The ABA Criminal Justice Standards: A Guide and a Celebration

On the eve of the fiftieth anniversary of the ABA’s adoption of the first volumes of the Criminal Justice Standards, the ABA Criminal Justice Section will reflect on and celebrate its past, and their guidance to the profession during our “2017 Spring CLE, Council and Committee Meeting” on May 4-7 at the Four Seasons Resort, in Jackson Hole, WY.

This free CLE program affords a unique opportunity for registrants to gain valuable information about the Standards and how they can provide helpful assistance to criminal law practitioners.

Among the topics to be covered in the CLE program:

- The “Making” of the Standards. The background and history of the Standards Project including the development and revision process.
- The use of law school “Roundtables” for developing new subject matter areas as Standards topics.
- The use of the Standards by federal and state courts, their endorsement and criticism of their use.
- Standards as a guide for best practices, a source for current law and as an aspirational statement by the ABA of the direction the law should take.
- Standards as a guide for ethical conduct.
- The “Electronic” Standards now in development.

As always, our various committees, and council will hold meetings throughout the conference. Dial in numbers will be made available on the various list serves closer to the conference.
he entertainment world has long had a love affair with the world of forensic science. Sherlock Holmes brought his knowledge of botany, chemistry, and firearms, coupled with his unassailable powers of inductive reasoning, to solve puzzling mysteries. As a result, he has long been a darling of fictional literature, stage, and screen and of the mystery genre. Crime scene investigation units made the acronym CSI a ubiquitous feature of primetime television series and “reality” shows.

Let me preface my remarks by first acknowledging that I serve as a commissioner on the National Commission on Forensic Science (NCFS). As a result, I am obligated to say that the views expressed in this column are mine and should not be confused as representing the views of the NCFS. These statements represent my opinion having served as a criminal prosecutor for 36 years, having testified before the U.S. Senate Committee on the Judiciary on the subject, and having spent some considerable time studying the field, inside and outside of the courtroom.

The power of science to detect and solve crime was long heralded as unerring, and the forensic practitioner’s conclusions as supported by science and the scientific method. But how closely do the techniques employed in our nation’s crime laboratories measure up to the near-infallibility popular culture has embraced? On February 18, 2009, the National Academy of Sciences (NAS) issued its report, *Strengthening Forensic Science in the United States: A Path Forward*. The report identified a number of weaknesses it saw in the field of forensics and called into serious question the validity of several methodologies.

The NAS report had been commissioned by Congress at the urging of a broad range of stakeholders, not the least of which was the forensic science community itself. The NAS submitted 13 recommendations that it believed would greatly strengthen forensic practice in the United States. These 13 recommendations were to foster “a culture that is strongly rooted in science.”

Therein lies the challenge facing the forensic science community today. Some practitioners have been resistant in their readiness to embrace the culture called for by the NAS. Some of that may be the result of the natural aversion to change in general. Some may be the result of a nationwide review of cases involving microscopic hair comparison. It may be feared in some quarters that the kind of changes that may result from the current study underway may upend convictions that are otherwise provident. It may well be premature to assess the effect of the review of microscopic hair comparison cases where convictions resulted. It should be noted that the review only focused on the language used in reports or testimony to determine whether or not the opinions as stated exceeded what the science would sustain. There was no consideration at that stage of the materiality of that evidence in comparison to the quantum of other evidence present in the case. The effect of that review remains to be seen.

For myself, I have spent virtually my entire career as a prosecutor, roughly 36 years. I have never failed to pursue evidence for fear of the effect it might have on an ongoing investigation, a pending case, or a past conviction. I do not believe others should pursue such willful blindness either.

So what is the state of forensic science? In my opinion, the reality is that in some disciplines there is a lot that we don’t know. The culture-readiness of some methods is not clear, and we know that there are aspects of some disciplines that can provide valuable, relevant information but that also require greater research. We know that some methods are scientifically reliable. That is, the test results are repeatable. But knowing that the test results are consistently repeatable does not mean that the results give us a valid picture of the real world, or tell us what those results might mean. In some disciplines, analysis can meet requirements of scientific reliability and validity, but limitations exist in all disciplines. In the case of fingerprint examination, for example, the quality of the latent print to be

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EDITOR’S NOTE: It has come to our attention that the article “The U.S. Bureau of Prisons’ Pre-release Program: Getting Out Early” by Alan Ellis and J. Michael Henderson, which appeared in the Winter 2017 issue of Criminal Justice magazine, contained content without citation from another work: Todd Bussert, Peter Goldberger, and Mary Price, “New Time Limits on Federal Halfway Houses: Why and How Lawyers Challenge the Bureau of Prisons Shift in Correctional Policy—and the Courts’ Response,” Criminal Justice 21:1 (Spring 2006). Had we been aware of these circumstances, the authors of the 2006 article would have been credited as co-authors and the content clearly cited.
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The Problem of Old Laws in an Era of New Games

BY ANDREW KIM
“Digital gaming”—a phrase that broadly covers games played on computers and mobile devices—has seen explosive growth over the past decade. What started off with a small but devoted group of gamers playing titles like StarCraft and Diablo has morphed into a seemingly ubiquitous form of entertainment that has entered the mainstream, as evidenced by the hordes of smartphone-wielding millennials searching for Pokémon in the augmented reality game Pokémon GO. Digital gaming owes its meteoric rise in large part to a particular subset of the industry—digital games that are played online.

One of the most popular forms of digital gaming is multiplayer gaming, which, in certain contexts, can include “social” or “social media” gaming. League of Legends, a third-person game played in a battle arena, is among the most popular multiplayer games—if not the most popular. In 2015, tens of thousands of League of Legends fans descended on a sold-out Madison Square Garden to watch the North American championship of the game, with 27 million viewers joining them via live stream on YouTube and Twitch. Another example is Counter-Strike: Global Offensive (CS:GO), played every month by over half a million users who are riveted by a multiplayer first-person shooter that has been around, in one form or another, for over a decade. And on mobile phones, over three million users play Game of War, a multiplayer “social game” in which players build virtual empires and battle one another for dominance.

At first glance, it may seem as if these games offer little reward other than personal pride and virtual glory. And they come at a price—most, like League of Legends and CS:GO—are pay-to-play games (or, in the case of Game of War, a “freemium” game in which the game is free but in-game features are not). Indeed, these games have been a big business for developers—digital gaming sales hit $61 billion in 2015.

But looking beneath the surface, it is clear these games have become a financial boon for players, too. Some of the ways in which a player can make money are unquestionably legal. Top players, for instance, can participate in tournaments hosted by game developers in which those players can win millions of dollars. And some of the ways are completely illegal, at least in the vast majority of states. Outside of the United States, for instance, third-party betting outlets allow interested parties to place wagers on the outcome of these multiplayer games. Although these outlets have attempted to make inroads into the United States, they largely remain banned for the time being as illegal gambling sites.

There is, however, a gray area. In the last couple of years, these massively popular online games have found themselves under the scrutiny of criminal antigambling laws, albeit in a civil context. Through no fault of their own, developers have increasingly found themselves snared by laws intended to ban “traditional” forms of gambling. For instance, players have used in-game features, such as the ability to trade items with no inherent value, to create a secondary market of shadow gambling without the developer’s consent. And yet game developers have been left holding the bag, accused of running a gambling operation because antiquated laws intended for older forms of gambling do not adequately address the circumstances these developers are in.

To be clear, it is very unlikely that a developer of a multiplayer online game will ever be brought up on criminal charges. The “gray area” exists because eager plaintiffs’ attorneys have filed lawsuits against these developers, looking to take advantage of a murky legal landscape even though these developers never intended for their games to be outlets for gambling. But these lawsuits all rely on criminal gambling prohibitions to make their case, and it is not implausible to think that a zealous regulator could take the next step and shut down an immensely popular game on the theory that it is illegal gambling, for reasons beyond the developer’s control.

This article highlights two problems posed by gambling laws that trouble digital gaming developers. The first is a new take on a familiar problem—the issue of uniformity. Although most states use the same rudimentary formula with the same elements for determining whether a game can be considered “gambling,” they vary as to how much of each ingredient is necessary to violate the law. The second is a problem likely unforeseen when the gambling laws were first passed—the issue of secondary markets, i.e., how players place real-world value on otherwise worthless in-game items and use those items to place wagers on in-game events.

DIGITAL GAMES AND GAMBLING LAWS: THE NEED FOR UNIFORMITY

The task of regulating gambling is generally left to the states, not the federal government. While there are a host of federal laws that deal with gambling, such as the Wire Act, the Illegal Gambling Business Act, and the Unlawful Internet Gambling Enforcement Act, these statutes are intended to work in tandem with existing state law prohibitions, with the goal of quashing interstate gambling.

Most state gambling laws were written decades, if not over a century, ago. The obsolescence of some of these laws can be seen on their face; many gambling laws have a rich history underneath the statutory text. California, for instance, prohibits the playing of faro, a seventeenth-century French card game not in vogue for some time. (Cal. Penal Code § 330; see Ex Parte Milburn, 34 U.S. (9 Pet.) 704 (1835) (denying habeas petition challenging bail on charges of keeping a faro bank).) Many state laws explicitly ban “policy” or “numbers” games, a form of street lottery popular in the mid-1900s and sometimes tied to organized crime.

That is not to say, however, that state gambling laws are effectively defunct, too archaic to be enforced. Some forms of gambling have continued to flourish since the inception of the
gambling laws currently in force. People still operate illegal and unlicensed slot machines (e.g., State v. Greenetrack, Inc., 154 So. 3d 940 (Ala. 2014) (per curiam)), secret gambling parlors still exist (e.g., United States v. Esposito, 638 F. App’x 133 (3d Cir. 2016)), and bookies still take surreptitiously placed bets on the outcomes of sporting events (e.g., United States v. Massimino, 641 F. App’x 153 (3d Cir. 2016)).

To combat these forms of “traditional” gambling and other variants of the modern age (such as illegal web casinos), prosecutors and civil enforcers (such as private plaintiffs) rely on laws that fall into one of three categories: (1) a general gambling prohibition, (2) “ancillary” gambling prohibitions, and (3) laws prohibiting bookmaking and pool selling. These laws have been effective in regulating games that have been considered illegal since the time the laws prohibiting them were written, but they have also ensnared games that are not considered “gambling” in the mainstream.

The type of law most problematic for modern gaming also happens to be the most general: a prohibition on “gambling.” Most states have a statute that bans “gambling” as a general matter. “Gambling,” in turn, is usually defined as a person offering a thing of value (the “stake”), placed on the outcome of a contest, for the opportunity to win a thing of value (the “prize”). These laws also have a third (and in many cases, most important) element: chance. Chance is described as “something that happens unpredictably without any discernible human intention or direction and in dissociation from any observable pattern.” (People v. Shira, 133 Cal. Rptr. 94, 105 n.12 (Ct. App. 1976).)

In all but two states, the contest on which a wager is placed must be a contest of chance in order for gambling to occur. Louisiana and Arizona are the exceptions—in those states, any stake placed for the opportunity to win a prize, regardless of whether it is placed on the outcome of a contest of chance or one of pure skill, is considered to be gambling. The rest of the states require at least a scintilla of chance in order for a wager placed on a contest to be considered gambling. In the vast majority of states, such as California and Massachusetts, chance must predominate over skill in order for the game to be considered gambling. The second largest group of states, including New York, require a “material” element of chance in the game—although these states differ on what the word “material” means. And the ambiguity of the word “material” itself causes problems, because materiality is often difficult to quantify. (Anthony N. Cabot et al., Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Iloglic to Define the Legality of Games of Mixed Skill and Chance, 57 Drake L. Rev. 383, 393 (2009).) Finally, in a small minority of states, such as Kentucky and Tennessee, any degree of chance is sufficient for determining whether there is gambling.

To illustrate, consider these games. Chess and trivia games are games of skill—chess requires strategic thinking, trivia requires sheer knowledge. The classic “one-armed bandit”—a slot machine—is an obvious game of chance; no amount of human manipulation can influence the outcome, which is determined by a random-number generator. These games are easy calls when it comes to the chance/skill question. But others are not. Consider, for example, card games, which many would automatically associate with gambling. Certain types of bridge are considered games of skill. Blackjack, a game for which some skill can be employed to mitigate the house edge (such as basic strategy or card counting), is a game of chance. And as recent memory shows, poker falls somewhere in the middle—its proponents say it is a game of skill, its detractors (including regulators and prosecutors) consider it a game of chance.

Setting aside variations on the levels of chance required for a game, another complication is the kind of role that chance must play in order for a game to be considered one of chance. States generally require that chance be a systemic component of the game, i.e., part of the game’s design, in order for a game to constitute “gambling.” Even in states where “any” chance will do, random events (such as a freak accident) that befell the competitors of a lawful skill-based game do not somehow transform the game into a contest of chance, as the design of the game itself would not contemplate or foresee the randomness. (See, e.g., Ky. Office of the Att’y Gen., Op. No. 80-409, 1980 WL 103297, at *2 (June 17, 1980).)

In the abstract, these concepts may seem straightforward; in practice, particularly with “modern” digital gaming, the lines are difficult to draw. Take fantasy sports, for instance. These games—particularly their online variant—have been increasingly popular over the last few years. Proponents assert that the game is one of analytics—athletes are selected as part of fantasy sports teams, but those athletes merely serve as vehicles for statistics and variables, with the endgame being to “create a lineup that will produce extreme outcomes” and better than everyone else’s. (Ed Miller & Daniel Singer, For Daily Fantasy-Sports Operators, the Curse of Too Much Skill, McKinsey & Co. (Sept. 2015), http://tinyurl.com/zzagw6l.) Detractors (including many state regulators) claim that the game is one of chance because “players exercise no control or influence over the actions of [fantasy sports] players” and because of random considerations such as injury, weather, and officiating. (Letter from Kevin K. Takata, Deputy Attorney Gen., Haw. Dep’t of the Attorney Gen., to the Honorable Rosalyn H. Baker, Senator, Sixth Dist. 6–7 (Jan. 27, 2016), available at http://tinyurl.com/j6byxsm.) The protracted confusion over whether fantasy sports are games of skill or games of chance has forced state legislatures to step in to clarify that they are not gambling contests.

The skill/chance issue, standing alone, is not an insurmountable obstacle for game developers—in-game chance elements can be added and removed. But what inhibits some digital game innovators—whose success depends on the ability to reach as many players as they can, across the country and around the world—is the uncertainty created by a patchwork of different laws. Because states vary on how much chance is required for a game to be considered “gambling” and what kind of role chance must play in order for “gambling” to occur, it is difficult for developers to create a game that would neatly accommodate every law. Consider, for instance, a hypothetical pay-to-win online trivia game. The game assigns a randomly selected category of questions every time a user plays the game—the user may or may not have a base of knowledge about that category. In most states—where
chance must predominate in a contest before the game can be considered “gambling”—the game would be perfectly legal. But in states such as Kentucky and Tennessee—where “any chance” will do—that pay-to-play trivia game could raise concerns about compliance under an aggressive interpretation of the gambling laws of those states.

“Ancillary” gambling prohibitions are companion laws that typically outlaw the facilitation of gambling, rather than the act itself. These include laws forbidding the running of a gambling facility, or the manufacture, possession, and operation of a gambling device. These laws typically cross-reference the general gambling prohibition to establish a violation of the law. Some states have ancillary gambling laws that are difficult to apply to digital games, mostly because they have considerably narrowed the scope of the offense. Massachusetts’s gambling device statute, for instance, explicitly states a gambling device must be a slot machine. (See Mass. Gen. Laws ch. 271, § 5A.) But states with broadly worded ancillary laws could use those laws to reach key components of a digital gaming operation. If, for example, a digital game is used for “gambling,” the server used to host games could be considered a “gambling device, depending on how a state defines the term.”

Pool selling and bookmaking prohibitions are less of a concern for the typical game developer. The two offenses are closely related, but they are not the same. Pool selling occurs when contestants pool together a pot of money (the prize pool); competitors then make wagers on the outcome of events, with winning wagers receiving prizes from the pool. Pari-mutuel horse racing is perhaps the most prominent example of a “pool.” Bookmaking is a close cousin, the distinction being that “the betting is with the bookmakers [i.e., the house], while in pool selling, the betting is among the purchasers of the pool.” (38 C.J.S. Gaming § 6.) These laws do not consider the skill/chance question. A stake on a contest is typically considered a bet that runs afoul of one of these two provisions, although several states have “purse, prize, and premium” laws that exempt entry fees paid for one’s own participation in a contest of skill in which prizes can be won from operators who do not take part in the contest (or otherwise have a vested interest). So long as a game format does not allow a player to wager a thing of value on the outcome of a contest, there is no concern about running afoul of pool selling and bookmaking prohibitions. For most developers, this should not be an issue, especially as they attribute no value to in-game items.

The criminal prohibitions discussed above were crafted at a time when gambling was treated purely as a vice. The legal landscape for gambling has since dramatically transformed, going from outright prohibition to careful regulation and licensure, replete with a schedule of fees and taxes owed to the state fisc. To the extent that digital gaming operations raise gambling concerns, the criminal laws could conceivably be used by prosecutors and regulators to shut them down. But as the legislative response to the uncertainty about fantasy sports shows, it is far more likely that any tension with the criminal laws will be addressed by accommodation and regulation, not resort to outright prohibition.

THE PROBLEM OF SECONDARY MARKETS

One unexpected source of potential legal problems is a feature of many digital games—in-game items. Although a game developer may not attribute any real-world value to an in-game item (or even a game account), the players themselves may assign that real-world value, which in turn has created legal headaches for developers. Most digital games are not designed with a real-world prize in mind: players can collect in-game items, but those items have no inherent real-world value. So in ordinary circumstances, they come nowhere close to violating the gambling laws, such as a general gambling prohibition or a bookmaking statute, because there is no opportunity to win anything of value.

These games sometimes allow players to trade virtual in-game items using the game platform itself. This is where things get complicated from a gambling law perspective. Some players may find a virtual quid pro quo arrangement satisfactory, trading one in-game item for another. But others may assign value to in-game items and may offer real money for certain items, especially those that are rare or otherwise prized in some way. So two players can come to an agreement to trade a virtual item for money, consummating the transaction by using a third-party vendor like PayPal or through BitCoin. These are not always small-dollar transactions—certain items on CS:GO, for instance, are regularly sold for hundreds of dollars. Even accounts themselves can become a desired good—players unwilling to spend the time to build up an in-game character or account can buy their way to success, purchasing accounts that have already achieved certain in-game accomplishments.

What results from this marketplace of in-game items and accounts is a thriving secondary market, where items and accounts are assigned real-world value by the players themselves, not the developer. And that market has spawned an unseemly outgrowth for those developers: gambling through the secondary market. At the most basic level of secondary market gambling, players can use in-game items or accounts to wager on themselves or others, e.g., Player 1 “wagers” an in-game item that he or she will beat Player 2 in an upcoming match (and vice versa), which the winning player can then sell on the secondary market. The next level of secondary market gambling is wagering on a match from which those placing wagers are totally detached—Players 1 and 2 wager virtual items on an upcoming team-based match involving two teams, with Player 1 asserting that Team A will win and Player 2 claiming that Team B will win. And the most extreme form of secondary market gambling is flat-out gambling—Player 1 transfers items to the in-game account of a third-party website, those items are assigned a monetary value, and then Player 1 plays casino-type games on the third-party website, “cashing out” winnings back in the form of in-game items.

These transactions raise the question of whether developers—who have no intention of fostering a gambling environment when they first release their games—could be liable for allowing gambling to occur through their games and on their systems. To be sure, no developer has been found civilly or criminally liable for violating the gambling laws.
of any state on a secondary market gambling theory, and it is highly unlikely that any will. But two recent civil actions provide food for thought as to how developers might find themselves unexpectedly on the hook for violating those prohibitions.

*Mason v. Machine Zone*, a suit involving the popular mobile game *Game of War*, presented one of the first examples of a game developer ensnared by a secondary market theory of gambling liability. *Game of War* is a strategy game in which players build virtual empires and attack one another in a quest for dominance. At the time, users accrued “gold,” an in-game currency that could either be earned or purchased. Players could use the “gold” to purchase in-game items that would enhance their gaming experience. Or they could go to a virtual wheel, on which they would wager “gold” in exchange for the opportunity to win, with the spin of the wheel, some other in-game item. The player in *Mason* contended that the virtual wheel constituted gambling because a stake (purchased “gold”) was placed on a contest of chance (the spinning wheel) for the possibility of winning a thing of value. The thing of value that could be won, the *Mason* player alleged, was a randomly selected in-game resource that would make the player’s account more valuable—that account could then be sold on the secondary market. The *Mason* court found the link to the secondary market too attenuated to implicate the developer and dismissed the case. (*Mason v. Machine Zone*, Inc., 140 F. Supp. 3d 457 (D. Md. 2015).) Similar claims were made in *Soto v. Sky Union, LLC*. (159 F. Supp. 3d 871 (N.D. Ill. 2016).) As of this writing, the U.S. Court of Appeals for the Fourth Circuit is considering the *Mason* case on appeal.

*McLeod v. Valve Corp.*, a case involving *CS:GO*, provides another approach to a secondary market theory of gambling liability. *CS:GO* is a multiplayer first-person shooter in which teams compete against one another to eliminate the other in timed rounds. In playing the game, players can accumulate “skins,” cosmetic decorations added to virtual in-game weapons. These skins can be acquired either through randomly generated “drops” or by trading with other players through an in-game platform. That platform also allows players to sell or buy skins for real money. Through third-party sites, players can wager skins on *CS:GO* matches and even wager skins in online “traditional” casinos replete with games like poker and roulette. Valve, the game’s developer, has not explicitly blessed any of this third-party activity. Instead, it has sent cease-and-desist letters asking for the third-party activity to stop. Nevertheless, the player in *McLeod* alleged that Valve, by allowing these sites to operate for the time that they did, engaged in illegal gambling. The district court ultimately dismissed the case on grounds that the plaintiffs lacked standing to bring their claims under RICO, punting on the question of gambling (but assuming it arguendo). (*McLeod v. Valve Corp.*, No. 2:16-CV-01227-JCC, 2016 U.S. Dist. LEXIS 137836 (W.D. Wash. Oct. 4, 2016).) In light of what was virtually a non-decision on the gambling issue in *McLeod*, suits have continued to spring up. (See, e.g., *G.G. v. Valve Corp.*, No. 2:16-cv-01941-JCC (W.D. Wash.).)

The *Machine Zone* and *McLeod* cases illustrate a problem unanticipated by the gambling laws currently in force: those laws presume that the operators themselves are offering prizes of value—they do not address what happens when it is someone else who is assigning value to prizes that otherwise would be worthless. To be sure, the problem of worthless items being used as proxies for money or other items of real-world value is not a new one. Courts have long held, for instance, that pinball operators who allow players to accumulate free plays and “cash out” those free plays for set sums of money operate illegal “gambling devices.” (*State v. One Hundred & Fifty-Eight Gaming Devices*, 499 A.2d 940, 952 (Md. 1985) (collecting cases).) (Yes, pinball is sometimes considered a game of chance.) The newness of the problem stems from the third-party assignment of value. If two players make an in-game wager using in-game items and therefore “gamble,” is the developer who hosts the game facilitating gambling? That raises another complicated question—what happens when the developer knows that the gambling is happening, but does nothing to shut it down? Is acquiescence enough to hold developers liable? Principles of fairness and lenity say no, as it is not the developer itself that is assigning value to the prizes. But the answer to the question of liability is not clear-cut.

**RECOMMENDATIONS**

The lack of uniformity in the gambling laws of the 50 states and the problem of secondary market gambling are only two issues that could potentially arise from the intersection of digital gaming and gambling laws. Despite its ubiquity, digital gaming is still a relatively new phenomenon, and the law has yet to catch up. It will likely be years before states are familiar enough with the digital gaming environment to take any action and reform their laws, if they feel compelled to do so at all.

That said, there are three steps states can take to alleviate the problems mentioned in this article. To address the lack of uniformity on the skill/chance question, states should adopt the definition of gambling as a binary choice: chance should either predominate, or it should not matter at all. Although game developers would likely prefer it if all 50 states required that chance predominate in a game in order for it to be considered gambling (as that would give them, in theory, a perfect sense of uniformity), states should also retain the right to exercise some semblance of sovereign prerogative in determining how much gambling to allow in their borders. However, predating gambling on “intermediate” levels of chance—e.g., a material degree of chance or “any” chance—casts needless ambiguity into the question of gambling. States using those tests should consider picking one side of the skill/chance question or the other, rather than straddling the fence.

As for the issue of secondary market gambling, states should consider adopting laws preemptively clearing developers of any liability under the gambling laws for such activity. Developers should be held liable only if they intentionally design their game so that players could covertly use it as a means of gambling. Another approach is to hold developers liable only for intentional design or if they know their game is being used for gambling and they take no steps to put a stop to such secondary market gambling. Under the second approach, developers should be given a safe harbor if
they take affirmative steps to shut down the gambling, such as the cease-and-desist letters sent out by Valve in response to the allegations in *McLeod*. Two challenges to this approach, however, are determining when a developer should be deemed “on notice,” and burdening developers with the affirmative duty of expending resources to take advantage of the safe harbor.

Finally, and perhaps most importantly, states should stay ahead of the curve and keep abreast of the latest digital gaming trends. Education and cooperation with the digital gaming industry is the best way to address other challenges that may arise as digital games play a more prominent role in American society. Nevada, for instance, has taken the lead on implementing regulations for “eSports wagering”—placing wagers on the outcome of certain digital contests played by “professional” digital gamers. By addressing at least one aspect of digital gaming early on, the Silver State has already started to reap benefits—casinos have gone all-in on professional digital gaming, i.e., eSports, and expect to yield big dividends.

One area that could be the focus of future regulation is the issue of addiction. eSports wagering in particular has the potential to combine two potent and well-documented forms of addiction—video game addiction and problem gambling. (Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017), http://www.espn.com/espn/feature/story/_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler.)

Whether state governments will take steps to reform their gambling laws to address these challenges remains to be seen. But states that proactively clear the air and help promote some semblance of uniformity in the gambling laws may hear from digital game developers sentiments familiar to many gamers—“TY” instead of “TISNF” (“thank you” and “that is so not fair,” respectively, in digital gaming parlance).
When Eddie Hood came home from the first day of jury selection in a capital murder trial, he already knew he would not be there long. Hood told his wife, “They are not going to want too many of ‘us’ on the jury.” By “us” he meant African Americans. Hood was right. Before Hood was even questioned, the prosecutors had marked him as “B#1.” Like the other black jurors, his name was highlighted in green on a list with a key that said, “Green highlights = Black.” And Hood—along with the four other black jurors in the pool—was in the top five on the prosecution’s list of “Definite Nos.” In the end, the jury was all white. The prosecutors argued it should sentence the defendant, Timothy Foster, a black 19-year-old, to death to “send a message to other people out there in the projects.” And it did.

Nearly three decades later, Foster’s conviction and death sentence were reversed by the U.S. Supreme Court in a 7–1 decision. Foster’s legal team (which includes these authors) had unearthed the prosecutors’ notes from the trial. The notes included race-based notations not only about juror Hood, but of all of the prospective black jurors. The investigator in the case had even written a memo suggesting which black juror to select “if it comes down to having to pick a black juror.” The Court found that the State had violated Foster’s rights under Batson v. Kentucky, which prohibits the exercise of peremptory strikes on the basis of race.

Foster’s case is a rare victory. Claims of discrimination in jury selection are notoriously hard to win. But just like Hood, everyone seems to know that
the discrimination is happening. No one doubted that the State would strike the black jurors at Foster’s trial. The only question was whether the State could get away with it. For nearly 30 years of appeals, it did. The Georgia courts repeatedly concluded that the State had not discrimination in Foster’s case, despite the smoking gun evidence in the prosecutors’ notes.

The Georgia courts’ rejection of Foster’s claim is sadly representative of the uphill battle that defendants face when bringing *Batson* claims in the state courts. A recent study published in the *North Carolina Law Review* found that in the 30 years since *Batson* was decided, the North Carolina appellate courts have never found a substantive *Batson* violation where the prosecutor had given a reason for striking a minority juror in any of the 114 cases they considered on the merits. The North Carolina Supreme Court has reviewed 74 cases in that same time period. Never once has it found a substantive violation under *Batson*. (See Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record,* 94 N.C. L. Rev. 1957 (2016).)

Yet race discrimination in jury selection was rampant in North Carolina. At a meeting of the North Carolina Conference of District Attorneys, a handout was distributed at a trial advocacy course called *Top Gun II* that provided prosecutors a list of race-neutral reasons they could draw from to explain strikes of black jurors. The list, titled “*Batson* Justifications: Articulating Juror Negatives,” included reasons such as “body language,” “lack of eye contact,” and “air of defiance.” One Cumberland County prosecutor was found to have used the list to justify striking black jurors in four different capital cases. (See State v. Golphin, Nos. 97 CR 47314-15; 98 CR 34832, 35044; 01 CR 65079, slip op. at 73–77, ¶¶ 68–78 (N.C. Gen. Ct. Justice Dec. 13, 2012).) In at least one capital case, the prosecutor simply read out loud from the *Top Gun* list, giving reasons that were clearly irrelevant to the case. Meanwhile, a statistical analysis of the strikes of black jurors in Cumberland County demonstrated the pervasiveness of race-based strikes. The study found that across 173 capital cases, 52.6 percent of eligible black jurors had been struck, but only 26.7 percent of other eligible jurors had been struck; black jurors were thus stuck at twice the rate of jurors who were not black. (Id. at 136–89.)

Why is relief in *Batson* cases so rare? Part of the blame falls on *Batson* itself. *Batson* analysis proceeds in three steps. First, the party raising the objection must make a prima facie case of discrimination by demonstrating a pattern of race-based strikes or other evidence of racial animus. In step two, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the challenged juror. At the third and final step, the court must weigh the totality of the evidence to determine whether the strikes were indeed motivated by race. This finding at the third step requires the judge to conclude not only that the prosecutor intentionally discriminated, but also that he or she lied about it. Most judges are loathe to make such damning findings about the prosecutors who come before them on a daily basis.

But another critical reason *Batson* fails is that courts routinely misapply it. Intent is inherently slippery, and thus difficult to prove. But courts frequently refuse to meaningfully assess intent in the way *Batson*’s step three requires. The challenges in proving intent, when combined with a cursory approach to step three, make it all too easy for courts to avoid upending convictions while condemning prosecutors for discriminating and then lying about it. Effective *Batson* litigation, then, must take a creative approach to generate undeniable evidence of intent and hold courts to the proper standard.

In this article, we address two key errors that courts make in their analysis of *Batson* claims. First, the courts conflate steps two and three of the *Batson* analysis. If the prosecutor’s reason is facially neutral, the court denies the *Batson* challenge. Second, courts falter at step three when the prosecutor has provided multiple reasons for its strike. Many courts analyze each reason one by one—if even one reason cannot be definitively discredited, the court will not find a violation of *Batson*.

**CONFLATING STEPS TWO AND THREE OF *BATSON***

This first error was at play in the Georgia superior court’s order in Foster. The state court denied Foster’s *Batson* claim because “the State put forward multiple race-neutral reasons for striking each juror,” and the reasons were “clear and reasonably specific.” (Foster v. Humphrey, No. 1989-V-2275, slip op. at 17 (Ga. Super. Ct. Dec. 9, 2013).)

But of course, the question at step three is not whether the reasons are race neutral. What matters is whether the reasons are true. To answer this question, courts are required to consider the totality of the evidence. Thus, generating powerful evidence that the court must confront is a critical part of effective *Batson* litigation.

We encourage developing a record that tells a powerful story about race discrimination—not only in the case at issue, but on a systemic level at that particular prosecutor’s office. This evidence not only strengthens the totality of the evidence, but also puts a fight to consistent efforts to discriminate in jury selection. Aside from prevailing in any one case, this broader evidence can educate the court about the common practices of the prosecutors in that jurisdiction and the variety of evidence that should be considered when attempting to ferret out intentional discrimination.

**Tracking patterns of race discrimination.** When
prosecutors have discriminated in one case, chances are they have discriminated in many others. And while it is easy to make excuses for disparate strikes in one case, it is much harder to explain a well-defined pattern of disproportionate strikes across cases. For criminal defense attorneys who regularly litigate against the same prosecutors’ offices, we recommend developing a database to track the strikes of black jurors across cases. Capital cases and other murder cases are typically highly publicized; tracking the jury composition for these cases as they arise could generate data that can be applied across cases.

Where it is impracticable to track a prosecutor’s complete record of strikes, it may be helpful to obtain the record from any cases that resulted in an appeal, which will often include the names of the jurors. Races can be determined by obtaining the master jury list, voter rolls, or other public sources of demographic information.

At the very least, it should be possible to get a history of Batson violations by a particular prosecutor or prosecutor’s office. Other sources might support a discrimination claim as well. Media or political advertisements might suggest that race is a recurring problem. We also submit that evidence that the prosecutor has been dishonest (such as Brady violations) should be relevant to his or her credibility in the Batson step three analysis. To our knowledge, no court has used a prosecutor’s Brady violation as evidence that he or she is not credible in a Batson case. But certainly, such unethical conduct should matter: it demonstrates a willingness to mislead the court. There may also be instances of racial bias outside of the Batson content. Perhaps a former employee has won an employment discrimination suit against the office. This, too, should be relevant when trying to prove an office’s willingness to act on racial bias.

Racially charged references in the trial record. Racially charged arguments show the prosecutor’s discriminatory intent. In Foster, the prosecutor asked the all-white jury to sentence Foster to death to “deter other people out there in the projects.” (Brief for Petitioner at 11, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349) [hereinafter Brief for Petitioner Foster].) At the time, 32 of the 34 units in the local housing projects were occupied by black families. Similarly, in Snyder v. Louisiana, the prosecutor implored the all-white jury to impose death on a black man who killed another man who was out with the defendant’s wife because the case was “very, very, very similar” to the O.J. Simpson case, where Simpson “got away with it.” (Brief for Petitioner at 2, Snyder v. Louisiana, 552 U.S. 472 (2008) (No. 06-10119).)

No court has yet relied on this sort of evidence in its Batson analysis. But in the oral argument in Snyder at the U.S. Supreme Court, the attorney for the defendant emphasized that race was both relevant and predominant in Snyder: "This is a case where the race of the victim and the race of the defendant are the determinative factors." (Oral Argument at 6, Snyder v. Louisiana, 552 U.S. 472 (2008) (No. 06-10119).)
Court, Justice Souter asked counsel for the State of Louisiana, “Do you believe that, if there had been a white defendant here, the O.J. Simpson case would have been mentioned?” (Transcript of Oral Argument, Snyder, 552 U.S. 472 (No. 06-10119).) He continued, “I find that highly unlikely. And because I find that highly unlikely, I put significance in the O.J. Simpson remark.” (Id.)

Justice Souter’s analysis is correct. Racially charged references made to an all-white or predominately white jury suggest that the prosecutor is capitalizing on the jury’s potential racial bias. This demonstrates motive to discriminate, which is critical to an analysis of intent.

Evidence that the case was racially charged. In cases that are racially charged, the State is more likely to be motivated to remove black jurors from the venire. The most obviously charged cases are those involving black defendants and white victims. But other factors can be important as well. Is the crime itself associated with racial stereotypes? Are any facts about the defendant—such as where he or she lives, employment status, interests, or home life—likely to trigger assumptions or animus based on race?

We can also look outside of the crime itself and into the racial dynamics of the community at large. In Foster, for example, the prosecutor’s comment about the housing projects was significant because those projects were almost entirely comprised of black families. The victim in the case lived in a white community right outside of those projects. Therefore, the prosecutor could exploit white jurors’ race-based anxieties about violent crime coming from poor black communities into nearby white ones.

Media references are a helpful place to look for racialized language about the defendant, the relevant communities, and other important dynamics. In doing media searches, we find it helpful to take a broad view. Instead of doing targeted word searches, carefully review the media reports from the date of the incident to trial. In the Snyder case, the district attorney had referred to the case as “his O.J. case” throughout that entire time period.

MULTIPLE REASONS FOR STRIKES
Another key error in courts’ analysis of Batson claims at step three is that they assess each of the prosecutor’s reasons one at a time. If any one reason is not demonstrably false, the court denies the Batson violation. In Foster, the State offered eight to 12 reasons for each of its strikes. (See Brief for Petitioner Foster, supra, at 11.) Some were obviously false. For instance, with respect to one juror, Marilyn Garrett, the State claimed it struck her because “her age [was] so close to the defendant.” (Id. at 32.) Foster was 18; Garrett was 34.

Other reasons were harder to disprove. For instance, the prosecutor said he struck Garrett because she worked with underprivileged children, and because of this, she would feel sympathy for Foster, who came from an impoverished background. (Id. at 33.) If it were truly the reason for the strike, this might be an acceptable rationale. Similarly, the State claimed that it struck Eddie Hood in part because his son had been prosecuted for a misdemeanor by that very same office. (Id. at 42.) Again, it is facially plausible that a prosecutor would want to strike a juror for that reason.

During the oral argument, Justice Alito asked what the Court should do when there is one good reason among a litany of suspicious or invalid ones:

Suppose there’s one reason that’s a killer reason? Like this—this individual has numerous prior felony convictions, alright? And then the prosecutor says in addition, . . . he looked down at the floor in answering the questions and didn’t seem to pause and didn’t seem to understand some of the questions. So under a circumstance like that, couldn’t the Court say, well, the one—there’s one reason here that . . . is clearly a justification for a peremptory strike? We don’t have to determine whether there’s evidence that the person was looking down at the floor.

(Transcript of Oral Argument, Foster, 136 S. Ct. 1737 (No. 14-8349) (Alito, J.).)

Our response is that this depends entirely on the totality of the circumstances. In Justice Alito’s extreme example of a prospective juror with multiple felony convictions, it may be difficult to prove that these convictions were not the real reason. But when the prosecutor has offered a plausible reason—like Hood’s son’s misdemeanor conviction—in a sea of implausible ones, the false reasons should make the court skeptical of a reason that seems like it could be valid.

The Court’s opinion in Foster (which Justice Alito joined with a separate concurrence) made clear that the Court does not require that each reason be separately debunked in order to find a Batson violation. Although the prosecutors in Foster had offered a flood of reasons for the strikes of black jurors, the Court did not even address all of them. Instead, the Court found that the prosecutors’ notes and a number of incredible reasons for its strikes made clear that race was their true motivation. Thus, one “killer reason” may not be enough to justify the strike if there is overwhelming evidence of discriminatory intent.

This approach to the totality analysis is especially important because it is not very difficult to fabricate race-neutral reasons. Recognizing this problem, an Illinois appellate court called the Batson process a “charade.” The court continued, “The State may provide the trial court with a series of pat race-neutral reasons . . . . [W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, ‘Handy Race-Neutral Explanations’ or ‘20 Time-Tested Race-Neutral Explanations.’” (State v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996).) As the Top Gun handout in North Carolina demonstrated, the court’s concerns were all too accurate.

CONCLUSION
Discrimination in jury selection undermines the integrity of the criminal justice system. Batson, our tool for addressing it, has been a weak tool. But it is critical that discrimination is laid bare where it infects criminal trials, especially where the defendant’s life is at stake. Our task is to be both thorough and innovative in making intentional discrimination impossible to ignore.
Immigration and marijuana are frequently in the news these days, usually as separate topics. Generally, they don’t mix well. Use of legalized marijuana presents several challenges to a noncitizen’s desire to enter or stay in the United States. Legalization and decriminalization, however, limit exposure to convictions related to marijuana, which actually can be a good thing for some noncitizens, because of the reduced risk of deportation for minor convictions related to marijuana.

State legalization of marijuana increases with every voting cycle. A majority of the states now have some form of legalized or decriminalized marijuana, if medical marijuana is counted. California, Nevada, Massachusetts, and Maine voted to legalize recreational marijuana in 2016, joining Washington, Colorado, Oregon, Alaska, and the District of Columbia. Florida, Arkansas, North Dakota, and Montana enacted medical marijuana laws this past year. Some tribes are taking steps toward legalization on tribal lands. Marijuana remains illegal on federal lands.

The basic issue for noncitizens with legalized marijuana is the apparent conflict between the Immigration and Nationality Act, the Controlled Substances Act, and state legalization statutes and regulations. Marijuana and its derivatives continue to be listed as Schedule I substances under the Controlled Substances Act, despite calls for their removal. The Obama administration allowed states to experiment with implementing recreational marijuana laws, and previous administrations tolerated the use of medical marijuana. The Trump administration may continue this pattern, based on his statements to media, but this is uncertain. It is possible the federal government, if opposed to state legalization, may sue state governments under a theory of preemption, or attempt to escalate enforcement, or approach the issue collaterally by affecting state funding. The issues are fluid, with constantly changing state laws and federal enforcement priorities. Meanwhile, the legal marijuana industry is growing, literally.

Criminal defense attorneys have an obligation to advise clients regarding immigration consequences of a plea, based on the Supreme Court’s 2010 landmark decision of Padilla v. Kentucky, 559 U.S. 356 (2010). The presence of marijuana or any controlled substance in a noncitizen’s case should trigger Padilla-obligation concerns. Accordingly, criminal defense attorneys have developed resources to seek advice for their clients regarding plea deals. Analysis of the immigration consequences of a criminal charge can be a minefield, as the specialization of crimmigration grows increasingly complicated. If controlled substances are involved in a noncitizen case, it’s best to assume the worst, and advise with great care.

MARIJUANA USE CAN BE GROUNDS FOR BARRING U.S. ADMISSION

Even where there is no charge or conviction, legalized marijuana can create issues for some noncitizens. A noncitizen who admits to the essential elements of a controlled substance offense, without actually being convicted, may still have a “conviction” for immigration purposes, based on the statutory definition. Providing a government officer with a “reason to believe” that a noncitizen is associated with drug trafficking, which could include a normal association with state-legal marijuana businesses, is enough to make the noncitizen and even his or her family members inadmissible. A noncitizen is also inadmissible or removable for being deemed a “drug abuser” or a “drug addict.” An intention to violate the federal Controlled Substances Act creates yet another basis for inadmissibility, even if no state statute is violated.

MARIJUANA LEGALIZATION EFFORTS

Legalization refers loosely to the full range of state marijuana laws, which vary widely state to state. State recreational marijuana laws typically include rules for agricultural production, retail distribution, and personal use. States with maturing industries resolve issues
involving a wide range of legal issues, such as zoning, banking, taxation, and criminality. There is a great deal of difference, state to state, in regulation. As many deportations are based on convictions for relatively minor violations related to marijuana, legalization laws have the potential to greatly limit the universe of deportation possibilities for noncitizens.

For example, in 2016, California passed Proposition 64: The Control, Regulate and Tax Adult Use of Marijuana Act. California’s law decriminalizes minor marijuana offenses for persons age 21 and older, and creates infractions for persons 18 to 20 years old. It also reduces criminal penalties for other marijuana activities, and allows for postconviction relief. The law creates a regulated commercial system for recreational marijuana, similar to those systems already in place in Washington, Oregon, and Colorado. California’s law goes further, though, in providing the possibility of postconviction relief for persons with certain marijuana convictions.

The U.S. Department of Justice (DOJ) has circulated four memorandums on prosecuting state-legal marijuana activities. Discretion is emphasized. The first memo, from Deputy Attorney General (DAG) David Ogden in 2009, addressed the exercise of prosecutorial discretion regarding the medical use of marijuana. (Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at http://tinyurl.com/zbgq8jy.) The 2011 DAG Cole memo clarifies the 2009 memo, stating “The Ogden Memorandum was never intended to shield such activities [commercial cultivation, sale, and distribution] from federal enforcement action and prosecution, even where those activities purport to comply with state law. . . . State laws or local ordinances are not a defense to civil or criminal enforcement of federal law. . . .” (Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), available at http://tinyurl.com/jm29hk4.) In a 2013 memo, DAG Cole addressed state legalization of recreational marijuana. This memo allowed for discretion, where states have “robust system[s]” of regulation:

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for.


The 2013 memo also highlights eight priorities for marijuana enforcement by the DOJ: (1) preventing distribution to minors; (2) preventing revenue from going to criminal enterprises; (3) preventing distribution from legal states to nonlegal states; (4) preventing state legalization to act as a pretext for trafficking in other controlled substances; (5) preventing violence and the use of firearms related to cultivation and distribution; (6) preventing drugged driving and other related public health concerns; (7) preventing the growing of marijuana on public lands and associated hazards; and (8) preventing marijuana possession or use on federal property.

Building on the Cole memo, the 2014 Wilkinson memo says the DOJ will take the same approach for tribes that wish to legalize. (Memorandum from Monty Wilkinson, Dir., Exec. Office for U.S. Attorneys, to All U.S. Attorneys et al., Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), available at http://tinyurl.com/jn6d79a.)

In 2014, Congress approved a provision in its spending bill prohibiting the DOJ and the Drug Enforcement Agency from spending funds for raids and prosecutions of state-legal medical marijuana businesses. Marijuana advocates celebrated. The Rohrabacher-Farr Amendment, so named after the California Representative sponsors, was renewed in 2016. Still, raids and prosecutions in medical-legal states have not completely stopped, due in part to interpretations of the amendment and state laws.

GOVERNMENT IMMIGRATION AGENCIES
The U.S. immigration system epitomizes bureaucracy. The U.S. Department of State (DOS) runs the consulates around the world where a person may obtain a visa to enter the United States. U.S. Customs and Border Protection (CBP) operates the border, preclearance, and airport clearance operations for admission to the United States. U.S. Citizenship and Immigration Services (USCIS) manages immigration benefits, including permanent residence and naturalization applications. U.S. Immigration and Customs Enforcement (ICE) handles interior enforcement of immigration law, and initiates most deportation actions. CBP, USCIS, and ICE are all bureaus of the U.S. Department of Homeland Security (DHS). The Executive Office for Immigration Review (EOIR), a branch of the U.S. Attorney General’s office, operates the administrative trial court level of the immigration court system. Appeals of EOIR decisions are typically handled by the U.S. Courts of Appeals.

IMMIGRATION STATUS MATTERS
Marijuana is not “legal” for noncitizens. Status is very important when evaluating immigration cases. “Noncitizens” can fall into many different categories. They include “lawful permanent residents”—those noncitizen immigrants who hold “green cards.” Noncitizens also include nonimmigrants—those who
are in the United States for shorter durations, such as tourists, students, and professionals. Persons without documentation, and those who have overstayed their period of authorized stay are also noncitizens. Each status has different legal implications. For example, green card holders have greater defenses against deportation than do non–green card holders. Similarly, waivers are available in some cases; and expedited removal—a fast-tracked deportation without an EOIR hearing—occurs in others. Marijuana involvement can present immigration challenges for any noncitizen, including green card holders.

The Immigration and Nationality Act (INA), the key federal statute for immigration, applies different standards depending on if a noncitizen is (1) seeking admission, (2) facing deportation, or (3) seeking to naturalize. Basically, the law favors persons already here over persons outside the country. The law also favors persons with legal status over persons without such status, and persons here longer over persons here shorter. A noncitizen’s rights and recourse are at their lowest when interviewing at a consulate or when seeking entry. Even after being in the United States for decades, and despite having any number of U.S. citizen relatives, a noncitizen may still be subject to removal.

IMMIGRATION CONSEQUENCES OF MARIJUANA-RELATED CONVICTIONS

“Conviction” defined. Convictions are defined broadly by the INA, disallowing many forms of postconviction relief, and including certain admissions of fact. The INA makes inadmissible anyone with a conviction for a violation (or a conspiracy or attempt to violate) of any law or regulation of a state, the United States, or a foreign country related to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802). (See INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).) INA section 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), defines a “conviction,” with respect to an alien, as:

[A] formal judgment of guilt of the alien entered by a court or, if adjudication has been withheld, where—
(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty be imposed.

Under U.S. immigration law, all that is needed for a conviction is (1) a finding of guilt or admission of enough facts to support such a finding, and (2) punishment, or restraint on liberty has been imposed, including suspended incarceratory sentences. (See Retuta v. Holder, 591 F.3d 1181, 1186 (9th Cir. 2010).)

The definition is purposely broad, so that if a conviction is later pardoned, expunged, or otherwise set aside, it usually persists for immigration. (See 9 FOREIGN AFFAIRS MANUAL (FAM) 302.4-2(2)(3) (formerly 9 FAM 40.21(b) N4.1-6l.) However, other forms of postconviction relief may be effective, such as when it is determined later that a judgment lacks legal validity. Examples include vacated convictions by the court of original jurisdiction, a granted writ of error coram nobis, or a dismissal of cause nolle prosequi. (Id.) Most interestingly, California’s Proposition 64 includes provisions allowing in certain cases for persons to apply to recall or dismiss a prior sentence, based on legal invalidity. Time will tell how immigration courts handle this issue.

The INA requires mandatory detention for certain convictions. These include controlled substance convictions, multiple crimes involving moral turpitude, and aggravated felonies. (See INA § 236(c), 8 U.S.C. § 1226(c).) Even if a marijuana conviction carries no prison time, ICE may take custody of the offender, until removing proceedings. There is currently a backlog of removal proceedings for roughly half a million cases. A diversion without a plea may avoid this consequence, based on the statutory definition of a conviction, which requires the finding of guilt.

Convictions for any controlled substance violation raise the possibility of inadmissibility and deportation. This includes attempt and conspiracy convictions. Paraphernalia convictions are also not safe. A plea agreement that involves a marijuana conviction may not be an immigration-safe resolution for a noncitizen. As per Padilla, counsel has an obligation to advise on the immigration consequences of a plea. Resources are available for crafting immigration-safe pre-plea deferrals.


Foreign convictions. On the other hand, foreign convictions usually are recognized as convictions for immigration purposes. Perhaps the most famous case is Lennon v. INS, 527 F.2d 187 (2d Cir. 1975), where John Lennon of the Beatles fought a protracted fight against deportation for a 1968 conviction in Great Britain for possession of cannabis resin.

Civil fines. A civil fine is not a conviction, and standing alone should not be a basis for inadmissibility. There is some precedent for this. In the 1990s, CBP confiscated marijuana under a “Customs Zero Tolerance Fines” program. Convictions were not sought with this program, but persons had to pay fines. In 1991, Legacy INS General Counsel authored a legal opinion saying the fines did not create inadmissibility under INA section 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). This memo has been used successfully with CBP to argue that inadmissibility has not been established and a waiver is not required where only a fine was paid. (Legal Opinion No. HQ 235-P from T. Alexander Aleinikoff, Gen. Counsel, to Michael D. Cronin, Assistant Comm’r, INS, Excludability under “Zero Tolerance Program” (Jan. 20, 1995).)

Aggravated felonies. Noncitizens, including lawful permanent residents, are deportable if convicted of an aggravated felony at any time after admission. (Matter of Rosas, 22 I. & N. Dec. 616 (B.I.A. 1999).) Aggravated felonies include a long list of specific classes of convictions in the INA, which may or may not be felonies under state or federal law. (See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).) The conviction need not be aggravated or a felony to qualify as an aggravated felony. Illicit trafficking in a controlled substance is an aggravated felony. (INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).) The conviction must be a trafficking offense under federal law to qualify as an aggravated felony, as per Moncrieffe v. Holder, 133 S. Ct. 1678 (2013). In Moncrieffe, the Supreme Court held in a 7–2 decision, penned by Justice Sotomayor, that social sharing of marijuana among friends does not qualify as illicit trafficking as an
aggravated felony, if the offense involved a small amount of marijuana and no remuneration.

**Crimes involving moral turpitude.** Convictions for crimes involving moral turpitude are a separate basis for inadmissibility than controlled substance offenses. (See INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).) Convictions for crimes involving moral turpitude can also form the basis for some deportations. (See INA § 237(a)(2)(A)(i)(ii), 8 U.S.C. § 1227(a)(2)(A)(i)(ii).) Waivers may be available, and whether the conviction meets the definition of a crime involving moral turpitude requires careful analysis. Further, naturalization applicants must establish good moral character, typically for a period of three to five years preceding their applications. (INA § 316(d), (e), 8 U.S.C. § 1427(d), (e).) Aggravated DUIs and some reckless conduct offenses can involve legalized marijuana and be deemed crimes involving moral turpitude. (See, e.g., Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009).)

**Immigration Consequences of Marijuana Use or Possession in Absence of Conviction**

**Admitting to marijuana use or possession.** Even if there is not a conviction, a connection to legalized marijuana can create all sorts of immigration problems for noncitizens. For example, the controlled substance inadmissibility bar includes admissions to acts that constitute the essential elements of any law or regulation of a state, the United States, or a foreign country related to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802). (INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A).)

This sort of thing comes up sometimes when a noncitizen seeks admission to the United States. CBP officers have been known to extract admissions of past marijuana use from a person, and bar their admission. The stories are somewhat random and frightening. Even if a person has been coming and going for years, an officer may arrive at an adverse determination of admissibility. INA section 235(b)(3), 8 U.S.C. § 1225(b)(3), states: “The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 232.” One officer’s decision may be challenged by another at any other time. Practically, this means if an officer notices something marijuana related—maybe a lighter, maybe a marijuana sticker—he or she may start a line of inquiry that ultimately results in a lifetime bar to the United States, despite the absence of any conviction.

Occasionally, CBP officers will search a person’s wallet. They may check a laptop or review a phone. Traveling internationally with a medical marijuana card is a bad idea, as the card can prompt further questioning. A medical marijuana card is not proof of a controlled substance violation, but may lead to questions that may establish inadmissibility. The marijuana issue can also come up at internal checkpoints, which are common around the southern border. Curiously, the Transportation Security Administration (TSA) reportedly is less concerned about legalized marijuana, and there are stories of its agents ignoring marijuana while scanning luggage.

**Right to remain silent.** All persons, including noncitizens applying for admission, have the constitutional right to remain silent. Sometimes it is a good idea to exercise this right, and if need be, give up on seeking admission. Exercising this right may lead to further searches. Applicants for admission may be allowed to withdraw their application for entry, rather than be coerced into a statement. Withdrawal of an application for admission to the United States is authorized at the discretion of the agency. (INA § 235(a)(4), 8 U.S.C. § 1225(a)(4).) The burden of proof for admissibility continues to be on the applicant for admission. Sometimes the best application for immigration benefits is the one that is never submitted.

**Border search exception.** The border search exception, allowing search and seizure without probable cause, applies at the border and its functional equivalents. “The government’s interest in preventing entry of unwanted persons and effects is at its zenith at the international border.” (United States v. Flores-Montano, 541 U.S. 149 (2004).) The government’s ability to operate immigration checkpoints extends 100 miles from the border. Personal interests in being free of unwarranted search and seizure are at their lowest at the border. Most searches have been upheld, if based on a reasonable suspicion, including personal, vehicle, and electronic searches. Systematic questioning of travelers is justified by the INA and the administrative search doctrine, which covers searches done under a regulatory scheme to further an administrative purpose. (United States v. Davis, 482 F.2d 893 (9th Cir. 1973).) **Validity of admission.** The validity of an “admission to the essential elements” might be contested in immigration court, but this is likely to be time consuming, potentially expensive, and possibly fruitless. Legally, the admission must be a formal one, offered free and voluntarily, addressing each statutory element of the offense. Partial or general admissions will not suffice. (See Matter of E.V., 51 I. & N. Dec. 194 (B.I.A. 1953) (free and voluntary); Matter of Espinosia, 10 I. & N. Dec. 98 (B.I.A. 1962) (admissions).) In Paccoguin v. Radcliffe, 292 F.3d 1209 (9th Cir. 2002), the court held that an admission is valid even if there was a possible defense, and the inspector must provide the alien with an understandable definition of the crime.

**Government information sharing.** Information sharing between governments, domestically and internationally, is on the rise. For example, the United States and Canada share more information now than ever, due to the Beyond the Border agreement. (See Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness, Homeland Security, www.dhs.gov/beyond-border (last updated Jan. 19, 2017).) Sometimes information not in one database shows up in another if a government agent takes the time to look. Often, an officer may not have complete information in the database and will therefore ask the client questions and potentially solicit admissions to marijuana use.

**Consequences of “Reason to Believe” Noncitizen Has Connection to Marijuana**

The INA’s admissibility bar on drug trafficking requires no conviction. (INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).) A noncitizen is inadmissible if the government knows, or merely has reason to believe, that the person is or has been an illicit trafficker in any controlled substance. The same applies if that noncitizen is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in illicit trafficking, or has endeavored to do so. (Id.) Also, immediate family members can be found inadmissible for this as well if they received financial or other benefit from drug trafficking in the previous five years.

Thus, persons either employed with state-approved marijuana grow operations or contracted for services relative to the operation may be
deemed to be a knowing aider, abettor, assister, etc. Persons are being denied entry, and sometimes required to obtain waivers, for marijuana industry activities such as providing accounting services for a legal marijuana operation, providing high-level scientific services related to growing marijuana, and designing marijuana greenhouses. Each situation is different, but the agencies seem to take a very conservative view regarding legalization and immigration.

Technically, the government must establish that the “reason to believe” is based on “reasonable, substantial and probative evidence,” and that the noncitizen is (or was) knowingly engaged in trafficking-related activities. A long line of cases examines whether the “reason to believe” standard is met. (See, e.g., Chavez-Reyes v. Holder, 741 F.3d 1 (9th Cir. 2014); Argaw v. Ashcroft, 395 F.3d 521 (4th Cir. 2005); Lopez-Molina v. Ashcroft, 368 F.3d 1206 (9th Cir. 2004); Alarcon-Serrano v. INS, 220 F.3d 1116 (9th Cir. 2000); Matter of Casillas-Topete, 25 I. & N. Dec. 317 (B.I.A. 2010).) While some persons will clearly know they are directly engaged in the legalized industry, others may be only working on the periphery. (See Matter of McDonald, 15 I. & N. Dec. 203 (B.I.A. 1975) (need to prove intent to distribute).)

These cases are of limited value when dealing with a consular interview or a border inspection, where the right of appeal is basically nonexistent. In Kerry v. Din, 135 S. Ct. 2128 (2015), the Supreme Court held by plurality that noncitizen spouses do not have a constitutional right to live in the United States with their spouse, and are not afforded the Fifth Amendment due process rights with their visa application. It can be very challenging to change the decision of a consular officer or border inspector, once made.

Perhaps it is helpful to cite state law if there is a possible “reason to believe” issue. Washington and Colorado were the first two states to approve recreational marijuana. They have developed sophisticated regulatory systems. For example, the Washington Administrative Code differentiates between a person who is a “consultant” and one who is a “true party of interest.” (WASH. ADMIN. CODE § 314-55-010.) A true party of interest may receive a percentage of the gross or net profits of the operation. Consultants advise. Washington law similarly distinguishes between “financiers” and “members.” (Id.) State regulations may therefore be helpful in determining noncitizens’ scope of involvement in an enterprise.

State law may also act a shield, perhaps depending on preemption arguments. California’s new law allows persons to possess, plant, and harvest up to six plants. Such activity is an aggravated felony under immigration law, but will now be legal in California. That such actions will be permissible will at least limit one source of deportable convictions. Courts have yet to resolve the panorama of preemption and treaty arguments related to state legalization. (See TEO’ D GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECT LEGAL ISSUES (2014).)

OTHER GROUNDS OF INADMISSIBILITY

Health-related grounds. One of the oldest bases for inadmissibility to the United States is health-related grounds. This may be a significant concern for noncitizens who use marijuana in legalized states, or with a history of use. “Drug abusers” and “drug addicts” are inadmissible to the United States, even if there is no record of conviction. (INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A) (iv).) Further, the INA says any alien who has been a drug abuser or drug addict after admission is deportable. (INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B).) This issue may arise when filling out immigration forms, when seeking readmission, or during interviews for immigration benefits (e.g., permanent residence or naturalization). Recall, marijuana is grouped with other Schedule I substances, such as heroin, cocaine, and meth. Any noncitizen who is or may be determined (under regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict has cause for concern.

Drug abusers and drug addicts, for immigration purposes, are persons deemed to have a “Class A” medical condition. (INA § 212(a) (1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv).) A Class A medical condition renders a visa applicant ineligible to receive a visa and, for mental health conditions, includes applicants determined by government-authorized physicians to have (1) a current physical or mental disorder with associated harmful behavior, and/or (2) a history of mental disorder with associated harmful behavior if the harmful behavior is likely to recur or to lead to other harmful behavior. (9 FAM 302.2-7(B)(7).)

The government, whether it be CBP, DOS, or another agency, will sometimes refer a person to a “civil surgeon” or “panel physician” to determine whether the person is inadmissible for a Class A medical condition (e.g., drug abuse, drug addict, or habitual drunkard). These are physicians approved by the government to conduct medical examinations for immigration. Civil surgeons practice inside the United States; panel physicians practice overseas. Medical examinations are a routine part of immigration.

Civil surgeons and panel physicians receive their technical instructions from the Centers for Disease Control and Prevention (CDC). Physician-patient confidentiality does not apply, as the physicians are acting on behalf of the government. The CDC instructions define their role as:

Civil surgeons must follow procedures prescribed by the DHS. Civil surgeons must ensure that the person appearing for the medical examination is the person who is actually applying for immigration benefits. The civil surgeon is responsible for reporting the results of the medical examination and all required tests on the prescribed forms. The civil surgeon is not responsible for determining whether an alien is actually eligible for adjustment of status; that determination is made by the INS officer after reviewing all records, including the report of the medical examination.

(technical Instructions for the Medical Examination of Aliens in the United States, CDC (1991), http://tinyurl.com/jmhkbb4q.)

Generally, the physicians are searching for communicable diseases. However, they are also responsible for making sure the noncitizen is not a drug abuser or addict. Some examining physicians are very aggressive in eliciting admission to “drug abuse.” These admissions can lead to the denial of a visa and the subsequent need to demonstrate rehabilitation. It typically takes at least a year to demonstrate rehabilitation.

The CDC updated its Technical Instructions in 2015. (See Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders for Panel Physicians, CDC, http://tinyurl.com/hfk83rt (last updated
The current version of the DSM [Diagnostic and Statistical 
Manual of Mental Disorders] defines sustained, full 
remission as a period of at least 12 months during which 
no substance use or mental disorder-associated harmful 
behavior have occurred. The panel physician has discretion 
to use their clinical judgment to determine if 12 months is 
an acceptable period of time for an individual applicant 
to demonstrate sustained, full remission. Remission must 
be considered in two contexts: (a) mental disorders and 
(b) substance-related disorders. For substance-related 
disorders for those substances listed in Schedule I though V of Section 202 of the Controlled Substances Act, the determination of remission must be made based on the applicants use and DSM criteria.

(9 FAM 302.2-8(B)(2).)

The Technical Instructions specifically say, “Random screening for drugs is not part of the routine medical examination for applicants for U.S. admission.” But there are anecdotal reports from immigration attorneys of panel physicians who aggressively pursue the question of drug abuse or addiction based on marijuana use. (See, e.g., Questions and Answers, USCIS International Operations Division in Ciudad Juarez Meeting with American Immigration Lawyers Association (AILA) (May 17, 2016), http://tinyurl.com/j6s87kv; AILA Doc. Nos. 16062934, 12121343, 06020110.) Simple experimentation should not qualify as drug abuse. However, routine use of legalized marijuana would likely be deemed as such. The strategies are very limited for challenging a Class A medical determination based on marijuana abuse or addiction. A person can ask the consular officer to seek an advisory opinion from the CDC, or ask for a reexamination based on 42 C.F.R. section 34.8, but these are likely long shots. The recourse then is to demonstrate rehabilitation over the course of at least a year.

**Intent to engage in unlawful activity.** “Intention to engage in an unlawful activity” also presents an immigration issue. A noncitizen will not be admitted if he or she expresses an intention to engage in an unlawful activity, such as purchasing marijuana, or working directly in the industry. Specifically, the INA requires denial of admission if the government officer has a “reasonable ground to believe” that the noncitizen is seeking to enter the United States to engage solely, principally, or incidentally in any other unlawful activity. (INA § 212(a)(3)(A)(ii), 8 U.S.C. § 1182(a)(3)(A)(ii) ) Seeking to enter the United States to visit in relation to state-legal activities could be deemed a basis for inadmissibility.

**Misrepresentation, crimes involving moral turpitude, and violations of export/import laws.** The INA includes other sections that impact admissibility or removal related to marijuana. These include lifetime bars for misrepresentation, convictions for crimes involving moral turpitude, and violations of U.S. export/import laws. For example, INA section 212(a)(6)(C), 8 U.S.C. § 1182(a) (6)(C), states, “Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.” Additionally, an admission to the essential elements of a crime involving moral turpitude, including marijuana, would be a basis for inadmissibility. If there is a misrepresentation in the process of inspection, or in an application for benefits, the government may deny the application and take other actions, such as noting the applicant to appear in immigration court, or effect an expedited removal at the border.

**EXCEPTIONS, WAIVERS, AND OTHER CONSIDERATIONS**

**Possession of 30 grams or less.** Marijuana differs from other controlled substances in the INA, albeit slightly. It is the only Schedule I controlled substance for which the INA makes specific exceptions. For immigrants, INA section 212(h), 8 U.S.C. § 1182(h), provides an immigrant waiver for “a single offense of simple possession of 30 grams or less of marijuana” under certain conditions. Similarly, INA section 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B), creates a marijuana removability exception for “a single offense involving possession for one’s own use of 30 grams or less of marijuana.” The naturalization regulations also include a 30-gram single-offense exception in determining good moral character. (See 8 C.F.R. § 316.10(b)(2)(iii).)

**Temporary visitor waivers.** Most forms of inadmissibility, with some national security exceptions, can be waived for temporary visitors, under INA section 212(d)(3), 8 U.S.C. § 1182(d)(3). Generally, temporary visitor waivers are much easier to obtain than permanent residence waivers. Applications for nonimmigrant waivers are adjudicated by CBP’s Admissibility Review Office (ARO), and can take months to adjudicate. Waivers are issued specific to the class of admission sought, and must be sought anew for a different class (e.g., B-1/B-2; later TN or H-1B). The process differs between Canadians, who are visa exempt, and other nationalities, who have to interview first for visas at consulates. The filing fee for Canadians is $585, and attorney fees and related expenses can run the overall cost up much higher.

Waivers are granted on a discretionary basis. Adjudicators are supposed to make a determination by balancing (1) the risk of harm to society if the applicant is admitted, (2) the seriousness of the underlying cause of the applicant’s inadmissibility, and (3) the nature of the applicant’s reason for wishing to enter the United States. (Matter of Hranka, 16 I. & N. Dec. 491 (B.L.A. 1978).) The ARO says that it also considers these factors in exercising discretion: (1) the nature of the offense, (2) the circumstances that led to the offense, (3) how recently the offense occurred, (4) whether it was an isolated incident or part of a pattern of misconduct, and (5) evidence of reformation and rehabilitation.

It is best to argue a waiver is not needed, if appropriate, as the ARO can issue a determination as such. Waivers are granted for temporary periods of time (six months to five years), and so establishing admissibility, instead of waiving inadmissibility, can save costs eventually. For example, CBP will fine a person for possession of marijuana, but this is a civil fine. The fine alone should not create a basis for inadmissibility, but admissions made during the inspection process could make a person inadmissible.

**Port parole.** “Port parole” is available in truly emergency circumstances, where there is not enough time to obtain a waiver. Port parole is a discretionary grant of entry, usually for a limited
Some specialize in white collar crimes, others prosecute or defend street crimes, and still others specialize in juvenile cases. Articles in Criminal Justice thus cover a wide variety of subjects, addressing areas of importance to all segments of the Section.

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

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**ETHICAL CONSIDERATIONS**

Legalized marijuana also presents several ethics issues for attorneys. Some states are amending their rules of professional conduct regarding advising on legalized marijuana. Washington, a recreation-legal state, added a comment to Rule of Professional Conduct 1.2 on scope of representation, stating that lawyers may counsel clients regarding the validity, scope, and meaning of Washington Initiative 502 and may assist a client as the lawyer reasonably believes is permitted by the statute. (See Wash. Rule of Prof’l Conduct 1.2 cmt. 18.) Similarly, Oregon adopted Rule of Professional Conduct 1.2(d), which requires lawyers to advise on the conflicts between federal, state, and tribal law and policy. Other states that have adopted similar amendments, or have them under consideration, include Alaska, Colorado, Hawaii, Illinois, and Nevada.

This raises the question of counsel’s duty to advise noncitizens regarding marijuana, legalized or not. Risk assessment requires the recognition of known and unknown risks for clients. The known and the unknown must account for the state of the law, the state of enforcement, and questions that are beyond one’s expertise.

To adequately represent a noncitizen defendant, counsel should consider the ways marijuana, legal or otherwise, may create deportation, inadmissibility, and naturalization risks for a client. This requires recognizing the client’s status in the first place, criminal history, and any other immigration-related factors. For criminal defendants, it is important to avoid admissions to the essential elements of a conviction in the record of conviction. Keeping the record clean of anything that later may give an officer a “reason to believe” that a noncitizen was engaged in drug trafficking, or was a drug abuser or drug addict, is ideal.

“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” (Strickland v. Washington, 466 U.S. 668, 688 (1984).) These norms may be changing—or perhaps need to change—if deportations become a higher priority for the government.
n March 1941, D.C. Comics published Issue 5 of the Batman comic book series. Among the stories was “Crime Does Not Pay.” Anyone who has followed the Caped Crusader over time—from the comic books to the campy 1960s television series to the Super Friends cartoons of the 1970s—knows that “crime doesn’t pay” is among the Dark Knight’s favorite mantras. For defendants in federal white collar cases, the sentiment is apt.

Upon conviction, federal white collar defendants face the possibility that the court will order them to serve time in prison. It might also order them to pay a fine or restitution or to forfeit their ill-gotten gains to the government. Or, it might order all of these things. What is the difference among these financial penalties?

A fine is money paid to the court as punishment for the offense. For example, if the defendant is convicted of wire fraud in which he or she tricked the victims into giving him or her $100,000 under false pretenses, the sentencing court might impose a fine of $5,000 as a punishment for the crime.

Restitution is an order to repay the specific victims the amounts they lost as a result of the offense. So in the above example, the sentencing court might order the defendant to repay the victims $100,000 in restitution. Importantly, restitution is not punishment for the offense; rather, it is an effort to make the victims whole after a transgression. It is akin to a civil judgment for money owed to an aggrieved party.

Like a fine, forfeiture is punishment. It is a theory—codified in the U.S. Code—through which the government is entitled to take from the culprit the proceeds of the crime. The idea behind forfeiture is that the moment the crime is committed, the proceeds of that crime vest with the U.S. government. When the wrongdoer is convicted, the government can make him or her turn over the proceeds of his or her crime, which are by law the government’s property. Forfeiture can be a harsh penalty, but it gives teeth to Batman’s concept that crime doesn’t pay.

These financial penalties are not mutually exclusive; a court can order the defendant to pay all three. So, taking the example above, the defendant might be ordered to pay a fine of $5,000, repay the victims the $100,000 they lost, and forfeit an additional $100,000. All told, the perpetrator of the $100,000 fraud in our example would owe $205,000 in fines, restitution, and forfeiture. In reality, while it is conceivable that a sentencing court could order all three financial penalties, it usually would not impose a fine, which is discretionary at sentencing, when there are large restitution or forfeiture obligations as well. On the other hand, because restitution goes back to the victims (and is mandatory in most cases), courts typically do not order a defendant to pay less than the full restitution amount.

What about forfeiture? It’s a penalty and it’s not discretionary, but do courts have any flexibility when ordering it?

Because forfeiture is a punishment, it’s subject to the Excessive Fines Clause of the Eighth Amendment. That leaves some room for defendants to argue against exorbitant
forfeiture amounts. The defendants in United States v. Beecroft, 825 F.3d 991 (9th Cir. 2016), and United States v. Viloski, 814 F.3d 104 (2d Cir. 2016), did just that with moderate success. Taken together, these cases show that it is possible to limit steep forfeiture orders. Of course, doing so is still an uphill climb.

THE SUPREME COURT SET THE BASELINE IN UNITED STATES V. BAJAKAJIAN

The facts of United States v. Bajakajian, 524 U.S. 321 (1998), are as follows: In June 1994, Hosep Bajakajian and his family were at Los Angeles International Airport about to board a flight to Italy. A dog trained to detect currency alerted to their bag, in which customs inspectors discovered approximately $230,000 in cash. Agents approached Bajakajian and explained they must report all cash over $10,000 in his possession; Bajakajian said he and his wife carried only $15,000. The agents searched their bags and discovered the full $357,144. Bajakajian was arrested and charged with attempting to leave the United States without fulfilling the requirement that he report that he was transporting more than $10,000 as required by 31 U.S.C. § 5316(a)(1)(A). Bajakajian was convicted of the underlying offense, and the government sought forfeiture of $357,144 as having been “any property . . . involved in [the] offense.” (18 U.S.C. § 982(a)(1).

After a bench trial on the forfeiture amount, the district court ordered Bajakajian to forfeit $15,000, even though the judge found the entire $357,144 forfeitable. The district court concluded that forfeiture of the entire sum would be “‘extraordinarily harsh’ and ‘grossly disproportionate to the offense in question,’” rendering it a violation of the Eighth Amendment. (Bajakajian, 524 U.S. at 326.) The government appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed the trial court, holding that “forfeiture ordered by § 982(a)(1) was per se unconstitutional in cases of currency forfeiture.” (Id. at 327.) The government sought a writ of certiorari, which the Supreme Court granted because the Ninth Circuit’s holding had “invalidated a portion of an Act of Congress.” (Id.)

The question before the Supreme Court was “whether forfeiture of the entire $357,144 that respondent failed to declare would violate the Excessive Fines Clause of the Eighth Amendment.” (Id. at 324.)

The Supreme Court first held that criminal forfeiture based on a defendant’s conviction for a particular offense constituted a “fine” within the meaning of the Eighth Amendment and, as a result, the Excessive Fines Clause applied. (Id. at 334.)

For our purposes, the more important aspect of the Supreme Court’s opinion is how a lower court should determine whether the forfeiture is excessive. Turning to that question, the Supreme Court began: “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” (Id.) It concluded “that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant’s offense.” (Id.)

In reaching this conclusion, the Supreme Court directed courts to “compare the amount of the forfeiture to the gravity of the defendant’s offense” to determine if the forfeiture is unconstitutional. (Id. at 336–37.) In making that comparison, the Supreme Court looked to “the essence of [Bajakajian’s] crime,” whether his conduct “fit into the class of persons for whom the statute was principally designed,” the “maximum sentence that could have been imposed,” and “[t]he harm that [Bajakajian] caused.” (Id. at 337–39.) By balancing those factors, the Supreme Court concluded that imposing forfeiture of the entire amount of Bajakajian’s unreported currency would violate the Eighth Amendment. As a result, it affirmed the judgment of the Ninth Circuit, albeit without endorsing the Ninth Circuit’s per se rule.

The Supreme Court’s analysis provided a framework for how lower courts should determine whether the forfeiture component of a defendant’s sentence violates the Eighth Amendment. Since that time, the lower courts have engaged in a straightforward application of Bajakajian in myriad circumstances in the face of defendants’ perpetual efforts to limit the amount of money they have to forfeit upon conviction. Usually, the analysis is rather mundane as the courts routinely uphold forfeiture orders that track the defendant’s profits. But sometimes, the lower courts find themselves grappling with the possibility of an exorbitant forfeiture order that appears on its face to violate the Eighth Amendment. One such case is United States v. Beecroft, where the Ninth Circuit vacated a forfeiture order because it seemed on its face to simply be too much.

BEECROFT AND THE $107 MILLION FORFEITURE ORDER

Melissa Beecroft participated in a massive residential mortgage-fraud scheme in the Las Vegas area between 2003 and 2008. The scheme was led by Steven Grimm and Eve Mazzarella. The conspirators would recruit and pay straw purchasers who would “buy homes at substantially inflated prices, sometimes with 100% mortgage financing.” (Beecroft, 825 F.3d at 994.) When the loans were funded, Grimm and Mazzarella would have the title and escrow companies send excess funds to various shell companies they owned, which they would purportedly use for repairs and improvements. Of course, no such repairs or improvements were made. Instead, they simply kept the money. They also had the straw buyers transfer ownership to the shell companies. All told, the scheme involved more than 400 straw-buyer transactions with attempting to leave the United States without fulfilling the requirement that he report that he was transporting more than $10,000 as required by 31 U.S.C. § 5316(a)(1)(A). Bajakajian was convicted of the underlying offense, and the government sought forfeiture of $357,144 as having been “any property . . . involved in [the] offense.” (18 U.S.C. § 982(a)(1).

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Melissa Beecroft participated in a massive residential mortgage-fraud scheme in the Las Vegas area between 2003 and 2008. The scheme was led by Steven Grimm and Eve Mazzarella. The conspirators would recruit and pay straw purchasers who would “buy homes at substantially inflated prices, sometimes with 100% mortgage financing.” (Beecroft, 825 F.3d at 994.) When the loans were funded, Grimm and Mazzarella would have the title and escrow companies send excess funds to various shell companies they owned, which they would purportedly use for repairs and improvements. Of course, no such repairs or improvements were made. Instead, they simply kept the money. They also had the straw buyers transfer ownership to the shell companies. All told, the scheme involved more than 400 straw-buyer transactions and 227 properties purchased for more than $100 million.” (Id.) The majority of the loans went into default, and the lenders lost tens of millions of dollars.

Beecroft began working as an administrative assistant for one of Grimm’s companies in September 2002. Through the course of her work with Grimm, she “participated extensively in Grimm’s mortgage-fraud scheme, completing loans for Grimm, handling false information that was given to banks on behalf of straw buyers (including inflating income information and even completing some of the fraudulent loan applications herself), and directing to whom
fraudulent third-party disbursements would be made.” (Id.) One witness described her as Grimm’s “right hand.” (Id.) The government claimed she made in excess of $400,000 from the commissions and fees the scheme generated. (Id.)

Beecroft was convicted after a lengthy jury trial of one count of conspiracy to commit bank, mail, and wire fraud; two counts of mail fraud; and two counts of wire fraud. At sentencing, the district court imposed a below-guidelines term of imprisonment of three years and ordered her to pay $2,275,025 in restitution. As to forfeiture, she was ordered to forfeit $107 million for the conspiracy count and an additional $1,420,000 for the remaining four counts. Her lawyer did not object to the sentence, including the monetary penalties, and she appealed. On appeal, she argued (in relevant part) that the forfeiture order violated the Eighth Amendment’s Excessive Fines Clause. Because her counsel did not object, the Ninth Circuit reviewed the claim for plain error.

The Ninth Circuit recognized that the forfeiture order was subject for review under the Excessive Fines Clause. The court then listed the four Bajakajian factors to determine whether the forfeiture was “grossly disproportional to the gravity of” the offense. (Id. at 1000 (quoting Bajakajian, 524 U.S. at 334)). In the Ninth Circuit, those factors are: “(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.” (Id. (quoting United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122 (9th Cir. 2004))).

The Ninth Circuit considered the offense to be quite severe in terms of the consequences on the victims and Las Vegas community. It also noted that the sentences proscribed for her conduct demonstrated its severity. Each count carried a statutory maximum penalty of 30 years in prison and a fine of up to $1 million. The guidelines range called for a range of imprisonment of 210–262 months and a fine of between $20,000 and $1 million. As for the substantive counts, for which Beecroft was ordered to forfeit $330,000; $305,000; $325,000; and $460,000, respectively, the court had “little trouble concluding that the amounts of forfeiture . . . are not excessive.” (Id. at 1001.) After all, they were well below the maximum statutory and guidelines recommended fine amounts of $1 million.

The $107 million forfeiture order for the conspiracy count, however, was another matter. The appeals court observed that the conspiracy offense had the same potential penalties, meaning that for that count “Beecroft was ordered to forfeit a sum more than 100 times greater than the maximum fine allowable and more than 5,000 times greater than the lower-end of the Guidelines range” for the applicable fine. (Id.) Thus, the appeals court found “a tremendous disconnect between the forfeiture amount and Beecroft’s legally available fine” and remarked that “such a disconnect stands out even among forfeiture orders which have previously been held grossly disproportional.” (Id.) Relying on the disparity and the fact that “the propriety of the forfeiture amount was not even discussed at sentencing,” the Ninth Circuit concluded that it had “no choice but to conclude that an order which so vastly outpaces the otherwise available penalties for Beecroft’s criminal activity runs afoul of the Excessive Fines Clause.” (Id. at 1002.) Therefore, the court vacated the forfeiture order and remanded to the district court to reconsider the amount in light of the Eighth Amendment’s Excessive Fines Clause.

In Beecroft, the Ninth Circuit was taken by the sheer size of the forfeiture amount. As noted, it was 100 times higher than the maximum fine authorized for the same offense. Certainly, astronomically high forfeiture sums might generate a similar reaction from sentencing or reviewing courts. But what if the forfeiture amount is not quite so huge, but is just as daunting for the defendant in light of his or her financial circumstances? Does that matter? It might.

CONSIDERING THE IMPACT ON THE DEFENDANT’S LIVELIHOOD

The Second Circuit took up this very question in United States v. Viloski. Benjamin Viloski was a lawyer and real estate broker. He had worked with Dick’s Sporting Goods on a number of development projects. During the course of his work for Dick’s between 1998 and 2005, he “participated in a kickback scheme” related to the construction of new stores. (Viloski, 814 F.3d at 107.) The kickbacks came in the form of “consulting” fees paid to Viloski, which he sometimes passed on to his codefendant and senior Dick’s executive, Joseph Queri Jr.

In 2009, Viloski’s misconduct caught up with him when he was indicted. After a three-week jury trial, he was convicted of several conspiracy and substantive mail fraud and money laundering counts, among others. In January 2012, the district court sentenced Viloski to a below-guidelines term of imprisonment of five years, ordered him to pay $75,000 in restitution to two developers, and ordered him to forfeit $1,273,285.50, which was the sum total of the kickbacks Viloski had received, laundered, and passed along to Queri.

Viloski appealed to the Second Circuit, which affirmed his conviction and sentence but vacated the forfeiture order and remanded for the district court to determine whether it violated the Excessive Fines Clause of the Eighth Amendment. The Second Circuit “specifically directed the District Court to evaluate the forfeiture in light of Bajakajian, 524 U.S. at 321.” (Id. at 108.)

On remand, the district court set forth the Second Circuit’s version of the Bajakajian factors for determining whether a forfeiture order violates the Excessive Fines Clause. According to the district court, those factors are: “(1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fits into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant’s conduct.” (Id. (quoting United States v. Viloski, 53 F. Supp. 3d 526, 530 (N.D.N.Y. 2014))). Viloski argued to the district court that it should consider, in addition to those factors, his “poor health,” “physical and civic disabilities,” “inability to pay the forfeiture,” and “lack of culpability and lack of profit from the scheme compared to co-defendant Queri.” (Id. (quoting Viloski, 53 F. Supp. 3d at 532.).) The district court was sympathetic to Viloski’s plight, but “declared them irrelevant” because “[t]he Supreme Court [had] limited the inquiry to the four Bajakajian factors.” (Id. (alterations in original) (quoting Viloski, 53 F. Supp. 3d at 532.).) The district court, therefore, considered only the Bajakajian factors and determined that the forfeiture did not violate the Eighth Amendment. Viloski again appealed.

On appeal, the Second Circuit noted that in prior cases it had “implicitly cautioned against applying the Bajakajian factors too rigidly.” (Id. at 110.) It explained that the Supreme Court did not consider the issues Viloski raised because Bajakajian had not raised them in his case. It also reasoned that “depriv[ing] a wrongdoer of his livelihood” was “one additional factor” that was “especially important.” (Id. at 111 (quoting Bajakajian, 524 U.S. at 335.).) The
Second Circuit reasoned that “it seems unlikely that the Bajakajian Court meant to preclude courts from considering whether a forfeiture would deprive an offender of his livelihood.” (Id.) It therefore held “that, when analyzing a forfeiture’s proportionality under the Excessive Fines Clause, courts may consider—in addition to the four factors [it had] previously derived from Bajakajian—whether the forfeiture would deprive the defendant of his livelihood, i.e., his ‘future ability to earn a living.’” (Id.)

The Second Circuit was quick to point out that this livelihood analysis “is a component of the proportionality analysis, not a separate inquiry.” (Id. at 112.) As a result, “a forfeiture that deprives a defendant of his livelihood might nonetheless be constitutional, depending on his culpability or other circumstances.” (Id.) The Second Circuit specifically cautioned “that courts may not consider as a discrete factor a defendant’s personal circumstances, such as age, health, or present financial condition, when considering whether a criminal forfeiture would violate the Excessive Fines Clause.” (Id.) But it noted that a person’s health or financial condition might have bearing on his or her ability to earn a living, which means that his or her personal circumstances “might thus be indirectly relevant to a proportionality determination, to the extent that those circumstances, in conjunction

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with the challenged forfeiture, would deprive the defendant of his livelihood.” (Id. at 113.)

The appeals court analyzed the Bajakajian factors in Viloski’s case under its clarified framework. After doing so, it concluded that “because the four Bajakajian factors support the conclusion that the forfeiture is not grossly disproportional to the gravity of Viloski’s offenses, and Viloski has failed to establish that the forfeiture would deprive him of his livelihood,” Viloski’s Eighth Amendment challenge failed. (Id. at 115.)

HOPE FOR THE (VIRTUALY) HOPELESS SITUATION
Defendants are often stuck without much to say when it comes to forfeiture. Other than contesting the numbers (usually a fool's errand except at the margins), white collar defendants will leave their sentencing hearings with a sizeable forfeiture order. But there is hope (however slight). Viloski reaffirms the Second Circuit’s view that the inquiry into whether a forfeiture amount is “grossly disproportional to the gravity of” the offense calls for an analysis that is moored to the analysis in Bajakajian, but not a strict application of the circuit’s distillation of Bajakajian into factors.

When endeavoring to expand the court’s proportionality analysis beyond the strict Bajakajian factors, it is useful to articulate the differences between different courts’ recitation of those factors. For example, the differences between the Bajakajian factors in the Second and Ninth Circuits are shown in this side-by-side comparison: The third and fourth factors are basically the same, but the first two are different. Both circuits look at the “essence” or “nature” of the crime in the first factor. Both circuits also analyze whether the crime was related to other “criminal” or “illegal” activities. But that is part of the first factor in the Second Circuit, while it is the second (and separate) factor for the Ninth Circuit. The Second Circuit then asks “whether the defendant fits into the class of persons for whom the statute was principally designed.” The Ninth Circuit makes no similar inquiry.

Why are the factors in one circuit different from the factors in another? Because the Supreme Court did not set forth a strict test; instead, it engaged in a proportionality analysis in the circumstances of one defendant’s case. This scenario creates an opportunity for defendants to press for courts to broaden their consideration of what makes a forfeiture “grossly disproportional to the gravity of” the

offense by demonstrating the shortcomings in any strictly factor-based Bajakajian analysis.

The Second Circuit’s recognition in Viloski that the Bajakajian factors are to be flexibly applied—and incorporating a livelihood analysis into them—gives reason for optimism. By focusing on the proportionality analysis, the Second Circuit recognized the importance of the impact of forfeiture on the defendant. While it did not endorse a wholesale inquiry into the defendant’s health and personal circumstances, it recognized the significance of the size of the forfeiture order on the defendant’s ability to earn a living. That consideration, which did not arise in Bajakajian, is crucial. Its recognition provides a bit more balance to the proportionality analysis because it adds something to the defendant’s side of the ledger.

Forfeiture is a virtual slam dunk for the government. But Viloski gives defendants an avenue to pursue to try to limit the size of any forfeiture order. By homing in on the impact of a large forfeiture order on their ability to earn a living, coupled with its excess over the maximum statutory fine, defendants might avoid the imposition of an outsized forfeiture order.
CONCLUSION

Defense counsel in federal cases are accustomed to detailing for sentencing judges the history and characteristics of their clients to persuade the court to exercise leniency in sentencing. Such arguments are traditionally aimed at minimizing the prison time imposed under the sentencing guidelines. Often, white collar criminals also face hefty forfeiture judgments that might haunt them long after they have left federal custody and returned to society. Following the line of argument tepidly endorsed in Viloski, it would be prudent for defense counsel to focus those same history and characteristics arguments on the size of those forfeiture judgments. By wrapping their arguments in the cloak of gross disproportionality and focusing the sentencing court on the real-world impact of an exorbitant forfeiture judgment, defense counsel might minimize the ultimate penalties imposed on their clients. Such a result would serve the ends of justice without running afoul of the Eighth Amendment’s prohibition on “excessive fines.”

CHAIR’S COUNSEL

examined can represent a significant limitation. In other disciplines, limitations might greatly affect the strength of that evidence in relation to the issues present in the case.

Until the advent of DNA profiling technology, a lot of these questions were not asked concerning the science underlying the laboratory results and their significance as evidence in courts of law. The methodology used in DNA profiling, though new, was firmly rooted in science. Corrections were made relatively early in its use to improve the quality of testing. Other developments expanded the availability of that testing to a greater number of cases. One of those improvements was a shift to a discrete allele system. This advance reduced measurement imprecision for forms of testing amenable to its use.

The debate about DNA shifted to an examination of how strong inferences from the evidence were in identifying an individual as the likely perpetrator of a crime. That shift placed a greater emphasis on empirical data through the testing and development of frequency databases. Science and mathematics, particularly statistics, have always been closely related. In Daubert v. Merrell Dow Pharmaceuticals, the majority cited John Ziman’s book Reliable Knowledge. Ziman described this relationship as mathematics having the capability of modeling reality, though not necessarily mirroring it.

For other types of DNA testing, notably mitochondrial DNA and Y-STR testing, the same degree of precision was not available. However, the forensic community acknowledged those limitations while recognizing that such techniques were still able to provide valuable and relevant information in cases appropriate to their use. The development of DNA technology as a tool of forensic science has greatly influenced the push to bring a greater culture of science to forensics.

Some disciplines have a heritage rooted in traditional science. Disciplines such as chemical identification and toxicology are well known in chemistry and biology. Other disciplines developed from scientific curiosity and beliefs acquired from observed phenomena. Sir Francis Galton, an anthropologist, was the father of fingerprinting. These observed artifacts encouraged the development of theories within forensic science about the applications that could assist in solving crime.

Some of these disciplines, frequently referred to as “pattern disciplines,” include toolmark, firearms, bitemark, and blood spatter examinations. Some, most notably bitemark evidence and handwriting examination, have come under serious criticism. No one has suggested that the field of forensic odontology should be discarded generally. Most people agree that forensic odontology can provide valuable assistance in the identification of human remains. If not reliable generally, bitemark evidence may nevertheless be appropriate for examination where the bite is preserved in a relatively stable strata such as cheese or where the population of potential “biters” is limited significantly.

Some techniques and methods need further study. For some, foundational validation under common casework conditions should be established. The limitations of those uses need to be examined, and measurement imprecision and rates of error when testing is performed correctly should be determined. Statistical data that might suggest the weight or strength of the inferences by a given test result may be “helpful” to the finder of fact.

Studies establishing such empirical reference points may serve as a safeguard against expert exaggeration or overreach by the offering party. Expert opinions founded in testing and data provide more reliable assistance to juries than the subjective opinion of the “expert” delivered ipse dixit.

Obviously the research-based, data-driven statement is more likely to be reliable, but as stated, they do not currently exist. They are however, being studied. Even where such empirical metrics cannot be established, there may be information that may be relevant and helpful to the finder of fact. Those characteristics can still be reported without the use of misleading statements that the features reported “match.”

The lack of development of a greater base of research has not been intentional. Instead, it may have to do with laboratories being located in public agencies where monies are limited and time is devoted to cases and not “science projects.” Scientific bodies have largely, until recently, demonstrated a disinterest in the study of forensic “science.” Whether such disinterest was the result of a bias against those who Oliver Wendell Holmes termed “the criminal classes”—specifically the lesser educated, racially disfavored, or poor—is subject to debate. Perhaps as a result of the work of the Innocence Project, the world of science has shown greater interest, with unjust punishment the potential cost.

It is my belief that the development of a research agenda requires national leadership. It is my fervent hope that this administration will continue the work that has been started. It is not important to me that the NCFS continues as the vehicle for pursuing this mission—other models may work as well or better. What is important is that the work continues.

To me, it is a matter of justice and of security. It is the preservation of public safety from those who would threaten us, both foreign and domestic. In Berger v. United States, Justice Sutherland spoke of a “sovereignty whose obligation is to govern impartially . . . and whose interest . . . is . . . that justice shall be done.” Continuing this work is an investment in that noble cause.
Prosecutorial Boundaries: De Facto Representation of Police Officers and Other Witnesses

BY J. VINCENT APRILE II

Prosecutors must maintain an efficient professional relationship with the law enforcement personnel with whom they work, whether those relationships are ongoing as with local police officers or temporary as with officers who do not regularly investigate cases in the prosecutor’s jurisdiction. Similarly, prosecutors must engage in temporary relationships with witnesses, including the alleged victim, in any given prosecution. These relationships can be fraught with opportunities for conflicts of interest and other ethical mistakes. It is essential for a prosecutor to appreciate and enforce boundaries in these situations.

“The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel.” (STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-3.2(a) (4th ed. 2015.).) Prosecutors do not represent the law enforcement officers with whom they work or the witnesses, including the alleged victims, in their cases. “The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.” (Id. at Standard 3-1.3.)

As a result, a prosecutor must be wary within the context of each prosecution from intentionally or unintentionally assuming de facto the role of counsel for a law enforcement officer who, for example, often investigates and testifies on behalf of the government. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor’s clients.” (Id.)

When a prosecutor believes within the context of a case the defense or the court has improperly or unfairly treated a law enforcement witness, the prosecutor may address the situation from the perspective of the advocate making the case for the government. However, the prosecutor must be careful to avoid simply becoming the champion of the officer in question, effectively assuming the role of the officer’s legal representative. Instead the prosecutor’s obligation is to challenge the perceived improper attack on the officer within the parameters of the law, procedural rules, ethical principles, and his or her role as the government’s advocate. Once the prosecutor’s primary purpose is to salvage or protect the officer’s reputation with little or no regard for the impact on the government’s case, the boundary between prosecutor and counsel for the officer has been crossed.

In one case, a prosecutor, who was outraged by an order assailing a specific police officer’s credibility in a prior case, was intent on precluding that order from being used as impeachment evidence against the officer in subsequent cases. To that end, the prosecutor urged the officer’s police department to initiate and conduct quickly an investigation of the officer in an effort to create evidence to dispute or rebut the prior judicial order in an upcoming case. The prosecutor and the officer actively engaged with the police and others in planning to hold a press conference denouncing as both unfair and wrong the prior judicial order questioning the officer’s credibility. In e-mails to officials in the police agency and the officer in question, the prosecutor declared a personal intent to defend and protect the officer’s name and reputation, to prevent the officer from being crucified in court and in the media, and evincing a willingness to take a bullet for the officer. The prosecutor then without sufficient investigation put on evidence at the subsequent trial that the police agency had cleared completely the officer. However, a reasonable inquiry by the prosecutor would have revealed that no police investigation had even been initiated nor had a decision been made as to whether such an investigation would be commenced in the future.

Under these circumstances, the prosecutor had undoubtedly morphed from his prosecutorial role in the case to functioning as the police officer’s attorney. This was a clear conflict of interest with his obligation to represent the government. In such a situation, that type of conflict should disqualify the prosecutor.

“The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor’s neutrality, judgment, or ability...
Amendments to Federal Rules of Criminal Procedure

BY DAVID A. SCHLUETER

Under the Rules Enabling Act, 28 U.S.C. §§ 2071–77, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees, who draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference’s Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States, they are forwarded to the Supreme Court of the United States, which reviews the rules, makes any appropriate changes, and in turn forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. That process—from initial drafting by the advisory committee to effective date—typically takes three years. On December 1, 2016, amendments to three Federal Rules of Criminal Procedure became effective—Rules 4, 41, and 45.

Federal Rule of Criminal Procedure 4. Arrest Warrant or Summons on a Complaint. There were several changes to Rule 4. First, an amendment to Rule 4(a) fills a gap that existed in those cases where an organizational defendant fails to appear in response to a summons. The amendment clarifies that in the case of an individual defendant who refuses to appear, the court may issue a warrant on its own motion. If requested by an attorney for the government, the court must issue a warrant. On the other hand, in the case of an organizational defendant who fails to appear, the court may “take any action authorized by United States law.”

Second, an amendment to Rule 4(c)(2) authorizes the service of a criminal summons on organizations outside the United States. Third, amendments to Rule 4(c)(3) addresses the question of how service of a summons may be made on organizational defendants. Rule 4(c)(3)(C) now parallels Federal Rule of Civil Procedure 4(h) and provides that if service has been made in the United States to an officer, or to a managing or general agent, of the organization, there is no need for a separate mailing of the summons to that organization. This amendment is intended to address those cases where an organization has committed a domestic offense, but has no place of business or mailing address within the United States. Rule 4(c)(3)(D), a new provision in the rule, addresses the procedures for service of a criminal summons on an organizational defendant outside the United States. The amendment recognizes that a foreign jurisdiction’s law might permit service of a summons on an organizational defendant through an officer, or a managing or general agent, just as can be done in the case of an organizational defendant in the United States. In additional, the new language provides a nonexhaustive list of possible means of service of process, which would provide “notice” to the organization.

Federal Rule of Criminal Procedure 41. Search and Seizure. There were a number of amendments to Rule 41. The caption for Rule 41(b) (“Authority to Issue a Warrant”) was changed to “Venue for a Warrant Application.” The committee note explains that the change, which is nonsubstantive, clearly indicates that Rule 41(b) identifies the courts that may consider applications for warrants and not the constitutional requirements for issuing a warrant.

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

Second, an amendment to Rule 41(f)(1)(C) addresses...
CRIMINAL JUSTICE MATTERS...

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the question of how to provide notice of a warrant to use remote access to search electronic media and seize or copy electronically stored data. Under the amendment, the officer executing the warrant must make reasonable attempts to serve a copy on the person whose property was searched or seized. The amendment also provides that service could be accomplished by any means, including electronic means which are reasonably designed to reach that person.

Federal Rule of Criminal Procedure 45. Computing and Extending Time. Rule 45, which governs computing and extending time for filings, cross-references Federal Rule of Civil Procedure 5. An amendment to Rule 45 eliminates the cross-reference to Federal Rule of Civil Procedure 5(b)(2)(E), which currently allows for an additional three days where service is by electronic means. The committee note explains that Federal Rule of Civil Procedure 5 was amended in 2001 to allow for electronic service, and included electronic service as one of the modes of service where three additional days were allowed. At that time, the courts were concerned about possible delays in electronic service. Those concerns, the committee note explains, have been alleviated. In addition, adding the three days at the end of the specified time for filing often complicates the counting methods. Finally, the committee note indicates that eliminating the reference to Federal Rule of Civil Procedure 5(b)(2)(E) means that the three additional days cannot be retained by consent to service by electronic means.

**CRIMINAL JUSTICE MATTERS...**

CRIMINAL JUSTICE: Prosecution Function Standard 3-1.7(a).) A prosecutor's office should seek to administer the law in an objective manner may be compromised.” (Nat'l Dist. Attorneys Ass'n, National Prosecution Standards Standard 1-3.3(d) (3d ed. 2009).) The personal decision of a prosecutor to become the de facto legal representative of a police officer who is a witness in the prosecution creates a disqualifying conflict of interest.

Once this prosecutor became so engrossed in defending the police officer’s reputation, there was a significant risk that the ability to function as an objective prosecutor would be materially limited by a personal, unabashed intention to vindicate the police officer at all costs. The prosecutor should have self-disqualified rather than jeopardize performing the role of an objective prosecutor, a minister of justice.

“The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter.” (Standards for Criminal Justice: Prosecution Function Standard 3-1.7(a).)

Abandoning the role of an objective prosecutor to function as a police officer’s legal representative in the case creates such a conflict of interest.

Perhaps the above example of a prosecutor functioning as a police officer’s counsel is too obvious. Yet that scenario illustrates the need to evaluate constantly whether a prosecutor has embraced a new role as counsel for a government witness, such as a police officer. The transformation may evolve slowly and require carefully scrutiny of each step as the prosecutor moves closer to assuming the function as the officer’s counsel. Conversely, change in roles may happen with dramatic swiftness. It is incumbent on prosecutors themselves, their supervisors, judges, and defense counsel to be aware of this possibility and monitor prosecutorial actions for evidence of this change in roles. “The prosecutor should avoid an appearance of impropriety in performing the prosecution function.” (Id. at Standard 3-1.2(c).)

Prosecutorial supervisors have an important role to play with regard to this phenomenon. “A prosecutor should seek out, and the prosecutor’s office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear.” (Id.) A prosecutor’s office should seek to inform its prosecutors of this limitation on their role and encourage them to discuss planned actions that approach the boundary between merely working the case and effectively representing a witness in the matter.

As previously noted, a prosecutor’s de facto representation of a witness is not limited to assisting law enforcement agents, but can occur when a prosecutor goes too far in protecting a government witness, including the alleged victim in the case. Although laws such as a victim’s bill of rights may require a prosecutor to share more information and receive more input from alleged victims, those laws do not transform prosecutors into the legal representative of the alleged victim in any criminal prosecution. The relationships between prosecutors and witnesses must also be carefully examined when prosecutorial actions create the appearance that a prosecutor is not an advocate for the government, but has assumed the role of a witness’s counsel.
Lawyers, Marijuana, and Ethics

BY PETER A. JOY AND KEVIN C. McMUNIGAL

As state marijuana laws have dramatically changed in recent years, more and more lawyers have asked state ethics authorities for guidance about how these changes in the legal landscape impact the ethical obligations of and limitations on lawyers. May lawyers in a state that has decriminalized marijuana, for example, advise and assist clients engaged in marijuana-related businesses such as growing, distributing, or selling marijuana in conformity with state law? Some state supreme courts have amended their ethics rules specifically to answer such questions. In other states, ethics authorities such as the state bar have issued opinions addressing them. In still other states, ethics authorities have yet to provide any guidance at all. In this column, we review the guidance state ethics authorities have offered so far to their lawyers about how to practice ethically under the new marijuana regimes found now in more than half of the American states.

THE DILEMMA

“Marijuana Lights Up State Ballots” announced the headline of an October 19, 2016, New York Times editorial reporting that on November 8 the citizens of nine states would vote on ballot proposals permitting either medicinal or recreational use of marijuana. Following the election, 28 states and the District of Columbia now permit some form of marijuana use. This trend of states reversing their positions on the legality of marijuana—including growing, distributing, selling, and using it—creates a unique and troubling dilemma for lawyers practicing in those states. While growing, distributing, selling, and using medical or recreational marijuana is legal now in many states, it continues to be a crime under federal law. What, then, is a lawyer in such a state allowed to do if someone who is considering entering the marijuana business or who is already in the marijuana business seeks the lawyer’s legal advice and assistance? May a lawyer negotiate or draft a lease for a building to be used by a client engaged in a marijuana-related business? May a lawyer negotiate or draft a contract on behalf of a client running a retail marijuana business with a supplier who grows marijuana? Is it ethically permissible to provide such advice and assistance because marijuana use and distribution is legal under state law? Or is the lawyer ethically prohibited from doing so because such a client would be or is already violating federal law?

It is worth noting at the outset that there are two dimensions to the dilemma created by the increasing schism between state and federal marijuana laws. First, advising and assisting a client with acts that are legal under state law but illegal under federal law may, as we have already noted, violate state ethics rules. Second, the same activity may make the lawyer an accomplice under federal criminal law. In sum, lawyers advising and assisting clients in a marijuana business potentially face both ethical sanctions by the state and criminal sanctions by the federal government. We address below only the first of these—potential ethical sanctions.

THE CURRENT FEDERAL POSITION

During the early decades of the twentieth century, state governments tended to lead and the federal government to follow in the criminalization of drugs. Just as the states were then at the forefront of criminalizing marijuana, they are now leading the way in the opposite direction in decriminalizing marijuana. It remains to be seen whether the federal government will someday follow this lead and eventually decriminalize marijuana. Although many Americans favor relaxation of marijuana laws, individual legislators at both the state and federal level are typically reluctant to vote in favor of such liberalization due to fear of being labeled soft on crime. It is thus difficult to get any legislative body, state or federal, to rescind drug laws. Many states allow voters to enact or change laws directly via a ballot initiative or referendum. These devices have provided marijuana decriminalization advocates in many states a path for sidestepping this political barrier. As illustrated in the New York Times editorial quoted at the outset...
of this column, ballot initiatives and referenda have played and are still playing a major role in reshaping marijuana laws.

There is no such ballot or referendum mechanism available at the federal level. And Congress recently has been unable either to agree on much of anything or to pass much legislation. So the prospect of this ethical dilemma being resolved by Congress decriminalizing marijuana is remote, at best.

THE COLE MEMORANDUM

Although Congress has not acted in response to the wave of marijuana decriminalization passing through the states in recent years, the executive branch of the federal government has. The Department of Justice (DOJ) has issued a series of memoranda providing guidance to federal prosecutors regarding marijuana law enforcement. The most recent of these, issued on August 29, 2013, by Deputy Attorney General James Cole (available at http://tinyurl.com/zukglx4), has played a key role in shaping the positions and reasoning of some state ethics authorities establishing ethical guidance for lawyers. It is thus worthwhile to describe its most salient points.

The Cole memo begins and ends with statements that should be troubling to anyone considering entering the marijuana business in a state where it is legal to do so and to any lawyer advising and assisting such a person. The memo starts by reminding its readers that Congress has determined that marijuana is a “dangerous drug,” that distribution of marijuana is a “serious crime” under federal law, and that the DOJ is “committed to enforcement” of that law. The memo concludes by emphasizing that the memo does not alter DOJ enforcement authority, provides no legal defense, and may not be relied upon to create any rights.

In between these somewhat ominous notes, the memo adopts a more conciliatory posture toward state and local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

WHAT MAY A LAWYER DO IN A “DECRIMINALIZED” STATE?

Just as state marijuana laws have changed rapidly in recent years, ethical guidance to lawyers in “decriminalized” states has also evolved rapidly, with changes occurring every few months. Accordingly, we cannot hope to provide in this column an up-to-date review of such guidance. Instead, we describe the current general contours of that guidance with the caveat that ethics standards in many states—especially the many states that have yet to provide any guidance at all—may well have changed by the time this column is read.

THE COLORADO EXPERIENCE

Adding to the ethical uncertainty surrounding lawyers and marijuana is the fact that the guidance and limits regarding what a lawyer may ethically do in regard to marijuana in some states has “flip flopped” back and forth as various authorities have weighed in on the subject. Consider, for example, the various positions adopted in Colorado, one of the states that has pioneered marijuana decriminalization.

In 2012, Colorado decriminalized recreational marijuana. In October 2013, Colorado Bar Association Formal Ethics Opinion 125 concluded that it was permissible for a Colorado lawyer to:

• represent a client in proceedings related to his or her past marijuana activities;
• advise government clients about marijuana rules and regulations;
• argue or lobby for or against marijuana rules and regulations; and
• advise a client about the consequences of marijuana use or commerce.

But the state bar concluded “for good or ill” that “under the plain language of Colo. RPC 1.2(d) . . . it is unethical for a lawyer to counsel a client to engage, or assist a client, in conduct that violates federal law.”

In March 2014, the Colorado Supreme Court, with two justices dissenting, effectively overruled Ethics Opinion 125 by adopting a new comment to Colorado Rule of Professional Conduct (RPC) 1.2(d) that provides:

A lawyer may counsel a client regarding the validity, scope, and meaning of [Colorado’s marijuana laws] and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.
One might have thought that this amendment to Colorado’s ethics rule would have provided the definitive word on the ethics of a Colorado lawyer advising and/or assisting a marijuana business. The Colorado Supreme Court is, after all, the final arbiter of legal ethics in Colorado. But in November 2014, the United States District Court for the District of Colorado chose to address legal ethics in the context of Colorado’s marijuana decriminalization. (See D. Colo. Local Att’y R. 2(b)(2), available at http://tinyurl.com/jybd33.) The district court “opted out” of the new comment to Colorado RCP 1.2(d), quoted above. It concluded that Colorado lawyers who practice before it are permitted to advise clients about the “validity, scope, and meaning” of Colorado’s marijuana laws. But, contrary to the Colorado Supreme Court’s recent amendment of the comment to Colorado RCP 1.2(d), lawyers who practice in the federal district courts in Colorado may not “assist a client in conduct that the lawyer reasonably believes is permitted by” those laws. So now, Colorado lawyers who practice in federal courts are subject to conflicting guidance from state and federal authorities about how they may ethically act in relation to Colorado’s marijuana laws.

THE OHIO EXPERIENCE

Positions advanced recently in Ohio about how its lawyers should operate under its newly enacted medical marijuana law have also varied dramatically over a short period of time. The statute that enacted Ohio’s new medical marijuana regime provided that Ohio lawyers would not be subject to ethical sanctions for advising and assisting clients operating in compliance with the new Ohio law.

However, in August 2016, the Ohio Supreme Court Board of Professional Conduct (BPC) issued an ethics opinion in response to inquiries from Ohio lawyers about permissible conduct in relation to Ohio’s recent medical marijuana law. (Ohio Sup. Ct. Bd. of Prof’l Conduct, Op. 2016-6 (Aug. 5, 2016), available at http://tinyurl.com/zy74og8.) The Ohio BPC reasoned simply that because a client distributing medical marijuana would be violating federal law, an Ohio lawyer cannot ethically advise or assist such a client. Examples of prohibited conduct given in the opinion include representation of clients before state regulatory boards, drafting or negotiating contracts or leases, and completion and filing of marijuana license applications. The only advice the lawyer is allowed to provide, according to the BPC’s opinion, has to do with the scope and consequences of violating the law. For example, an Ohio lawyer may advise a client that distribution of medical marijuana violates federal drug laws.

The Ohio BPC in arriving at this conclusion focused exclusively on the text of Ohio RPC 1.2(d). It did not examine the purposes behind Ohio RPC 1.2(d).

Nor did it address the fact that since the enactment of Ohio RPC 1.2, the social and legal landscape in Ohio and many other states regarding marijuana use has significantly changed. The Ohio BPC also did not address or acknowledge the likely consequences of its position—that anyone seeking to enter the medical marijuana business in Ohio would essentially be deprived of legal advice and assistance and that, accordingly, the functioning and effectiveness of Ohio’s regulatory system for controlling medical marijuana would be seriously compromised.

What about Ohio lawyers employed by state and local government agencies in charge of implementing and regulating new medical marijuana businesses in Ohio? May such lawyers ethically advise and assist those government agencies and the officials who work for those agencies? Such government agencies could easily be viewed as assisting and encouraging conduct that violates federal law by, for example, issuing licenses to grow and distribute medical marijuana. Interestingly, though, the Ohio BPC concluded that such lawyers are exempted from the prohibitions imposed on lawyers advising and assisting private clients. The BPC acknowledged that such agencies are “arguably enabling” conduct that violates federal law. Nonetheless, although there was no basis for such an exemption in the text of Ohio RPC 1.2(d) the BPC was interpreting, Ohio BPC Opinion 2016-6 without explanation or justification exempted lawyers advising and assisting government agencies.

Like the Colorado Supreme Court, the Ohio Supreme Court later amended Ohio’s ethics rules to effectively nullify Opinion 2016-6. The amendment to Ohio RPC 1.2(d) provides:

A lawyer may counsel or assist a client regarding conduct expressly permitted under [Ohio’s medical marijuana law] authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.

AN OVERVIEW

States that have decriminalized marijuana and whose ethics authorities have addressed how their lawyers may now ethically behave have been uniform in addressing certain, typically noncontroversial, issues. For example, virtually every state that has addressed the ethical implications of marijuana decriminalization has said that it is appropriate for a lawyer to defend a client whose past activities may have been in violation of either state or federal marijuana laws. Also, states have
uniformly found it appropriate for a lawyer to explain to a client the current contours of state and federal marijuana laws.

A number of states have specifically amended their ethics codes to address the implications of marijuana decriminalization. All that have done so allow the state’s lawyers to advise and assist clients acting in compliance with the state’s marijuana laws regardless of federal illegality. The key state ethics rules at the heart of debate over whether lawyers should be able to advise and assist clients in the marijuana business are the state analogs to Model Rule 1.2(d).

States such as Oregon and Ohio amended the actual language of their versions of Rule 1.2(d). States such as Colorado, Nevada, and Washington amended the comment to their versions of Rule 1.2(d) to the same effect.

In some states that have not, as of this writing, amended their ethics rules to address the implications of marijuana decriminalization, ethics authorities other than the state’s supreme court have provided guidance. Ethics opinions in Connecticut and New Jersey do not allow lawyers to advise or assist clients involved in marijuana businesses, while opinions in Arizona, Illinois, and New York do allow lawyers to advise and assist such clients.

