As an Air Force dependent growing up in Spain and other exotic places, my playmates were many races and cultures. They spoke beautiful languages and carried intriguing tales, legends, and beliefs. Our babysitter’s warning that we stay clear of gypsies, because they would snatch us away from home, only drew us to the music, colorful dress, and joyous abandon that these nomads’ children appeared to enjoy.

As I got older, watching television news about the civil rights struggles, racial violence, and the Vietnam War made me feel shock and horror. And smack in the middle of taking these in, I was amazed at the wonder of the lunar landing.

We are a nation of contrasts. Wonderful scientific and life-saving medical advancements travel alongside ignorance and hatred. Some of our most revered political figures will destroy their reputations in a flash with a display of ignorance or hubris. And our leaders also come to understand, and publicly accept, what was popular to reject or ostracize just months earlier.

I cannot help but believe that we will soon also come to our senses regarding the enormous racial inequalities that have been accepted for far too long in our criminal justice system. It has taken embarrassingly too long to begin to correct the crack/powder cocaine sentencing inequity brought on by ignorant beliefs. The early court opinions upholding these laws recalled for me the tortured legal logic of *Plessy v. Ferguson*, defending yesterday’s racial segregation.

Dwelling on justifications and defensive explanations for our shameful unequal imprisonment of black and brown people is much the same. It is not productive or honest. The suggestion that there is more crime or drug abuse in poor communities is just not true. (See Suniya S. Luthar, *The Problem with Rich Kids*, PSYCHOL.

Communities that are invested in solutions achieve good results.

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Today, Nov. 5, 2013 (revealing greater drug, theft, and property crimes among affluent youth.)

When my dad retired from the Air Force, the nice community where I lived had just as much petty theft by kids seeking money for drugs as in the part of town where lower-income kids lived. Kids got in fights, used drugs, and drove too fast just as much in Country Club Estates as they did in public housing. They just were dealt with differently. Some of my public school classmates went to military schools and nature camps for rehab while others were hobbled for life after stints in juvenile custody and then jail.

Merely hypothesizing about why this happens is a waste of time. We need to identify these problems and go about solving them. A good example of what works is the ABA Racial Justice Improvement Project. In diverse locations such as Brooklyn and New Orleans, Madison and St. Louis, the project invites stakeholders to invest in correcting racial inequities in criminal justice. A very small investment of monies from the ABA and grants (from the Bureau of Justice Assistance, Office of Justice Programs, and US Department of Justice), with the expertise and sweat equity of ABA Criminal Justice Section and Individual Rights and Responsibilities Section members have accomplished great things: equal use of diversion programs, increased use of parole and probation, better reentry programs, decriminalization of minor wrongs, and myriad other reforms.

Communities that are invested in solutions, not explanations or excuses, achieve good results. In communities accepted for our project’s assistance, law enforcement, prosecutors, defenders, the courts, and community activists engaged in these solutions. They identified and established the problems, backed their beliefs with empirical data, and set about solving inequities through trust and collaboration. Not all communities made the cut. It took an investment by all stakeholders in problem solving. Sadly, communities engrossed in recriminations were left behind.

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While Honest Providers Struggle with Enforcement, Criminals Go Free

BY KIRK OGROSKY
Health care fraud costs the United States “tens of billions of dollars a year” according to the Federal Bureau of Investigation (FBI). As the agency principally responsible for investigating health care fraud offenses, the FBI estimates total annual health care expenditures in the United States to exceed $3 trillion. (Health Care Fraud, FBI, http://tinyurl.com/lgqurux (last visited Feb. 25, 2015.).) As parallel civil and criminal health care fraud investigations and proceedings pose risks to unwary practitioners, attorneys representing health care providers should prepare for a steady rise in enforcement. Note the rise in enforcement. Notwithstanding increases in cases, questions remain as to whether the law enforcement apparatus can achieve more than punitive impact on a few individuals rather than effective system-wide deterrence.

This article provides an overview of health care fraud enforcement, parallel proceedings, and how cases originate. It also discusses investigatory tools, the role and problems of reliance on civil False Claims Act (FCA) cases, and oversight issues that plague the Medicare program and make it susceptible to fraud. It concludes with suggestions for improving weaknesses in the system.

Health Care Enforcement Overview

Medicare fraud has been a significant topic of discussion for over 25 years. (See Malcolm K. Sparrow, Fraud Control in the Health Care Industry: Assessing the State of the Art, Res. in Brief (Nat’l Inst. of Justice, Washington, D.C.), Dec. 1998, available at http://tinyurl.com/lhv927r.) With the exception of the diversion of federal agents to antiterrorism efforts after 2001 and sequestration in 2014, federal funding for enforcement, the number of convictions, and civil FCA settlements has been on the rise. Despite rhetoric, government stakeholders at the Department of Justice (DOJ), the Office of Inspector General (OIG) in the US Department of Health and Human Services, and the FBI seem not to believe that fraud is “under control or even in the process of being fixed.” (Id.) After a decade of expanding enforcement, the existing parallel criminal and civil mechanisms do not appear to be improving the goal of deterrence.

The False Claims Act

DOJ promotes the results of a seemingly never-ending focus on monetary recoveries to the Medicare trust fund that result from FCA settlements. According to DOJ, FCA cases have brought over $27 billion back to the Medicare trust fund since 1997. (Annual Report, Health Care Fraud and Abuse Control Program FY 2014, Dep’t of Justice, Dep’t of Health & Human Servs. (March 19, 2015.).) To put this number in context, $27 billion is more than half of the estimated FCA recoveries since the law’s amendment in 1986, and it is less than half of what many estimate to be annual losses suffered by Medicare. (Press Release, DOJ, Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), http://tinyurl.com/k8jcup4.) DOJ’s Commercial Litigation Branch of the Civil Division recovered over $2.3 billion in settlements and judgments in fiscal year 2014 alone. (Id.)

Civil FCA enforcement is driven by whistleblowers and their counsel, who file qui tam cases seeking to recover up to a quarter of settlement amounts. (31 U.S.C. § 3730(d)(1).) These cases, however, tend to recover money only from corporations and individuals who are willing to settle and desire to maintain a good relationship with the government. Even though occasionally part of a parallel criminal proceeding, FCA cases focus not on the worst offenders but on those capable of paying money to the whistleblowers. Therefore, FCA enforcement creates private prosecutors driven not by justice, but by targeting those who desire a good relationship with the government.

Criminal prosecutions, on the other hand, are not brought for the purpose of personal financial recovery. Yet, criminal prosecutions in the health care enforcement world serve to advance the interests of whistleblowers who leverage such cases in order to extract dollars in qui tam cases. The parallel track enforcement system has pushed perverse enforcement incentives where some believe that the threat of prosecution is used to extort fines and penalties, while others assert that defendants use the system to buy their way out of prosecution.

Either way, the real issue is whether the system is working to achieve the public interest. One cause for concern is that in some recent FCA settlements, it appears that the government knew or should have known about the alleged bad conduct in advance if DOJ had a global enforcement strategy. Some advocates of qui tam litigation believe that whistleblowers deserve to be richly rewarded because they deliver evidence, yet this presupposes that the government was unaware of the facts and that other witnesses, if asked, would fail to tell the truth to federal agents. The intersection of whistleblowers’ financial incentives and the public interest in the integrity of the justice system should lead to an examination of current enforcement.

Enforcement Agenda

Attorney General Eric Holder noted that the “[Obama] Administration has never been more determined to move aggressively in protecting patients and consumers, bringing criminals to justice, and building on what’s already been achieved.” (Eric Holder, Attorney Gen., DOJ, Remarks at the Chicago Health Care Fraud Prevention Summit (Apr. 4, 2012), http://tinyurl.com/nmrhp7t.)

In late 2014, Leslie R. Caldwell, assistant attorney general for the criminal division, addressed DOJ’s priorities for upcoming years at a conference for the Taxpayers Against Fraud (TAF)—the preeminent organization of whistleblower attorneys. (Leslie R. Caldwell, Assistant Attorney Gen., DOJ, Remarks at the Taxpayers Against Fraud Education Fund Conference (Sept. 17, 2014), http://tinyurl.com/oh874ka.) Caldwell emphasized the continued success of her division’s Medicare Fraud Strike Force by noting that since its inception in 2007, it has charged over 2,000 defendants who have billed the Medicare program more than $6.5 billion. (Id.) More importantly, Caldwell committed that DOJ’s “experienced

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prosecutors” will immediately review all new civil qui tams to
determine whether a criminal investigation should be opened. (Id.) While this exact process has been part of DOJ’s man-
date for decades, DOJ making the announcement at TAF was
a noteworthy gesture. (See 31 U.S.C. § 3730(b)(2); FED. R.
CIV. P. 4(i).) 

Given the current enforcement environment, it is important
for all attorneys involved in health care matters to under-
stand the process and tools of the enforcement trade when
dealing with simultaneous criminal, civil, and administra-
tive investigations. 

Enforcement Dilemma
Before discussing the present dilemmas facing enforce-
ment, it is important to outline how health care fraud is
discovered, the prevalence of the problem, and how cases
are initiated. Time and again, government officials have
been asked to quantify the amount of Medicare fraud. These
efforts have proved futile because fraud, by definition, is
not a self-revealing offense. Criminals who perpetrate fraud
go to great lengths to remain undetected, which requires the
enforcement apparatus to identify criminality and not simply to act when crimes are reported. Thus, enforcement
programs face a double-edged sword: identifying Medicare
fraud highlights management inefficiencies and oversight
failures, but failing to identify fraud promotes the status quo. With that said and understanding the inherent limita-
tions, where is the fraud? 

First, criminal fraud cases typically involve the Medicare
program, not private insurance. Even with increasing enforce-
ment, most attorneys would be hard-pressed to identify cases
that charge criminals with stealing from private insurers. Sec-
ond, defendants in criminal cases normally are individuals
who enter health care through low-barrier-to-entry businesses
such as durable medical equipment stores (DMEs), commu-
nity mental health centers (CMHCs), or home health care
agencies (HHHCAs). With no educational demand and few
state or federal licensure requirements, almost anyone can enter the health care market through these types of businesses.

Since 2007, DOJ has used the Medicare Fraud Strike Force
to pursue and punish the most severe offenders—those who
steal the most. These offenders target Medicare because the
regulatory system is based on trust and allows providers to
be paid upon claims submission with little preliminary audit-
ing or preauthorization. 

While Medicare takes a beating, private insurers rarely suf-
er the mega-billion dollar losses from outright criminals. Yet
private insurers are some of the same government contracted
companies that administer the Medicare and Medicaid pro-
grams. If private plans can protect stockholder monies, they
should be able to protect taxpayer funds. Yet the difference
is in the government contracts that dictate how claims are to
be processed and paid, and how the US Congress funds the
administration of public plans. Private plans have enacted
many commonsense safeguards to identify and discourage
fraud, resulting in a rate of fraud that is insignificant com-
pared to that experienced by federal programs. 

From a structural standpoint, taxpayer-funded systems
need to be administratively financed as private insurance pro-
grams are. Funding private insurance companies to service
public plans as they service their private plans seems to be
an obvious answer, but it requires Congress to spend money
in order to save money. The question is whether the public
would be willing to slow access to care for Medicare patients
by allowing payment restrictions that deter fraud and abuse.
Even knowledgeable public officials who could hold program
administrators and contractors accountable are reluctant to
increase funding for fraud detection and prevention. With-
out significant operational changes, law enforcement has few
options but to focus its limited resources on identifying and
prosecuting the worst offenders. 

On the civil side, whistleblowers’ attorneys continue to
set the civil FCA agenda because they are drafting and fil-
ing the qui tam cases. Simply put, these private prosecutors
have no incentive to report or file cases against real crimi-

nals because real criminals have no interest in a continuing
relationship with the government. Half of the enforcement
equation—the civil half—is not actively seeking to identi-
ify real offenders. This results in a lopsided enforcement
system that has a tendency to ignore real criminals and the
vast amounts of fraud they perpetrated, and instead attack
actors with deep pockets who want to comply with the law
and are willing to settle cases. Civil and criminal compo-
nents must align their incentives to protect federally funded
programs. This means that DOJ needs an articulated civil
FCA agenda that is not dependent on whistleblowers, and
criminal prosecutors need to coordinate with civil counter-
parts to quickly detect the most serious offenders. At the
end of the day, no amount of litigation or prosecution will
cure all the problems, but a sincere effort may increase the
deterrent impact. 

Tools of the Trade
FCA investigations usually begin with the filing of a qui
tam case, a hotline report to the government, or an analysis
of aberrant billing claims. While government sources are
usually former employees, they can also be competitors, or
cooperators from a criminal case. The FBI, DOJ, and OIG
are not the only agencies that investigate health care fraud.
Other agencies include state Medicaid fraud control units
(MFCUs), the Internal Revenue Service (IRS), the Postal
Inspection Service, and the Department of Defense (DOD).

The first sign of an ongoing investigation usually is when
a current or former employee is visited and interviewed about
alleged fraud. These initial contacts are frequently followed
by subpoenas or search warrants. Whatever the initial con-
tact—letter, subpoena, or interview—counsel should focus on
understanding the allegations and ascertaining the facts. The
material sought by subpoena is always the best preliminary
information because it gives an opportunity to understand the
focus of the investigation. When the government attorneys
and agents are open and willing to communicate, counsel
can make headway by guiding investigators. Knowing what
conclusions counsel can draw from the type of investigation
tools being used is an important first step to understanding the intricacies of health care fraud enforcement.

There are four main types of subpoenas in health care cases, and each signals information about the government’s investigation. The types of subpoenas include inspector general (IG) subpoenas, Health Insurance Portability and Accountability Act of 1996 (HIPAA) subpoenas, grand jury subpoenas, and civil investigative demands (CIDs). As discussed below, the type of subpoena and the items requested provide significant insight about the investigation to the recipient.

IG subpoenas are used by DOJ to advance qui tam cases. (5 U.S.C. app. 3 § 6(a)(4).) IG subpoenas are simple documentary requests. While the authorizing statute does not specify sanctions for failure to comply, courts consistently enforce IG subpoenas where (1) they are issued within the statutory authority of the agency, (2) the material sought is reasonably relevant, and (3) the requests are not unreasonably broad or unduly burdensome. Receipt of an IG subpoena is a clear sign that a company has been sued in a sealed qui tam. Counsel should also be aware that material produced pursuant to an IG subpoena can be shared widely across government agencies, which may lead to action by other government entities.

HIPAA authorizes DOJ to issue subpoenas for documents and testimony in investigations relating to any act or activity involving a federal health care offense. (18 U.S.C. § 3486(a).) HIPAA subpoenas are also referred to as authorized investigative demands (AIDs). US attorneys’ offices can issue HIPAA subpoenas directly. (Id. § 3486(a)(1).) Because they are not issued by OIG, these subpoenas can be issued quickly by DOJ without involving other agencies, and, unlike grand jury subpoenas, the information obtained through these subpoenas allows sharing between all the attorneys at DOJ without regard to Federal Rule of Criminal Procedure 6(e). The receipt of an AID directly from a criminal assistant US attorney signals an ongoing criminal investigation, unlike receipt of an IG subpoena, which signals a civil qui tam.

Grand jury subpoenas are used by criminal prosecutors to obtain documents and compel testimony. Whereas a HIPAA subpoena may be used in a civil matter, a grand jury subpoena cannot. Also, Rule 6(e) makes it a criminal offense for the prosecutor to share or leak material absent a court order. A grand jury subpoena reflects that there is an open criminal investigation and that a federal prosecutor has been assigned to the matter.

Lastly, the use of CIDs has been on the rise since 2009. CIDs are typically used during qui tam cases. DOJ civil attorneys can use CIDs to obtain both documents and testimony. (31 U.S.C. § 3733(a)(1).) Unlike traditional Rule 26 civil discovery, CIDs are employed by the government before litigation has commenced. (Id.) This fact alone makes it difficult to seek judicial review or to attempt to set appropriate limits. DOJ may issue a CID if there is any “reason to believe that any person may be in possession, custody, or control of documentary material or information relevant to a false claims law investigation.” (Id.) While a subpoena can only call for production of documents, CIDs can require: (1) production of documents with a sworn certificate, (2) answers to interrogatories, or (3) oral testimony. (Id. § 3733(a)(1)(A)-(D).) The government may share any information obtained through a CID with the qui tam relator, so long as the government “determine[s] it is necessary as part of any false claims act investigation.” (Id. § 3733(a).)

Serving and responding to subpoenas often sets the tone for an investigation. The government expects a knowledgeable response. To get to speed quickly, counsel often conduct internal investigations to assess the issues. Given the prevalence of compliance investigations, it is important to decide in advance if internal review material should be privileged or not.

Courts will not hesitate to order the release of attorney-client communications if an internal investigation is not carefully initiated. In United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, No. 6:09-cv-1002, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012), the court ruled that documents created by counsel and compliance were not protected. The court determined that while communications with outside counsel enjoy a presumption of protection, communications between in-house counsel and corporate employees do not, and the organization has the burden of establishing that each communication is privileged. Perhaps more concerning, in United States ex rel. Barko v. Halifax Co., No. 1:05-cv-1276, 2014 WL 1016784 (D.D.C. Mar. 11, 2014), the court compelled production of internal investigation materials. This case highlights the risk associated with having in-house personnel involved with internal investigations.

Progression and Procedures

DOJ must investigate every qui tam complaint as a matter of law, and claims that lack merit place a burden on personnel and resources. While FCA litigation has taken a top role in the government’s efforts, such cases may have a distorting effect due to whistleblower payout. Understanding the mechanics of qui tams illuminates some of the strong incentives to push questionable claims while ignoring obvious fraud.

When a whistleblower files a qui tam complaint under the FCA, he or she must file under seal and disclose all material evidence to DOJ. (31 U.S.C. § 3730(b)(1)–(2).) The complaint remains under seal for 60 days, and DOJ is required to “diligently . . . investigate” the allegations during that period so it can decide whether to intervene and take over the litigation. (Id. § 3730(a)–(b).) At the end of the 60 days, if the government is not ready to decide whether to intervene, it seeks an extension of the seal “for good cause shown,” as well as a concurrent extension of its deadline to make an intervention decision. (Id. § 3730(b)(3).) In health care cases, courts typically authorize multiple extensions, which prolong the investigation.

Ultimately, courts force DOJ to make an intervention decision. If the government declines to intervene, the matter is unsealed and the relator becomes responsible for litigating the case. (Id. § 3730(c)(3).) At that time, the complaint becomes vulnerable to dismissal under various procedural bars.
While the public discourse is inundated with claims of private whistleblowers saving government dollars, the question should be asked whether qui tams are the superior tool to identify and root out fraud. Since enactment in 1865 and based on publicly reported resolutions, the FCA has resulted in the recovery of approximately $30 billion. (See generally DOJ $3.8 Billion FCA Recovery, supra.) Based on current annual estimates, almost 150 years of qui tam litigation has not returned half of what the Medicare program loses in a single year. As discussed above, companies that resolve FCA cases are those that desire a continuing relationship with the government, whereas individuals who get caught defrauding the government do not stick around to pay the money back or pretend to desire a good relationship. Given the numbers, it is obvious that enforcement needs to go far beyond the current methods of utilizing the FCA.

One small adjustment—making relator’s counsel responsible for the cost of the government investigation if the case is determined to lack merit—might curb spurious claims. Furthermore, the justice system provides disagreeing parties an opportunity for their day in court, and federal judges have a responsibility to ensure that cases are appropriately managed and do not sit idle for years. This is particularly important given that mandatory penalties and treble damages result in very few FCA cases proceeding to trial. Finally, DOJ should have an independent enforcement agenda addressing appropriate civil matters so that private parties do not control the civil enforcement arena.

Parallel Proceedings

No one knows the amount of fraud in the Medicare system. Even the Medicare Fraud Strike Force data analysis is more akin to random targeting than systematic policing. Time and again, cases are announced that illustrate fraudulent schemes that should have been detected before a claim was paid but took years to identify.

Given public assertions from the FBI that taxpayers are losing “tens of billions of dollars a year,” the enforcement system is not sufficient—which leads to a question about how federal programs are managed and what the Centers for Medicare & Medicaid Services (CMS) does to stop losses. In 1998, Harvard Professor Malcolm Sparrow highlighted that setting up administrative roadblocks to stop criminals who drive around such obstacles is a flawed concept ab initio. (See generally Control systems . . . offer no defense against determined, sophisticated thieves, who treat the need to bill ‘correctly’ as the most minor of inconveniences.”.) Yet, CMS still creates bureaucratic roadblocks in the name of fighting fraud. The primary problem with these roadblocks is that they serve to harass legitimate providers who are trying to comply when the real threat comes from criminals who focus on how to sidestep the hurdles effortlessly.

On December 3, 2014, CMS issued new “fraud fighting” rules that: (1) deny Medicare enrollment to providers who terminated a prior Medicare number without paying debts owed to Medicare, and (2) deny ambulance suppliers the ability to back-bill for up to a year prior to enrollment. (42 C.F.R. pt. 424.) Director Shantanu Agrawal from the CMS Center for Program Integrity (CPI) asserted that “some providers tried to game the system and dodge rules to get Medicare dollars; today, this final rule makes it much harder for bad actors that were removed from the program to come back in.” (Press Release, CMS, New CMS Rules Enhance Medicare Provider Oversight; Strengthens Beneficiary Protections (Dec. 3, 2014), http://tinyurl.com/nqxpdp.) CMS believes these new rules could save an estimated $327 million per year. (Id.)

While CMS is fighting people who “dodge rules” by enacting “new rules,” providers are forced to manage with increased administrative burdens. This administrative focus on trustworthy providers, much like the FCA whistleblowers’ focus on those with money, does nothing to deter individuals intent on stealing. These flaws have their origin in the lack of a comprehensive law enforcement plan to protect taxpayer funds.

To design and fund a system capable of removing fraud losses, the government first needs a reasonable estimate of fraud in the Medicare program. If Congress is to fund a program to fix the problem, it needs to understand the size of the problem. Using median treatment costs across disease states while utilizing International Classification of Diseases (ICD) codes should make it relatively easy to benchmark cost norms and assess losses. While cost anomalies highlight areas for inquiry, they do not necessarily identify fraudulent behavior. Identifying fraud losses requires a more nuanced review of medical data to provide an assessment of medical necessity. No amount of data analysis will detect the individuals deliberately trying to outwit the analysis.

DOJ, OIG, and CMS need adequate funding to design and operate efficient fraud deterrence programs. Current auditing and review processes do more to educate criminals on how to commit fraud than they do to deter it. When payment contractors deny claims, request support, and audit under current payment rules, they are simply educating those who intend to steal without realizing they are doing so.

Fraud prevention must first be based on understanding our patient population, disease states, and provider communities. Second, enforcement personnel must consult specialists who understand treatment and medical decision making. Third, before claims are paid, data analysis should be conducted. Finally, when criminals are discovered, their movements and changes in billing must be monitored, and DOJ needs to pursue them immediately.

