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FROM THE EDITORS

Dear Readers:

On behalf of our members, we are proud to publish the inaugural issue of the *Criminal Law Practitioner*, formerly known as the *Criminal Law Brief*. The new publication format reflects our mission to provide practice-oriented resources to professionals in the criminal justice field. This issue includes nine pieces: four articles from practitioners in the field of criminal law; three articles from current Washington College of Law students; and two editorials that highlight recent trends and controversial issues.

We would not have arrived at this stage without the support of many individuals. Specifically, we extend our utmost appreciation and gratitude to Professor Cynthia Jones for her preliminary advice and nuanced vision back in May 2013; our faculty advisor, Professor Jenny Roberts, for her ongoing guidance and support throughout this transition period; and the new WCL Criminal Justice Practice and Policy Institute, for their unrelenting encouragement. Further, we are pleased to announce our online presence through our new website and continually improving blog (founded by former Editor-in-Chief Monica Trigoso '12). Our new look and logo are attributable to Chad Harrison and Erik Garcia who are both tremendously talented graphic designers and incredibly gracious with their spare time.

To our authors, thank you for taking a chance with us. To our student authors, thank you for your hard work throughout the year. And to our dedicated members, thank you for putting in the long hours that have made the *Criminal Law Practitioner* a reality.

Sincerely,

Megan Petry

Editor-in-Chief

Joseph Hernandez

Executive Editor

DROWNED OUT WITHOUT DISCOVERY: POST-CONVICTION PROCEDURAL INADEQUACY IN AN ERA OF HABEAS DEFERENCE

by Rachel G. Cohen & Krista A. Dolan

State post-conviction proceedings are becoming the central stage upon which the battle for freedom from imprisonment, for life versus death, and for the protection of substantial constitutional rights must be litigated. An ever-narrowing lens through which federal review may be conducted, it has rendered the state court the sole opportunity to adduce evidence in support of a prisoner's claims that he is being held in violation of the Constitution. The United States Supreme Court has recognized the initial-review collateral proceeding in state court as the critical forum for the vindication of claims of ineffective assistance of counsel.[1] Such claims "often depend on evidence outside [of] the trial record."[2] The Court has recognized that in federal post-conviction litigation, it is far better to permit litigants to raise certain claims in collateral proceedings where there "has been an opportunity to fully develop the factual predicate for the claim."[3] In emphasizing the importance of collateral post-conviction review, presentation of evidence on the record, in state court, takes on a pivotal role.

By contrast, the Commonwealth of Kentucky has effectually eviscerated the post-conviction litigant's access to a full evaluation of the evidence necessary to vindicate his rights. This paper will begin by discussing discovery mechanisms in Kentucky and the existing inadequacies of those mechanisms. Part II discusses the need, in light of recent Supreme Court decisions and federal statute, to expand access to discovery in the post-conviction context. Part III discusses the "fast-track" provision of the Anti-Terrorism and Effective Death Penalty Act and its failure to address a post-conviction litigant's access to discovery. Part IV discusses the need for adequate post-conviction discovery procedures, as well as an overview of existing state law. Part V discusses Kentucky's Open Records Act and associated issues with obtaining records via open records procedures. Finally, Part VI discusses potential options for implementing a mechanism providing post-conviction litigants with meaningful access to discovery.

I. "Discovery" in Kentucky

Kentucky's rules regarding discovery in criminal cases are set forth by Kentucky's Rules of Criminal Procedure.[4] Discovery is not automatic; rather, it must be requested by the defense.[5] