Hogan Lovells, Washington, D.C., on October 24. Saltzburg exemplifies the principles of the award—the ethical and professional conduct; excellence in scholarship, teaching, or community service—and has made a significant contribution to promoting public understanding of criminal justice, justice and fairness in the criminal justice system, or best practices on the part of lawyers and judges.

The Raeder-Taslitz Award is given in memory of the late professors Myrna Raeder and Andrew Taslitz. Myrna Raeder was a past chair of the Criminal Justice Section and the first woman to hold that post. She was a revered professor at Southwestern Law School and a passionate advocate for recognition of the special needs of women in the criminal justice system and the impact that criminal penalties such as incarceration could have on women and their families. Andrew Eric Taslitz (“Andy”) was the 2014 chair-elect of the Criminal Justice Section. He was a brilliant thinker and an esteemed member of the Howard University School of Law faculty for 23 years before moving to the Washington College of Law at American University in 2012.

Boutros Receives Norm Maleng Minster of Justice Award

Andrew S. Boutros, assistant US attorney in Chicago, was honored with the ABA Criminal Justice Section’s Norm Maleng Minster of Justice Award during the National Institute on International Regulation and Compliance: FCPA, Economic Sanctions & Export Control on October 2 in Washington, D.C. As a federal prosecutor, Boutros has conducted some of the largest and most complex, multidistrict, international fraud investigations and prosecutions of business organizations and corporate executives. As a defense attorney, Boutros led teams of attorneys defending corporations and executives in high-stakes criminal and regulatory probes being investigated by the Fraud Section of the US Department of Justice, the US Attorneys’ Offices, the Securities and Exchange Commission, and other government agencies.

The Norm Maleng Award is bestowed on a prosecutor who embodies the principles enunciated in the ABA Standards for Criminal Justice, Prosecution Function, particularly that “the duty of the prosecutor is to seek justice, not merely to convict.”

Third International White Collar Crime Institute in London


The conference touched on hot-button, cross-border white collar crime issues, including corporate espionage and cybercrimes, international money laundering and sanctions, evidentiary concerns, whistleblowers, collateral consequences, deferred prosecution agreements, and international internal investigations.

The conference featured luncheon remarks from Michael J. Garcia, the independent chair of the Investigatory Chamber of the FIFA Ethics Committee and partner at Kirkland & Ellis LLP in New York City. Other speakers included Nicholas Purnell QC, head of...
Plenary session on “Criminal Prosecutions & Investigations: A Comparison of
Enforcement Mechanisms, The Use of Investigative Agencies and Cross Bor-
der Evidence Sharing” at the Third Annual International White Collar Crime
Institute, October 13–14 in London.

Upcoming Events in 2015

**ABA/CJS Midyear Meeting**
Feb. 5–7
*Houston, TX*

**Game Law Minefield Institute**
Feb. 12–13
*Las Vegas, NV*

**National Summit on Collateral Consequences**
Feb. 26
*Washington, DC*

**White Collar Crime Institute**
March 4–6
*New Orleans, LA*

**CJS Spring Council & Committee Meetings**
April 23–26
*St. Petersburg, FL*

**CJS Spring CLE**
May [TBD]
*San Antonio, TX*

**Health Care Fraud Institute**
May 13–15
*Miami Beach, FL*

**Forensics Conference**
June 5
*New York, NY*

**ABA/CJS Annual Meeting**
July 30–Aug. 4
*Chicago, IL*

**International White Collar Crime Institute**
Oct. 12–13
*London, UK*

**Global White Collar Crime Institute**
Nov. 19–20
*Shanghai, China*