Conclusion

The Medicare program is a trust-based system that operates on a pay first and ask questions later basis. Given the current levels of expenditures, there is no question that the payment system and enforcement programs need to advance. No amount of prosecution or litigation will cure problems with the system. This article suggests a few ways that the system can be improved to reduce operational losses and fight fraud. Ultimately, Congress and all stakeholder agencies must work together to advance an efficient and modern program.
Immigration Relief: Legal Assistance for Noncitizen Crime Victims

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

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

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- organizational charts of the agencies and departments that adjudicate immigration applications;
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UNDERSTANDING DNA ANALYSIS & INTERPRETATION

BY MICHAEL D. DEAN AND MARCI N. WEASE
DNA analysis has become a highly important tool for solving crimes, prosecuting the guilty, and protecting and exonerating the innocent. DNA evidence also has an overwhelming power over a jury. It gives jurors the confidence they need to convict or acquit without the serious reservations that come with other forms of circumstantial evidence and eyewitness testimony. However, many investigators, practicing attorneys, and everyday jurors who have come to rely on DNA to perform their duties have little understanding of what takes place between the time when a DNA sample is collected and when the forensic scientist renders his or her opinion during trial. The goal of this article is to provide a basic understanding of DNA and the process followed to turn a crime scene sample into a statistic for identifying an individual.

What Is DNA?
Deoxyribonucleic acid (DNA) is commonly referred to as the “blueprint” for the construction of a living organism. In essence, DNA dictates the organization and placement of every cell in our bodies. Every living thing has a unique physical makeup and, with the exception of identical twins, no two individuals have identical DNA. Thus, one’s DNA may serve as a “signature”—something entirely unique that is capable of identifying an individual to the exclusion of others.

The molecule’s shape can be thought of as a ladder that is twisted into a double helix. (See fig. 1.) The rungs of the ladder are made up of pairs of nucleotides with each nucleotide in the pair attaching to the rail of the ladder on its respective side. There are four types of nucleotides that form the pairs along the DNA strand: adenine (A), guanine (G); cytosine (C), and thymine (T).

In contrast to the overall complexity of the DNA structure, the number of possible nucleotide pairings is limited. Adenine always pairs with thymine (and vice versa), and guanine always pairs with cytosine. Therefore, the number of possible nucleotide pairs serving as the “ladder rungs” is limited to the following four:

A—T
T—A
G—C
C—G

Using DNA in a Criminal Investigation
DNA is contained within the nucleus of all nucleated cells (red blood cells have no nucleus and so lack nuclear DNA). Cells—for example, skin cells—are constantly being shed from our body and replaced by new cells. When a person touches an object with exposed skin, cells are commonly shed from the skin and may cling to the touched object. Generally speaking, the more intensely an exposed body interacts with an object, the greater chance for leaving cells behind for later detection. This is why it is more likely that DNA will be obtained from a personal cell phone than from a window that was touched gently on one occasion.

When the shed cells are properly preserved for later testing, a laboratory scientist is able to extract the DNA from the nucleus and analyze its makeup in order to develop a unique DNA profile for the individual who left the DNA behind. Once a profile is obtained, a forensic scientist is able to compare that profile to the profile developed from a known standard, usually the standard of a victim or a suspect in a case. In some cases, police are without leads and have not identified a suspect. In such a case, the profile may be cross-referenced with the Combined DNA Index System (CODIS)—a national database containing the DNA profiles of known individuals. The CODIS profiles come mainly from individuals who have been convicted of a felony offense, but CODIS also contains DNA profiles for missing persons, biological relatives, and forensic unknowns. All 50 states have

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passed legislation requiring convicted offenders to submit their DNA for entry into CODIS. (Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, FBI LABORATORY SERVICES, http://tinyurl.com/ckvencj (last visited Mar. 24, 2015.).)

How Do Scientists Create a DNA Profile?

The human genome is enormous. Although the genome is able to be sequenced, it is economically impossible and nonsensical for forensic scientists to lay an entire strand of a suspect’s DNA next to a strand of DNA collected at a crime scene to see if each component of the molecule is identical. To simplify the process, scientists look instead at tiny segments found at specific locations of the DNA molecule. These specific locations are known as loci (plural) or a locus (singular).

Most people are familiar with the term “gene.” A gene is thought of as genetic coding for a particular physical trait or function. But the full strand of DNA packaged in our 26 chromosomes is not made up of such coding genes. We also carry what is sometimes referred to in lay terms as “junk” DNA—long strands of DNA that apparently do not code for a physical trait or function but vary from person to person. Most of our DNA molecule (over 90 percent) is of this noncoding or “junk” DNA. The loci used in forensic testing contain stretches of this noncoding DNA. Regardless of the gene’s ultimate purpose, it should be known that the gene is made up of two alleles.

An allele is composed of a series of nucleotide pairings that serve as the genetic code for the gene. When a human being is created, we receive a pair of alleles that join together at a particular locus to form the gene. One of the locus’s two alleles comes from our mother, and the other allele comes from our father. It is important to emphasize that a locus is made up of two alleles, although the two alleles may be the same from mom and dad, i.e., they can both give the same one, so in that case the recipient will have two copies of the same allele. In such a case, it is said that the gene is homozygous at that locus.

For purposes of forensic analysis, alleles are not themselves unique to an individual. Instead, human beings will have a pair of common alleles at a particular locus. For example, let us assume that at Locus A the following alleles are known to appear: 1, 2, 3, 4. That is, for human beings, only four allele variations are known to exist at that locus that a person may inherit from his or her parents. For this locus, each parent will provide either a 1, 2, 3, or 4. Let us further assume that a DNA swab was gathered at a crime scene and police have a suspect in mind. The DNA from the crime scene is analyzed and the scientist finds that at Locus A, the culprit has the allele pair (1, 3). That is, on the locus examined, the culprit’s gene contains the allele pairing consisting of the known common allele “1” (inherited from one parent) and “3” (inherited from the other). Standing alone, this is helpful, but far from conclusive; to see why is a matter of statistics.

As previously mentioned, the forensic scientist analyzing this sample knows what to look for because the number of possible allele combinations at the given locus is limited. Assume for our example that the following alleles are known to exist among the human population in the following frequencies:

- Genotype (1, 2): 1 in 10 persons or .10 of the population
- Genotype (3, 3): 1 in 5 persons or .20 of the population
- Genotype (1, 3): 1 in 20 persons or .05 of the population
- Genotype (4, 2): 1 in 4 persons or .25 of the population
- Genotype (2, 3): 1 in 5 persons or .20 of the population
- Genotype (4, 1): 1 in 8 persons or .125 of the population
- Genotype (3, 4): 1 in 13 persons or .075 of the population

Consequently, examining this one locus (Locus A), our scientist is confident that the person responsible for the crime shares his or her DNA with only 1 in 20 other individuals, or 5 percent of the population. The scientist next examines the suspect’s DNA and finds that he or she also has Genotype (1, 3) at Locus A. The suspect therefore cannot be excluded as the contributor. However, considering only this evidence, a 1 in 20 result is hardly conclusive.

But the analysis is not limited to examining only a single locus. Let’s say that our scientist now turns his or her attention to Locus B. Locus B is known by the scientist to contain the common alleles 5, 6, 7, and 8 that will appear in a finite set of common genotype genes. The DNA swab from the crime scene reveals that the culprit has Genotype (8, 8) at Locus B. That is, the culprit inherited the allele 8 from both parents (it is homozygous). Our suspect’s DNA is examined and his or her profile reveals that he or she also has Genotype (8, 8). The scientist is aware that the following allele pairs appear in the following frequencies at Locus B:

- Genotype (5, 6): 1 in 10 persons or .10 of the population
- Genotype (8, 8): 1 in 5 persons or .20 of the population
- Genotype (7, 6): 1 in 20 persons or .05 of the population
- Genotype (8, 6): 1 in 4 persons or .25 of the population
- Genotype (5, 5): 1 in 5 persons or .20 of the population
- Genotype (7, 5): 1 in 5 persons or .20 of the population
Now, using simple mathematics, the odds have just improved that police have identified the right suspect. This is so because the odds are no longer merely 1 in 20. The odds of coincidence that our suspect has the same DNA as the unknown culprit is now equal to the odds of an individual having Genotype (1, 3) at Locus A and Genotype (8, 8) at Locus B. Following the product rule of probability, this works out to be .05 x .20 = .01 (1 percent of the population).

We could go on to a third locus, but we think the reader gets the point. The more loci for which a suspect shares a set of alleles with the crime scene DNA, the smaller the percentage the possible “coincidence” becomes. By the same token, when examining what appears to be a single-source sample, such as the example here, our suspect can be eliminated if one of the alleles comprising our crime scene profile does not match that of our suspect. Once 10 or so loci are examined and match those of our suspect, the number becomes absolutely astronomical—often with the odds being one in several sextillions (1,000,000,000,000,000,000,000,000,000). In other words, the odds are so overwhelming that the forensic scientist is able to render an opinion that our suspect is the “source” of our crime scene sample. Some laboratories prefer not to state the conclusion in terms of whether a suspect is the “source” of DNA found at the scene. Instead they will state their conclusion in terms of the random match probability (RMP) estimate described above. The RMP estimate is a mathematical statement of the probability of finding someone with the same genetic profile at random among the general population.

The example above is a simple one and not a real-world case. The purpose was to convey to the reader some basic points to DNA analysis for purposes of understanding the mathematics behind the forensics:

1. DNA analysis does not involve side-by-side comparison of the entire DNA molecule;
2. DNA analysis focuses on examining certain “known” locations, or loci;
3. For any given loci, there are a variety of common alleles that the scientist can expect to find;
4. The chances or frequency of any one known pair of alleles appearing at the particular locus for a specific population is also known (this is discussed at more length below); and
5. The odds begin to multiply to an ever-smaller number the more a known DNA profile shares specific alleles at the specific loci with the unknown sample.

It should be noted that the likelihood of observing a particular allele at a particular locus varies within the demographics of the human population. For example, a particular allele may appear in a different percentage of the white female population than the African-American male population. DNA analysis results will usually provide the attorney with a final statistical breakdown of the likelihood of the profile appearing among various demographics.

**Frequency and Reliability**

Scientists base their conclusions regarding the likelihood that a known individual contributed the DNA collected at a crime scene based on statistics: the statistical odds that a particular assortment of alleles will be found across a given set of loci. For this numerical analysis, the scientist does not conduct genetic experiments on all members of the population to determine the frequency that the allele appears at the analyzed locus. The scientist’s work is, for the most part, confined to information available in the laboratory. So where does the statistical data come from? How do scientists know that, as in the example above, Genotype (1, 3) at Locus A truly does appear in 5 percent of the population?

The answer is that forensic scientists rely on research conducted by other scientists outside of the lab and sampling of DNA samples taken at random for that purpose. One source of statistics accepted as reliable within the scientific community comes from the research conducted by Bruce Budowle and his associates and published in 2001 in “CODIS STR Loci Data from 41 Sample Populations.” (See 46 J. Forensic Sci. 453, available at http://tinyurl.com/cu7ge96.) Other scientific research for statistical information is available to scientists; however, a brief examination of Budowle’s work is illustrative of how such information is derived.

During the year 2000, Budowle and his associates sought to demonstrate that the distribution of allele frequencies were such that the product rule, referenced above, could be reliably used to conservatively estimate profile frequencies without prejudice to a defendant. (FBI, VNTR Population Data: A Worldwide Study, Volumes I–IV (1993.).) To do so, Budowle examined DNA data generated by different laboratories from around the world. At the time, some scientists and population geneticists argued that “substructure” in populations, which limit allele variation, was significant enough to make it inappropriate to use the product rule in calculating the RMP. Budowle and others acknowledged substructure existed but held that it was not significant enough to preclude use of the product rule. The worldwide study demonstrated that across populations, use of the product rule was reliable and, as used in the forensic community, was sufficiently conservative in favor of the defendant. Following the release of the worldwide study, the leading scientists on both sides of the “substructure” debate jointly authored an article in the journal Nature determining that the use of such allele frequencies and the product rule was appropriate. (See Eric S. Lander & Bruce Budowle, DNA Fingerprinting Dispute Laid to Rest, 371 Nature 735 (Oct. 27, 1994.).) Two years later, a National Research Council of the National Academy of Sciences (NAS) released its second report in four years regarding DNA profiling, focusing primarily on the statistical issues. In that report, the committee recommended the use of a theta (θ) value (an adjustment to the product rule) be used to ensure that any substructure in a population is accounted for. The NAS recommended two theta values—one value for large populations and a slightly greater value where a population database was established for isolated subpopulations where a case requires such a database. The use of a theta value is designed to ensure that any probability estimate will be conservative in favor of a suspect or defendant.

It is sometimes suggested that because a defendant comes
from a particular isolated subpopulation, say Alaskan Inuit, the RMP is not correct unless a statistic is given for that popu-
lation, in addition to those for Caucasian, African American, and other ethnic groups. However, unless there is reason to
expect that the perpetrator of the crime is limited only to
Alaskan Inuit, such a database is unnecessary. This fallacy is
the result of a misunderstanding of the meaning of the RMP.
Remember, the RMP answers the question: What is the prob-
ability that someone else’s profile, selected from unrelated
persons at random, matches that found on the evidentiary
item? If the alternatives to the defendant are more probably
from the general populations found across the United States
rather than an isolated subpopulation, a probability estimate
for the isolated subpopulation is not required and use of the
more general population databases is appropriate.

The Hardy-Weinberg Equilibrium
Another potential criticism comes from the reliability of the
statistics over time. That is, even assuming that allele frequen-
cies are completely accurate at the time they were taken, isn’t
it possible that the frequency may change from one genera-
tion to the next? If 5 percent of the population has Genotype
(1, 3) at Locus A now, is there a chance that 7 percent will
have that same genotype 10 years from now? How do we
know that the statistics used are not outdated?

For DNA analysis purposes, forensic scientists consider
what is known as the Hardy-Weinberg Equilibrium, named
after the scientists G.H. Hardy and Wilhelm Weinberg, who
first demonstrated the principle mathematically. The Hardy-
Weinberg Equilibrium assumes that mating among the human
population occurs randomly. Assuming this random state,
the frequency of an allele appearing among the population
remains constant from one generation to the next. Thus, if
Genotype (1, 3) appears at Locus A in 5 percent of the pop-
ulation, random mating can be shown mathematically to
produce no change in this frequency over time. Additionally,
if the loci that are used in forensic testing were actual genes
rather than “junk” DNA, the processes of evolution might
be expected to cause such changes. However, the “noncod-
ing” areas have been utilized, at least in part, specifically
for that purpose.

Random mating is a core assumption. And, attorneys know
that where there is an assumption, there exists an opportu-
nity to undermine a scientific process. For example, what
about isolated subpopulations such as the Amish? Due to
the social isolation, it cannot be fairly said that mating randomly
exposes the population’s members to the greater population.
However, population geneticists have learned from studies
of human populations as well as those of other species that
only a limited amount of random mating is required in order
to sustain the Hardy-Weinberg Equilibrium.

This was the core of the “substructure” debate mentioned
earlier. Part of the criticism of the use of the “product rule”
to generate the random match probability was based on pop-
ulation studies of two small tribes of the Brazilian rainforest
and one Central American tribe of similar size. These tribes
had populations of between 300 and 700 members. Genetic
variation was exceptionally limited in those tribes, not just
due to the size of the tribes or their isolated location but also
by virtue of the fact that mating outside of the tribe was pun-
ishable by death. As a result, members of these tribes were
more closely related to one another than brother and sister.
This is a characteristic of populations not ordinarily found
in a criminal case in the United States.

To correct for the Hardy-Weinberg assumption, population
 geneticists may factor in a $\theta$ as described earlier. In
effect, this waters down the ultimate statistic used to conclude
whether or not a particular person contributed to crime scene
dNA, thus rendering the conclusion a conservative estimate.

Building a DNA Profile
The analytical procedure for building a DNA profile follows
four main steps:

1. Extraction
2. Quantification
3. Amplification
4. Interpretation

Each of these steps will be addressed in turn.

**Extraction.** One must gain “access” to the inside of
the cell before the nuclear DNA can be analyzed. The interior
of a cell is protected by a cell wall composed of lipid bilay-
ers that are essentially fats. To break down the cell walls,
the forensic sample (swab, cutting, hair, etc.) is placed in an
extraction tube along with a chemical detergent that can break
down fats and grease. (This is why detergents are used for
washing dishes—the soap binds around the fats and removes
them from the surface of the dish.) For DNA extraction in
forensic laboratories, scientists will use a prepared kit pur-
chased from a manufacturer, or the solution—often referred
to as stain extraction buffer—can be made in-house. After
this initial step, the cutting, swab, or other material that origi-
nally contained the DNA is usually removed from the tube
and discarded. This leaves only the extraction solution that
now contains the cellular material and, thus, the DNA needed
for the remainder of the process.

Once the cell wall has been broken down, the DNA is still
protected within the nuclear envelope. This envelope may
be thought of as a “cell” wall around the nucleus itself. This
envelope must also be broken down in order for the DNA
to work its way “free” and into the solution. To accomplish
this, a second set of chemicals—usually an alcohol-based
solution—is often added to the tube. At this point, the DNA
is separated into the upper layer of the solution and is ready
to be quantified to determine whether there is enough DNA
to continue analysis.

**Quantification.** This step refers to the act of measuring
the quantity of genetic material extracted from the sample during
step 1. The process begins with the forensic scientist using a
machine known as a vortex to rapidly shake the DNA sample
in a manner similar to a mechanical paint mixer. The rapid
shaking causes the DNA material to distribute evenly within
the solution. After this is done, a portion of the sample is
removed for quantification using a real-time PCR machine
(RT-PCR).
Before using the RT-PCR, the scientist will add a chemical dye—referred to as a “tag”—to the sample. The chemical dye attaches itself to the DNA molecules. The sample is then loaded into the RT-PCR, where it undergoes a process of heating and cooling after which it is passed through a laser detection window. As the sample passes through the window, a laser is fired at the sample, causing the tag to become “excited,” which in turn causes the sample to emit a light wave signal. This signal is then detected by the machine, which measures the signal’s intensity. Based on the intensity, the RT-PCR is capable of determining the quantity of genetic material present. Given that we are dealing with relatively large instruments attempting to measure a microscopic molecule, it may seem that the methods used to measure DNA are suspect. However, the RT-PCR is capable of accurately measuring DNA quantity within one picogram (one trillionth of a gram). Moreover, the RT-PCR is calibrated and tested frequently. For example, the Indiana State Police Laboratory in Indianapolis tests the accuracy of the machine on a quarterly basis using a known quantity of DNA material. In addition, the RT-PCR manufacturer conducts annual calibration and testing to ensure accuracy. Finally, the forensic scientist will always use a control sample that is measured along with the testing sample. The control contains a known quantity of DNA that is compared to the results provided by the machine to ensure they are consistent with the known quantity. A negative control containing only the reagents that were added to the forensic samples is also run to ensure that a sample that should reveal an absence of DNA does in fact give such a negative reading.

Once the quantity of DNA for the portion of the original sample is determined, the results are extrapolated to the unquantified portion of the DNA sample in order to determine a total amount of DNA. The portion of the sample submitted for quantification is then discarded. From a forensic perspective, the DNA product is essentially “used up” after the quantification step and cannot continue in the remaining part of the process.

Amplification. Sometimes quantification will determine that there is a less than desired quantity of DNA available for final analysis. When this occurs, forensic scientists will create duplicates of the molecule until a sufficient sample is obtained. The process of duplicating the DNA is referred to as amplification. Amplification begins with denaturing, or “unzipping,” the DNA molecule. More specifically, denaturing the DNA refers to the process of splitting the molecule into two halves. Each of these halves will then contain its half of the nucleotide pairing from each “rung” of the ladder. (See fig. 3.)

Denaturing is accomplished by adding a chemical reagent containing “free floating” nucleotides (A, C, T, and G) that were not part of the original DNA sample, as well as chemicals capable of breaking down the DNA molecule. After this, the sample is placed into a machine called a thermocycler—a program-controlled, scientific instrument calibrated to heat and cool samples to specific, desired predetermined temperatures needed for DNA denaturing and re-annealing (reassembling the molecule, described in more detail below).

The thermocycler somewhat resembles a desktop printer and is approximately the same size. The thermocycler is topped with a metal block containing wells capable of holding a 96-well plate. The well plate is a plastic plate with small “test tube-like” compartments that hold individual DNA samples and the amplification reagents. (See fig. 4.) The thermocycler heats the sample with a heated aluminum block that sits underneath the plate containing the samples. This heat acts together with the reagents to “unzip” the DNA molecules into the two halves.

Once the DNA is unzipped, a cooling process is followed, referred to as “re-annealing” the DNA. During this process, the free floating nucleotides will bond to the nucleotides on each of the two “halves” of the original DNA molecule. It bears repeating that any given nucleotide will only pair with one specific type of the remaining three. A will always pair only with T, and G will always pair only with C. Thus, as each half of the molecule begins pairing its attached nucleotides with the free floating nucleotides contained in the reagent, a replica of the original DNA molecule is created. What began as a single DNA molecule has now been ripped in half and reconstructed into two exact replicas. This process is repeated with each repetition producing an exponentially greater quantity of genetic material (e.g., one becomes two, two becomes four, four becomes 16, 16 becomes 256, etc.). Amplification is completed when the forensic scientist has obtained millions of copies of the original portion of the targeted DNA template. This entire process takes approximately four hours to complete.

Interpretation. Once a sufficient quantity of DNA is obtained through amplification, the forensic scientist is ready to submit the samples to the final stage of laboratory treatment in order to be able to analyze the DNA profile. The profile may then be compared to a known profile(s)—usually a suspect and a victim in a criminal investigation. Based on the analysis, the scientist will be capable of rendering an opinion as to the likelihood that the suspect was the contributor of the crime scene sample.

The final stage begins by adding yet another set of reagents to the DNA. These reagents contain dyes, buffers, and primers. These substances work in conjunction with a capillary electrophoresis instrument that utilizes the reagents to detect and identify the subject DNA’s alleles at the various loci being examined.

Many labs use a capillary electrophoresis instrument manufactured by Applied Biosystems, widely recognized as the industry leader. The electrophoresis instrument contains a
varying number of glass capillaries, or “tiny glass tubes.” The DNA sample is passed through the capillaries that lead past a detection window. Once at the window, the electrophoresis instrument will fire a laser at the DNA that will emit a signal that is measured in relative fluorescent units, or RFUs. RFUs are standardized units that are measured based on the units’ intensity. The intensity of the RFU reading will vary based on which allele is present at a particular locus and how “strong” or “weak” that signal is. The signals are then depicted visually as “peaks” on a graph arranged by the alleles that were detected at the predetermined loci. This gives the scientist a visual depiction of the genetic profile obtained from the sample similar to that shown in figure 5. The height of the resulting peak is a direct reflection of the strength or weakness of the signal detected. For example, a weaker signal will result in a lower peak or a lower RFU value.

Figure 5 provides an example of a profile generated from DNA collected at a crime scene (evidence sample) compared with a profile generated from DNA collected from a suspect (suspect’s standard). The profile is depicted horizontally along the graph that is broken down into four loci. Going from left to right, the loci are designated: D8S1179, D21S11, D7S820, and CSFIPO. Each of these loci have certain known alleles that may appear. In this case, locus D8S1179 had the allele (13, 16) appear in both samples. It is interesting to note that locus D7S820 has only one spike showing the presence of allele 9. This is because both the suspect sample and the evidence standard had parents who both passed along a “9,” and thus the homozygous allele (9, 9). The fact that both samples contained two “9” genes at the locus resulted in a comparatively larger spike on the graph.

It can be visually determined by examining the graph that the profiles “match” alleles at all four loci. The chances that the same individual contributed both samples would likely be alarmingly high.

Safeguarding against Potential Contamination
It is common for forensic scientists to simultaneously analyze DNA for more than one laboratory file (case). When this is done, there exists the potential for contaminating one sample with the DNA from a second. For example, to maximize laboratory efficiency, several DNA samples may be amplified together on the same 96-well plate, causing samples to be placed near one another in a tray (see fig. 4). This presents at least some risk of a substance being transferred between samples.

In addition, the scientist may inadvertently touch a sample with his or her gloves. When the scientist goes to retrieve the reagent for breaking down the DNA during the extraction process, DNA from the touched sample could potentially enter the reagent container, thereby contaminating all future samples that use the reagent.

Scientists are aware of these dangers and take measures to prevent them from occurring. Several “rules” apply when multiple cases are extracted at the same time. The laboratory work area must be cleaned before any standards are processed. New gloves should be worn, and a separate tube rack should be used for each sample group undergoing analysis. It is also common practice for scientists to change gloves frequently during the analysis. At a minimum, this is done between each stage of the analysis (extraction, quantification, etc.). The frequent changing of gloves reduces the risk of transferring spillage that may have been transferred onto a glove during any particular stage. In addition, it is routine practice for many scientists to change their gloves before handling a bottle containing a reagent. Many analysts also change gloves between each case handled within a batch of cases. Finally, both crime scene samples and known standards taken from victims and suspects are never analyzed together.

Scientists also use negative controls for each step of analysis. As previously mentioned, the first step—extraction—involves placing the materials containing the crime scene source of DNA into a tube in preparation for adding the extracting reagents. These tubes are placed in rows within the tray. A reagent tube containing only chemical reagents and no DNA sits in between each of the samples. This tube serves as the negative control and is referred to as a blank.

Once multiple tubes have been placed into a tray, an analyst typically will only open one tube in a tray at a time as work is being performed. The cap to that tube will be closed prior to opening another to limit the chances of contamination of either the samples or their associated blanks. This process is followed down the row of samples as reagents are added.

When extraction is complete, a portion of both the DNA sample and its associated blank are submitted for quantification. Again, each blank serves as a negative control, as each of the blanks should have remained pure during the extraction phase. The quantification process will measure the amount of DNA present in the sample, including any DNA present in the blank. If the scientist detects a quantity of DNA in any of the blanks, the scientist is alerted to a possible contamination to the other samples.

This same safeguard is applied to other stages of the analytical process. The presence of DNA in the negative control blank during the quantification process will indicate a contamination that possibly occurred during extraction. The presence of DNA in a blank after amplification will
reveal a contamination that occurred between quantification and amplification. Finally, a contaminated sample at the final stage may reveal peaks on the electropherogram for the negative control blank, which should have no DNA and therefore no alleles detected. Moreover, contamination occurring to a sample may be detected if the scientist obtains a profile containing more than one allele at the loci, thereby indicating the presence of a mixture of DNA in the tested sample. This would manifest as additional peaks on the electropherogram, showing more than two peaks at a particular locus. If this occurs, the samples cannot be used for interpretation because a control has failed. During any stage of analysis, controls must perform as expected in order for the associated data to be usable.

Finally, scientists also utilize a positive control consisting of a known DNA quantity and profile. Knowing with certainty the quantity and makeup of the positive control provides the scientist a means of ensuring that the various machines are properly functioning during the quantification and interpretation stages. For example, during the quantification phase, the scientist is alerted to a possible problem when the RT-PCR provides a measurement of the positive control inconsistent with its known value. Likewise, the scientist can be assured that the capillary electrophoresis process is in working order when he or she receives results confirming the presence of known alleles at the various loci consistent with the positive control’s known profile. If the results demonstrate a profile inconsistent with the known positive control, the scientist can be confident that there has been an equipment malfunction or a possible contamination event. The resulting failed control requires further investigation in order for analysis of the associated samples to continue.

**Accreditation and Auditing**

Many forensic labs have earned accreditation from the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). This organization has been providing laboratory accreditation for federal, state, and local crime labs for over 30 years. It is the largest forensic accreditation body in the United States. (See ASCLD/LAB, www.ascldlab.org/ (last visited Mar. 24, 2015).) ASCLD/LAB is not the only accreditation organization for forensic laboratories in the United States—ANAB, formerly known as FQS, and the American Association for Laboratory Accreditation (A2LA) also provide laboratory accreditation for forensic laboratories. Moreover, the current accreditation standard for forensic laboratories is ISO (International Organization for Standardization) accreditation. ISO accreditation means that the laboratory has achieved an international standard of competency. All of these organizations provide accreditation to the ISO standard.

Forensic labs may also undergo various forms of performance auditing. That review may be as a regular part of the accreditation process mentioned above or as part of a proficiency testing program or for other purposes. One organization providing such auditing services is the National Forensic Science Technology Center (NFSTC). Performance audits are a regular part of quality assurance programs required of forensic DNA laboratories, federal, state, and local, that receive federal grant funding or that are part of CODIS. These quality assurance standards were first established by the DNA Advisory Board (DAB), an organization created by the federal DNA Identification Act of 1994. (CODIS—Quality Assurance, FBI LABORATORY SERVICES, http://tinyurl.com/kclaodz (last visited Mar. 24, 2015).) The DAB promulgated two separate sets of quality assurance standards: (1) Quality Assurance Standards for Forensic DNA Testing Laboratories; and (2) Quality Assurance Standards for Convicted Offender DNA Databasing Laboratories. The DAB no longer exists, but the work of maintaining and updating those standards has since been handed over to the Scientific Working Group on

(continued on page 21)
FEDERALISM AND POT
THE NO MAN’S LAND FOR BANKS AND SELLERS

BY JOHN W. MOSCOW AND JENNA N. FELZ
It is now legal to sell marijuana for recreational use in four states and the District of Columbia, yet such transactions remain unlawful under federal law. Despite the federal statutory framework prohibiting the use and sale of marijuana, the proliferation of these state laws has had a political effect on the federal government. In August 2013, the Department of Justice (DOJ) announced that the Obama administration would not challenge laws legalizing marijuana in Colorado and Washington as long as those states maintained strict rules involving the sale and distribution of the drug. (Memorandum from James M. Cole, Deputy Attorney Gen., to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at http://tinyurl.com/ncr9ur8.)

Although the current administration, which ends January 20, 2017, has declined to enforce federal drug laws in states that have legalized the manufacture, distribution, and sale of marijuana, the specter of future federal enforcement actions remains. This concern is especially prescient given the recent Republican takeover of the Senate. The uneasy peace that exists between the states and the federal government manifests itself most clearly in the efforts of the marijuana industry to gain access to the banking system, and the fear of the bankers—despite their desire for this new avenue of business—that dealing with enterprises engaged in federal crimes may cost them dearly.

Source of the Conflict

The modern system of global drug control and enforcement dates back to the 1961 Single Convention on Narcotic Drugs, to which the United States and 72 other countries are signatories. The 1961 Single Convention categorizes drugs into four schedules, establishing differing degrees of regulation for each schedule. Under the treaty, marijuana is classified as a “Schedule I” drug, which includes heroin and cocaine. Signatories of the treaty agree to “limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of [such] drugs.” (Single Convention on Narcotic Drugs, 1961, art. 4, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204.) The exclusion for medical and scientific purposes was based on the use of the opium derivative morphine as a medicine.

In the United States, Congress passed the Controlled Substances Act (CSA) in 1970 as the national implementing legislation for the 1961 Single Convention. Still in force today, the CSA effectively outlaws the sale or use of marijuana as a Schedule I controlled substance for any purpose other than medicinal use. (21 U.S.C. § 812.) The CSA states that “it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” (Id. § 841(a).)

Individuals who violate the CSA by “engag[ing] in a continuing criminal enterprise” face a minimum of 20 years in prison to a maximum of a life prison term, as well as up to $2 million in fines. (Id. § 848.) But even at lower levels of sales or possession of marijuana, the mandatory minimum sentences are quite harsh. Possession of 1,000 marijuana plants (or 1,000 kilograms of a mixture or substance containing detectable amounts of marijuana) carries a minimum of 10 years in prison and a maximum term of life with a fine of up to $10 million for an individual. (Id. § 841(b)(1)(A)(vii).) The sentence may not be suspended, there is no probation available, and parole is barred by the statute. For smaller quantities of marijuana, the sentences are shorter: § 841(b)(1)(B)(vii) provides for a sentence of five to 50 years with a fine of up to $5 million for the possession of 100 marijuana plants or 100 kilograms of a mixture or substance containing detectable amounts of marijuana. These sentences reflect an antidrug, antimarijuana attitude dating back to the Nixon era. But dismantling the legal structures created in the 1970s may be difficult today.

The Financial Black Hole

The US attorney general, who is responsible for scheduling drugs under the CSA, may not reschedule marijuana to a less restrictive schedule absent a decision from the Commission on Narcotic Drugs, and ultimately a recommendation from the World Health Organization. (Comm. on Drugs & the Law, N.Y. City Bar, The International Drug Control Treaties: How Important Are They to US Drug Reform? (Aug. 2012), available at http://tinyurl.com/mq8q83p.)

In addition to the CSA, Congress enacted federal civil forfeiture statutes that declare all proceeds, materials, and property related to the sale of controlled substances forfeited to the United States government. The Drug Abuse Prevention and Control Act of 1970 effectively divests the seller of illicit drugs of any property rights in the money received or property related to the growth, distribution, and sale of marijuana at the moment of sale. (18 U.S.C. §§ 981(a)(1)(B)(i), 983(a)(1)(A)(i); 21 U.S.C. § 881(a)(1)–(11).) Money paid by marijuana sellers to providers of services, or deposited into banks, is subject to seizure under the law, because such funds lawfully belong to the federal government.

The prospect of forfeiture is critical to the ability of those in the marijuana industry to hire counsel, rent space, pay utility bills (which can be high if marijuana is being grown under lights), and, most especially, bank the proceeds of their sales. Counsel, who need to know their clients’ business to competently represent them, can legally be required to cede to the federal government any payments they collect in fees arising from the sale of marijuana. The same holds true for landlords and utility companies. It is even more of a problem for banks.

Banks that open accounts for and accept deposits from a marijuana seller are therefore subject to two conflicting demands for the money: from the customer and potentially from the federal government. The banking customer will seek to withdraw his or her money to run the business, pay expenses, taxes, and the like. But under federal forfeiture

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laws, the federal government has the right to come to the bank and demand from it a sum equal to deposits made into the bank, without regard for withdrawals made by the customer. What that means in practice is that for every dollar a bank knowingly takes in deposits from a licensed marijuana dealer, it may have to pay that money twice—once to the customer and, potentially, once to the federal government—bad business for the bank!

Furthermore, the Bank Secrecy Act of 1970 (BSA) requires all banks to report and respond to transactions believed to be linked to illegal activity. (31 U.S.C. § 5311.) The BSA requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $10,000, and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities, including the sale of marijuana. This is yet another obstacle that marijuana producers and sellers confront in states that have legalized the recreational sale and use of the drug. Because the sale of marijuana for recreational purposes is still illegal under federal law, banks are required to file suspicious activity reports (SARs) even in states where the drug is legal under state law. FinCEN has modified SARs, but a public record that the customer is dealing in marijuana still must be created. (See Memorandum from Dep’t of Treasury Fin. Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Business (Feb. 14, 2014) [hereinafter FinCEN BSA Memo], available at http://tinyurl.com/ln4p2b.)

As of spring 2015, four states—Alaska, Colorado, Oregon, and Washington—have passed laws legalizing the use of recreational marijuana, as has the District of Columbia, and all by ballot initiative. To illustrate public approval, 69 percent of voters approved legalization in Washington, D.C., along with 55 percent in Alaska, and 52 percent in Oregon. Buoyed by public approval and the legitimacy granted by recent legalization, marijuana producers and sellers have reason to celebrate. However, given the serious federal penalties they may face, those in the marijuana industry also have much cause for concern. While the probability of federal enforcement under the current administration is low—98 percent of all prosecution is at the state level—the risk, however small, still remains. A more immediate concern for those engaged in the marijuana trade is banking the proceeds from the sale of marijuana.

As discussed above, all proceeds from the sale of marijuana legally belong to the United States government under federal forfeiture laws, creating the practical problem of how to bank the proceeds. FinCEN recommends assessing the following factors to determine the risk of providing financial services to a marijuana-related business: (i) verify with the appropriate state authorities whether the business is duly licensed and registered; (ii) review the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) request from state licensing and enforcement authorities available information about the business and related parties; (iv) develop an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) conduct ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) conduct ongoing monitoring for suspicious activity, including for any of the red flags described in the guidance; and (vii) refresh information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. (Id.) FinCEN also cautions that financial institutions that decide to provide financial services to marijuana-related business must file SARs. (Id.)

All proceeds from the sale of marijuana legally belong to the United States government under federal forfeiture laws, creating the practical problem of how to bank the proceeds.

Possible Fixes

In response to this very real conflict of laws, FinCEN has issued guidance to states that have legalized the sale and use of marijuana. (See FinCEN BSA Memo, supra.) FinCEN advises financial institutions to make the decision to open, close, or refuse any particular account or relationship based on a number of factors, including (i) its particular business objectives, (ii) an evaluation of the risks associated with offering a particular product or service, and (iii) its capacity to manage those risks effectively. (Id.)

FinCEN recommends assessing the following factors to determine the risk of providing financial services to a marijuana-related business: (i) verify with the appropriate state authorities whether the business is duly licensed and registered; (ii) review the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) request from state licensing and enforcement authorities available information about the business and related parties; (iv) develop an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) conduct ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) conduct ongoing monitoring for suspicious activity, including for any of the red flags described in the guidance; and (vii) refresh information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. (Id.) FinCEN also cautions that financial institutions that decide to provide financial services to marijuana-related business must file SARs. (Id.)

While FinCEN’s guidance permits banks to report marijuana transactions, FinCEN’s approval does not alleviate the
associated federal risks of banking marijuana sale proceeds. Banking activity in Colorado in the months since FinCEN released its guidance is instructive. As recently as August 2014, FinCEN has reported that more than 100 banks nationally have filed reports indicating a banking relationship with legal marijuana business and their affiliates. However, nearly as many banks have filed reports stating they had terminated such relationships. (See David Migoya, FinCEN: Some banks are banking pot shops, many more closing accounts, Denver Post, Aug. 12, 2014, http://tinyurl.com/k6fkchs.)

In response to the reluctance of banks to accept the proceeds of marijuana sales, earlier this year Colorado Governor John Hickenlooper signed into law a bill designed to establish the world’s first state-level marijuana banking system. The bill enacts the Marijuana Financial Services Cooperatives Act, which allows uninsured legal marijuana businesses operating in Colorado to create what the state calls “cannabis credit co-ops.” The bill allows such credit co-ops to petition the Federal Reserve for clearance to bank marijuana proceeds—a very unlikely result. The bill has many critics who see the entire reason for its existence as symbolic, as the federal government is unlikely to legalize the banking of illegal activity.

In addition, in November 2014, Colorado banking regulators approved the world’s first marijuana credit union in Colorado, called the Fourth Corner Credit Union. It is unrelated to the passage of the Marijuna Financial Services Cooperatives Act, and instead followed the standard state credit union licensing process. The Fourth Corner Credit Union would allow marijuana business owners to more safely store and transfer marijuana proceeds. While it received approval from Colorado’s Division of Financial Services, it must still obtain insurance from the National Credit Union Administration, which it may not receive for the reasons listed in this article.

**Conclusion**

The reluctance on the part of many financial institutions to bank marijuana proceeds reflects the very real risks still associated with the practice. A new US attorney general, desirous of raising money or for ideological reasons, could sue any bank dealing with marijuana proceeds and have a winning case for all the deposits from marijuana sales. Banks’ filings with FinCEN clearly identify which banks are accepting marijuana-related deposits. While there likely would not be many criminal prosecutions in states where a jury is likely to include members of the community who voted in favor of legalizing marijuana sales, the same is not true in civil forfeiture cases, as a jury does not come into play. And, because the defendant is not entitled to a jury in this type of case, it makes it much easier for the government to win. In addition, there is a great incentive to pursue such cases because the DOJ would retain the money that is forfeited. As more states legalize the recreational sale and use of marijuana, this problem will continue to gain in size and scope. The potential for DOJ forfeiture, whether motivated by greed or ideology, will most certainly increase.

What keeps laws alive is public acceptance of them, and when that disappears, the laws may collapse rapidly. Matters that appear to be appropriate to one generation may appear wholly inappropriate to another. As support for an idea changes, support for the law may erode with no visible signs until the law collapses. With the turning tide of public acceptance of marijuana, the federal laws banning the recreational use of marijuana may quickly collapse. But until they do, pioneers in the growth, distribution, and sale run the risks of arrest, a lengthy imprisonment and hefty fine, and, more realistically, forfeiture of everything they obtained through this new business enterprise. There may be much money to be made, but with great rewards comes great risk.

**DNA Analysis (continued from page 17)**

DNA Analysis Methods (SWGDAM). These standards serve as the benchmark for quality assessment.

It is worth noting that the standards established by the DAB and used by the NFSTC are the “minimal” standards a laboratory must meet to be deemed competent. These are not necessarily best practices, and a laboratory may establish its own standards and protocol that exceed the minimum requirements.

Labs take great pride in the community as having high standards and being able to maintain them. It is a badge of honor to work for an organization that has no findings during an annual audit. Labs want defined standards and requirements so that there is as much uniformity within the lab among analysts as possible. Labs want everyone to do the job in the best way possible. They want the job done efficiently and in a way that best represents the evidence. One definitive way to achieve this goal is to ensure that each analyst is doing the job in as much the same way as possible. The way labs do this is by setting a specific and often rigorous set of standards that must be followed. Incidentally, labs have a corrective action plan to ensure their analysts follow the procedures, and if those are not followed a corrective action will be enacted. Based on the type of error that occurred, the analyst could be removed from his or her position or, in extreme cases, terminated.

**Conclusion**

DNA analysis has provided the criminal justice system with an invaluable tool to solve crimes, to prosecute the guilty, and to protect and exonerate the innocent. Its evidentiary weight to a jury is absolutely immense. However, many investigators and court officers who have come to rely on DNA to perform their duties have little understanding of what takes place between the time when a DNA sample is collected and when the forensic scientist renders his or her opinion during trial. The information contained in this brief article should provide a basic, foundational understanding of DNA analysis, thus increasing the transparency of this primarily behind-the-scenes process.
We now know, as the founders of the juvenile court system intuited at the dawn of the twentieth century, that children are not little adults. Relying in large part on brain imaging studies and psychological research regarding the maturational arc of adolescence, the United States Supreme Court has abolished the juvenile death penalty and mandatory juvenile life without parole. (Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).) Youth are accountable, but in a constitutional sense are different than adults. Practitioners across the country are considering the implications of the message of proportional sanctioning and sentencing in a variety of contexts, including zero tolerance in schools, capacity to form mens rea, mandatory transfer, and collateral consequences. (See, e.g., Laurence Steinberg, Should the Science of Adolescent Brain Development Affect Juvenile Justice Policy and Practice?, Keynote Address at the 2014 Models for Change Cross Action Network Meeting, Nat’l Ctr. for Mental Health & Juvenile Justice (May 20, 2014), http://tinyurl.com/qgxbyww.) However, this landscape has been complicated by a disturbing and counterintuitive narrative—the recriminalization of status offense conduct.
that was decriminalized in the aftermath of In re Gault, 387 U.S. 1 (1967), and the enactment of the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1974.

This article examines the unintended consequences of such policies and practices that have adversely affected our most vulnerable youth and exacerbated racial disparities in the juvenile and child welfare system. It has been argued with some persuasiveness that “the trend in the United States has been to criminalize the very nature of adolescence in the name of social welfare, with youth of color bearing the brunt of what is actually social control.” (James Bell & Raquel Mariscal, Race, Ethnicity, and Ancestry in Juvenile Justice, in JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE 111, 115 (Francine T. Sherman & Francine H. Jacobs eds., 2011).)

Alarmingly, recriminalization is occurring at a time of declining national juvenile arraignment rates. The process has been characterized by dramatic increases in school referrals to juvenile justice, treating status offenders who violate conditions of supervision as delinquent probation violators, and sanctioning for so-called “technical” probation violations, i.e., for reasons other than the alleged commission of new offenses. In exploring this terrain, this article reviews the history and rationale for treating status offenders differently than youth accused of criminal acts and the unintended consequences of current practices that have undermined the rehabilitative promise of the post-Gault era. “During the past two decades, many youth have come to the attention of the juvenile justice system from schools, child welfare agencies, and the mental health systems.” (NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 3 (Richard J. Bonnie et al. eds., 2013) [hereinafter REFORMING JUVENILE JUSTICE].)

Wide-scale implementation of zero tolerance disciplinary regimes, deployment of police officers in schools without first defining their relationship and scope of authority, and the use of the valid court order (VCO) are reminiscent of the parens patriae philosophy of the pre-Gault era. As will be discussed, the VCO amended the JJDPA in 1980, which enables states to convert status offense cases into delinquency probation violations for youth who do not follow conditions of care. This narrative has very concerning racial overtones, as black and ethnic minority youth make up a disproportionate number of adolescents disciplined by schools, managed by the child welfare system, and diagnosed with mental health problems such as emotional disturbances. (Id.)

Racial and ethnic disparities is one of the most intransigent and disturbing issues facing juvenile justice in the United States. While comprising approximately 38% of the population eligible for detention, the over-representation of youth of color in secure confinement has increased to almost 70% over the past decade.

These startling increases in disparities for youth of color occurred while arrest rates for serious and violent crimes declined by 45%. (Bell & Mariscal, supra, at 111 (citations omitted).)

While “race and ethnic disparities exist in the adult criminal justice system, they are more pronounced in the juvenile justice system where social factors . . . are part of the decision-making process at every stage.” (Id. at 115.)

Gault is often cited for the heralding of a juvenile due process revolution. The founders of the system “believed that society’s role was not to ascertain whether the child was ‘guilty’ or innocent,’ but ‘what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’” (In re Gault, 387 U.S. 1, 15 (1967).) The child was to be “treated” and “rehabilitated.” The results were to be achieved without coming to constitutional grief by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae. However, the reality did not match the rhetoric. In spite of the ostensible intent, the “enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context.” (Id. at 17.) In evocatively depicting the reality of the treatment youth experienced, the Court noted that “Juvenile Court history has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” (Id. at 18.) As Dean Pound observed in 1937, “The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . .” (Id. (quoting Roscoe Pound, Foreword to Pauline V. Young, Social Treatment in Probation and Delinquency, at xxvii (1937))).

The comparison to the oppressive and secretive court of English monarchs might seem hyperbolic, but the harm done to children in the Houses of Refuge that devolved into training schools and prisons would have made Dickens blush. In the nonadversarial medical model, there was a nonrebuttable presumption that a child needed treatment or “fixing.” In this world, a youth’s noncompliance with home or school rules was treated as a criminal matter often leading to lengthy periods of incarceration. There was no differentiation between civil offenses or conduct that we now consider to be status offenses—e.g., not attending school, running away from home, violating curfew, or being stubborn—and allegations of criminal conduct.

On June 8, 1964, Gerald Gault and a friend, Ronald Lewis, were arrested by the sheriff of Gila County, Arizona. Gault was 15 years old and had been on probation for having been in the company of another boy who had stolen a wallet from a lady’s purse. A neighbor had made a verbal complaint about a telephone call in which the caller or callers had made remarks “of the irritatingly offensive, adolescent, sex variety.” (Id. at 4.) As there was no evidentiary hearing, it was never conclusively established which statements, if any, could be attributed to Gault or to Lewis. On June 15, 1964, after a session in the judge’s chambers, without the right to counsel or confrontation of witnesses, Gault was committed to the State Industrial

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School for the period of his minority (i.e., until age 21), unless sooner discharged by “due process of law.” (Id. at 7.)

At the time the State Industrial School was the functional equivalent of juvenile prison. Under Arizona law, no appeal was permitted. The youth in Gault had received a six-year sentence. An adult in similar circumstances would have faced a maximum term of not more than two months or a fine of $5 to $50. Of course, an adult in the criminal system would have also been entitled to the benefit of due process. This disparity of treatment underlines the danger of net widening or greater exposure to state intervention in the name of fixing and treating. This pattern was the hallmark of the pre-Gault era and is being resurrected today.

While prolonged detention for minor offenses in the name of treatment characterized the era, there was little, if any care, provided. In dramatically concluding that “the condition of being a boy does not justify a kangaroo court,” the Court cited Justice Fortas’s observation that “[a] child receives the worst of both worlds... he gets neither the protections accorded adults nor the solicitous care and regenerative treatment provided. In dramatically concluding that “the condition of treatment characterized the era, there was little, if any care, without honoring the presumption of innocence and conducting rigorous fact finding unnecessarily entangles youth in the system and resurrects the horrors of the pre-Gault world.

In 1974, Congress passed the JJDPA, which created the Office of Juvenile Justice and Delinquency Prevention (OJJDP). The JJDPA provided federal juvenile justice dollars to the states in return for compliance with sweeping reforms. As has been noted, the pre-Gault practice was that all children in the system—regardless of the nature of their offense—required corrective guidance. The JJDPA reflected the national consensus that status offenses should be decriminalized. Accordingly, the JJDPA’s initial core requirements were the deinstitutionalization of status offenders and sight and sound separation from adults. Removing juvenile offenders from adult prisons and reducing disproportionate minority contact (DMC) with the juvenile justice system later became the other core principles of the legislation. (Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§ 5601 et seq.).) Deinstitutionalization was designed to keep youth accused of status offenses from being housed with juveniles accused of criminal acts. Many states responded by enacting comprehensive statutory schemes with titles such as Children in Need of Services (CHINS) or Persons In Need of Services (PINS) to address offenses that only apply to minors, such as truancy, running away, or being stubborn or ungovernable. (Francine T. Sherman & Jay D. Blitzman, Children’s Rights and Relationships: A Legal Framework, in Juvenile Justice, supra, at 68.)

However, the so-called due process revolution was short-lived. Only four years after Gault, a reconstituted Supreme Court, viewing the history of juvenile justice through a different lens, held that jury trials in juvenile proceedings were not constitutionally mandated. (McKeiver v. Pennsylvania, 403 U.S. 528 (1971).) Gault had only addressed the basics of fundamental fairness during the adjudicatory stage. Issues such as bail, transfer, and sentencing were not reached. Accordingly, each state was left to design the contours of its juvenile system, and the full realization of Gault’s promise of due process remains aspirational. (See, e.g., Jay D. Blitzman, Gault’s Promise, 9 BARRY L. REV. 67, 84 (2007).) In 1980, the JJDPA was amended with the enactment of the VCO. (41 U.S.C. § 5663.) The VCO enabled states that adopted the VCO’s Promise to treat children accused of violating conditions of parole to incarcerate nonviolent offenders, the juvenile due process revolution was over shortly after its inception.

The demographic projections about a rising adolescent arrest rate were accurate, but no tsunami of juvenile crime. The “tough on crime” rhetoric had great resonance, and most jurisdictions raced to amend legislation targeting violent offenders for adult prosecution. By 2006, 29 states and the District of Columbia had adopted some form of the VCO. (Blitzman, Gault’s Promise, supra, at 83 (citing Linda A. Szymanski, Prohibition as a Disposition for Status Offenders, NCJJ SNAPSHOT EXTENDED (Nat’l Ctr. for Juvenile Justice), Apr. 11, 2006.).) With the power to incarcerate nonviolent offenders, the juvenile due process revolution was over shortly after its inception.

The demographic projections about a rising adolescent arrest rate were accurate, but no tsunami reached our shores. National juvenile arrest rates for all offenses peaked in 1996 and by 2011 had declined by 54 percent. (Law Enforcement & Juvenile Crime: Juvenile Arrest Rate Trends, OJJDP STATISTICAL BRIEFING BOOK, http://tinyurl.com/n6bu69 (last updated Dec. 9, 2014.).) At the same time, school suspensions, expulsions, and referrals to law enforcement have soared, and many children have been securely detained. (Aaron J. Curtis,
On its face, deploying police in schools seemed a logical response to protect students from external threats. Instead, it has had the unintended consequence of increasing arrests of children for normative behaviors inside of schools. (Robin L. Dahlberg, ACLU, Arrested Futures: The Criminalization of School Discipline in Massachusetts’ Three Largest School Districts 5 (2012) [hereinafter Arrested Futures], available at http://tinyurl.com/m56a7fl.) Moreover, while the majority of the publicized school shootings have occurred at suburban or rural schools, police presence has been featured in urban settings with high populations of youth of color. According to the National Association of School Resource Officers, school-based policing is the fastest growing area of law enforcement. (Id. at 9.) Sixty years ago, only Flint, Michigan, employed school resource officers. By 2005, 48 percent of public schools responding to a US Department of Justice survey reported having police on site in schools. Today, there are an estimated 17,000 school police officers. (Id.)

Research has shown that the presence of police in schools frequently results in significant increases in student arrests for misbehavior previously addressed by educators and parents. (Id.) At the same time, studies have demonstrated that police in schools, “particularly ones who use arrest as a means to resolve student discipline issues, do not make schools safer.” (Id. at 9–10 (citing Matthew P. Steinberg et al., Consortium on CH. SCH. RESEARCH at the UNIV. of CHI., URBAN EDUC. INST., STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS, THE ROLES OF COMMUNITY CONTEXT AND SCHOOL SOCIAL ORGANIZATION 26 (May 2011)).) The research also shows that students of color and students with emotional issues and learning disabilities are disproportionately affected. (Id.) A 2011 New York Civil Liberties Union report indicates that youth with disabilities are four times as likely to be suspended as students...
without disabilities. (Id. at 11.) New York City has over 5,000 school police. As the age of criminal court jurisdiction in New York is still 16, a student of that age arrested for misconduct in school can end up in Rikers Island awaiting arraignment.

There is a need to consider the relationship between police and school administrators as well as the training of the school resource officer. In looking at school policing patterns in the Massachusetts cities of Boston, Worcester, and Springfield, the Arrested Futures study concludes that school arrest patterns are dramatically affected by whether or not districts have their own security, have city police on site, or call for assistance on an as-needed basis. For example, as of the date of publication, the only city in the study to have armed, uniformed police stationed in its schools was Springfield. For the years in which data were collected, 2007–2010, Springfield’s arrest rate in schools was approximately three times higher than either of the other districts. Although Boston’s arrest rate for public disorder was lower overall than Springfield’s, Boston’s arrest rate of students of color was disproportionate.

“In both Boston and Springfield, arrest rates at schools for learning and behavioral difficulties were particularly high—in some cases up to 23 times higher than the rates of other schools in the district.” (Id. at 21.)

In 2000, there were over three million school suspensions and over 97,000 school arrests. (NAACP LEGAL DEF. & EDUC. FUND, Dismantling the School-to-Prison Pipeline 2 (2005), available at http://tinyurl.com/njq4lj6.) African American students represent 16 percent of school enrollment, but 31 percent of the arrests. (SENTENCING PROJECT, POLICY BRIEF: DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 6 (May 2014) [hereinafter POLICY BRIEF], available at http://tinyurl.com/kbvt96c.) By comparison, white students accounted for 31 percent of enrollment, but 21 percent of the arrests. (Donna St. George, Federal data show racial gaps in school arrests, WASH. POST, (Mar. 6, 2012) available at http://tinyurl.com/qeztcqp.)

African American students were more than 3.5 times more likely to be suspended or expelled as white students; 20 percent of African American males were suspended from school during the 2009–10 school year. (Id.)

Disciplinary data show that African American and Latino students also routinely receive harsher punishment for similar misbehavior than their white peers. (Bell & Mariscal, supra, at 111–113, 119; Russell J. Skiba et al., Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline, 40 IND. SCH. PSYCHOL. REV. 85 (2011).) For example, in the Los Angeles Unified School District (LAUSD), 93 percent of the 90,000 combined arrests and tickets issued in the 2011–12 school years were for African American or Latino children. The costs of school failure are substantial. “Students who are arrested at school are three times more likely to drop out than those who are not. Students who drop out are eight times more likely to end up in the criminal justice system than those who remain in school and graduate, and the cost of housing, feeding and caring for prison inmates is nearly three times that of educating public school students.” (ARRESTED FUTURES, supra, at 5 (footnotes omitted).)

**Understanding the Problem, Changing the Solutions**

Efforts have been made to understand the points of entry to our juvenile justice system. The JDAI is working nationally to help states use limited public safety dollars more wisely and to understand and attack disproportionate minority contact. As of 2009, approximately 110 localities and 27 states and the District of Columbia were participating in the endeavor. The John D. and Catherine T. MacArthur Foundation’s Models for Change, started in 2007, has also been working to address the issues. The W. Haywood Burns Institute for Juvenile Justice Fairness and Equity (BJI) has been involved in more than 40 jurisdictions across the country to develop institutional responses and reconsideration of policy and practice. The National Council of Juvenile and Family Court Judges’ School Pathways to the Juvenile Justice System Project recently launched a 16-site project designed to assist counties across the country in mapping how school-based cases reach our court system. In 2012, retired Chief Judge Judith Kaye, of the New York Court of Appeals, convened a national summit, “Keeping Kids in School and Out of Court” to address school-to-prison pipeline issues.

The Office of Civil Rights and the Department of Education statistics, documenting the racial disparities and rates of school suspension and court referral, were focal points of discussion. Forty-eight states and the territories sent multidisciplinary delegations. Strength-based alternatives to zero tolerance, including positive behavioral support, emotional supported learning, restorative justice, and positive youth development were presented. Collaborative systemic partnerships between schools, police, advocates, and juvenile courts designed to divert cases and provide alternatives to legal processing were also featured. A positive example in this context is Judge Steven Teske’s Clayton County, Georgia, School Offender Protocol, sponsored by the JDAI, which developed a memorandum of understanding that allows for communication between school resource officers and educators prior to an arrest being made.

States are also rethinking school suspension and expulsion policies. Given the 2008 fiscal crisis, many jurisdictions have realized that community-based treatment alternatives are more affordable than costly incarceration that has not reduced recidivism. It is important to be smart on crime. The adult sanctioning model in schools and juvenile justice is inconsistent with what we know about adolescent development. It is also inconsistent with the message of proportional accountability articulated in Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 132 S. Ct. 2455 (2012). The American Bar Association and the American Psychological Association (APA) have challenged the use of zero tolerance. In 2008, for example, the APA issued a policy statement questioning the use of zero tolerance policies as not being consonant with what we know about adolescent development. (APA Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations, 63 AM. PSYCHOLOGIST 852 (2008).) Accountability is important, but zero tolerance becomes intolerance when educators and jurists sanction in a way that is not proportionate.
The recriminalization process has also affected adolescents in the child welfare system. A significant percentage of youth who are status offenders in our child welfare system are also involved in the juvenile justice system. These “crossover” youth who have both civil and criminal contact with the court are more likely to be female, children of color, truant, and/or lower performing in school than the general population. (Lorrie Lutz & Macon Stewart, Georgetown Univ. Ctr. for Juvenile Justice Reform, Crossover Youth Practice Model (2007), available at http://cjjr.georgetown.edu/pdfs/cymp/cymp.pdf.) One Arizona study found that 73 percent of the state’s dependent children who were in the care of the child protection agency had contact with the juvenile justice system as well. (Gregory J. Halembe et al., Nat’l Ctr. for Juvenile Justice, Arizona Dual Jurisdictional Study: Final Report (2004), available at www.ncj.org/pdf/azdual_juri.pdf.) Forty-nine percent of those dependent children were placed on probation, and 51 percent had been detained at some time, even if only briefly. (Id. at 11.) In addition, dependent children referred to the juvenile court were twice as likely to recidivate as the general delinquency population. (Id. at 30.) Similarly, in Massachusetts, 38 percent of all youth held and 58 percent of female youth held in secure detention by the Department of Youth Services were involved with the state’s child protection services. (Citizens for Juvenile Justice, Unlocking Potential: Addressing the Overuse of Juvenile Detention in Massachusetts 12 (2014), available at http://tinyurl.com/pkhtu5q.) Georgetown University’s Center for Juvenile Justice Reform has made recommendations to address the unique issues faced by crossover youth. (Larry Brown, Georgetown Univ. Ctr. for Juvenile Justice Reform, Bridging Two Worlds: Youth Involved in the Child Welfare and Juvenile Justice Systems 19–25 (2008), available at http://tinyurl.com/mawzcbd.) These recommendations include the reauthorization of the JJDPA and phasing out the use of VCOs to criminalize status offenders. (Id.)

The use of the VCO has also had a disparate impact on marginalized youth. While females constitute only 28 percent of petitioned delinquency cases, adolescent girls comprise a significantly higher percentage of all classes of status offenders. (Sarah Hockenberry & Charles Puzzanchera, Nat’l Ctr. for Juvenile Justice, Juvenile Court Statistics 2011 at 9 (2014), available at www.ncj.org/pdf/jcsreports/jcs2011.pdf.) Girls made up 53 percent of runaways, 45 percent of truants, and 43 percent of “ungovernables,” as well as 39 percent of alcohol violations and 32 percent of curfew violations. (Id. at 71.) In every category of status offense, the number of female offenders was greater than their average percentage of the delinquency population. (Id.) Similarly, 32 percent of girls committed in the juvenile justice system were committed to youth authorities as the result of technical violations or status offenses, while only 17 percent of the boys were committed for such infractions. (Francine T. Sherman, Reframing the Response: Girls in the Juvenile Justice System and Domestic Violence 18 Juv. & Fam. Just. Today, no. 1, Winter 2009, at 16.)

The numbers are particularly troubling given the context of the often violent and dangerous households from which many runaway girls flee. (Id.) Girls, who are more likely to be the victims of physical and sexual abuse, are being detained for violating court orders not to run away again from these destructive environments. (Alecia Humphrey, The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders, 15 Hastings Women’s L.J. 165 (2004).) Similar scenarios apply in cases of sexual exploitation. (Id.) Data from an American Correctional Association study indicates that of the females in juvenile correctional facilities, 61 percent had experienced physical abuse and 54 percent had experienced sexual abuse. (Media Chesney-Lind & Lisa Pasko, The Female Offender: Girls, Women and Crime 24 (1997).) The VCO has also had an adverse racial impact, with youth of color being detained at higher rates than their white peers. Whites and Hispanics account for the vast majority of status offenses. In 2011, 17 percent of white juveniles and 16 percent of juveniles who belonged to racial minorities were detained on technical violations of probation and violations of VCOs. (Sarah Hockenberry, Juveniles in Residential Placement, 2010 at 12, OJJDP (June 2013), available at http://www.ojjdp.gov/pubs/241060.pdf.) Despite the relative number of offenders, African Americans were 269 percent more likely to be arrested for truancy than their white peers. (Policy Brief, supra, at 3.) The same racial disparities that occur in the juvenile justice system are reflected in the application of VCOs and other technical probation violations. (Id.)

Action can be taken to address these disconcerting trends, as there are ways to limit the number of youth detained for minor, often noncriminal, conduct. The JJDPA was last reauthorized in 2002 and has been due for reauthorization since 2007. In 2009 and 2010, versions of reauthorization provisions were passed in both houses of Congress, but no action has been taken on either bill. (Juvenile Justice and Delinquency Prevention Act, H.R. 6029, 111th Cong. (2010); Juvenile Justice and Delinquency Prevention Act, S. 678, 111th Cong. (2009).) Both the House and Senate bills include a three-year phaseout of the VCO provision, with a one-year hardship exception should a state qualify. The proposed modification would prevent any new status offenders from being detained during the three-year phaseout and would limit detention of status offenders to a seven-day holding period. In February 2014, a new bill that would end the detention of status offenders with the complete reauthorization of the JJDPA was filed, but action has not been taken. (Prohibiting Detention of Youth Status Offenders Act, H.R. 4123, 113th Cong. (2014).) There is a consensus among major juvenile justice organizations and prominent jurists in favor of the reauthorization of the JJDPA and the repeal of the VCO. However, while the reauthorization legislation has not been acted on, Congress has effectively eliminated the Juvenile Accountability Block Grants (JABG) Program. The JABG program is a federal initiative designed to aid state and local juvenile justice systems. The program’s budget allocation has been reduced by 90 percent since 2002. (Karolisyn, supra.) As federal juvenile justice dollars decline, states have less incentive to comply with the JJDPA mandates, and some have opted out from the law’s requirements altogether (e.g., Wyoming). (Hockenberry &...
This process creates the opportunity for states to criminalize status offense conduct such as truancy. Private initiative to avoid VCO include the Vera Center on Youth Justice’s Status Offense Reform Center. This MacArthur Foundation-supported project helps educate and initiate community-based services for juveniles who face status offenses by steering them to programs that will keep them away from the juvenile court system. (Annie Salsich & Jennifer Trone, *From Courts to Communities: The Right Response to Truancy, Running Away, and Other Status Offenses*, VERA, 2–9 (Dec. 2013), available at http://tinyurl.com/oyrccnj.)

There are, of course, arguments to be made in support of the VCO. For example, some judges are understandably frustrated by the inability to keep a child safe who is engaging in risky behaviors such as substance abuse or running away. In such circumstances, even in states where the VCO is not used, children have been detained or held on bail. While the ostensible purpose of bail is to ensure court appearance or to address allegations of dangerousness, safety concerns have resulted in detention orders for children who judges believe cannot be securely detained in the child welfare system. The practice, however, can lead to the slippery slope of pre-adjudicatory best-interest determinations that harken back to *Gault*. Washington’s Becca Bill is a classic example of the safety concern and the unintended consequences of net widening as the result of the wide-scale application of the VCO.

The 1995 Becca Bill (Wash. Rev. Code ch. 13.32A) is named after Rebecca Hedman, who was murdered while living on the streets. At the time of her death, she was 13 years old, engaged in prostitution, and abusing drugs, and had been on the run from her therapeutic group home. (Kery Murakami, *Would “Becca Bill” Have Saved Becca?*, SEATTLE TIMES, June 23, 1995.) The law enables parents to seek an “at-risk youth petition,” which is a valid court order prohibiting teens from running away from home, once a child has been on the run for 72 hours. A child who then runs again in violation of the court order can be detained under the VCO exception of the JJDPAct. Significantly, the legislation also created new truancy reporting requirements for local schools that increased the truancy case load in the state from 91 children in 1994 to 16,236 in 2007. (Id.) This widens the net of the juvenile justice system by greatly expanding the reach of the VCO and the number of youth subject to secure detention.

Locking up children for not going to school criminalizes truancy and begs the question of whether this solves the problem of providing them with an education. Detention for any reason is traumatizing, and holding children for even brief periods compromises successful reentry to school and increases dropout rates, which in turn greatly compromises public safety. (*ARRESTED FUTURES*, supra.) In 2011 alone, Washington reported detaining 2,461 status offenders under the VCO as a result of the Becca Bill. (Coalition of Juv. Just. Safety: Opportunity and Success Project, *Use of the Valid Court Order, State-by-State Comparisons* (2013) at 1 available at http://tinyurl.com/nthhd88.) Rebecca Hedman’s case is beyond tragic, but the scope of the legislative response is concerning. The case raises provocative questions that often arise in juvenile sessions. There are no panaceas for such complicated family and systemic issues, but it seems that the primary response and focus should be in the child welfare system, including the development of staff secure programs.

Even in states that do not utilize the VCO, detention decisions are often crafted that implicate conditions of release that are status offense-like in nature, such as “attend school without incident.” (*See, e.g.*, Jake J. v. Commonwealth, 740 N.E.2d 188 (Mass. 2000).) The outcome of this practice is the functional equivalent of the VCO. The unintended consequences of using the VCO in broader contexts or detaining youth pretrial may be motivated by well-intentioned rehabilitative impulses. However, these practices criminalize what is often normative adolescent behavior.

**Conclusions**

If the pendulum of juvenile justice is to find equilibrium, we have to consider the criminalization of status offense conduct in all contexts. In 1980, the Institute of Judicial Administration and the American Bar Association published the IJA-ABA Juvenile Justice Standards. One of the standards that was not adopted called for the abolition of status offense jurisdiction nationwide. The history and use of the VCO provides traction for this argument. (*See, e.g.*, Merril Sobie & John D. Elliott, *The IJA-ABA Juvenile Justice Standards: Why Full Implementation Is Long Overdue*, 29 CRIM. JUST., no. 3, Fall 2014, at 24.) However, abolition might lead to a “beware of what you wish for” scenario, as states may impose status offense conditions in other contexts, including conditions of release and conditions of supervision. Reauthorization of the JJDPAct and repealing the VCO are prudent first steps to ensure that youth are not detained for normative adolescent behavior. Strategies concerning deconstructing the school-to-prison pipeline have to be expanded beyond the implementation of school policies and use of police. To attack the cradle-to-prison pipeline, we have to soberly address access to public education, the realities of geographic segregation, and implicit and explicit bias.

Criminalizing status offense conduct has compromised public safety and disproportionately affected our most vulnerable populations. “The juvenile justice system has become the default system—the warehouse—for low-risk, high-need youth.” (Bell & Marisical, supra, at 124.) Due process is perhaps our most potent antidote. In striking down the application of criminal sanctions for a curfew ordinance against minors, the Massachusetts Supreme Judicial Court concluded that the practice was illegal, as it criminalized status offense conduct. (*Commonwealth v. Weston*, 913 N.E.2d 832 (Mass. 2009).) The court observed, that “[s]tatus offenses such as being abroad at night may not be ‘bootstrapped’ into criminal delinquency.” (*Id. at 846.*) This case should be cited whenever detention determinations are being made or conditions of release are requested. If we are to redress current patterns and realize *Gault*’s promise, thinking about fundamental fairness is necessary. We must also be wary of unnecessary state intervention that entangles youth and families in our juvenile and child welfare systems. In this context our version of the Hippocratic Oath should be “Do as little harm as possible.”
On November 1, 2013, James and George (not real names) were cellmates in a federal prison. They committed the same crime of possession with the intent to distribute cocaine base (crack). They had the same criminal record of minor drug offenses. They were determined to have caused the same minimal harm to society and to pose the same minimal risk upon release. While sharing a cell, they eat their meals at the same time, they sleep at the same time, and they exercise at the same time. It may seem as if they are serving the same time, but they are not. James was convicted in 1999 and was sentenced to life in prison. George was convicted in 2013 and was sentenced to five years. George will leave prison in roughly three to four years, while James will leave in a pine box.

James has already served more time than George will. During his sentencing, James’s lawyer asked the judge to depart from the draconian guidelines to give James an individualized sentence reflecting the nonviolent offense for which he was convicted. At the time of his sentencing, the US Sentencing Guidelines were mandatory. Consequently, James was sentenced without consideration of mitigation that would be allowed today. James has exhausted his appellate rights, including challenging the constitutionality of disparate impact of the law on his sentence. His only hope for relief is commutation, rarely given under Article II of the US Constitution. Without action by the president of the United States, James will die in prison.

Changes in federal sentencing reducing the amount of time George received for conviction as a nonviolent offender do not inure to James’s benefit because they are not retroactive. Consequently, James and George received disparate sentences for the same crime. James is one of the thousands of nonviolent offenders serving a longer prison term because laws enacted after his conviction do not apply retroactively to
his case. According to the Department of Justice, the United States incarceraes one-fourth of the world’s prisoners. Over the last 30 years, the United States has increased its prison population by 800 percent. The Bureau of Prisons operates at 33 percent over capacity. More than half of those in prison are incarcerated for drug offenses.

On January 30, 2014, while addressing the New York State Bar Association, Deputy Attorney General (AG) James Cole announced the Clemency Initiative. According to Cole, the exercise of this Article II power (to reduce the sentence of a person convicted) was described by President Obama as an “important step toward restoring fundamental ideas of justice and fairness.” Deputy AG Cole asked the bar to assist potential candidates in assembling effective and appropriate commutation petitions.

On April 23, 2014, Cole announced the criteria under which the petitions would be evaluated. The candidates must be inmates who: (1) are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today; (2) are nonviolent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels; (3) have served at least 10 years of their sentence; (4) do not have a significant criminal history; (5) have demonstrated good conduct in prison; and (6) have no history of violence prior to or during their current term of imprisonment.

In response to Deputy AG Cole’s request, the American Bar Association, the American Civil Liberties Union, Families Against Mandatory Minimums, Federal Public and Community Defenders, and the National Association of Criminal Defense Lawyers joined together under a working group called Clemency Project 2014. Through the efforts of the project, the participating organizations are identifying clemency petitioners and recruiting and training volunteers to assist them in securing clemency.

Clemency Project 2014 set up an infrastructure wherein the applicants could elect to receive assistance through an electronic survey administered through the Bureau of Prisons beginning May 5, 2014. In the first two weeks following release of the survey, more than 18,000 people applied. Lawyers from across the country volunteered to be involved in Clemency Project 2014. And on July 15 and 16, 2014, Clemency Project 2014 provided training via webinar to the first 500 volunteer lawyers. Since then, the training has been revised based on feedback from the lawyers and is now available by video on-demand. As of today, more than 1,500 lawyers have volunteered to help.

Clemency Project 2014 created a website, https://clemencyproject2014.org/, that has over 50 reference documents for lawyers, including memoranda of law, sentencing guideline updates, and forms for use in evaluating an applicant for clemency. There is no requirement that a lawyer have experience in criminal law. Resource counselors are available to answer questions for lawyers screening applicants. Everything a lawyer needs to prepare a petition can be found in the resource materials, which can be accessed after a lawyer is assigned an applicant.

The Lawyers’ Committee for Civil Rights Under Law agreed to recruit and assist with large firm participation in Clemency Project 2014. By December 2014, more than 26,000 inmates applied for assistance from the clemency project and more than 50 large firms agreed to help, along with 19 law schools and nearly 400 small firms and solo practitioners. Lawyers have been assigned cases and are already actively collecting records and evaluating applicants under the criteria announced by Deputy AG Cole. Petitions are already being submitted.

After a lawyer completes an evaluation, a screening committee reviews the executive summary submitted by the lawyer. If the applicant meets the criteria, the screening committee recommends that a petition be drafted for the applicant. The recommendation is reviewed by the steering committee, and, upon approval, a petition is prepared. The final petition is sent to the US Department of Justice’s Office of Pardon Attorney for review and submission to the president.

On December 17, 2014, President Obama commuted the sentences of eight federal prisoners. These grants of clemency mark the first since Deputy AG Cole announced the initiative in January 2014. On March 31, 2015, the president granted 22 additional clemency petitions.

Some may ask whether Clemency Project 2014 remains viable in view of the departure of Deputy AG Cole and the impending departure of AG Eric Holder. The answer is absolutely! The American Bar Association and other participating agencies remain committed to providing to every qualified applicant a lawyer, free of charge, to assist with petitioning for clemency. Clemency Project 2014 continues to recruit lawyers to assist applicants with clemency and fully expects the president to continue to consider and grant clemency to applicants who meet the criteria.

In his April 23, 2014, remarks announcing the Clemency Initiative, Deputy AG Cole noted that President Obama said many of those who qualify under the criteria “would already have served their time and paid their debt to society” if sentenced under current law. “For our criminal justice system to be effective,” Cole remarked, “it needs to be not only fair, but it must also be perceived as being fair. These older, stringent punishments that are out of line with sentences imposed under today’s laws erode people’s confidence in our criminal justice system.” Clemency Project 2014 seeks to restore fundamental ideas of fairness and justice.

To volunteer for Clemency Project 2014, go to https://clemencyproject2014.org/ref/training.aspx to sign up. Lawyers must review the on-demand training and complete a survey, after which an applicant will be assigned to a lawyer and the process begins. Current Criminal Justice Act (CJA) panel attorneys are exempt from training and may receive an assignment once they sign up.

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May Practicing Prosecutors Ethically Run for Judgeships?

BY J. VINCENT APRILE II

In Dallas and San Antonio, Texas, as well as in Louisville, Kentucky, some chief prosecutors are allowing their assistant prosecutors to remain employed while actively campaigning for judicial positions, often running against judges who preside over their cases. These examples, while not necessarily exhaustive, illustrate the issue: Is it ethically permissible for a lawyer to continue employment as a prosecutor while running for election as a judge? Is such a dual role a conflict of interest?

Every lawyer is required by the controlling ethics rules to monitor his or her own situation to avoid conflicts of interest generated by the lawyer’s personal interests. “A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.” (Model Rules of Prof’l Conduct R. 1.7(a)(2) (emphasis added.)) This precept applies equally to prosecutors, who face the significant risk that a conflict will materially limit the prosecutor’s duties and responsibilities. “Concurrent conflicts of interest can arise . . . from the lawyer’s own interests.” (Id. R. 1.7 cmt. [1].) A prosecutor’s interests can create an actual conflict of interest that impairs the ability to act ethically. “A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.” (ABA Standards for Criminal Justice: The Prosecution Function § 3-1.3(f) (3d ed. 1993).)

A prosecutor running for a judgeship has personal, political, and often financial interests generated by the desire to be elected to a judicial position. For example, often the judgeship being sought will carry a much greater salary than the prosecutor’s present salary and better retirement and insurance benefits. This, for some, is an obvious incentive to run.

When running for a judgeship, an assistant prosecutor’s decisions in each individual case are subject to greater scrutiny by the media and the opposing campaign. When deciding whether to prosecute a defendant, to grant diversion, to amend charges, to offer a plea agreement, or to concede a suppression motion, or how to resolve a multitude of other issues, the assistant prosecutor, consciously or subconsciously, cannot avoid considering how the decision could impact his or her judicial campaign. Contributions to a prosecutor’s judicial campaign by defense lawyers who have or will have cases involving the prosecutor/candidate raise the specter of yet another personal conflict of interest. Defense counsel who do not contribute to the prosecutor’s judicial campaign may feel discriminated against when contributing attorneys appear to obtain better case resolutions. A San Antonio judge in July 2013 concluded, “It is inherently a conflict when [prosecutors] are giving lawyers plea bargains at the same time [they] are asking for money or asking for a vote.” (Brian Chasnoff, Judges upset that prosecutors are running against them, San Antonio Express-News, July 19, 2013, http://tinyurl.com/okx22w6.)

“Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action . . . will be materially limited as a result of the lawyer’s other responsibilities or interests.” (Model Rules of Prof’l Conduct R. 1.7 cmt. [8].) These conflicts facing a prosecutor/judicial candidate, when analyzed under national prosecutorial standards, would appear to preclude prosecutors running for judicial positions. “A prosecutor should not hold an interest or engage in activities, financial or otherwise, that conflict, have a significant potential to conflict, or are likely to create a reasonable appearance of conflict with the duties and responsibilities of the prosecutor’s office.” (Nat’l Dist. Attorneys Ass’n, National Prosecution Standards § 1-3.1 (3d ed. 2009).)

Whether a potential or actual conflict, or only the appearance of a conflict of interest, a prosecutor’s judicial campaign can adversely impact the perception by participants in the criminal justice system and the general public of the candidate as a fair and impartial prosecutor. Those perceptions have the potential to undermine not only the integrity of the prosecutor/candidate, but also the criminal justice system. “The prosecutor is an independent administrator of justice.” (Id. § 1-1.1.) These apparent conflicts generated by the dual role of prosecutor and judicial candidate undermine that standard of professional responsibility.

Even when a prosecutor opts to campaign for an upcoming open judicial seat, these ethical conflicts remain though no sitting judge is the opposing candidate in the election. An office policy allowing a prosecutor to run for a judicial position with no incumbent candidate does not avoid these ethical problems.

When confronted by evidence of a miscarriage of justice that occurred in one of his or her cases, any prosecutor is understandably faced with concerns that rectifying the erroneous conviction will undermine the prosecutor’s
own professional reputation as well as reflect adversely on others who were involved in pursuing the charges in question, such as police officers and members of the prosecutor’s office. This apparently has been a significant impediment in the past for some prosecutors faced with the realization that an injustice happened in one of their cases. However, this type of anxiety and concern will be much greater for a prosecutor who knows that acting to remedy the injustice may cause voters to question his or her competence as a prosecutor, undoubtedly one of the marketing points in a judicial candidate’s election campaign. Additionally, seeking to correct the injustice may alienate individual police officers, the police department, and the local police association, whose endorsements the candidate wants to obtain or retain. Ethically, a prosecutor has a “specific obligation[] to see . . . that special precautions are taken to prevent and to rectify the conviction of innocent persons.” (Model Rules of Prof’l Conduct R. 3.8 cmt. [1].)

From another perspective, such an opportunity to undo an injustice could be seen by voters as evidence of the judicial candidate’s integrity and commitment to justice—excellent attributes for a judge. The problem is that although rectifying such a wrong could be beneficial to the prosecutor’s judicial campaign, it could just as easily be a detriment. That very dilemma creates at least a potential conflict of interest for the judicial candidate functioning as a prosecutor.

If the goals of both the judge and the prosecutor are in actuality the same, does this eliminate any real possibility of a conflict of interest arising out of the dual roles of prosecutor and judicial candidate? Even though both a prosecutor and a judge have similar obligations to seek justice, a prosecutor is an advocate, but a judge is never permitted to be an advocate for one or more of the parties. A prosecutor’s ability to seek justice occurs in a context dramatically different from that of a judge, making conflicts of interest between the roles of prosecutor and judge not only possible, but probable.

When a government office permits its prosecutors to remain employed while running for a judgeship, the office is effectively subsidizing the employee’s campaign against a judge who is presiding over many of the office’s criminal cases. Such a situation has the potential to create enmity or its appearance between the incumbent judge and the prosecutor’s office. As a Dallas judge said in 2013, “It puts a chill on justice if the DA is picking judges to target just because he doesn’t like the way they run their court or their attitude toward prosecution policies.” (Jennifer Emily, Dallas DA accused of pushing prosecutors to run against judges, Dallas Morning News, Oct. 7, 2013, http://tinyurl.com/nukzuq3.) A judge facing an election challenge from a local prosecutor will often feel deliberately attacked by that prosecutor’s office, regardless of the accuracy of that assessment. It does not matter whether the chief prosecutor has recruited or otherwise encouraged staff prosecutors to run for judgeships or whether the office simply wants to help the judicial candidates by allowing them to keep their jobs while campaigning. The situation itself is a breeding ground for tension and hostility between the judge and the prosecutor/candidate as well as the prosecutor’s office.

Cognizant of the inherent ethical and perception problems, many prosecution offices across the country have office policies prohibiting their prosecutors from running for judicial office or requiring that they resign if they decide to become candidates. Nationally, many public defender programs have similar restrictions on their defense lawyers who wish to seek judicial office. This type of policy restriction is consistent with the ethical principle that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” (Model Rules of Prof’l Conduct R. 5.1(b); see ABA Comm. on Prof’l Ethics & Responsibility, Formal Op. 467 (Sept. 8, 2014) (discussing managerial and supervisory obligations of prosecutors under Rules 5.1 & 5.3).)

Obviously, no ethical issues arise when a prosecutor resigns and runs against an incumbent judge, regardless of how recently or frequently the ex-prosecutor had been before the judge. The conflicts of interest are simply not present in that scenario.

A prosecutor who remains on staff while campaigning for a judgeship faces significant ethical dilemmas generated primarily by the conflicting roles of prosecutor and judicial candidate. These conflicts appear to preclude the practice under any circumstance, and require prosecutor’s offices to enact policies to prohibit prosecutors while employed by the office from running for judicial positions. ■
Innocent Man’s Journey Back after Getting Life

BY ALEXANDER BUNIN

Imagine a young husband and father who works and lives peacefully in a quiet town, coming home one day to a crime scene where he learns his wife has been brutally murdered in front of their young son. Local law enforcement has no suspect.

In the days thereafter, the distraught man talks to the sheriff, but avoids media attention. He first accepts an offer to be polygraphed, but cancels when officials tell him his 6:00 p.m. appointment will drag on until after midnight.

[The sheriff] was incensed. . . . He pleaded with me to reconsider. But nothing he said mattered to me. I was tired of his swagger. I was tired of his gun belts and his bravado. I was tired of his cowboy hat. I was tired of the unprofessionalism, of always having to make allowances for what he needed. I was tired of him treating me as if I’d killed [my wife.] And on top of everything else, I was just tired. . . . I left with my friends. And after that night, everything changed.

Although never before accused of a crime, with no witness and no physical evidence identifying him as the killer, the young father becomes the sole suspect. Ultimately, he will be convicted of murder and spend 25 years in prison. He lost his wife, the ability to raise his son, and much of his own life—yet he is an innocent man.

This happened to Michael Morton, whose new book, Getting Life: An Innocent Man’s 25-Year Journey from Prison to Peace (Simon & Schuster 2014), is the type of clear and unadorned storytelling by someone who learned the craft from countless hours of reading. By the second chapter, it builds momentum and never again slows down. From accusation to exoneration, it holds a reader’s attention.

The book takes place mostly in Williamson County, Texas, just north of Austin. A narrow-minded sheriff and an ambitious prosecutor combined to build a case against the innocent 32-year-old man. While they may have believed he killed his wife, Christine, their certainty and willingness to manipulate evidence guaranteed injustice. In a statement to a therapist, Morton’s three-year-old son described a “monster” who came to the house and attacked his mother. Asked if his father was present, the child said “no.” A bloody bandana found near the house would indisputably identify the real murderer, but it wasn’t tested until 25 years later. Both items were withheld from the defense.

Many years later, a team of lawyers worked to exonerate Morton. Barry Scheck (who wrote the book’s foreword), Gerry Goldstein, and Cynthia Orr (Criminal Justice Section chair) are all nationally renowned criminal defense attorneys. John Raley, a civil attorney from Houston, and Nina Morrison of the Innocence Project spent years accumulating the case for innocence and endured many obstacles before victory.

One of those obstacles was Ken Anderson, the overzealous prosecutor who later became a Williamson County district judge. During the post-conviction proceedings, the district attorney and Anderson’s protégé, John Bradley, fought hard against any reexamination of the case. He resisted the attempts to have the bloody bandana tested. When it became clear that Morton would win, Bradley offered immediate release, but only if Morton would absolve the county of wrongdoing. Morton refused, despite knowing that he would remain in prison and that victory was still uncertain.

Morton’s willingness to wait for justice resulted not only in his freedom, but a reckoning for Ken Anderson. In a rare proceeding called a court of inquiry, Anderson was tried for criminal contempt. The special prosecutor was Rusty Hardin, famous for defending Roger Clemens and Adrian Peterson. Hardin was once the most feared and respected prosecutor in Harris County. He had no sympathy for Anderson’s failure to follow the law. Anderson was convicted and disbarred, but spent less than a week in jail.

The book makes two important points. First, anyone can be falsely accused of a crime. Morton was a white man with a good job and family, and had never been in trouble before. He did not confess. He was represented by excellent trial lawyers. There was no mistaken eyewitness testimony. There was simply a blind faith by law enforcement and prosecutors in which the ends were thought to justify the means.

Second, when the innocent are convicted, the guilty go free. Testing of the bandana conclusively proved the presence of DNA from Mark Norwood, a man who had committed similar burglaries and assaults. By the time of Morton’s exoneration, Norwood had murdered Mildred McKinney in a manner chillingly resembling his killing of Christine Morton. He matched the description provided by Morton’s son. Had the investigation not stopped with Michael Morton, McKinney might still be alive.

One surprise for readers will be Morton’s lack of animosity toward anyone associated with his (continued on page 50)
Supreme Court Cases of Interest

BY CAROL GARFIEL FREEMAN

The most significant case granted review in this period is Glossip v. Gross, No. 14-7955, challenging Oklahoma’s lethal injection protocol. The case will be argued in April, and should be decided before the end of the Term in June. Before cert was granted, the Court denied a stay of execution to one of the petitioners, over the dissents of four justices. (Warner v. Gross, 135 S. Ct. 824 (Jan. 15, 2015) (No. 14A761.) After cert was granted, both the state and petitioners sought and obtained a stay of execution for the remaining petitioners. (Glossip v. Gross, 135 S. Ct. 1197 (Jan. 28, 2015).) Florida and perhaps other states have put executions on hold pending the decision in Glossip.

In the most interesting decided case, the Court unanimously upheld the right of a Missouri state prisoner to grow a short beard in accordance with his religious faith. (Holt v. Hobbs, infra.)

Several dissenting opinions from denials of cert are worth mentioning. Justices Thomas and Scalia dissented in a case involving the presumption of vindictiveness when a greater sentence is imposed after a new trial. (Plumley v. Austin, 135 S. Ct. 828 (Jan. 20, 2015) (No. 14-271).) Justices Kagan, Ginsburg, and Breyer dissented in a case involving the issues that can be raised on an appeal. (Joseph v. United States, 135 S. Ct. 705 (Dec. 1, 2014) (No. 13-10639).) Justice Sotomayor, with whom Justice Breyer joined, wrote separately to explain their votes to deny cert in a case in which the petitioner had not received counsel in his state habeas proceedings because it was not clear that he has been totally denied access to the courts. (Redd v. Chappell, 135 S. Ct. 712 (Dec. 1, 2014) (No. 14-6264).) Finally, Justice Scalia, joined by Justice Thomas, dissented from the denial of cert in a case involving the deference a court owes to an executive agency’s interpretation of a law involving both criminal and administrative enforcement. (Whitman v. United States, 135 S. Ct. 352 (Nov. 10, 2014) (No. 14-29).)

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CERTIORARI GRANTED

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

Capital Cases


II. Whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his mental retardation has denied petitioner his “opportunity to be heard,” contrary to Atkins and Ford v. Wainwright, 477 U.S. 399 (1986), and his constitutional right to be provided with the “basic tools” for an adequate defense, contrary to Ake v. Oklahoma, 470 U.S. 68 (1985).


In Baze v. Rees, 553 U.S. 35 (2008), the Court held that Kentucky’s three-drug execution protocol was constitutional based on the uncontested fact that “proper administration of the first drug”—which was a “fast-acting barbiturate” that created “a deep, comalike unconsciousness”—will ensure that the prisoner will not experience the known pain of suffering from the administration of the second and third drugs, pancuronium bromide and potassium chloride. Id. at 44.

The Baze plurality established a stay standard to prevent unwarranted last-minute litigation challenging lethal-injection protocols that were substantially similar to the one reviewed in Baze; a stay would not be granted absent a showing of a “demonstrated risk of severe pain” that was “substantial when compared to the known and available alternatives.” Id. at 61.
In this case, Oklahoma intends to execute Petitioners using a three-drug protocol with the same second and third drugs addressed in Baze. However, the first drug to be administered (midazolam) is not a fast-acting barbiturate; it is a benzodiazepine that has no pain-relieving properties, and there is a well-established scientific consensus that it cannot maintain a deep, coma-like unconsciousness. For these reasons, it is uncontested that midazolam is not approved by the FDA for use as general anesthesia and is never used as the sole anesthetic for painful surgical procedures.

Although Oklahoma admits that administration of the second or third drug to a conscious prisoner would cause intense and needless pain and suffering, it has selected midazolam because of availability rather than to create a more humane execution. Oklahoma’s intention to use midazolam to execute the Petitioners raises the following questions, left unanswered by this Court in Baze:

Question 1: Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious.

Question 2: Does the Baze-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in Baze?

Question 3: Must a prisoner establish the availability of an alternative drug formula even if the state’s lethal-injection protocol, as properly administered, will violate the Eighth Amendment?

The Question Presented is:

Whether, to convict a defendant of distribution of a controlled substance analogue, the government must prove that the defendant knew that the substance constituted a controlled substance analogue, as held by the Second, Seventh, and Eighth Circuits, but rejected by the Fourth and Fifth Circuits.

Immigration


Given that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Federal Circuit Courts of Appeals have conclusively and affirmatively held that they have jurisdiction over denials by the Board of Immigration Appeals of requests to equitably toll motions to reopen, the question presented is:

Whether the Fifth Circuit Court of Appeals erred in this case in holding that it has no jurisdiction to review Petitioner’s request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel under 8 C.F.R. § 1003.2(c)(2).

[Editor’s Note: In its brief, the government agreed with petitioner that the Fifth Circuit erred in holding that it had no jurisdiction to review ordinary]
the petitioner’s request, and concluded that the case should be remanded for further proceedings. In granting cert, the Court appointed an attorney as amicus to brief and argue in support of the Fifth Circuit’s decision.]

Related Civil Cases


Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.


1. Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.

2. Whether it was clearly established that even where an exception to the warrant requirement applied an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.

**DECIDED CASES**

**Capital Cases**

**Christeson v. Roper**, 135 S. Ct. 891 (Jan. 20, 2015) (No. 14-6873). The Court, per curiam, granted cert and summarily reversed a decision that had denied substitute appellate counsel to a prisoner whose first appellate counsel had missed the deadline for filing his first federal habeas petition. Counsel could not argue their own ineffectiveness, and thus substitute counsel should have been appointed under **Martel v. Clair**, 132 S. Ct. 1276 (2012). Appointed counsel had miscalculated the date for filing under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(1) and indeed did not meet with Christeson until several weeks after the petition had been due. The petition was filed late and dismissed; a certificate of appealability was denied. Several years later, the first attorneys contacted other lawyers for advice on how to proceed. The remedy was a motion under Federal Rule of Civil Procedure 60(b), arguing that the AEDPA limitation should have been equitably tolled because of the first counsel’s inexcusable failure to file the petition on time. Two motions by the new lawyers for substitution of counsel were denied. The per curiam opinion observes that federal law entitles indigent defendants to the appointment of counsel in capital cases and that a court may appoint substitute counsel on motion. (18 U.S.C. §§ 3599(a)–(d).) In **Martel**, the Court held that such a motion should be granted when it is “in the interests of justice.” Here, the district court failed to recognize the serious conflict of interest that the first counsel had. AEDPA’s statute of limitations based on counsel’s negligence should be tolled “only for ‘serious instances of attorney misconduct.’” (Holland v. Florida, 560 U.S. 631, 651–52 (2010).) Such an argument would reflect adversely on the professional reputation and livelihood of the attorneys, and thus should be made by substitute counsel. Substitute counsel will still be required to demonstrate that Christeson qualifies for equitable tolling. The case was remanded to the court of appeals for further proceedings. Justice Alito, joined by Justice Thomas, dissented, concerned that the facts in the record showed simple attorney error, not the egregious error that would justify equitable tolling, and arguing that the case should not have been reversed without briefing and argument.

**Jennings v. Stephens**, 135 S. Ct. 793 (Jan. 14, 2015) (No. 13-7211). Jennings’s federal habeas petition was granted by the district court on the ground that his lawyer failed to present mitigating evidence in his background and had failed to review case files from his prior convictions that would have shown mild retardation and organic brain damage. The case of **Wiggins v. Smith**, 539 U.S. 510 (2003), held that such failures could constitute ineffective assistance of counsel. The court rejected Jennings’s alternative argument that his lawyer had violated **Smith v. Spisak**, 558 U.S. 139 (2010), when he stated during summation that he “could not ‘quarrel with’” a death sentence. The court directed that Jennings be released unless within 120 days he was granted a new sentencing hearing or was resentenced to a term of imprisonment. The state appealed the grant of habeas. Jennings did not file a cross-appeal, but, in addition to supporting the judgment on the **Wiggins** grounds, argued in the court of appeals that the district court had erred in rejecting his **Spisak** claim. The court of appeals reversed on the **Wiggins** issues but did not reach the **Spisak** issue because Jennings had not filed a separate appeal. The Supreme Court held that a habeas petitioner who prevails in the district court on one ground does not have to file a cross-appeal or seek a certificate of appealability under 28 U.S.C. § 2253(c) to argue on appeal that the trial court
Crimes and Offenses

Whitfield v. United States, 135 S. Ct. 785 (Jan. 13, 2015) (No. 13-9026). In an unanimous opinion by Justice Scalia, the Court held that a person who requires another to move from one place to another, even for a short distance, in the course of a bank robbery, “forces [the] person to accompany him without the consent of such person,” and is subject to the additional penalty authorized by 18 U.S.C. § 2113(e). Whitfield, escaping from a botched bank robbery, entered the home of 79-year-old Mary Parnell and “guided her” from a hall into a computer room a few feet away. Parnell suffered a heart attack and died. The Court rejected Whitfield’s argument that § 2113(e) requires “substantial” movement. Although the section was passed in 1934 to cover hostage-taking by bank robbers such as John Dillinger, the section has not been changed despite various amendments to other parts of § 2113 and presumably carries its original meaning. The phrase “accompany” does not in itself require substantial movement but includes such activities as accompanying one to the vault or to the altar. However, violation of the statute does require movement of the victim from one place to another, and thus mere movement of a bank teller’s feet during the robbery would not qualify.

Fourth Amendment

Heien v. North Carolina, 135 S. Ct. 530 (Dec. 15, 2014) (No. 13-604). A state officer stopped a car with only one working brake light, believing that state law required two working brake lights. The occupants agreed to a search of the car, which revealed cocaine. Although the trial court found that the faulty brake light provided reason for the stop, an intermediate appellate court concluded that the stop was invalid because state law only required one working brake light. The state supreme court reversed, holding that the statute was sufficiently unclear that the officer reasonably, although wrongly, believed that two lights were required. The Supreme Court affirmed, holding that a reasonable mistake of law may validate a stop under the Fourth Amendment. Prior cases have held that a search may be lawful although based on a reasonable mistake of fact. Reasonable suspicion may also stem from a reasonable mistake of law. Although recent decisions have dealt solely with mistakes of fact, this principle has been recognized in analogous cases interpreting reasonable suspicion involving customs and ship seizure issues going back 200 years. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court upheld an arrest and search based on an ordinance requiring a person to identify himself or herself to police, which was later held unconstitutional. At the time of the encounter, the officer had no reason to doubt that the ordinance was valid, and thus the officer had sufficient probable cause for the arrest, although DeFillippo’s conduct was lawful. The mistake of law that will validate a stop must be objectively reasonable; this does not encourage officers to remain ignorant of the provisions of the laws they are tasked with upholding. Opinion of the Court by Chief Justice Roberts, in which Justices Ginsburg, Breyer, Alito, and Kagan joined. Justice Kagan filed a concurring opinion, in which Justices Kennedy and Alito joined.

Habeas Corpus

Glebe v. Frost, 135 S. Ct. 429 (Nov. 17, 2014) (No. 14-95). The Court, per curiam, granted cert and summarily reversed a decision of the Ninth Circuit that had granted habeas to a state prisoner on the ground that the trial court had wrongly required his lawyer to choose between conflicting theories of defense in closing argument. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal
habeas may be granted to a state prisoner only if the state court’s decision was contrary to or an “unreasonable application” of “clearly established” federal law as determined by the Supreme Court, or an “unreasonable determination of the facts.” Only a rare error that “infects the entire trial process” and “necessarily render[s] [it] fundamentally unfair,” called a “structural” error, warrants automatic reversal. The court of appeals concluded that the relevant Supreme Court case, Herring v. New York, 422 U.S. 853 (1975), held that “complete denial of summation” is a structural error that violates the right to counsel. Assuming that this interpretation is correct, Herring did not hold that mere restriction of summation is a structural error. Moreover, it is not clear that requiring the defense to choose between arguing reasonable doubt and duress essentially required the defense to concede guilt, and it certainly was not a structural error. Because the state court had held the restriction of summation was a trial error under state law, the case was remanded for further proceedings on whether the error was harmless.

Prisoners’ Rights—First Amendment

Holt v. Hobbs, 135 S. Ct. 853 (Jan. 20, 2015) (No. 13-6827). Gregory Holt, a devout Muslim whose religion requires him to grow a beard, challenged as violating his First Amendment rights the Arkansas Department of Corrections’ refusal to permit inmates to grow beards unless they have a dermatological condition. Holt’s offer to compromise with a one-half-inch beard was denied, and he was threatened with disciplinary action if he refused to comply with the institution’s policy. Holt’s pro se cert petition was granted. He obtained counsel for the Supreme Court proceeding, and, after argument, the Court unanimously ruled that the state’s policy violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc et seq., because it “substantially burdened” Holt’s exercise of his religious rights and was not “the least restrictive method of furthering” the state’s “compelling governmental interest.” The Court concluded that the department’s policy preventing Holt from growing a beard was not justified by the fact that he could observe other aspects of his religion, because RLUIPA provides greater protection than cases involving the First Amendment rights of prisoners. RLUIPA applies to a religious practice whether or not it is “compelled” by the religion. Nor did it matter that not all Muslims believe they must grow beards. The department of corrections had the burden of proving that its policy furthered a “compelling governmental interest” and was the “least restrictive means of furthering that interest.” It defended its policy on the ground that prisoners could conceal contraband (SIM cards, razor blades, etc.) in a one-half-inch beard. The Court was skeptical that anything could be concealed in such a short beard (this argument was “hard to take seriously”) and also noted that a better place for concealment would be in clothes or in the longer hair that prisoners were permitted to grow. Searches of the half-inch beards would reveal any contraband hidden therein, and the prisoner could be observed while combing the beard, which would protect officers from any contraband. As to the argument that prisoners could effect escapes or move to other areas of the prison by shaving, the Court noted that photos could be taken of them with and without the beards. Moreover, “the vast majority” of state and federal departments of correction allow half-inch beards for any reason without any problems. If a particular problem arises with a particular prisoner, the institution may question whether the inmate is abusing the privilege in violation of the prison’s compelling interests. Opinion by Justice Alito for a unanimous Court. Justice Ginsburg, with whom Justice Sotomayor joined, filed a concurrence distinguishing this case from Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), on the ground that accommodating Holt’s beliefs “would not detrimentally affect others who do not share” his belief. Justice Sotomayor filed a separate concurrence emphasizing that the state had not shown a “plausible explanation” for its policy based on its experience in prison administration.

Relevant Civil Cases

Carroll v. Carman, 135 S. Ct. 348 (Nov. 10, 2014) (No. 14-212). The Court, per curiam, granted cert and reversed a decision of the Third Circuit that had held a police officer was not entitled to qualified immunity in an action under 42 U.S.C. § 1983. Two police officers had gone to the plaintiffs’ home looking for a wanted man. The house was on a corner lot, with no parking on the front side; the officers parked on a side street. After they looked into a small structure with its door open and a light on, they walked toward the house (apparently on the property). Seeing a glass door that opened onto a deck, they thought this was a “customary entryway” and stepped onto the deck. As they did so, a man came out, and during a confrontation pulled away from the officers, lost his balance, and fell. His wife came out and agreed to a search of the house; the wanted man was not there. In an action alleging that the officers had entered the plaintiffs’ home looking for a wanted man, the court held that the police officer was entitled to qualified immunity, and the Supreme Court reversed. The Court held that the police officers were entitled to qualified immunity because the plaintiffs had failed to show a reasonable belief that the officers violated the Fourth Amendment based on the circumstances of the entry. The Court noted that the officers had a “reasonable belief” that the deck was a “customary entryway” and that the officers had a reasonable basis for believing that the wanted man was inside the house. The Court further noted that the officers had a reasonable belief that the plaintiffs’ search was lawful because the officers had a reasonable belief that the plaintiffs had consented to the search.

In the case of Holt v. Hobbs, the Court noted that the state’s policy violated the RLUIPA because it “substantially burdened” Holt’s exercise of his religious rights. The Court concluded that the department’s policy preventing Holt from growing a beard was not justified by the fact that he could observe other aspects of his religion. The Court also noted that searches of the half-inch beards would reveal any contraband hidden therein, and the prisoner could be observed while combing the beard, which would protect officers from any contraband.
through a driveway, walkway, or other passage other than the front door. The Court concluded, however, that the officer had not violated “clearly established” law by approaching the house through an area reasonably open to the public. The case was remanded for further proceedings.

_Warger v. Shauers_, 135 S. Ct. 521 (Dec. 9, 2014) (No. 13-517). Warger sued Shauers for injuries sustained in a collision between his motorcycle and Shauers’s car. After the jury returned a verdict for the defendant, Warger sought a new trial on the ground that a juror had lied during the voir dire. He submitted an affidavit from another juror that the foreperson had told the jurors during deliberations that her daughter had been at fault in a motor vehicle collision in which a man had died and that a civil suit would have ruined her life. Rule 606(b) of the Federal Rules of Evidence provides in part that “[d]uring an inquiry into the validity of a verdict,” evidence “about any statement made or incident that occurred during the jury’s deliberations” is inadmissible with three specific exceptions: evidence about “extraneous prejudicial information . . . improperly brought to the jury’s attention,” about “an outside influence” that was “improperly brought to bear on any juror,” and that a mistake had been made in entering the verdict on the verdict form. The Court held that the plain meaning of Rule 606(b) requires exclusion of the affidavit, and rejected the so-called Iowa rule that excludes juror testimony about deliberations only if the testimony involves the thought processes of the jurors in reaching the verdict. Although a verdict can be attacked by evidence of perjury by a juror on a material matter that would have provided a basis for a challenge for cause, _McDonough Power Equipment Co. v. Greenwood_, 464 U.S. 548 (1984), that evidence must be from nonjurors. Opinion by Justice Sotomayor for a unanimous Court.

**ARGUMENTS**

January 14, 2015:  

January 21, 2015:  

February 23, 2015:  

**February 24, 2015:**  
_Henderson v. United States_, No. 13-1487, _Cert. Alert_, 29:4 _Crim. Just_. at 45 (Winter 2014) (whether a court can transfer a firearm to a person to whom the defendant has sold it, or sell it for the benefit of the defendant, when the defendant cannot lawfully possess the firearm).

**March 2, 2015:**  
_Ohio v. Clark_, No. 13-1352, _Cert. Alert_, 29:4 _Crim. Just_. at 44 (Winter 2014) (whether persons required to report suspected child abuse thereby become agents of law enforcement for purposes of the confrontation clause, and whether the child’s statements to a teacher in response to concerns are “testimonial” under the confrontation clause) (solicitor general to argue as amicus curiae).

**March 3, 2015:**  


**March 23, 2015:**  
_City & County of San Francisco v. Sheehan_, _supra_ at 35.

**March 30, 2015:**  
_Brumfield v. Cain_, _supra_ at 33.

**April 20, 2015:**  

**April 21, 2015:**  
_McFadden v. United States_, _supra_ at 34.

**April 27, 2015:**  
_Kingsley v. Hendrickson_, _supra_ at 35.

**April 29, 2015:**  
_Mata v. Holder_, _supra_ at 34.  ■
Federal Rules Amendments Approved

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, which 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.

On April 25, 2014, the Supreme Court approved amendments to Rules 5, 6, 12, 34, and 58 of the Federal Rules of Criminal Procedure and to Federal Rule of Evidence 801. Those amendments became effective on December 1, 2014.

**Criminal Rule 5. Initial Appearance.** Rule 5(d) has been amended to reflect provisions in Article 36 of the Vienna Convention on Consular Relations. That article provides that foreign nationals who are being detained must be advised of the right to have the consulate of their home country advised of their arrest and detention. The amended rule requires the judge at the defendant’s initial appearance to advise a defendant—who is not a United States citizen—that he or she may request that an attorney for the government or a federal law enforcement officer notify an officer in the consulate of the defendant’s home country that he or she has been arrested. The rule also provides that even without the defendant’s request, a treaty or other international agreement may require such notification. The accompanying Committee Note for the amendment states that the committee believed that it would be more efficient and effective to provide this advice to every defendant, without first determining whether the defendant is a United States citizen. The Committee Note also indicates that the amendment does not create any individual rights or remedies that may be invoked by a defendant.

**Criminal Rule 6. The Grand Jury.** Rule 6(c)(3)(D) was amended by changing the reference to 50 U.S.C. § 401(a) to 50 U.S.C. § 3003, to reflect the recodification of § 401(a). Section 3003 includes a definition of the term “counterintelligence,” a term used in the rule.

**Criminal Rule 12. Pleadings and Pretrial Motions.** Rule 12 was significantly amended in 2014. Rule 12(b)(1) was expanded by adding language that provides that a party may raise any defense, objection, or request by pretrial motion that can be decided by the court “without a trial on the merits.” Rule 12(b)(2) was amended to provide that a motion alleging a lack of jurisdiction may be made at any time. Rule 12(b)(3) was amended to clarify which motions must be made before trial; that list now includes a claim of failure to state an offense, which had previously been considered a jurisdictional challenge that could be raised at any time. The Committee Note states that that change reflects the decision in United States v. Cotton, 535 U.S. 625 (2002), that defects in an indictment are not jurisdictional. The amended rule also states that a listed motion must be made pretrial if the basis for the motion is “reasonably available.”

Rule 12(c), which addresses deadlines for making pretrial motions, now states that if the court does not set a deadline, the start of the trial is the deadline. The court may extend or reset the deadline for pretrial motions, and if a party does not meet the deadline for making a Rule 12(b)(3) pretrial motion, it is considered untimely. But the court may still consider the motion if the party shows good cause, or in the case of a claim of failure to state an offense, the defendant shows prejudice.

**Criminal Rule 34. Arresting Judgment.** Rule 34(a) was amended to conform to amended Rule 12(b). Now Rule 34(a) simply states that the court must arrest judgment if the court does not have jurisdiction of the charged offense.

**Criminal Rule 58. Petty Offenses and Other Misdemeanors.** Rule 58(b)(2)(H) was amended to parallel a provision in amended Rule 5(d). At the defendant’s initial appearance, the judge must advise the defendant that he or she may request that an attorney for the government or a federal law enforcement officer notify an officer in the consulate of the defendant’s home country that he or she has been arrested. The rule also provides that even without the defendant’s request, a treaty or other international agreement may require such notification.

**Federal Rule of Evidence Rule 801(d)(1)(B). Prior Consistent Statements.** Rule 801(d)(1)(B) addresses the issue of using a witness’s prior consistent statement to rehabilitate a witness’s credibility. Before the 2014 amendment to that rule, counsel could only use a prior consistent statement if the witness had been attacked by an allegation that the witness had recently fabricated testimony or was testifying under an improper influence or motive. Once that foundation was laid, the prior consistent statement was admissible as nonhearsay. The rule has
been amended by adding language to provide that a prior consistent statement is also admissible under the hearsay exemption when it would be otherwise admissible to rehabilitate a witness’s credibility. The original language in Rule 801(d)(1)(B) is now in Rule 801(d)(1)(B)(i). A new provision, Rule 801(d)(1)(B)(ii), permits counsel to use a prior consistent statement to rehabilitate a witness whose credibility has been attacked on grounds other than recent fabrication or improper influence or motive.

Chair's Counsel (continued from page 1)

Much was accomplished with few resources. The Building Community Trust Model Curriculum and Instruction Manual, voir dire tool kit, pretrial release reforms, and other resources are available online. Further, the Criminal Justice Section report Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System kicked off important work to end implicit bias in our lifetimes. In conjunction with the Judicial Division, our work to end implicit bias in the criminal justice system is moving forward by developing and deploying a tool kit to recognize and eliminate our unconscious biases—retraining the biased brain. Our current goal is to end implicit bias among juries, judges, and lawyers in our courtrooms.

And bipartisan political support for criminal justice reforms is also afoot. There is consensus that over-criminalization, over-incarceration, mandatory minimum sentencing, and underrepresentation must be reversed and rehabilitation employed. There is a push in the judicial branch and among scientists to eliminate junk science from our criminal courts. There is a current ground swell of support for change. Some see this as sound economic policy, some as desired social change. But whatever the motivation, the results will be achievement of needed reforms. The Koch brothers and the Center for American Progress recently joined in criminal justice reform efforts despite their wildly divergent viewpoints. Conservative and liberal politicians have jointly and separately proposed bills to promote such reform efforts in Congress. In most cases, people will not accept the role they have played in creating these problems. Recognizing this, I suggest that our first efforts should be to change our current practices. Where there is evidence of explicit bias, we should condemn and sanction. I am shocked and saddened that racial bias is still acceptable among leadership and in some communities. This has always been a stain on our great nation. We should no longer tolerate such intolerance. And where inequities are caused by cognitive dissonance and implicit bias, we should expose the problem, educate, and change it. Much more needs to be done.

In February 2015, ABA President Bill Hubbard attended the first Collateral Consequences Summit put on by the Criminal Justice Section. In addition to inviting stakeholders to seek important reforms, the Summit touted the powerful ABA Criminal Justice Section’s National Inventory of the Collateral Consequences of Conviction (created with the National Institute of Justice). Again, identifying problems, backed by a database, the Section has called for the repeal of collateral consequences of convictions that diminish the ability to overcome a conviction after the punishment is served. So very many of these collateral consequences are unrelated to any legitimate criminal justice goal. For example, public housing restrictions are imposed for life as a result of a minor misdemeanor conviction—a restriction that may lead to homelessness. Persons with convictions are excluded from any employment requiring even the most common licenses. Thus, those convicted of minor, nonviolent offenses are barred from becoming even barbers or beauticians; or engaging in other more gainful employment that would help them thrive and become self-actualized. Most of the convictions triggering these restrictions are not public safety offenses. And the majority of the collateral consequences continue to hobble persons convicted of even the most minor wrongs. In Texas, something as simple as leaving the scene of an accident can cause the loss of any licensed employment under the Business and Commerce Code. A person can lose his or her livelihood, reversing the fortunes and futures of an entire family for, essentially, a traffic offense. The National Inventory of the Collateral Consequences of Conviction provides powerful information to inform courts, prosecutors, and defense lawyers who are resolving criminal cases in the courts. It also promotes change in our state houses by informing legislators and the regulators who conceived the collateral consequences about the unintended and unreasonable consequences of so many “add on” sanctions. The inventory can be utilized to identify and eliminate these meaningless and harmful measures.

A friend of mine, April Fraizer, recently said that collateral consequences have allowed the legalization of racism. It appears that she is, unfortunately, correct. Minorities are disproportionately disenfranchised. And a study, the Mark of a Criminal Record, conducted by Devah Pager, has shown that racism continues unaided by these collateral consequences. The study showed that a white applicant with a conviction has two times a success rate at obtaining entry-level employment than a person of color without a conviction, all other things being equal. As chair of the ABA Criminal Justice Section, I invite you to utilize the powerful tools, resources, and examples encompassed in our work to eliminate racial inequities in and reform criminal justice. Only by eliminating racial bias in what we do, can we call our system just.
The Massachusetts Drug Lab Scandal

BY PAUL C. GIANNELLI

Crime lab scandals seem to follow a natural progression. The first stage is publicity through saturated news coverage. This triggers an official investigation. Finally, the courts are often left with sorting out the legal consequences. The misconduct of Annie Dookhan, a forensic chemist in Massachusetts, was no exception.

The Publicity

The newspapers provided extensive coverage:

Dookhan allegedly removed evidence from the lab’s secure area without authorization, forged colleagues’ initials on control sheets that record test outcomes, and intentionally contaminated samples to make them test positive, after they were sent back to her to re-check because she had “dry-labbed” instead of completing the required preliminary tests. While colleagues were suspicious of her shoddy work habits and unusually high output and reported concerns to supervisors, little action was taken for more than a year, according to the police inquiry.


State police say she tested more than 60,000 drug samples involving 34,000 defendants during her nine years at the lab. . . . Dookhan later acknowledged to state police that she sometimes would take 15 to 25 samples and instead of testing them all, she would test only five of them, then list them all as positive. She said that sometimes, if a sample tested negative, she would take known cocaine from another sample and add it to the negative sample to make it test positive for cocaine. . . .


Already, nearly 300 offenders have been released after evidence analyzed by Dookhan was questioned.


The Investigation

In 2012, the Massachusetts State Police (MSP) took over control of the state’s forensic drug laboratory, which had been part of the Department of Public Health (DPH) lab. Shortly after the transfer of control, MSP officials learned that the DPH had failed to disclose that Dookhan, who had resigned earlier in 2012, had (1) breached chain-of-custody protocols, (2) falsified test results (“dry labbing”) substances, (3) lied about her credentials, and (4) forged signatures on laboratory documents.

The MSP notified the Massachusetts attorney general, who investigated and ultimately charged Dookhan with several crimes. Following the attorney general’s investigation, the governor closed the lab in August 2012. The governor then ordered the office of the inspector general (OIG) to conduct an investigation into the lab. (See Office of the Inspector Gen., Commonwealth of Mass., Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002–2012 (2014.).)

Background

In 2009, Dookhan’s supervisor noticed that she was testing a much higher volume of samples than any other chemist at the lab. Dookhan’s immediate supervisor and the lab supervisor reported their concerns to the director of the Division of Analytical Chemistry, but nothing was done aside from a “superficial” audit of Dookhan’s work papers. (Id. at 64.) Between 2009 and 2011, several other chemists also reported concerns about Dookhan’s work, specifically that it would be impossible for her to test the samples correctly at her high volume of output and that she often failed to follow proper procedure when handling and marking samples. Finally, two different employees reported that Dookhan had forged their initials on lab documents. The employees’ concerns were not addressed, and they were told that the matter was being taken care of by supervisors. (Id. at 64–65.)

In June 2011, an evidence officer, who was entering drug results into a lab computer, realized that in some cases there was no “primary” chemist’s name assigned in the computer system as required, but that Dookhan’s name appeared on the drug cards. This occurred with 90 samples, indicating that Dookhan had taken samples that had not been assigned to her.

The division director removed Dookhan from her testing responsibilities and put her at a desk outside the testing rooms. She also gave Dookhan the responsibility of helping to update and draft new testing protocols,
which many other employees saw as a reward, not a punishment. Dookhan’s supervisors did not report her misconduct to any “senior officials” at the DPH for five months. Additionally, Dookhan still retained access to samples and continued to be assigned and to test samples as well as testify in court. She also had keys and passcodes to enter the evidence safe and testing rooms because her supervisors never restricted Dookhan’s access. Subsequently, it was discovered that Dookhan had falsified her credentials both on her résumé and while testifying in court. She claimed that she was either working on or already possessed a master’s degree in chemistry, but she had never taken any courses for such a degree. (Id. at 71.)

In November 2011, the DPH commissioner learned of Dookhan’s chain-of-custody breach and ordered an internal investigation, but the investigation was limited to corroborating the breach of chain-of-custody protocols. During the DPH investigation, the secretary of the executive office of Human Health Services learned of Dookhan’s misconduct and alerted the governor’s office, which triggered the OIG investigation.

**Lack of Supervision**

The OIG found several underlying issues in the operation of the lab that allowed Dookhan’s misconduct to go undetected. The first issue concerned the management of the lab. Employees described the lab supervisor as a “hands-off” manager who allowed employees to use their own methods and work at their own pace. Additionally, he did little to establish procedures and did not monitor lab employees to ensure that proper procedures were followed at all times.

There was also a lack of oversight of chemists. Lab supervisors did not conduct performance reviews of chemists, monitor their work on a regular basis, or observe them testify in court to ensure that they were being accurate and truthful. Moreover, although the lab’s policy was to have a supervisory chemist partnered with two lower level chemists to oversee their work, a supervisor was not put in every testing room. For example, in Dookhan’s room, her supervisor was promoted to a position supervising the evidence room, but no replacement supervisor was ever installed. (Id. at 23–24.)

**Lack of Training**

Another major issue was the lack of training for both new and experienced chemists. Specifically, new chemist training was too focused on preliminary testing and did not adequately emphasize chemical theory and instruction on new techniques. Experienced chemists at the lab were not provided adequate opportunities for continuing education in new testing methods and legal developments related to forensic drug analysis. Many chemists paid for their own training and accommodations in order to attend certain forensic drug training programs. (Id. at 29.)

**Lack of Adequate Protocols**

The lab did not have adequate testing and work protocols. The lab’s protocol and policy manual simply stated that the lab followed the Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) protocols and policies—and attached an outdated 2004 SWGDRUG manual. Moreover, lab policies and procedures were updated informally through handwritten notes, articles, memoranda, and e-mail, but were never memorialized in a comprehensive manual. (Id. at 32.)

In addition, the lab was inconsistent with its testing procedures. The lab used a two-chemist system to identify and test samples. The first chemist was the “primary” chemist who determined the weight of the substance and conducted preliminary screening tests to determine the substance’s identity. The sample was then given to a “confirmatory” chemist who would either confirm the primary chemist’s findings or send it back for retesting. The confirmatory chemist used a gas chromatography-mass spectrometry (GC/MS) instrument to test the samples and was responsible for ensuring that the machine was operating properly and that the samples were handled and labeled correctly. Although this was the required protocol, the OIG found that at times more than two chemists were involved in sample testing and at other times one chemist performed both the primary and confirmatory steps in the testing. (Id.)

**Weak Quality Control**

The OIG found that quality control in the lab was lacking. According to lab protocols, chemists were required to perform certain tasks to ensure that the equipment was functioning properly, including a daily check of their balances and a daily maintenance tuning of the GC/MS. The chemists had sheets on which they were to indicate with a check that they had performed the task. According to the OIG, this was ineffective because, while the supervisors were required to initial the form to signify that the chemist had completed the task, they often just initialed the sheet without actually checking that the chemist had completed his or her work. The lab director performed monthly audits of chemists’ testing, but the samples reviewed were too few to make any impact in the quality of the testing. There was also no real external quality control and assurance because the lab was unaccredited, which meant that it was not required to undergo the routine audits like accredited labs. (Id. at 43–46.)

**Lax Security**

Lab security was inadequate. Although the lab had biometric safety measures, key codes, and verbal passwords, the lab supervisor failed to monitor who had keys, codes, and passwords. This facilitated Dookhan’s...
access to the evidence safe and testing rooms without going through the proper protocol. (Id. at 49–52.)

Chain-of-Custody Protocols
The OIG also found lab employees often deviated from chain-of-custody procedures when transferring samples to and from the evidence safe. The lab had a computer system called FoxPro and a handwritten evidence log to monitor evidence coming into and leaving the safe. Every transfer of a sample was entered into FoxPro, and internal lab transfers in and out of the safe were supposed to be recorded by hand in the logbook. However, on many occasions employees failed to or incorrectly recorded sample numbers in both systems, and chemists were often allowed to take custody of too many samples at a time, thereby increasing errors in custody protocols. Even when these breaches in protocol were discovered, there was no documentation that the evidence officers were instructed to investigate the missing information, and instead were told to manually enter it into the computer. There was also no inventory of samples in the drug safe between 2002 and 2012. (Id. at 53–61.)

Retesting
Because the sampling methods used by chemists at the lab were flawed, the OIG questioned the results of many of the identifications used in prosecutions. In drug trafficking cases, chemists (1) often used invalid arbitrary methods to determine weight and identity, (2) incorrectly applied statistical methods, and (3) failed to specify the testing methods used and the statistical limits of those methods. Because trafficking charges and punishments are determined by weight, this was a serious problem.

The OIG retested multi-run samples with the cooperation of local law enforcement agencies, which had taken back samples from the state lab. The OIG used a TrueNarc machine to retest 1,203 multi-run samples. (TrueNarc uses a laser to obtain a structural image of the substance and then matches that image to its library of structures of chemical substances.) Out of the retested samples, the OIG found 464 that were inconsistent or inconclusive when compared with the lab’s original conclusions.

Judicial Response
Not surprisingly, Dookhan’s misconduct became the subject of litigation. For example, the defendant in Commonwealth v. Scott, 5 N.E.3d 530 (Mass. 2014), filed a motion to withdraw his guilty plea. The Supreme Judicial Court of Massachusetts held that, in light of Dookhan’s guilty pleas and the information gathered during the investigations into her misconduct, a due process violation could be presumed: “[W]here Dookhan signed the certificate of drug analysis as either the primary or secondary chemist in the defendant’s case, the defendant is entitled to a conclusive presumption that Dookhan’s misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth.” (Id. at 535 (emphasis added).) However, in order to qualify for relief, the defendant must “demonstrate a reasonable probability that knowledge of Dookhan’s misconduct would have materially influenced his decision to tender a guilty plea.” (Id.)

If Dookhan was not the primary or secondary chemist, the presumption did not apply:

Here, Dookhan was neither the primary nor the secondary chemist on the four drug certificates. Her remote and tangential relationship to this accused of.

Texas also faced a similar situation earlier in 2014. In Ex parte Coty, 418 S.W.3d 597, 598 (Tex. Crim. App. 2014), a laboratory technician (Jonathan Salvador) at the Houston Police Department Crime Lab “committed ‘professional misconduct’ [by] using the evidence in one case to support the evidence in another case.” The court rejected the conclusive presumption approach to a due process violation, ruling instead that it will infer that the evidence in question is false, if the applicant shows that: (1) the technician in question is a state actor, (2) the technician has committed multiple instances of intentional misconduct in another case or cases, (3) the technician is the same technician that worked on the applicant’s case, (4) the misconduct is the type of misconduct that would have affected the evidence in the applicant’s case, and (5) the technician handled and processed the evidence in the applicant’s case within roughly the same period of time as the other misconduct. Once the applicant satisfies this initial burden by establishing the identified factors, the applicant has proven that the technician in question has engaged in a pattern of misconduct sufficiently egregious in other cases that the errors could have resulted in false evidence being used in the applicant’s case. However, as part of this inquiry, it is incumbent upon the applicant to establish the extent of the pattern of misconduct the technician is accused of.

(Id. at 605.)

(continued on page 47)
Innocent Defendants Pleading Guilty

BY PETER A. JOY AND KEVIN C. McMUNIGAL

United States District Judge Jed Rakoff recently wrote an interesting and timely article in the New York Review of Books highlighting the risk of innocent defendants pleading guilty and offering a proposal aimed at reducing this risk. (Jed S. Rakoff, Why Innocent People Plead Guilty, N.Y. REV. BOOKS, NOV. 20, 2014, available at http://tinyurl.com/nuuu768.) Judge Rakoff recommends changing the Federal Rules of Criminal Procedure to allow federal magistrate judges to participate in plea negotiations early in criminal cases just as they now participate in settlement negotiations in civil cases. In this column we examine the reasons why we share Judge Rakoff’s concern and offer an assessment of his proposal.

Sentencing differentials. One of Judge Rakoff’s primary concerns is that heavy potential sentences combined with mandatory minimums and sentencing guidelines allow prosecutors to create drastic sentencing differentials that generate enormous pressure on innocent defendants to plead guilty. A sentencing differential is the difference between the potential sentence a defendant faces after a trial and the sentence the same defendant faces after a guilty plea. Judge Rakoff sees these differentials as placing an unfairly high price on defendants exercising the constitutional right to jury trial. But perhaps his most basic point is that “the prosecutor has too much power” to determine sentences due to charging decisions, mandatory minimums, and sentencing guidelines, and that this imbalance in power can undermine the accuracy of guilty pleas.

Psychology. Judge Rakoff also argues that prosecutors in our criminal justice system are often overconfident about the strength of their cases and the guilt of defendants. Multiple sources of cognitive error can bring about the sort of overconfidence Judge Rakoff describes.

We have previously written about how cognitive error can contribute to inaccuracy in our criminal justice system. One source of such error is the human tendency to “see what we expect to see.” Dr. Jerome Groopman has written about this problem in the context of pediatricians and the recurring challenge of spotting among the overwhelming majority of healthy children the relatively rare child who suffers from a serious medical problem. Seeing primarily healthy children leads pediatricians to expect a child to be healthy, and this predisposition can at times impair their ability to find and treat serious illness.

Like pediatricians, defense lawyers, prosecutors, and judges across the country routinely deal with high volumes of criminal defendants, the overwhelming majority of whom are guilty. Accordingly, these lawyers and judges are prone to see what they expect to see—guilty defendants. This tendency may be compounded by cynicism borne of the fact that many guilty defendants falsely claim to be innocent. Such cognitive error may seriously predispose defense lawyers, prosecutors, and judges to being unable to spot innocent defendants and even to stop looking for them, increasing the risk that an innocent defendant will plead guilty.

Other sources of cognitive error for prosecutors and police that increase the risk of innocent defendants pleading guilty arise from what psychologists call “nonrational escalation of commitment” and “tunnel vision.” Once a person has taken a particular position, that person becomes reluctant to change that position or reexamine the facts or rationales that support that position. In short, the person has a tendency to escalate his or her commitment to a particular position even in the absence of rational reasons for doing so. This can lead a person to fail to look for and otherwise ignore facts that contradict the position adopted, what has sometimes been called “tunnel vision.” Prosecutors typically commit to a position regarding a defendant’s guilt early on—at the very least by the time the defendant is charged and often earlier than that. Police usually commit to a position on a defendant’s guilt during the investigation of a case. Nonrational escalation of commitment and tunnel vision then can blind prosecutors and police to the possibility that the defendant is innocent. Convinced that the defendant is guilty, prosecutors and police may fail to consider or possibly even look for evidence inconsistent with
guilt, such as exculpatory evidence covered by the Brady doctrine.

**Access to information.** Judge Rakoff writes about defense counsel being “at a considerable informational disadvantage to the prosecutor.” We have written previously about how lack of discovery and, in particular, lack of access to exculpatory information held by the prosecutor can contribute to innocent defendants pleading guilty. Access to information and evidence prior to a guilty plea has been a hotly contested issue for some time. Many lower federal and state courts held that a defendant pleading guilty retained a due process right to obtain exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963). But in 2002, the United States Supreme Court in United States v. Ruiz, 536 U.S. 622 (2002), refused to recognize such a right. Since then, legislative efforts to address this issue have met with limited success.

**Resources.** Defense lawyers who work in our criminal justice system are frequently overburdened with far too many cases and far too few resources, such as investigators and expert witnesses. (See, e.g., Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 Hastings L.J. 1031 (2006).) Such high caseloads and lack of investigative resources create a powerful incentive for defense lawyers to resolve cases through guilty pleas and make it difficult for them to figure out who among those pleading guilty may be innocent.

Inordinately high caseloads also plague many prosecutor offices. (See Adam M. Gershowitz & Laura R. Killinger, The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants, 105 Nw. U. L. Rev. 261 (2011).) As with defense lawyers, such high caseloads pressure prosecutors to resolve cases through guilty pleas without the prosecutors having the time to individually evaluate the facts of particular cases, making it less likely that they will be able to identify the innocent defendants among the many guilty ones. Such overburdened prosecutors may be willing to give more generous guilty plea offers to reduce caseloads, which may be a boon to guilty defendants but only increases the pressure on innocent defendants to plead guilty.

**The proposal and its impact.** Judge Rakoff suggests that federal magistrate judges become involved in the plea negotiation process. Under his proposal, the prosecutor and defense lawyer would meet separately early on in the case with a federal magistrate judge. The magistrate judge, prosecutor, and defense lawyer would each be “provided with the particulars” regarding evidence and issues, and everything said would be recorded and placed under seal. The magistrate judge might also choose to meet with witnesses and possibly even interview the defendant. Afterward, the magistrate judge would make a recommendation the parties would be free to accept or reject. The magistrate judge might recommend dismissal, a negotiated guilty plea, or trial if no negotiated guilty plea appeared feasible. The prosecutor would be prohibited from making any guilty plea offer until after the magistrate judge made a recommendation.

How would Judge Rakoff’s proposal impact the various factors contributing to false guilty pleas identified earlier in this column?

**Sentencing differentials.** The primary source of Judge Rakoff’s concern about innocent people pleading guilty is the severity of the sentences that defendants face after trial. Reducing the general severity of sentences by steps such as eliminating mandatory minimums would ameliorate this concern, but he is not optimistic that will happen in our current political climate.

We fail to see how involving a judge in guilty plea negotiations would reduce the pressure generated by high sentencing differentials on innocent defendants to plead guilty. As Judge Rakoff points out, these differentials are largely a function of criminal statutes and guidelines that the judge is not free to ignore. And much of the discretion these statutes and guidelines grant is placed in the hands of the prosecutor. It is possible that a judge’s recommendation might convince a prosecutor to amend the charging document. But if not and the judge tends to follow the guidelines, the judge’s recommendation might simply add to the pressure an innocent defendant feels to plead guilty. Another concern is that magistrate judges may be overly influenced by an incentive to clear their own dockets as well as those of the district court judges with whom they work.

**Psychology.** Would judicial involvement in guilty plea negotiations reduce the problem of repeat players in the criminal justice system “seeing what they expect to see”—that is guilty people—and not spotting those who are innocent? Judges themselves are repeat players who routinely interact with a large number of guilty people. So, like prosecutors and defense lawyers, judges are likely to struggle with the problem of spotting innocent people coming through the criminal justice system.

Judicial involvement seems more promising as a way to counter nonrational escalation of commitment and tunnel vision on the part of prosecutors. The judge will not have taken a position on the guilt or innocence of the defendant, so the judge should be in a good position to check and perhaps get prosecutors to rethink the strength of their positions. This is a classic argument for involving third parties in settlement discussions, and federal magistrate judges have been serving this function in civil cases for many years with much success.

**Access to information.** Judge Rakoff stipulates as part of his proposal that the lawyers be “provided with the particulars” regarding evidence and issues
in the case. He does not specifically address whether this would include full discovery, including discovery from the defense. Nor does he say whether his proposal includes defense access to Brady material. In our view, adding such a discovery requirement, especially one requiring disclosure of Brady material to the magistrate judge and defense, would significantly increase the potential of his proposal to reduce the risk of innocent people pleading guilty. It may also help to ensure that prosecutors comply more fully with their disclosure obligations to the defendant prior to trial.

**Resources.** A requirement that both prosecutors and defense lawyers meet with a magistrate judge to discuss each case and the evidence might increase the incentive for both parties to prepare their cases and familiarize themselves with the evidence so as not to look unprofessional before the judge. That incentive might help counter the tendency of both lawyers to view a guilty plea as a reason not to fully investigate a case. Federal public defenders and prosecutors, who tend to have more manageable caseloads and greater resources than their counterparts in state courts, would likely have the ability to prepare their cases well for the sort of guilty plea negotiation sessions Judge Rakoff envisions. But if the prosecutor and defense lawyer have the sort of large caseloads that are common in many state courts around the country, it seems unrealistic to expect that they would have the time or resources to do such preparation.

Inadequate resources are a problem and a driving force behind the use of negotiated guilty pleas for all participants in the criminal justice system. This raises another question about Judge Rakoff’s proposal. Does even the federal system have adequate resources to have magistrate judges adopt this sort of role in all guilty plea negotiations? If extended to state systems, which have even higher caseloads and often fewer resources, are states likely to have the resources to have judges take on this additional role?

At present, approximately 90 to 95 percent of both federal and state court cases are resolved through plea bargaining. Would prosecutors, who wield most of the power in plea negotiations, be willing both to cede some of this power to judges and engage in a new approach that would require more, not less, work on each case? Without the support of prosecutors, it seems to us unlikely that Judge Rakoff’s proposal has a realistic chance of being adopted.

**Conclusion**

We fully share Judge Rakoff’s concerns about innocent people pleading guilty in our current criminal justice system and applaud his recognition of the problem and his effort to find a way to reduce the risk of this happening. Federal magistrate judges have a great deal of experience negotiating settlement agreements in civil cases, and it may well be that their experience could be put to good use by involving them in guilty plea negotiations. We suggest that his proposal clarify that full discovery, including Brady material, must be provided by the prosecution to the magistrate judge and the defense. It is also important to recognize that limitations exist on the ability of magistrate judges to address some powerful factors contributing to innocent guilty pleas, such as the size of sentencing differentials.

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**Scientific Evidence (cont. from page 44)**

In State v. Roche, 59 P.3d 682, 685, 690 (Wash. Ct. App. 2002), the defendants moved for a new trial based on newly discovered evidence—i.e., Michael Hoover, the chemist at the Washington State Patrol Crime Laboratory who tested the methamphetamine, “had been self-medicating with heroin sent to the crime lab for testing purposes.” The court of appeals held that the defendants were entitled to new trials. The court observed that Hoover’s credibility was a critical issue:

> Hoover’s credibility has been totally devastated by his malfeasance. Not only did Hoover steal heroin from the crime lab, he also admitted that he regularly used heroin on the job. He repeatedly lied about his activities until he was finally confronted with the fact that he had been videotaped. Even then, he maintained that it all started when an officer asked him to purify heroin for a drug-dog training project, although he could not provide the name of the officer who allegedly made this request. Furthermore, Hoover’s co-workers thought that his work seemed sloppy and even suspected, with some scientific basis to support their suspicions, that he might have been dry labbing some methamphetamine cases. These events are serious enough that a rational trier of fact could reasonably doubt Hoover’s credibility regarding his testing of any alleged controlled substances, not just heroin, and regarding his preservation of the chain of custody during the relevant time period. (Id. at 690–91 (footnote omitted)).

**Conclusion**

For discussion of other lab scandals, see Paul C. Giannelli, Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs, 86 N.C. L. Rev. 163 (2007).
Authentication and Hearsay: Which Trumps?

BY STEPHEN A. SALTZBURG

Suppose that a document is offered by the government as a defendant’s statement to prove the truth of its contents, and the defendant objects that he or she did not write or adopt the statement. To decide admissibility, does the trial judge use Federal Rule of Evidence 104(a) or 104(b)? Or does the judge use both? The answer should be clear after 40 years of experience with the evidence rules, but it remains cloudy for many courts and lawyers.

The Difference

Federal Rule of Evidence 104(a) sets forth this standard:

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

It makes clear that the judge may rely on inadmissible evidence such as hearsay that would be excluded under Rule 802 in making a ruling.

Rule 104(b), on the other hand, sets forth a different standard:

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

On its face, Rule 104(b) makes clear that it operates similarly to Rule 901(a), which states that “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”

So, Rule 104(a) permits a judge to consider inadmissible evidence in making an evidence ruling while Rules 104(b) and 901(a) require the judge to focus on evidence that actually is admitted. In the discussion that follows, each mention of Rule 104(b) should be assumed to also apply to Rule 901(a).

A Sample Case

United States v. Harvey, 117 F.3d 1044 (7th Cir. 1997), illustrates the conflict that may arise when a defendant objects that a statement is not his or hers. The defendant, Roderick Harvey, set up a campsite for himself and his dog, Drigo, in the Shawnee National Forest, which is located in southern Illinois. He was charged with cultivating several plots of marijuana that law enforcement officials discovered near the campsite.

When law enforcement officials first discovered the marijuana plots during aerial surveillance, Harvey was in a hospital and rehabilitation center recovering from serious injuries suffered when he collided with a truck while riding a bicycle. He was in the center for approximately six weeks after the marijuana was discovered, and from the outset he expressed concern about his dog being left somewhere in Shawnee National Forest.

It took law enforcement officials two weeks after sponyng the marijuana plots from the air to actually reach them on foot in an isolated, rugged location. They came upon some plants that were six to seven feet tall and were near a well-developed campsite containing two tents. The officers saw no people at or around the campsite but encountered a large, emaciated German shepherd that growled and barked at them.

The officers returned to the campsite a couple of days after first reaching it and installed vibration-activated video surveillance equipment that they periodically checked for more than a month without finding any evidence of a human presence at the site.

Two days after Harvey left the center, officers conducting live surveillance of the campsite saw him at the site moving around with the aid of crutches. The officers arrested Harvey, searched the campsite, and found freshly-cut marijuana and a black satchel near where Harvey had been sleeping in one of the tents.

Two notebooks found inside the satchel contained diary-like entries and things-to-do lists. There were references to planting dates, planting conditions, and the grow plots around the campsite. One crossed-out entry stated “20 plants into ground up top today.” Officers also found another entry that referred to the National Organization for the Reform of Marijuana Laws (NORML), numerous entries mentioning a dog named Drigo, miscellaneous papers bearing Harvey’s name, and a copy of a magazine generally devoted to the cultivation of marijuana. Officers testified that Harvey asked about his dog “Drago” (the name as recalled by one of the arresting officers) and the status of his camping gear while being transported to federal court.