But in many states that have decriminalized marijuana, no ethical guidance at all has been forthcoming.

OUR VIEW
What recommendations do we have in regard to the issues raised in this column?

First, every state that has decriminalized marijuana either for medical or recreational purposes should provide clear guidance to its lawyers about what they are ethically permitted to do in relation to the state’s new marijuana laws. There is no good reason for keeping those lawyers in the dark. Providing guidance in advance will save time and resources and avoid the potential unfairness of having to resolve these issues later through disciplinary proceedings against individual lawyers.

Second, the best way, in our view, for a state to provide this guidance is for its state supreme court to amend the state’s ethics rules to specifically address its current marijuana laws. The issues are important and timely enough to deserve the attention of the highest ethics authority in the state, its supreme court. In addition, such an amendment avoids the potential waste of resources seen in Colorado and Ohio, where ethics authorities other than the state supreme court took the time to write opinions dealing with marijuana decriminalization only to have those opinions effectively overruled by the Colorado and Ohio supreme courts.

Finally, turning to the substantive ethical issues raised in this column, in our view the better approach to addressing the dilemma created by the increasing divergence between federal and state marijuana laws is the one that has been adopted in Colorado, Nevada, Washington, Oregon, and Ohio through ethics rule amendments and in Arizona, Illinois, and New York through ethics opinions. In short, a state that has decriminalized its marijuana laws should allow its lawyers to advise and assist clients in the state. One of the primary objectives of legal ethics rules is to increase compliance with the law. This includes a state’s newly enacted marijuana laws. This essential objective will not be served if the entire bar of a state are required to sit on the sidelines and let the citizens of the state try to figure out on their own the often detailed requirements of a state’s marijuana laws. In addition, a common objective of both the new state marijuana laws and the current federal enforcement guidelines set forth in the Cole memo is a “strong and effective state regulatory and enforcement scheme.” Simply put, this objective is much more likely to be realized if a state’s lawyers are empowered to advise and assist clients on how to comply with that regulatory and enforcement scheme.

CONCLUSION
The recent presidential election creates considerable uncertainty as to whether the DOJ will continue to adhere to the position outlined in the Cole memo. Neither President Donald Trump nor Attorney General Jeff Sessions has, to our knowledge, given a clear statement about future enforcement of federal marijuana laws. Suffice it to say that a DOJ decision to rescind the policy set forth in the Cole memo and enforce federal marijuana laws in states that have decriminalized marijuana would raise enormous practical and theoretical questions regarding the ethical guidance we review in this column. But unless and until the DOJ does rescind the Cole memo, state supreme courts should follow the lead set by Colorado, Ohio, Oregon, Nevada, and Washington and amend their ethics rules to allow their state’s lawyers to advise and assist clients acting within new state marijuana laws.

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The Prisoner’s Lawyer’s Dilemma

BY CHARLIE GERSTEIN

The criminal system churns through millions of people each year. Almost all convictions result from guilty pleas, for reasons that readers of this magazine know well: the threat of lengthy pretrial detention, the possibility of a long sentence, and the costs—financial, emotional, and human—of contesting a criminal charge.

In 2012, Michelle Alexander floated an idea that many who work in the criminal system had also considered: what if everybody went to trial? (See Michelle Alexander, Go to Trial: Crash the Justice System, N.Y. Times, Mar. 11, 2012, at SR3.) “The system of mass incarceration,” Alexander wrote, “depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.” (Id.)

The system would crash.

Scholars and lawyers immediately raised a host of objections to this strategy. (It’s worth noting that Alexander didn’t actually advocate advising clients to refuse guilty pleas en masse.) I’d like to respond to one of those objections: that it would be unethical for a public defender to advise his or her client to refuse an otherwise beneficial plea deal for the purpose of forcing the system to face a deluge of litigation and, therefore, crash. (See, e.g., Carrie Leonetti, Painting the Roses Red: Confessions of a Recovering Public Defender, 12 Ohio St. J. Crim. L. 371, 387 (2015).)

A criminal defense lawyer’s ethical obligations are easily summarized: advocate for your client’s best interests as zealously and as diligently as you can without breaking the rules. The defense lawyer’s morality—like all lawyers’ morality—is role-specific. A defense lawyer’s duty is to his or her client, not to any other competing need. In the service of that duty, the defense lawyer gives his or her client advice on whether or not to plead guilty. (The ultimate decision to plead guilty or go to trial is always the client’s.) And in giving that advice, the defense lawyer must give his or her client all the relevant information concerning the decision.

Attempting to crash the system by advising clients to refuse plea bargains, the argument goes, is unethical because it forwards a larger goal—ending mass incarceration—at the expense of the client’s short-term best interests. If you advise all of your clients to refuse pleas, “[s]ome defendants would end up way worse off, serving thirty years after trial because they turned down a five-year offer as part of your ‘break the system’ strategy. Your advice to those clients was malpractice.” (Id.)

I don’t think so. Or, at least, I don’t think so in all cases. I think that, given certain assumptions about a jurisdiction’s criminal system, all clients in that jurisdiction are better off if they all refuse to plea bargain. This is possible because lawyers can help their clients cooperate.

Consider first the classical prisoner’s dilemma. (See, e.g., John von Neumann & Oskar Morgenstern, The Theory of Games and Economic Behavior (1944).) Two codefendants, A and B, are arrested and imprisoned in separate cells. The prosecutors lack sufficient evidence to convict the pair on the principal charge against them unless they rat each other out, but the prosecution can convict both on an easily provable, lesser charge regardless. So the prosecutors offer each prisoner a bargain: If A and B each rat on the other, each of them serves two years in prison; If A rats on B but B remains silent, A will be set free and B will serve three years in prison (and vice versa); If A and B both remain silent, both of them will serve only one year in prison (on the lesser charge).

According to John Nash’s theory of stable equilibria, if both A and B are acting only in their own individual self-interest, they will both rat each other out and end up in jail for two years. A Nash equilibrium is one in which neither player can benefit from changing his or her strategy if the other’s remains the same. A knows that regardless of what she does, B will be better off ratting A out; B knows that regardless of what he does, A will be better off ratting B out; so they both

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UNIQUE NASH EQUILIBRIUM IN THE PRISONER’S DILEMMA
always rat each other out, even though they’d both be better off if they worked together. But they can’t work together.

At first glance, the problem of the public defender seeking to crash the system might look like the prisoners’ dilemma. If everybody else is pleading not guilty, anyone who pleads guilty will get a particularly sweet plea deal from the swamped prosecutor, and anyone who doesn’t miss the boat. The defendants would be better off taking it, right?

But consider the prisoner’s lawyer’s dilemma. Imagine that A and B, both represented by the same lawyer, are being prosecuted for the same crime in a small town with one prosecutor and a strict speedy-trial rule. The speedy-trial clock is about to run, so both the prosecutor and the defense lawyer know that there isn’t enough time to take both A and B to trial. The prosecutor offers them both the same deal: plead guilty and get a two-year sentence. If either goes to trial, he will get a 10-year sentence. And assume the prosecutor can’t simply flip a coin and prosecute one but not the other.

There are two Nash equilibria here—both plead guilty, and both go to trial. But if A and B do not know what the other will do, they will both plead guilty. Each assumes that the other will assume that the first will plead guilty. Fearing that possibility, they both plead guilty. But if they can cooperate, they will both go to trial because if each can make a creditable commitment to go to trial, the other will be better off making one too. (E.g., Roger B. Myerson, Learning from Schelling’s “Strategy of Conflict” (Apr. 2009), http://tinyurl.com/jnr4cr7.)

The lawyer can help them cooperate. She can truthfully tell both A and B that the other is willing to go to trial. Knowing that, both A and B would be better off going to trial. Because each client’s best interest is served by cooperating, the lawyer is not only ethically permitted to facilitate cooperation, she may be ethically required to. Crashing the system is a Nash equilibrium. And it can happen if lawyers help.

I think that the would-be system-crashing public defender sometimes faces a world that looks more like the prisoner’s lawyer’s dilemma than the prisoner’s dilemma. For this to be true, first, the public defender’s office must represent a large enough portion of the criminal defendants in its jurisdiction to ensure that it can flood the prosecution with enough trials to effectively shut the system down, and the defenders must be able to act together to achieve this goal. Second, the defense lawyers must be reasonably sure that the prosecution won’t respond to—or, better still, won’t be able to respond to—the defense lawyers’ efforts by selecting a small portion of defendants and prosecuting them extremely harshly relative to the crimes with which they are charged. Finally, the defense lawyers must be confident that if their clients have all the information about the pros and cons of pleading guilty under these circumstances—denying them information in order to get them to plead guilty would be unethical—a very high proportion of their clients will take their advice and refuse to plead guilty.

Where these things are true, defense lawyers should be able to slow the criminal justice system to a halt. Without guilty pleas, as Alexander and others have explained, the system simply won’t have the resources to adjudicate the glut of claims that modern mass incarceration requires. But, of course, other objections to the strategy remain. What if prosecutors do end up decimating defendants, randomly selecting a few people for especially harsh treatment? Perhaps prosecutors will triage, starting by prosecuting only the top decile of charges ranked by severity. If prosecutors do that, will defense attorneys be obliged to predict who will be in that decile and advise those clients to accept a guilty plea? And if that happens, can the prosecutors simply continue down the scale of severity until they’ve potentially prosecuted everyone, ending up back where they started? What if the system responds to the defenders’ efforts by simply locking everyone up pending long-delayed trials? Although this would be illegal, that’s surely no reason categorically to assume that it won’t happen. And if the system eventually resuscitates itself, how will it look?

I don’t have answers to these questions. But whatever else is true of crashing the system, it’s not necessarily unethical.
In September 2016, the President’s Council of Advisors on Science and Technology (PCAST) released a report on forensic science: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (available at http://tinyurl.com/j29c5ua). The report has been attacked by a number of law enforcement groups.

There are several parts to the report, as well as recommendations. The first part sets forth general principles of science. Many common forensic techniques do not satisfy these principles. The second part of the report focuses on six forensic techniques: (1) DNA analysis of single-source and simple-mixture samples, (2) DNA analysis of complex-mixture samples, (3) bitemark analysis, (4) latent fingerprint analysis, (5) firearms analysis, and (6) footwear analysis.

VALIDATION

The report begins with a discussion of the validation of forensic techniques. It first distinguishes between two types of validity:

(1) Foundational validity for a forensic-science method requires that it be shown, based on empirical studies, to be repeatable, reproducible, and accurate, at levels that have been measured and are appropriate to the intended application. Foundational validity, then, means that a method can, in principle, be reliable. It is the scientific concept we mean to correspond to the legal requirement, in Rule 702(c), of “reliable principles and methods.”

(2) Validity as applied means that the method has been reliably applied in practice. It is

ESTABLISHING VALIDITY

According to the report, validity must be established empirically, even if based on subjective methods:

(1) Foundational validity requires that a method has been subjected to empirical testing by multiple groups, under conditions appropriate to its intended use. The studies must (a) demonstrate that the method is repeatable and reproducible and (b) provide valid estimates of the method’s accuracy (that is, how often the method reaches an incorrect conclusion) that indicate the method is appropriate to the intended application.

(2) For objective methods, the foundational validity of the method can be established by studying [and] measuring the accuracy, reproducibility, and consistency of each of its individual steps.

(3) For subjective feature-comparison methods, because the individual steps are not objectively specified, the method must be evaluated as if it were a “black box” in the examiner’s head. Evaluations of validity and reliability must therefore be based on “black-box studies,” in which many examiners render decisions about many independent tests (typically, involving “questioned” samples and one or more “known” samples) and the error rates are determined.

(4) Without appropriate estimates of accuracy,
an examiner’s statement that two samples are similar—or even indistinguishable—is scientifically meaningless: it has no probative value, and considerable potential for prejudicial impact.

Statements claiming or implying greater certainty than demonstrated by empirical evidence are scientifically invalid. Forensic examiners should therefore report findings of a proposed identification with clarity and restraint, explaining in each case that the fact that two samples satisfy a method’s criteria for a proposed match does not mean that the samples are from the same source. For example, if the false positive rate of a method has been found to be 1 in 50, experts should not imply that the method is able to produce results at a higher accuracy.

Neither experience, nor judgment, nor good professional practices (such as certification programs and accreditation programs, standardized protocols, proficiency testing, and codes of ethics) can substitute for actual evidence of foundational validity and reliability. The frequency with which a particular pattern or set of features will be observed in different samples, which is an essential element in drawing conclusions, is not a matter of “judgment.” It is an empirical matter for which only empirical evidence is relevant. Similarly, an expert’s expression of confidence based on personal professional experience or expressions of consensus among practitioners about the accuracy of their field is no substitute for error rates estimated from relevant studies. For forensic feature-comparison methods, establishing foundational validity based on empirical evidence is thus a sine qua non. Nothing can substitute for it.

(Id. at 5–6.)

DNA ANALYSIS
The report found that the analysis of samples from a single individual or from a simple mixture of two individuals (such as from a rape kit) is foundationally sound. But the report also noted that “validity as applied” is different: “DNA analysis, like all forensic analyses, is not infallible in practice. Errors can and do occur. Although the probability that two samples from different sources have the same DNA profile is tiny, the chance of human error is much higher. Such errors may stem from sample mix-ups, contamination, incorrect interpretation, and errors in reporting.” (Id. at 7.)

In contrast, the report concluded that DNA analysis of complex mixtures of biological samples from multiple unknown individuals in unknown proportions raises serious issues of interpretation—e.g., mixed blood stains and multiple individual touching of a surface. The report concluded that, “at present, studies have established the foundational validity of some objective methods under limited circumstances (specifically, a three-person mixture in which the minor contributor constitutes at least 20 percent of the intact DNA in the mixture) but that substantially more evidence is needed to establish foundational validity across broader settings.” (Id. at 8.)

BITEMARK ANALYSIS
The report commented:

[T]he foundational validity of a subjective method can only be established through multiple, appropriately designed black-box studies. Few studies—and no appropriate black-box studies—have been undertaken to study the ability of examiners to accurately identify the source of a bitemark. In these studies, the observed false-positive rates were very high—typically above ten percent and sometimes far above. Moreover, several of these studies employed inappropriate closed-set designs that are likely to underestimate the true false positive rate. Indeed, available scientific evidence strongly suggests that examiners not only cannot identify the source of bitemark with reasonable accuracy, they cannot even consistently agree on whether an injury is a human bitemark. For these reasons, PCAST finds that bitemark analysis is far from meeting the scientific standards for foundational validity.

(Id. at 9.)

At another point, the report observed: “Other methods may not be salvageable, as was the case with compositional bullet lead analysis and is likely the case with bitemarks.” (Id. at 14.)

LATENT FINGERPRINT ANALYSIS
PCAST found that latent fingerprint analysis is a foundationally valid subjective methodology—

albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors based on longstanding claims about the infallibility of fingerprint analysis. The false-positive rate could be as high as 1 error in 306
cases based on the FBI study and 1 error in 18 cases based on a study by another crime laboratory. In reporting results of latent-fingerprint examination, it is important to state the false-positive rates based on properly designed validation studies.[]

(Id. at 9–10 (footnote omitted).)

**FIREARMS ANALYSIS**

As to firearms analysis, PCAST conducted an “extensive review” of the relevant literature prior to 2009 and adjudged it “consistent with the National Research Council’s conclusion” that the foundational validity of the field had not been established. The council found “that many of these earlier studies were inappropriately designed to assess foundational validity and estimate reliability. Indeed, there is internal evidence among the studies themselves indicating that many previous studies underestimated the false positive rate by at least 100-fold.” (Id. at 11.)

However, PCAST identified one notable advance since 2009:

the completion of the first appropriately designed black-box study of firearms. The work was commissioned and funded by the Defense Department’s Forensic Science Center and was conducted by an independent testing lab (the Ames Laboratory, a Department of Energy national laboratory affiliated with Iowa State University). The false-positive rate was estimated at 1 in 66, with a confidence bound indicating that the rate could be as high as 1 in 46. While the study is available as a report to the Federal government, it has not been published in a scientific journal.

The scientific criteria for foundational validity require that there be more than one such study, to demonstrate reproducibility, and that studies should ideally be published in the peer-reviewed scientific literature. Accordingly, the current evidence still falls short of the scientific criteria for foundational validity.

(Id.)

**FOOTWEAR ANALYSIS**

PCAST determined “that there are no appropriate black-box studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks. Such associations are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.” (Id. at 13.)

**HAIR ANALYSIS**

In June 2016, the Department of Justice (DOJ) released proposed guidelines concerning testimony on hair examination, which included a supporting documentation on its validity and reliability. It concluded:

Based on these and other published studies, microscopic hair comparison has been demonstrated to be a valid and reliable scientific methodology. These studies have also shown that microscopic hair comparisons alone cannot lead to personal identification and it is crucial that this limitation be conveyed both in the written report and in testimony.

(Supporting Documentation for Department of Justice Proposed Uniform Language for Testimony and Reports for the Forensic Hair Examination Discipline 4 (2016), http://tinyurl.com/2g8gr6s.)

PCAST disagreed: “The supporting documents fail to note that subsequent studies found substantial flaws in the methodology and results of the key papers. PCAST’s own review of the cited papers finds that these studies do not establish the foundational validity and reliability of hair analysis.” (Forensic Science in Criminal Courts, supra, at 13.)

**RECOMMENDATION TO DOJ**

PCAST’s recommendations to the attorney general are perhaps the most controversial:

(ii) Where there are not adequate empirical studies and/or statistical models to provide meaningful information about the accuracy of a forensic feature-comparison method, DOJ attorneys and examiners should not offer testimony based on the method. If it is necessary to provide testimony concerning the method, they should clearly acknowledge to courts the lack of such evidence.

(iii) In testimony, examiners should always state clearly that errors can and do occur, due both to similarities between features and to human mistakes in the laboratory.

(Id. at 19.)

**RECOMMENDATIONS TO COURTS**
PCAST made several recommendations to courts, including:

- Statements suggesting or implying greater certainty are not scientifically valid and should not be permitted. In particular, courts should never permit scientifically indefensible claims such as: “zero,” “vanishingly small,” “essentially zero,” “negligible,” “minimal,” or “microscopic” error rates; “100 percent certainty” or proof “to a reasonable degree of scientific certainty;” identification “to the exclusion of all other sources;” or a chance of error so remote as to be a “practical impossibility.”

(CONCLUSION)

The report is consistent with the findings of the landmark 2009 report by the National Academy of Sciences: “Among existing forensic methods, only nuclear DNA analysis has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between an evidentiary sample and a specific individual or source.” (NAT’L RESEARCH COUNCIL, NAT’L ACAD. OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 100 (2009).)

The report will undoubtedly be controversial. After the report was released, “[a]n FBI statement was directly critical of the report saying it ‘makes broad, unsupported assertions regarding science and forensic science practice’ and conflates distinctions about levels of evidence that led to ‘troubling generalized conclusions about all forensic science disciplines.’” The backlash among several law enforcement groups also underscored what is at stake. (Spencer S. Hsu, White House Science Advisers Urge Justice Dept., Judges to Raise Forensic Standards, WASH. POST, Sept. 20, 2016, http://tinyurl.com/jhucv73.)

In response, DOJ released a statement criticizing the report on the day of its release. According to DOJ, the PCAST report “does not mention numerous published research studies which seem to meet PCAST’s criteria for appropriately designed studies providing support for foundational validity. That omission discredits the PCAST report as a thorough evaluation of scientific validity.” (Department of Justice, Comment Letter on PCAST’s Report to the President on Forensic Science in Federal Criminal Courts: Ensuring Scientific Validity of Pattern Comparison Methods (Sept. 20, 2016). PCAST, in turn, invited all stakeholders to identify validity studies that it might have overlooked. “DOJ ultimately concluded that it had no additional studies for PCAST to consider.” (PRESIDENT’S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, AN ADDENDUM TO THE PCAST REPORT ON FORENSIC SCIENCE IN CRIMINAL COURTS 3 (Jan. 6, 2017), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf.) Nor did the more than 400 papers submitted by 26 respondents cause PCAST to change its positions. The bottom line remained: “In science, empirical testing is the only way to establish the validity and degree of reliability of such an empirical method. Fortunately, empirical testing of empirical methods is feasible. There is no justification for accepting that a method is valid and reliable in the absence of appropriate empirical evidence.” (Id. at 4.) However, most prior studies use “closed-set design.” In these studies, “the correct source of each questioned sample is always present; studies using the closed-set design have underestimated the false-positive and inconclusive rates by more than 100-fold.” (Id. at 7.)
The Crime of All Crimes: Toward a Criminology of Genocide

BY NICOLE RAFTER
REVIEWED BY ROBERT COSTELLO


Author Nicole Rafter explains that all books are born out of specific times and places—and this particular one grew out of her experience as a Fulbright Fellow at Johannes Kepler University in Linz, Austria, the hometown of Adolf Hitler. On a daily basis she was reminded of the Third Reich—Hitler’s now abandoned elementary school stood nearby, his mother’s home was a short distance away, and she passed Adolf Eichmann’s apartment on her errands—but visiting Hartheim Castle, where mentally challenged citizens seen as threats to the Aryan blood were killed in one of the first gas chambers, provided the spark for Rafter to change the subject of her research from the history of criminology to genocide. A highly regarded criminologist, Rafter was not interested in adding to the plethora of historical accounts about the Holocaust or of genocide, but to further the development of criminology’s perspective on genocide.

A 1941 quote by Winston Churchill describing the mass killings of Russian prisoners of war by the German army as “a crime without a name” shows a lack of terminology and formal study in this area until Polish-Jewish international lawyer Raphael Lemkin created the term “genocide” (the Latin prefix geno means tribe or race and caedere means to kill) as part of his formal study in the area around 1944. Lemkin is considered to have started the modern study of genocide, which historians and sociologists continued after his death in 1959. Naturally, many early students were Jewish individuals who were born in Europe and lived through the Holocaust. While Holocaust studies is a field in its own right, it has branched into the general subject of genocide studies, which continues to evolve and explode due to the recent events in Rwanda and Yugoslavia. Many of the new works and researchers in genocide studies have no direct connection to the Holocaust, and this book is part of that expansion.

Rafter compares eight genocides in order to identify any typical patterns that may emerge. This format and structure permits her to identify how genocides have transformed over the twentieth century and to draw conclusions about the causes of genocide. She also examines these eight genocides for ways in which criminology and criminological theory may help in better understanding genocide.

Rafter answers several research questions, including the following.

How has genocide changed during the twentieth century? Like all crimes, genocide has evolved over the past century and continues to do so. For example, the locations of genocide shifted considerably. Historically, genocides were connected to colonialism—with its need for resources such as labor and land—starting with the Spanish entering the New World into the twentieth century. After the mid-twentieth century, the number of genocides in Asia declined and Europe had only one in the former Yugoslavia. The end of the Cold War also brought to an end genocides in Latin America. Mid-twentieth century has genocides occurring in new places for the first time. Africa, in particular Central Africa, had multiple genocides in the second half of the century.