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Harvey objected at trial to the admission of the diary entries, but the trial judge admitted them over objection despite the fact that the government did not offer any handwriting evidence at trial. On appeal, the government argued that the entries were admissible because only the individual who planted the marijuana could have made them. The court of appeals found this argument to be unpersuasive:

The Government’s overall objective in this case was to prove that Harvey was responsible for the marijuana plants around the campsite. To prove that, the Government offered the written materials found there. But to authenticate those materials as Harvey’s writings, the Government argues that only Harvey could have written them because only the planter of the marijuana would keep those kinds of records. The Government, in other words, assumes that Harvey planted the marijuana—the very point it must ultimately prove. This is circular reasoning at its worst. The references to the marijuana plants suggest the materials were written by the planter of the marijuana, but those references hardly imply that Harvey is the author/planter.

(Id. at 1049.)

The court nonetheless found no abuse of discretion on the part of the trial judge and explained as follows:

Rule 901(b)(4) allows evidence to be authenticated by “[a]ppearances, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” The written materials were found in an isolated and remote area where law enforcement agents observed no one other than Harvey. The materials were within Harvey’s campsite; indeed, they were next to Harvey’s own bed. The writings also make numerous references to Harvey’s beloved dog, Drigo. These distinctive characteristics and circumstances are sufficient to support a finding that the materials were written by Harvey.

(Id. (alteration in original).)

The court of appeals then turned to the question of what standard a trial judge must use in deciding on admissibility:

If the notes and diaries were truly written by Harvey, they would also not be hearsay because they would be statements made by a party-opponent. See Fed. R. Evid. 801(d)(2)(A). The question for us, however, is whether the finding of authenticity under Rule 901 is sufficient to make the written materials nonhearsay under Rule 801.

Some cases seem to treat the inquiries under the two rules as identical, meaning that authenticated statements by a party-opponent are automatically not hearsay. Indeed, the admissibility of hearsay is routinely treated as a preliminary question under Rule 104(b) which, like Rule 901, requires only “evidence sufficient to support a finding.”

On the other hand, Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987), states that the Federal Rules of Evidence “nowhere define the standard of proof the court must observe in resolving these [preliminary] questions.” The Bourjaily Court therefore held that preliminary facts relevant to Rule 801(d)(2)(E)—the coconspirator exception to the hearsay rule—must be proven under a “preponderance of the evidence” standard. Since Bourjaily, we have stated more generally that “[w]hen making preliminary factual inquiries about the admissibility of evidence under a hearsay exception, the district court must base its findings on the preponderance of the evidence.” United States v. Franco, 874 F.2d 1136, 1139 (7th Cir. 1989). The admission of evidence under Rule 801 may therefore require a higher standard of proof than the prima facie showing required to authenticate evidence under Rule 901.

(Id. at 1049–50 (alterations in original) (citations omitted).)

In the end, the court of appeals failed to decide which rule governed and instead concluded that “[r]egardless of whether the authentication and hearsay thresholds are identical, we find that the written materials satisfy the higher preponderance of the evidence standard.” (Id. at 1050.) It appears that other courts believe that it is sufficient for the judge to find simply that Rule 104(b) is satisfied and that it is not to satisfy the higher standard of Rule 104(a). One example is United States v. Gil, 58 F.3d 1414 (9th Cir. 1995). In still other cases, courts address the evidence question as simply a hearsay question without focusing on authentication. One example is United States v. Brinson, 772 F.3d 1314 (10th Cir. 2014).

Getting to the Right Answer

So the question is which standard applies. The right answer is that the trial judge must use both Rule 104(b) and Rule 104(a). A simple example can help to explain this.

Assume (1) the government charges a defendant with operating a website that is used to transmit child pornography and that there are pictures and statements on the website, (2) the government wants to admit the pictures, (3) the government wants to admit the statements for their truth, and (4) the defendant objects on hearsay and authentication grounds.

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Assume also that the trial judge has a hearing at which the government calls a law enforcement officer to testify that “I spoke with three longtime friends of the defendant, who told me that the defendant told each of them that the website was his.” If the trial judge believes the officer, the judge could find by a preponderance of the evidence that the website was operated by the defendant, even though the officer’s testimony is inadmissible hearsay. Rule 104(a) allows this. If the trial judge makes the preponderance finding, this would be sufficient for the judge to find that Rule 801(d)(2)(A) is satisfied as to the statements. But nothing in Rule 104(a) allows the judge to admit the officer’s testimony regarding what the three friends said, and it is highly unlikely that their statements would satisfy any hearsay exception. Therefore, there would be no admitted evidence to tie the defendant to the website, the government could not authenticate the photos as being posted by the defendant, and, therefore, the judge could not admit the photos into evidence because Rule 104(b) requires admissible evidence connecting the photos to the defendant.

Can it really be that the statements could be admitted because the judge assessed them under the hearsay rule and Rule 104(a), but the photos could not be admitted because they are physical evidence and only relevant if tied to the defendant under the Rule 104(b) standard? This would seem to make little or no sense, and the gut reaction of any experienced judge or lawyer is that it must be wrong. They are right. It is wrong.

**Why Is It Wrong?**

It is wrong because the prosecution is not entitled to ask the jury to use evidence as being a genuine or authentic anything without sufficient evidence for the jury to find by a preponderance of the evidence that it is what the government claims. In other words, the prosecution cannot ask the jury to infer or conclude something without an adequate evidentiary basis.

If the trial judge were to admit the statements based on the officer’s hearsay testimony at a hearing, the prosecution would have succeeded in offering no admissible evidence to justify asking the jury to find that the statements were made by the defendant. The statements would be in evidence, would prove nothing, and might in the end have to be stricken as irrelevant or as confusing under Rule 403.

**What Is Right?**

The bottom line is that any party wanting the jury to find that something is what that party claims it is must satisfy Rule 104(b). To say, for example, that a website is the defendant’s, there must be sufficient evidence for the jury to find not just that there is a website with material on it, but also that the defendant operated that website. The proponent of the evidence must offer sufficient foundational facts for the jury to find by a preponderance of the evidence that the website is the defendant’s. Under Rule 104(b), the judge is not a fact finder—the judge is a fact screener who decides whether there is sufficient evidence for the jury to make the required finding.

If, however, evidence is properly authenticated but is also hearsay (such as the statements on the hypothetical website), the judge must use the Bourjaily standard discussed in Harvey and, in order to satisfy Rule 801(d)(2)(A), make the requisite finding by a preponderance of the evidence that the defendant made the statements. In making this ruling, the judge is a fact finder.

**Conclusion**

The simple hypothetical demonstrates that the proponent of any evidence always must satisfy Rule 104(b) in order to be permitted to ask a jury to conclude that evidence is what the proponent claims it is. When the evidence is hearsay, the proponent must also satisfy the hearsay rule and offer evidence (that need not itself be admissible) that enables the judge to find by a preponderance of the evidence that there is an exception or exception that supports admission. The fact that evidence is hearsay does not remove the need for authentication; it means that in addition to authenticating the evidence and thereby satisfying Rule 104(b), the proponent must also satisfy the hearsay rule and satisfy Rule 104(a).

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**Book Review (cont. from page 33)**

conviction and imprisonment. Part of that is his spiritual journey. Morton realized that hate would destroy him. Instead, he used his experience to help make sure it would not happen to others. He hired a lobbyist and worked with diverse criminal justice groups to pass a law that drastically reformed Texas criminal discovery practice. What is known as the Michael Morton Act requires the prosecution to copy most evidence in its possession and give it to the defense upon request. It is more progressive than most other states. It was passed with no opposition and quickly signed by the governor.

I have heard Michael Morton tell his story to audiences several times, and I have watched An Unreal Dream: The Michael Morton Story, an award-winning documentary. Having been a criminal defense lawyer for 29 years, I do not go looking for legal dramas. I avoid television shows and films about criminal justice. Yet I had no qualms about reading a story I already knew. It is that good.
The Lowest Sentence, the Best Place, the Earliest Release: Part 1

BY ALAN ELLIS

Approximately 97 percent of all federal criminal defendants plead guilty. Seventy-five percent of the others who proceed to trial are convicted. Almost 99 percent will ultimately be sentenced. Over 87 percent will be sentenced to prison. Thus, for most offenders the three key concerns are: “How much time am I going to do?” “Where am I going to do it?” “How soon am I going to get home?” The following tips are offered in an effort to secure the lowest possible sentence.

Below-guidelines variance sentences are on the rise, while sentences within the guidelines continue to decrease. According to the statistics compiled by the US Sentencing Commission since Booker, non-government-sponsored (e.g., non-section 5K1.1 departures) below-guidelines sentences have increased from 12 percent of all sentences imposed in 2006 to 20.8 percent in 2014. Within-guidelines sentences have decreased from 61.7 percent of all sentences imposed in 2006 to 47.2 percent in 2014. The increase in below-guidelines sentences is even more dramatic when looking at particular offense categories. For example, non-government-sponsored below-guidelines sentences for child pornography offenses—perhaps the most controversial of all types of guidelines sentences—have more than doubled from only 20.8 percent of all such sentences imposed in 2006 to 43.8 percent in 2014. The trends for non-government-sponsored below-guidelines sentences in the top five offense categories, as well as the trend for sentences overall, are shown in figure 1 (see page 51).

Cost of Incarceration. Do not forget to remind the court of the continuing crisis in overcrowding the Bureau of Prisons is experiencing, which necessarily makes access to rehabilitation and medical care all the more difficult, and further can accentuate any vulnerability to abuse that a client may face. The latest statistics indicate the current population is at 138 percent of capacity. As of 2014, the Inspector General for the Department of Justice has listed for the past two years reform of the federal prison system as the top challenge facing the department—higher even than terrorism.

Mid-range sentencing options—home confinement. Judges sometimes impose a split sentence, that is, a sentence that combines incarceration and home confinement. Zone C of the federal Sentencing Table allows a judge to impose a split sentence with guidelines ranges of 10–16 months or 12–18 months. The period of incarceration will likely be served in a federal prison. And in some cases, an offender may be designated by the Bureau of Prisons to serve his or her sentence in a detention facility’s (such as MDC Brooklyn, FDC Philadelphia, FDC Houston, MDC Los Angeles, MCC Chicago) Work Cadre Program. To ensure that the client does not have to be incarcerated in a federal prison, let alone a detention facility that houses all sorts of inmates, suggest that a sentence of probation or time served plus supervised release conditioned upon the same amount of time in a residential reentry center (RRC), i.e., halfway house, be imposed. You may even want to suggest more time in the RRC than called for by the guidelines.

Allocation. Don’t overlook the importance of allocation. For an excellent discussion, see US District Judge Mark W. Bennett’s article entitled “Heartstrings or Heartburn: A Federal Judge’s Musings on Defendants’ Right and Rite of Allocution” in the March 2011 issue of the NACDL’s The Champion.

Character letters. Defenders must educate probation officers about clients before prosecutors have had an opportunity to poison the well. One way to do so is by providing probation officers with favorable character letters. Defenders can provide clients with a character instructional letter to send to family, friends, and supporters with guidance on how to write a character letter. Here is one of ours:

Client’s Name
Client’s Address

Dear [Client’s Name]:

I understand that there are a number of individuals including friends, family members, and business associates who know you and wish to write letters to the Court about you, but who believe they could use some guidance about how to convey their messages. Character letter writers often could use some guidance about how to convey their messages. I told you I would attempt to provide some guidance, and am doing so in this letter for their use.

The letters should be addressed to the Judge:

Honorable __, Judge
United States District Court
Address

but should be sent to me so that I may review them to make copies for the prosecutor and the Probation Officer. If you have any questions for me or would like some guidance about how to make copies for the prosecutor and the Probation Officer, please call __ at ___.

ALAN ELLIS is a regular columnist for Criminal Justice magazine and past president of the NACDL. He practices in the areas of federal sentencing, prison matters, postconviction remedies, and international criminal law, with offices in San Francisco and New York. Contact him at AELaw1@alanellis.com or go to www.alanellis.com. This article is adapted from the author’s 2015–2017 Federal Prison Guidebook.
Officer before sending them on to the Judge. The letters should be in the words of the letter writer, should be concise, and should be genuine. There should be no orchestrated letter-writing campaign; instead, individuals who strongly feel they have relevant information for the Judge should be given a copy of this letter to assist in expressing those views. Writers should refrain from including their address and telephone number on the letter as it will need to be redacted.

What follows are some suggestions which these letter writers may wish to incorporate:

1. State their present or former position, e.g., “I am/was the Pastor of the XYZ church.”
2. Describe their relationship with you, including the nature and the length of the relationship, and how you met.
3. Describe the good that you have done in charitable, educational, civic, or business activities. Particular experiences which the writer has had with you and which demonstrate your human virtues would be helpful. An anecdote—an act of charity, or a particular kindness—briefly stated may be worth far more than merely describing you in abstract terms as “decent.”
4. Express belief in your honesty and how your conduct was out-of-character with everything else you’ve done in your life.
5. Tell the Judge, in the strongest possible terms, why imprisonment would be tragic to you, your family, and the community.
6. Plead for consideration as a human being based on what you have been doing in your entire life.
7. Plead for mercy or compassion based on your service to others (without your having expected anything in return), not as a special favor.
8. Use their own thoughts and language as they see fit.

Of course, the suggestions above are not all-inclusive, and some letter writers may not be in a position to make statements based on their experience about all areas described above. What is important is that the letters be genuine and reflect the deeply held beliefs of the letter writer.

Additionally, I strongly suggest that letter writers NOT:

1. Question the guilty verdict or finding of guilt;
2. Comment on the evidence in the case;
3. Suggest a particular sentence;
4. Express personal views on the criminal justice system; or
5. Use the words “lenient” or “leniency” in requesting sentencing by the Judge.

I would be happy to discuss these suggestions further with you or with any person interested in writing to help you.

Finally, even though your sentencing date is not until __, it would be useful for me to receive the letters no later than __.

Sincerely yours,

ALAN ELLIS
LAW OFFICES OF ALAN ELLIS

![Rate of Non-Gov't Sponsored Below Guidelines Sentences](image-url)

US Supreme Court to Adopt Electronic Filing System

BY JUSTIN P. MURPHY

The Supreme Court recently announced that it intends to edge forward and join other federal courts by making briefs and other filings available electronically. Although cameras, cell phones, and other technology will remain barred from the Court, Chief Justice Roberts announced that electronic filings may be accepted as soon as 2016. There will be an initial trial period during which attorneys will be required to file documents both electronically and on paper, and even after the trial period concludes, paper filing will be required, although the “default” will be the electronic record.

Chief Justice Roberts announced the upcoming changes in the 2014 Year End Report on the Federal Judiciary (see http://tinyurl.com/nax9ftr). Chief Justice Roberts’s comments, excerpted below, explain the Court’s rationale for its decision:

When the Court opened the doors of its new Courtroom in 1935, it also revised its procedure for issuing decisions. Under the new “hand-down” protocol, immediately before a Justice announced a decision in the Courtroom, the Clerk of the Court directed messengers to hand copies to a small group of journalists stationed in front of the bench. The journalists then dispatched the copies through . . . pneumatic tubes to their colleagues in the press booths one floor below, saving the messengers dozens of steps and precious minutes in communicating the news of Court actions.

In 1968, John P. MacKenzie, the Supreme Court reporter for the Washington Post, described the Court’s process of transmitting decisions as “perhaps the most primitive . . . in the entire communications industry.” The Court’s pneumatic age ended in 1971, when Chief Justice Burger authorized the removal of the pneumatic tube system at the same time that he introduced the Court’s familiar curved bench.

The Washington Post’s celebration of the marvels of pneumatics, followed by the Supreme Court’s belated embrace and overdue abandonment of a pneumatic conveyance system, illustrates two tenets about technology and the courts, one obvious and the other less so. First, the ceaseless growth of knowledge in a free society produces novel and beneficial innovations that are nonetheless bound for obsolescence from the moment they launch. No one should be surprised that the same surge of creativity that pushed courts from quills to hot-metal type will inevitably propel them past laser printers and HTML files as new technologies continue to emerge. Second, and perhaps less evidently, the courts will often choose to be late to the harvest of American ingenuity. Courts are simply different in important respects when it comes to adopting technology, including information technology. While courts routinely consider evidence and issue decisions concerning the latest technological advances, they have proceeded cautiously when it comes to adopting new technologies in certain aspects of their own operations. In this year-end report, I would like to describe progress the courts have made in taking advantage of information technology, recognizing that the courts will always be prudent whenever it comes to embracing the ‘next big thing.’

True, in today’s high-tech world, the idea of CM/ECF may seem to some mundane. In the realm of computer science, electronic case filing cannot rival the dazzling design technologies that empower engineers, or even the vivid gaming technologies that entice adolescents and the young-at-heart. Nevertheless, CM/ECF is vitally important to the cause of justice because it can make the courts more accessible, and more affordable, to a diverse body of litigants, drawn from every corner of society, who often enter the courthouse reluctantly, apprehensively, and only as a last resort.

The Supreme Court is currently developing its own electronic filing system, which may be operational as soon as 2016. Once the system is implemented, all filings at the Court—petitions and responses to petitions, merits briefs, and all other types of motions and applications—will be available to the legal community and the public without cost on the Court’s website. Initially, the official filing of documents will continue to be on paper for all parties in all cases, with the electronic submission an additional requirement for parties represented by attorneys. Once the system has operated effectively for some time and the Supreme Court Bar has become well acquainted with it, the Court expects that electronic filing will be the official means for all parties represented by counsel, but paper filings will still be required. Parties proceeding pro se will continue to submit documents only on paper, and Court personnel will scan and upload those documents to the system for public access. The Court will provide more information about the details of the system, including the process for attorneys to register as authorized filers, in the coming months.

These new systems are important steps forward. Indeed, the federal judiciary’s CM/ECF system was
pioneering technology when it was introduced, and it remains the premier model among court systems around the world for electronic case management. Nevertheless, the federal courts, including the Supreme Court, must often introduce new technologies at a more measured pace than other institutions, especially those in private industry. They will sometimes seem more guarded in adopting cutting-edge innovations, and for good reason, considering some of the concerns that the judiciary must consider in deploying new technologies.

The federal courts, however, also face obstacles that arise from their distinct responsibilities and obligations. The judiciary has a special duty to ensure, as a fundamental matter of equal access to justice, that its case filing process is readily accessible to the entire population, from the most tech-savvy to the most tech-intimidated. Procedural fairness begins in the clerk’s office. When deploying CM/ECF, the judiciary must make sure that its operating instructions are clear, its applications and dashboards are intuitive, and its systems are compatible with a broad range of consumer hardware and software. Unlike commercial enterprises, the courts cannot decide to serve only the most technologically-capable or well-equipped segments of the public. Indeed, the courts must remain open for those who do not have access to personal computers and need to file in paper, rather than electronic, form.

The courts also have important security concerns that must be satisfied before new systems go live and continuously throughout their operational life. Litigation often involves sensitive matters: Criminal prosecutions, bankruptcy petitions, malpractice suits, discrimination cases, and patent disputes may all lead to the collection of confidential information that should be shielded from public view to protect the safety of witnesses, the privacy of litigants, and the integrity of the adjudicatory process. Courts understandably proceed cautiously in introducing new information technology systems until they have fairly considered how to keep the information contained therein secure from foreign and domestic hackers, whose motives may range from fishing for secrets to discrediting the government or impairing court operations.

Federal judges are stewards of a judicial system that has served the Nation effectively for more than two centuries. Like other centuries-old institutions, courts may have practices that seem archaic and inefficient—and some are. But others rest on traditions that embody intangible wisdom. Judges and court executives are understandably circumspect in introducing change to a court system that works well until they are satisfied that they are introducing change for the good.

As technology proceeds apace, we cannot be sure what changes are in store, for the courts or society generally. Innovations will come and go, but the judiciary will continue to make steady progress in employing new technology to provide litigants with fair and efficient access to the courts.

Chief Justice John Roberts, December 2014
Midyear Meeting Highlights

BY KYO SUH

The ABA Criminal Justice Section hosted a wide array of programs and activities during the ABA Midyear Meeting, Feb. 5–7, in Houston, Texas. The White Collar Crime Committee presented “Cybercrime: The Dark Side of Technology,” a CLE that discussed cyber-attack and response, cyber investigations and prosecutions, data and evidence collection, jurisdictional issues, and forensic computer exams. The Victims Committee and Young Lawyers Committee each hosted panels focused on the use of social media. Section Chair James E. Felman provided an overview of the Clemency Project 2014. In order to further our efforts to promote diversity within the Section, the Women in Criminal Justice Dialogue Group hosted “The Role of Women in Criminal Justice Reform: What’s Next after Ferguson and New York.”

Resolutions Passed
The Section proposed four resolutions on criminal justice for adoption as ABA policy during the ABA House of Delegates meeting on February 9 in Houston. The resolutions included #107A, urging governments to adopt a presumption against the use of restraints on juveniles in court; #107B, urging accountability for those who unlawfully intimidate witnesses; #107C, urging governments to enact sentencing laws that would eliminate life without the possibility of release or parole for youthful offenders both prospectively and retroactively; and #107D, which adopts the black letter of the ABA Standards for Criminal Justice: Prosecution Function and Defense Function. All four resolutions were adopted.

Collateral Consequences Inventory Done
ABA President William Hubbard sent a letter on behalf of the association to US governors, state bar presidents, and state supreme court justices sharing the news of the completion of the ABA National Inventory of the Collateral Consequences of Conviction (www.abacollateralconsequences.org). The ABA Criminal Justice Section spearheaded the effort that identifies legal restrictions in areas such as employment, housing, and education benefits, and other opportunities for people with convictions. Developed with a grant from the National Institute of Justice as a provision of the Court Security Improvement Act to combat this growing problem, the database collects and analyzes the collateral consequences for each US jurisdiction to help legislators, prosecutors, public defenders and defense lawyers, legal aid organizations, and the national media to report, develop, and implement safety-enhancing and economically beneficial collateral consequences reforms.

Report on Money Crimes and Sentencing
The ABA Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes completed its first draft guidelines and submitted its recommendations to the US Sentencing Commission for review. The Section also sent the report to over 740 district judges nationwide. The recommendations address the growing concern that reliance by judges on the current US Sentencing Guidelines for economic crimes resulted in sentences that were too harsh, especially in cases with high losses. Read more about the suggested guideline reforms at www.americanbar.org/groups/criminal_justice/economic_crimes_taskforce.html.

New Book
Money Laundering: Legislation, Regulation & Enforcement
By Miriam F. Weismann
This book provides an updated and comprehensive review of the subject of anti-money laundering activity. The book is designed to organize and simplify (to the extent possible) the explanation of the laws, regulations, and salient cases. For more information, see www.americanbar.org/groups/criminal_justice/publications.html.
Upcoming Events

Sixth Annual Prescriptions for Criminal Justice Forensics Conference
June 5
New York, NY

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

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

CJS 8th Annual Fall Institute, CJS Council & Committee Meetings
Oct. 22–25
Washington, DC

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

For more information, see www.americanbar.org/groups/criminal_justice/events_cle.html.