Last century also experienced a shift in the motivations for genocide. In the first half of the century, genocide “tended to be committed by nation-states against other states. Both colonist and interstate genocides drew on imperialism, nationalism, and grand ideologies of race and ethnicity to justify their atrocities” (page 6). More recent genocide events occur beneath or independent of the nation-state and within the same country as part of a civil war. This key change could explain the uptick of genocide in the latter part of the century.

Rafter highlights the use of mass rape as a change in genocide. It is difficult to precisely know if mass rape is new or a reflection of better record keeping by monitoring agencies. There is less abduction of children and women compared to prior genocides where slavery and labor were motivating factors. Finally, recent genocide episodes do not match the “dehumanization” found in the Holocaust, but each one carries its own crimes against humanity.

How have the responses to genocide changed? Despite all the changes about genocide over the past century discussed above, the most significant may be the worldwide recognition of it as a crime. Prior to the Nuremberg trials after World War II, no group was ever brought to trial and punished for their genocidal actions. This marked the end of impunity for high-level actors. The early 1990s witnessed two additional examples of a lack of impunity with two special courts from the United Nations: the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

An additional change in response to genocide occurred in December 2002 with the creation of the International Criminal Court. This court of last resort has jurisdiction over genocides, war crimes, and crimes against humanity. The United States
The Privilege against Self-Incrimination and the Compelled Production of Passwords to Encrypted Digital Media

BY THOMAS D. RALPH

In order to comply with the Fifth Amendment, suspects generally may not be compelled to provide “testimonial information” unless knowledge of the information that is obtained through governmental compulsion is a “foregone conclusion” to the government. (Fisher v. United States, 425 U.S. 391, 408, 411 (1976).) When a defendant is compelled to enter his or her password to decode encrypted data for law enforcement investigators, the defendant’s act of producing the password conveys that the suspect knows the password or “key” that corresponds with the encrypted data at issue and allows the government to access the underlying data. Central to determining whether compelled decryption will become a common practice in a world with ever-increasing amounts of encrypted data is whether courts will require the government to show that it is a foregone conclusion that the defendant knows the password for the data at issue or whether courts will require the government to prove its specific knowledge of the data that it seeks to decrypt.

There are few published opinions addressing the issue. Recently, the Florida Second District Court of Appeal held that the relevant inquiry is whether it is a foregone conclusion that the defendant knew the password. (State v. Stahl, No. 2D14-4283 (Fla. Dist. Ct. App. Dec. 7, 2016) (citing Commonwealth v. Gelfgatt, 11 N.E.3d 605 (Mass. 2014).) Other courts, however, have required the government to establish its knowledge of the contents of the encrypted files and have held that the compelled production of a password by a defendant violates the Fifth Amendment. (See, e.g., In re Grand Jury Subpoena Dues Tecum Dated March 25, 2011, 670 F.3d 1335 (11th Cir. 2012).)

The practical difference between these two approaches is enormous. In most cases, it is relatively easy for the government to show through circumstantial evidence that a defendant knows his or her password. How else would a defendant use his or her password-protected cell phone, for example? It is the rare case, however, when the government knows the specific content of the data for which it is seeking an order to decrypt. Even in these rare cases, why would the government need to decrypt files if it already knows what the files contain? The seemingly simple question of what the government must prove that it knows before it seeks a decryption order will determine whether huge fields of evidence are available to prosecutors.

Although frequently discussed in the same context as the compelled production of passwords, the compelled production of biometric information like fingerprints in order to decrypt data is analytically distinct. Taking fingerprints (and even the forced extraction of blood from a suspect) has been held not to constitute compelling “testimonial information” from a suspect and thus permissible under the Fifth Amendment. (Schmerber v. California, 384 U.S. 757, 763–64 (1966).) Compelling a suspect to use his or her fingerprint to decrypt a phone has the same effect as compelling the suspect to enter the password into the phone. Courts must determine, therefore, whether a meaningful distinction can be made between compelling a suspect to do the physical act of touching a cell phone and compelling a suspect to do the act of typing in a password to an encrypted digital device.

BOOK REVIEW CONTINUED FROM PAGE 39

is not among the 123 countries that ratified the Rome Statute that establishes the court and defines these crimes.

Rafter explains how this formal change in the creation of an international court resulted in the trend of a “transitional justice movement” to respond worldwide to genocide and other massive acts against humanity. Whereas the international court purview is justice, the transitional justice movement is comprised of many different groups, such as nongovernment organizations that provide a range of services including direct support to victims, establishing institutions, truth commissions, and other work to help heal a divided nation.

The awakening of the public’s consciousness to genocide is another welcomed change in our response to it. The use of media in the form of increased journalistic exposure as well as genocide as a film genre has increased the general public’s knowledge and understanding. Finally, a form of education is genocide tourism, which is extremely popular as, for example, more people visit Holocaust sites each year than died during Nazi reign.

A highly acclaimed researcher, Rafter is also a gifted writer who utilizes an engaging style accessible to all readers. It offers a thorough grounding in the field while presenting a new perspective to examine genocide. As a neophyte to this area, I recommend this book as it broadened my thinking of criminal justice beyond the typical mindset of street and white collar crime.

THOMAS D. RALPH is an assistant district attorney serving as Chief of the Appeals and Training Bureau at the Middlesex District Attorney’s Office in Massachusetts. Previously, Mr. Ralph served as Chief of the Massachusetts Attorney General’s Cyber Crime Division.
Impermissible Expert Testimony on Credibility: An Illustrative Case
BY STEPHEN A. SALTZBURG

It is increasingly common for experts to testify in criminal cases about patterns of behavior of victims. Common examples include sexual assault and child sexual abuse cases. Often the testimony is offered to explain typical behaviors of victims, which might seem strange to a jury that did not have the assistance of expert testimony to explain those behaviors. Sometimes, however, the testimony drifts impermissibly into forbidden testimony as to whether a victim is telling the truth in a particular case. Knowing the line between permissible and impermissible requires careful attention, as People v. Relaford, No. 15CA0124 (Colo. Ct. App. June 30, 2016), illustrates.

THE ALLEGATIONS AND INVESTIGATION
A seven-year-old boy and his adoptive mother lived with Relaford during a summer. Several weeks after they moved out, the boy told his mother that Relaford had sexually assaulted him. The mother called the police, and in a detective responded by conducting a forensic interview with the boy. The boy described the assaults, said that sometimes Relaford used sex toys during the assaults, and added that he and Relaford watched a pornographic movie and looked at pornographic sex magazines together. The boy also said he had witnessed Relaford assault an eight-year-old girl who lived nearby.

The detective interviewed the girl, who initially denied that Relaford had assaulted her. But when the detective told her that he knew what had happened and needed to hear it from her she responded that “Dave [Relaford] has actually done it to me.” She also said that Relaford had used a sex toy on one occasion and she had watched pornographic movies and looked at pornographic magazines with Relaford.

THE CHALLENGED EXPERT TESTIMONY
The prosecution relied on the testimony of a marriage and family therapist whose qualifications were not challenged by the defense and who was qualified as an expert in “child sexual assault and abuse, specifically patterns of disclosure, outcry statements, Victim-Offender relationship dynamics, the process of memory, and suggestibility and fabrications.” The expert made clear that she did not review police reports or watch the videos of the forensic interviews, and based her opinion on what the prosecution told her about the ages of the children, the relationships of the parties, and where the events occurred.

The expert offered background information on the memory process in general and more specifically on the memory process in children who have been sexually assaulted. She testified without objection as follows: (1) children who have been victims of multiple assaults in similar locations might mix up details about what occurred in each assault; (2) inconsistent statements about what
happened and when were not unusual; and (3) younger children were much more likely to recall details that they initially omitted in an interview than they were to agree with suggestive or coercive questioning suggesting things that never actually occurred.

The expert then responded without objection to a series of questions about whether children lie by opining as follows: (1) children do lie; (2) preschool-age children lie during games like hide-and-go-seek; (3) older children lie to avoid the consequences of their actions and the negative consequences that flow from the reactions of adults; and (4) it is unusual for children to lie about an adult, and usually the explanation for their doing so is that they have mental health issues or are lying in the school environment about teachers, family members, or daycare providers.

After providing this testimony about children’s lying generally, the expert testified without objection that practitioners had found that children lied about sexual assault when they were “system-savvy adolescents” who have “been in lots of different sorts of institutional settings” and had a motive to lie, or when they were involved in “very, very disturbed, high-conflict custody cases” in which one parent persuaded the child that the other parent was abusing the child.

Defense counsel objected when the prosecutor asked the expert, “Okay, what about, of course, in our situation we’re talking about a seven – and eight-year-old, a little bit beyond preschool? So, I mean, have you ever experienced a situation where somebody in that age, seven or eight—?” The objection was that the expert was being asked to offer an opinion that the children were telling the truth. The trial judge sustained the objection, after which the expert then responded without objection to a series of questions about whether children lie by opining as follows: (1) children do lie; (2) preschool-age children lie during games like hide-and-go-seek; (3) older children lie to avoid the consequences of their actions and the negative consequences that flow from the reactions of adults; and (4) it is unusual for children to lie about an adult, and usually the explanation for their doing so is that they have mental health issues or are lying in the school environment about teachers, family members, or daycare providers.

The court distinguished cases in which testimony was admitted to show that a child fit the pattern. The court explained that witnesses may offer opinions about a witness’s character for truthfulness under rules like Colorado Rule of Evidence (CRE) 608(a), but the rule does not permit an opinion on whether a particular witness is telling the truth in a particular case:

“CRE 608 evidence is not permitted to establish whether a witness testified truthfully on the witness stand or whether he or she was truthful on a particular occasion.” Liggett v. People, 135 P.3d 725, 731 (Colo. 2006). “[E]xperts may not offer their direct opinion on a child victim’s truthfulness or their opinion on whether children tend to fabricate sexual abuse allegations.” People v. Wittrein, 221 P.3d 1076, 1081 (Colo. 2009). The supreme court has held that expert testimony that children tend not to fabricate stories of sexual abuse is “tantamount to [an expert] testifying that [a] child victim was telling the truth about her allegations.” Id. at 1082 (citing People v. Snook, 745 P.2d 647, 648 (Colo. 1987)).

The court distinguished cases in which testimony about patterns of behavior by child incest victims was admitted to show that a child fit the pattern. The court explained that such expert testimony was not confined to a credibility opinion in contrast to the opinion by the expert in Relaford.

The court concluded that other testimony provided by the expert in Relaford was proper. It included the testimony on memory process, the typical relationship between victims and perpetrators, why the children might
Too Close for Comfort? Separating the Roles of the Treating Doctor and the Forensic Evaluator

BY ERIC Y. DROGIN

When we started this column one year ago, we made a commitment to “delve into finer points of legal and forensic practice.” There may be no better example of these than the frequently encountered but rarely understood problems that arise when counsel tries to draft a defendant’s treating doctor as the evaluating expert—or vice versa. Let’s review how a prosecutor might interact with a reputable forensic psychologist to untangle such issues:

Prosecutor: It looks like I’m going to need some help with that aggravated assault case after all. Defense counsel just disclosed that they’re going to use a psychologist to establish a mental health defense.

Doctor: Wait—before you disclose any of the details, are you sure it isn’t me?

Prosecutor: When were you arrested for aggravated assault?

Doctor: Let’s start over. Who’s their expert? One of the usual suspects?

Prosecutor: Actually, no . . . and that’s the problem. The doctor’s name is Hyman Rorschach.

Doctor: No it isn’t.

Prosecutor: I swear.

Doctor: Well, I’ve never heard of him . . . and believe me, I’d remember the name.

Prosecutor: That’s the point. I wouldn’t assume you’ve heard of him, because he’s not a forensic psychologist. He’s the defendant’s treating doctor, so I’m in kind of a tight spot.

Doctor: How so?

Prosecutor: None of our experts know him either, but we learned he’s been practicing for 30 years, offers crisis counseling for free at the local homeless shelter, and never had so much as a speeding ticket.

Doctor: No aggravated assault convictions?

Prosecutor: I can’t criticize him for being a hired gun—no offense—and I can’t criticize him for how much money he’s going to make in this case, because he won’t even be charging to testify.

Doctor: What do you see as the biggest threat here?

Prosecutor: He’s the defendant’s doctor, and he established a diagnosis for her long before she committed this offense. It’s usually very effective.

Doctor: It’s also usually very unethical.

Prosecutor: Really? According to whom?

Doctor: Well, let’s start with the American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (APA Code), which has a standard that discourages “multiple relationships,” like when “a psychologist is in a professional role with a person” and “at the same time is in another role with the same person.”

Prosecutor: Finally, some good news in this case! Still, I don’t want to make the defense’s arguments for them, but if I challenge their use of this doctor I can already hear them saying, “What’s your problem? Does he adopt a different ‘role’ every time he gives her a test, refers her to a physician, or writes her a letter for work? On Tuesday, he’s a psychologist who does therapy, and on Wednesday, he’s a psychologist who explains her to the court. So, this means doctors can’t testify anymore?”

Doctor: Of course they can—under different circumstances. Let’s analyze this from the perspective of your own profession. A “fact” witness just tells us what happened. There wouldn’t be any problems with Dr. Rorschach coming into court and saying, “I’ve treated her for 10 years, she has an anxiety disorder, I referred her to Dr. Freud for some medication, despite which I believe she’s doing only marginally better than she was when we started.”

Prosecutor: There’s nothing wrong with that.

Doctor: No, but when the doctor’s duties become those of the “expert” witness, that’s considered to be a different matter.

Prosecutor: Considered by whom? I’ll need more than just common sense to back this up.

Doctor: For one thing, the APA Code does advise practitioners under “multiple relationships” and also under another standard called “code of conduct” that they should avoid conduct that “could reasonably be expected to impair” their “objectivity, competence, or effectiveness.” In this and in any other case, I’m sure we’d agree that “objectivity” is a nonnegotiable requirement for an “expert” witness.

Prosecutor: Agreed.

Doctor: We get additional support for this from another American Psychological Association resource,
called the Specialty Guidelines for Forensic Psychology (APA Guidelines).

**Prosecutor:** Maybe I should just go and apply for a job at the public defender’s office, but is this going to apply when the doctors don’t really identify themselves as “forensic psychologists” in the first place?

**Doctor:** Actually, it does. The APA Guidelines tell us right up front that they apply whenever a psychologist engages in “the practice of forensic psychology,” which is considered to occur “from the time the practitioner reasonably expects to, agrees to, or is legally mandated to provide expertise on an explicitly psycholegal issue.”

**Prosecutor:** So, do these APA Guidelines contradict the direction we get from the APA Code?

**Doctor:** No, because the guidelines promulgated by the American Psychological Association always complement the APA Code . . . similar to how regulations complement the basic law laid down by a statute.

**Prosecutor:** What about when the court sends an order for an expert to provide therapeutic services?

**Doctor:** The APA Guidelines specifically address “therapeutic-forensic role conflicts,” and tell us that “providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm,” and that “when requested or ordered to provide either concurrent or sequential forensic and therapeutic services, forensic practitioners are encouraged to disclose the potential risk and make reasonable efforts to refer the request to another qualified provider.”

**Prosecutor:** Now that’s something I can sell at a hearing! What are they getting at with “concurrent or sequential”? Is that to prevent a doctor from saying, “I’m not treating this patient anymore, so the rules no longer apply?”

**Doctor:** Yes, in part, and it also covers another sort of situation: when one side or the other properly retains a forensic psychologist, but then invites that doctor to provide therapeutic services after the fact in order to soften the “hired gun” characterization and gain some “treating doctor” momentum as well.

**Prosecutor:** What about when the court sends an incompetent defendant to the state hospital for treatment and hears testimony from those doctors?

**Doctor:** The APA Guidelines anticipate an exception for this, and advise that such doctors “seek to minimize the potential negative effects of this circumstance.” By the way, there’s a similar rule for psychiatrists. The American Academy of Psychiatry and the Law has Ethics Guidelines for the Practice of Forensic Psychiatry that explain how offering expert opinions about patients “may adversely affect the therapeutic relationship with them,” and that “the credibility of the practitioner may also be undermined by conflicts inherent in the differing clinical and forensic roles.”

**Prosecutor:** I’ll try to get a hearing on this issue by the end of the week.

Our readers were also promised a “balanced approach,” so here goes. Defense counsel won’t want to pass up any useful opportunities to bring treating doctors into court in a fact witness role, and should not be thwarted by arguments that any doctor must be considered an “expert.” There’s often considerable value in establishing impairment of a more general nature through fact witnesses—particularly when expert witnesses are unaffordable or unavailable.

Please feel encouraged to contact Dr. Drogin at edrogin@bidmc.harvard.edu with any questions about these clinical/forensic role conflicts, or with any suggestions for future topics.

**TRIAL TACTICS**

have made inconsistent statements or omitted details originally that they later recalled, and the general behavior of child sexual assault victims. None of this involved an opinion as to whether the children were lying or telling the truth, even though it clearly might have assisted the jury in making the credibility determination that only it is empowered to make.

The court concluded that the error in admitting the testimony was not an obvious error and that it was unlikely to have had much impact on the jury’s verdict given the other strong evidence in the case.

**LESSONS**

1. It is not always immediately obvious when an expert moves from permissible expert testimony about the characteristics associated with a particular group like child victims and enters the forbidden area of opining on the truthfulness of a particular witness. Defense counsel in this case was quick to object when it appeared that the expert was being asked to opine on the credibility of a seven– and eight-year-old. But, after objecting, defense counsel failed to recognize that the prosecutor was eliciting the same opinion less directly.

2. The failure to object leaves a defendant with only plain error review, and reversals under the plain error standard are rare. They occur only when an appellate court believes that the error undermines confidence in the verdict to an impermissible extent.

3. By familiarizing themselves with the Relaford case, prosecutors and defense counsel can become more aware of the line separating permissible and impermissible expert testimony and more adept at recognizing testimony that is only relevant because it addresses the truthfulness of a witness in the case being tried. The rules of evidence in effect in Relaford are the same as those that govern trials in federal courts and in virtually every state. So the lessons to be learned apply throughout the Nation.
Supreme Court Cases of Interest

BY CAROL GARFIEL FREEMAN

Judge Neil Gorsuch of the Tenth Circuit has been named to fill the seat of Justice Antonin Scalia, who died about a year ago, and may have been confirmed by the time this issue is published. However, it is unlikely that he would be able to participate in the decision of any of the cases set for argument during this term. Several comments on orders merit mention. The Court granted the application for stay of the death sentence in one case, Chief Justice Roberts writing that although he did not believe the case merited their usual criteria for a stay or for review, he voted to grant the stay desired by four justices to permit them to “more fully consider the suitability of this case for review.” (Arthur v. Dunn, No. 16-602 (16A451) (Nov. 3, 2016).) On February 21, the Court denied cert, prompting a strong dissent by Justice Sotomayor, joined by Justice Breyer. The dissent reviewed the substantial evidence that death by lethal injection, as currently administered, is cruel. As suggested in Glossip v. Gross, 135 S. Ct. 2726 (2015), Arthur proposed “a ‘known and available’ alternative method for his own execution,” that is, death by firing squad. In addition to rejecting Arthur’s challenges to the lethal injection protocol, the lower courts rejected the alternative proposal because Alabama law does not expressly provide for such method of execution. Justice Sotomayor reviewed the history both of lethal injection and earlier methods of execution, each of which had ultimately been rejected as cruel (hanging, electrocution, and the gas chamber). She concluded that the lower court decision allows the states “to immunize their methods of execution—no matter how cruel or how unusual—from judicial review and thus permits state law to subvert the Federal Constitution.”

Justice Breyer dissented from the denial of cert in Sireci v. Florida, 137 S. Ct. 470 (Dec. 12, 2016) (No. 16-5247), Sireci having been sentenced to death 40 years ago. He reiterated his view that it is time to consider the constitutionality of the death penalty.

The Court granted cert, vacated, and reversed several cases from Arizona to permit the state courts to consider application of Montgomery v. Louisiana, 136 S. Ct. 718 (2016), and Miller v. Alabama, 132 S. Ct. 2455 (2012), to defendants sentenced to life without parole for crimes committed when they were juveniles. Justice Sotomayor, concurring, wrote to explain the decision; Justice Alito, joined by Justice Thomas, dissented. (Tatum v. Arizona, 137 S. Ct. 11 (Oct. 31, 2016) (No. 15-8850).)

Finally, Jennings v. Rodriguez, No. 15-1204, which was argued on November 30, raises questions as to whether aliens subject to detention under 8 U.S.C. § 1225(b) or 8 U.S.C. § 1226(c) must be afforded bond hearings if the detention lasts six months, and the standards applicable at such hearings or at hearings under 8 U.S.C. § 1226(a). On December 15, the Court directed the parties to file supplemental briefs addressing the question whether any of these propositions are required by the Constitution. As of this writing, the case has not been decided.

The decisions in the four cases resolved between October and February, discussed below, were unanimous. Decisions in seven other cases argued in October and November are pending as of late February, and the Court has scheduled arguments in 15 other cases related to criminal justice before the end of the term in April. This promises a very full column for the Summer and Fall issues.

CERT GRANTED

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

CAPITAL CASES

Davila v. Davis, No. 16-6219, cert. granted limited to question 1 presented by the petition. Jan. 13, 2017, decision below at 650 F. App’x 860 (5th Cir. 2016), reh’g denied, June 28, 2016 (argument April 24):

1. Does the rule established in Martinez v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013), that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim, also apply to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims?

McWilliams v. Dunn, No. 16-5294, cert. granted limited to question 1 presented by the petition, Jan. 13, 2017, decision below at 634 F. App’x 698 (11th Cir. 2015), reh’g denied, Feb. 16, 2016 (argument April 24):
The defendant’s mitigation in this Alabama death penalty case was based on severe mental health disorders that resulted from multiple head injuries. In response to the defense motion for a mental health expert, the trial judge appointed an expert who reported his findings simultaneously to the court, the prosecution, and the defense just two days before the sentencing hearing. Defense counsel had no opportunity to consult with the expert or have him review voluminous medical and psychological records that were not made available to the defense until the start of the sentencing hearing. Thus, as the dissent below noted, “McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State’s psychiatric experts.”

This meaningless expert assistance violated McWilliams’s rights under Ake v. Oklahoma, 470 U.S. 68, 83 (1985), which held that when an indigent defendant’s mental health is a significant factor at trial, the State must “assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” However, there is a division among the circuits with regard to this holding, which affects the type of expert assistance indigent defendants receive nationwide, in both capital and non-capital trials. Most circuits have held that an independent defense expert is required by Ake, but minorities of circuits, including the court below, have found that Ake is satisfied by an expert who reports to both sides and the court. The questions presented are:

(1) When this Court held in Ake that an indigent defendant is entitled to meaningful expert assistance for the “evaluation, preparation, and presentation of the defense,” did it clearly establish that the expert should be independent of the prosecution?

1 McWilliams v. Comm’r, Ala. Dep’t of Corr., 634 F. App’x 698, 716 (11th Cir. 2015) (Wilson, J., dissenting).

(2) Whether, Pepper v. United States, 562 U.S. 476, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011) overruled United States v. Hatcher, 501 F.3d 931 (8th Cir. 2007) and related opinions from the Eighth Circuit Court of Appeals to the extent those opinions limit the district court’s discretion to consider the mandatory consecutive sentence or sentences under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the basis for the 18 U.S.C. § 924(c) convictions.

Maslenjak v. United States, No. 16-1194, cert granted, Jan. 13, 2017, decision below at 821 F.3d 675 (6th Cir. 2016), reh’g denied, May 27, 2016 (argument April 26):

Whether the Sixth Circuit erred by holding, in direct conflict with the First, Fourth, Seventh, and Ninth Circuits, that a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement.


The North Carolina Supreme Court sustained petitioner’s conviction under a criminal law, N.C. Gen. Stat. § 14-202.5, that makes it a felony for any person on the State’s registry of former sex offenders to “access” a wide array of websites—including Facebook, YouTube, and nytimes.com—that enable communication, expression, and the exchange of information among their users, if the site is “know[n]” to allow minors to have accounts. The law—which applies to thousands of people who, like petitioner, have completed all criminal justice supervision—does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose. The question presented is:

Whether, under this Court’s First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner—who was convicted based on a Facebook “post” in which he celebrated dismissal of a traffic ticket, declaring “God is Good!”

CRIMES AND OFFENSES

Dean v. United States, No. 15-9260, cert. granted limited to question 2 presented by the petition, Oct. 28, 2016, decision below at 810 F.3d 521 (8th Cir. 2015), reh’g denied, Feb. 12, 2016 (argument February 28):
FIFTH AMENDMENT

Overton v. United States, No. 15-1504; and Turner v. United States, No. 15-1503, cert. granted limited to question posed by the Court and cases consolidated for one hour oral argument, Dec. 14, 2016, decision below at 116 A.3d 894 (D.C. 2015), reh’g denied, Jan. 14, 2016 (argument March 29):

Whether the petitioners’ convictions must be set aside under Brady v. Maryland, 373 U.S. 83 (1963).

IMMIGRATION

Esquivel-Quintana v. Sessions, No. 16-54, cert. granted, Oct. 28, 2016, decision below at 810 F.3d 1019 (6th Cir. 2016), reh’g denied, Apr. 12, 2016 (argument February 27):

Under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia, consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen is legal. Seven states have statutes criminalizing such conduct.

The question presented is whether a conviction under one of those seven state statutes constitutes the “aggravated felony” of “sexual abuse of a minor” under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act—and therefore constitutes grounds for mandatory removal.

RELATED CIVIL CASE

Los Angeles County v. Mendez, No. 16-369, cert. granted limited to questions 1 and 3 presented by the petition, Dec. 2, 2016, decision below at 815 F.3d 1178 (9th Cir. 2016), reh’g denied, June 23, 2016 (argument March 22):

In a 42 U.S.C. § 1983 action, the district court concluded Los Angeles County Sheriff’s Department (“LASD”) deputies did not use excessive force in shooting the plaintiffs in violation of their Fourth Amendment rights, based upon the factors set forth by this Court in Graham v. Connor, 490 U.S. 386 (1989), as the deputies reasonably feared for their safety at the time of the shooting. However, the deputies were nevertheless found liable under the “provocation” rule created by the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”). This Court has not yet agreed or disagreed with the Ninth Circuit’s “provocation” rule, but has noted the doctrine has been “sharply questioned” by other Courts of Appeals. City & Cnty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1777 n.4 (2015). The questions presented are:

1. Whether the Ninth Circuit’s “provocation” rule should be barred as it conflicts with Graham v. Connor regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff’s Fourth Amendment rights, and has been rejected by other Courts of Appeals?

3. Whether, in an action brought under 42 U.S.C. § 1983, an incident giving rise to a reasonable use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment?

SENTENCING

Honeycutt v. United States, No. 16-142, cert granted, Dec. 9, 2016, decision below at 816 F.3d 362 (6th Cir. 2016), reh’g denied, May 31, 2016 (argument March 29):

Under 21 U.S.C. § 853(a)(1), a person convicted of violating a federal drug law must forfeit to the government “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.” The question presented is:

Does 21 U.S.C. § 853(a)(1) mandate joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy?

SIXTH AMENDMENT

Lee v. United States, No. 16-327, cert granted, Dec. 14, 2016, decision below at 825 F.3d 311 (6th Cir. 2016)
To establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant who has pleaded guilty based on deficient advice from his attorney must show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, the question that has deeply divided the circuits is whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.


Because “most constitutional errors can be harmless,” this Court has “adopted the general rule that a constitutional error does not automatically require reversal of a [criminal] conviction” and instead is subject to a “harmless-error analysis.” *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Among the constitutional violations subject to such analysis is ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984).

At the same time, the Court has identified a category of “structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards.” *Fulminante*, 499 U.S. at 309. The consequences of such errors are “necessarily unquantifiable and indeterminate” and are therefore not susceptible to a harmless-error inquiry. *Sullivan v. Louisiana*, 508 U.S. 275, 281–282 (1993).

The question presented is whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel’s ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts.

**DECIDED CASES**

**CRIMES AND OFFENSES**

*Salman v. United States*, 137 S. Ct. 420 (Dec. 6, 2016) (No. 15-628). Maher was employed by Citigroup and gave his close brother Michael investment tips of timely information that was not public. Michael gave the information to Salman, with whom he had become friendly when Salman was courting his sister. Maher and Michael both testified at Salman’s trial for securities fraud and conspiracy, in violation of 15 U.S.C. §§ 78j(b), 78ff and 18 U.S.C. §§ 2, 371, and Salman was convicted. An earlier case, *Dirks v. SEC*, 463 U.S. 646, 664 (1983), held that a tipper can breach his or her fiduciary duty by disclosing inside information in exchange for a personal benefit, which could include either something of value or “mak[ing] a gift of confidential information to a trading relative or friend.” The court of appeals upheld Salman’s conviction because Maher had breached his fiduciary duty by providing tips to his brother Michael, who traded on them and gave the tips to Salman, who knew the tips came from Maher. In another case, the Court of Appeals for the Second Circuit decided *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), involving tippees who were several steps removed from the tipper, and where there was no evidence that the tippees knew the source of the tip. The court in *Newman* held that under *Dirks*, the inference that the tipper receives a personal benefit from disclosure to a trading relative or friend requires that there be a close relationship that “represents at least a potential gain of a pecuniary or similarly valuable nature.” The Supreme Court rejected Salman’s argument, based on *Newman*, that the tipper doesn’t personally benefit unless his goal is to obtain something of tangible value, and also rejected the government’s argument that any gift of confidential information, expecting the information to be used in trading, would violate the statute. The Court held that *Dirks* resolves the issue. The tipper must obtain a personal benefit, which can be shown by objective facts and circumstances. A close personal relationship between the parties can suggest that the tipper intended the profits from the tipped transaction to be a gift to the tippee. In this case, Maher would have benefited if he had traded and given the profits to his brother Michael. The tipper essentially gives the tippee a gift by providing information from which the tippee can profit. Here, Salman knew the tip was from confidential information and thus “acquired” Maher’s fiduciary duty “and breached himself.” Opinion by Justice Alito for a unanimous court.

*Shaw v. United States*, 137 S. Ct. 462 (Dec. 12, 2016) (No. 15-5991). In another unanimous opinion, this one by Justice Breyer, the Court upheld a conviction under the bank fraud statute. Shaw used identifying numbers of a bank account belonging to Stanley Hsu to transfer money to accounts at other banks from which he could withdraw Hsu’s funds. Shaw was convicted
under the first subsection of the bank fraud statute, 18 U.S.C. § 1344(1), which makes it a crime to “knowingly execute a scheme . . . to defraud a financial institution.” He argued that the statute doesn’t apply to a scheme to obtain property of a depositor, but only a scheme to obtain property of the financial institution. The Court noted that the bank does have a property interest in the deposits made by customers, having the right to use the funds to make loans to increase its income. Even if the bank is considered as a bailee, the bailee has a property interest in the property bailed superior to that of anyone except the bailor and his agent. Shaw misled the bank to obtain access to Hsu’s deposit funds, and thus defrauded the bank. The statute does not require that the financial institution have suffered any loss. Nor does it require that Shaw knew that the bank had a property interest in the funds or that he had the purpose of defrauding the bank. He knew the bank had the funds and knowingly made false statements to obtain them, thus effecting a scheme to defraud the bank. The Court rejected Shaw’s argument that subsection (1) should not cover acts included in subsection (2), which criminalizes the use of “false or fraudulent pretenses” to obtain “property . . . under the custody or control of” a bank. The subsections do overlap but not completely, because subsection (2) does cover acts that are not included in subsection (1) (such as when the false representation is made not to the bank but to a third party and the intent is to defraud the third party). Finally, the Court refused to apply the rule of lenity because the statute is clear. The case was remanded, leaving to the court of appeals the question whether the jury instruction defining “scheme to defraud” was ambiguous or otherwise improper.

DOUBLE JEOPARDY
Bravo-Fernandez v. United States, 137 S. Ct. 352 (Nov. 29, 2016) (No. 15-537). Bravo-Fernandez (Bravo) and Martínez-Maldonado (Martínez) were charged with bribery (18 U.S.C. § 666), conspiracy to commit bribery (18 U.S.C. § 371), and interstate travel connected with the bribery (18 U.S.C. § 1952(a)(3)(A)). At trial, it was agreed that they had conspired and traveled to Las Vegas at Martínez’s cost, Bravo being a state senator who then sponsored legislation to aid Martínez’s business. The jury convicted them of bribery but acquitted them of the conspiracy and travel counts. On appeal, the conviction was reversed on the ground that the instructions had permitted the jury to convict if it found receipt of a gratuity when the circuit precedents held that only a quid pro quo would violate the bribery statute. The defendants asked that a retrial be prohibited on the ground that the issue whether they had violated the bribery statute had been decided against them by the acquittals, and that the doctrine of issue preclusion (“collateral estoppel”) prevented retrial. The Court, in yet another unanimous opinion, this by Justice Ginsburg, held that inconsistent verdicts do not prevent retrial of a defendant who has been convicted on one count but acquitted on another, when the conviction on that one count is reversed on issues unrelated to the irrationality of the inconsistent verdicts. The general rule is that an ultimate fact that has been decided by a valid and final judgment cannot be litigated again in a different case between the same parties. (Ashe v. Swenson, 397 U.S. 436 (1970) (holding that jury’s acquittal of robbery of one poker player barred prosecution for robbery of a second poker player when issue was whether Ashe had been one of the robbers).) A defendant cannot attack a conviction by arguing that the jury’s verdicts are inconsistent when there was conviction on one count and acquittal on another. (Dunn v. United States, 284 U.S. 390 (1932).) When there are irreconcilably inconsistent verdicts on two counts, the defendant cannot meet his or her burden of showing that the issue to be relitigated was in fact determined by the jury; because the acquittal is inconsistent with the conviction, it has no preclusive effect on the other count, and the conviction on that count stands. (United States v. Powell, 469 U.S. 57 (1984).) However, when the jury acquits on one count but fails to reach a verdict on another count “turning on the same critical issue,” the hung count cannot be retried because there is no way to determine why the jury hung, and the acquittal is a final determination on the underlying facts. (Yeager v. United States, 557 U.S. 110 (2009).) In Bravo’s case, the conviction on the bribery count was reversed for error in the instructions not related to the inconsistency of the verdicts. Because of the inconsistency, it is impossible to determine exactly what the jury decided, and therefore the acquittal does not preclude relitigation of the underlying facts. The usual rule holds that a count can be retried when a conviction is reversed on appeal other than for insufficient evidence. Justice Thomas filed a concurring opinion, arguing that the double jeopardy clause as originally enacted did not cover issue preclusion, and suggesting that Ashe and Yeager should be reconsidered.

RELATED CIVIL CASE
White v. Pauly, 137 S. Ct. 548 (Jan. 9, 2017) (No. 16-67). The Court, per curiam, granted cert and reversed a decision of the Court of Appeals for the Tenth Circuit that had affirmed the denial of qualified immunity to a police officer who had shot and killed an armed occupant of a house without giving warning. Two women had called the police to report a reckless truck driver. The women had followed the truck; the driver, Daniel Pauly, stopped and confronted them. That conversation was not violent, and Daniel drove off to his nearby home. The women stayed on the scene, and when the police arrived gave them the plate number of the truck, which was identified as belonging to Daniel Pauly. Two police officers went off to investigate Daniel’s side of the encounter with the women and to see if he was drunk. A third officer, White, stayed at the scene in case the
truck driver returned. The two officers located Daniel’s house, went up to it “covertly,” found the truck, and saw two men (Daniel and his brother Samuel) moving inside. When the brothers called out to the police to identify themselves, the officers responded that they had the house surrounded and that the occupants should come out. One officer did shout that they were state police, but the brothers did not hear the identification. The brothers armed themselves and called out that they had guns. At this point, Officer White arrived and, hearing that the men had guns, drew his own gun and crouched behind a stone wall. A few seconds later, Daniel opened the door and fired two shotgun blasts. Samuel opened a window and pointed a handgun toward Officer White. A second officer fired at Samuel but missed; Officer White fired and killed Samuel. Samuel’s estate and Daniel filed suit under the Civil Rights Act, 42 U.S.C. § 1983, alleging that the officers had violated Samuel’s right to be free of excessive force. The Court criticized the lower court for writing that the fact situation was “unique” but failing then to conclude that White did not violate “clearly established” law. The situation was ongoing and he could reasonably have assumed that the other officers had identified themselves. The case was remanded, the Court expressing no opinion on whether a reasonable jury could infer that White knew that the other officers had not properly identified themselves or whether the other two officers would be entitled to qualified immunity.

ARGUMENTS

Monday, January 9, 2017:
Nelson v. Colorado, No. 15-1256, Cert. Alert, 31:4 CRIM. JUST. at 54 (Winter 2017) (Is it consistent with due process to require a defendant whose conviction is reversed to prove his innocence by clear and convincing evidence to get back the monetary penalty he paid?).

Tuesday, January 17, 2017:

Wednesday, January 18, 2017:

Tuesday, February 21, 2017:
Hernández v. Mesa, No. 15-118, Cert. Alert, 31:4 CRIM. JUST. at 54 (Winter 2017) (Does a Mexican citizen shot and killed by a Border Patrol agent in a no-man’s land between El Paso, Texas, and Mexico have the right to hold the agent liable for alleged violation of the Fourth and Fifth Amendments, and does the agent have qualified immunity?).

Monday, February 27, 2017:

Tuesday, February 28, 2017:
Dean v. United States, No. 15-9260, supra.

Wednesday, March 22, 2017:
Los Angeles County v. Mendez, No. 16-369, supra.

Tuesday, March 28, 2017:
Lee v. United States, No. 16-327, supra.

Wednesday, March 29, 2017:

Wednesday, April 19, 2017:
Weaver v. Massachusetts, No. 16-240, supra.

Monday, April 24, 2017:
McWilliams v. Dunn, No. 16-5294, supra. Davila v. Davis, No. 16-6219, supra.

Wednesday, April 26, 2017:
Maslenjak v. United States, No. 16-309, supra.
Dear Ms. Remotigue:

I write to express my appreciation of the recent article, Raleigh, Limiting Mail and Wire Fraud’s Scope, Criminal Justice, Winter 2017, at 30-34, and its discussion of United States v. Weimert, 819 F.3d 351 (7th Cir. 2016).

As Mr. Weimert’s counsel at trial and on appeal, I feel that supplementation of the article’s discussion of the facts will be helpful to its readers. In Weimert, the appellate court relied on specific facts in directing a judgment of acquittal on all five counts of conviction. I write to correct one misstated fact and to add certain others which influenced the Seventh Circuit’s decision.

Mr. Weimert worked for Anchor Bank, fsb, and IDI, subsidiaries of a holding company known as Anchor Bancorp of Wisconsin (ABCW). The holding company serviced an outstanding loan to US Bank in part by upstreaming dividends from Anchor Bank until prohibited to do so by federal regulators. Anchor Bank received approval for TARP funds but was forbidden to transfer those monies to ABCW. To raise funding to service the US Bank loan, Mr. Weimert sold a property owned by IDI, which transferred the sale proceeds to the holding company.

A chart discussed during argument before the Seventh Circuit accurately depicts the money flow in the case:

While investigating financial institution crime during the 2008-09 mortgage meltdown, SIGTARP examined numerous acts by officers and employees of Anchor Bank and ABCW. The single indictment related to that investigation charged David Weimert with six counts of wire fraud. A jury convicted him of the first five counts, acquitting him of the sixth.

Counts One through Four charged fraudulent wire communications in the form of Letters of Intent which stated contingent offers subject to negotiation and approval between Mr. Weimert, on behalf of IDI, and potential buyers operating at arms-length. The Seventh Circuit reversed those convictions, holding that deception about pre-contractual negotiating positions should not be considered material for purposes of the mail and wire fraud statutes.

Count Five charged a wire communication to the IDI board of directors, based on a prosecution theory that Mr. Weimert breached his fiduciary duty to the board. Arguably Skilling v. United States, 561 U.S. 358, 405–09 (2010), supplied grounds for reversal because Mr. Weimert’s personal involvement in the deal was disclosed and not a kickback or a bribe. However, the appellate court approached the issue by discussing whether Mr. Weimert’s conduct breached a fiduciary duty as defined by the Court during the time period in question, finding it did not.

By directing a judgment of acquittal on the above grounds, the Seventh Circuit found no need to reach a second appellate issue, whether the jury instruction defining materiality misstated the law. The district court granted the government’s request to instruct the jury on a conduit theory of convergence, based on the holding of United States v. Seidling, 737 F.3d 1155 (7th Cir. 2013), a case in which I also was trial and appellate counsel. The Weimert opinion declined to define the conduit theory, which I found minimally disappointing, given the outcome on appeal.

I wish to extend kudos to Attorney Raleigh and the Criminal Justice editorial board for bringing attention to this fascinating case and the issues presented.

Sincerely,

MEYER LAW OFFICE

Stephen J. Meyer
CJS at Midyear Meeting: ABA House of Delegates Adopts CJS Resolutions

BY RABIAH BURKS AND KYO SUH

The American Bar Association (ABA) adopted all four resolutions sponsored by the Criminal Justice Section (CJS) during the ABA House of Delegates (HOD) meeting on February 6, 2017, in Miami, Florida. The resolutions include 112A, which urges the U.S. Department of Justice to strengthen efforts for accuracy in microscopic hair analysis; 112B, which urges prosecutors to implement conviction-integrity policies when an office supports a defendant’s motion to vacate; 112C, which urges law enforcement to translate Miranda warnings “in as many languages and dialects as necessary”; and 112D, which urges the repeal/modification of prohibitions on blood donations by gay men.

In response to executive orders issued by President Donald Trump, the ABA adopted resolution 301, which urges laws protecting due process and other safeguards for immigrant, asylum-seeking children who entered the United States without parents; and resolution 10C, which urges President Trump to withdraw Executive Order 13,769. It calls on future executive orders to follow legal procedures relating to border security, immigration enforcement, and terrorism.

These resolutions and others considered by the HOD at the Midyear Meeting are available at http://tinyurl.com/hzrtm5y.

ABA TASK FORCE ON BUILDING PUBLIC TRUST IN THE AMERICAN JUSTICE SYSTEM

The ABA Task Force on Building Public Trust in the American Justice System released a report during the Midyear Meeting in Miami outlining ways for lawyers and communities to work together to build public trust and confidence in the criminal justice system. A full copy of the report can be read at ambar.org/publictrust.

ABA FILES AMICUS BRIEF IN LEE V. UNITED STATES

At the request of CJS’s Amicus Committee, the ABA filed an amicus brief in Lee v. United States, No. 16-327 (available at http://tinyurl.com/jae7sbu). This case involved a lawful permanent resident who was given incorrect legal advice as to immigration consequences while facing criminal prosecution, as the charges he pleaded guilty to would result in mandatory and permanent deportation. On appeal, the government conceded that the attorney’s representation was ineffective and fell below prevailing professional norms. The issue before the Supreme Court is whether a defendant is prejudiced by bad advice, and whether it is irrational for an immigrant to risk trial with the hopes of avoiding deportation. The amicus brief, drafted by McDermott Will & Emery, focused heavily on CJS resolutions drafted in the aftermath of Padilla v. Kentucky, as well as the new Prosecution and Defense Function Standards that address immigration considerations.

ABA FORMS TASK FORCE TO STUDY DUE PROCESS RIGHTS IN COLLEGE SEXUAL MISCONDUCT CASES

CJS has established the ABA Task Force on College Due Process Rights and Victim Protections to developed guidelines and best practices to ensure due process for both the victim and the accused in college campus sexual misconduct cases. The task force is led by Andrew S. Boutros, CJS Council Member and national cochair of Seyfarth Shaw’s White Collar, Internal Investigations, and False Claims Act Team. It will be comprised of 10 to 12 members and will include lawyers, academics, defense attorneys, prosecutors, government officials, victim advocacy representatives, and other interested constituents.

ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND PUBLIC DISCOURSE

The Criminal Justice Standards for Fair Trial and Public Discourse are now available for purchase in print and e-book format at shop.americanbar.org. The task force was chaired by Ronald Goldstock, and the reporter was Jessica Roth. This is the first volume of the standards to be available as an e-book.

UPCOMING EVENTS

- CJS Spring Meeting and Program: May 4–7, Jackson Hole, Wyoming
- 27th Annual National Institute on Health Care Fraud: May 17–19, Ft. Lauderdale, Florida
- 8th Annual Prescription for Criminal Justice Forensics: June 2, New York, New York
- Second Global White Collar Crime Institute: June 7–8, São Paulo, Brazil
- Third False Claims Act Trial Institute: June 14–16, Washington, D.C.
- CJS Annual Meetings at the ABA Annual Meeting: Aug. 10–13, New York, New York
- 4th Annual Southeastern White Collar Crime Institute: Sept. 7–8, Braselton, Georgia
- 10th Annual CJS Fall Institute and Meetings: Nov. 2–5, Washington, D.C.

For more information, see americanbar.org/crimjust.
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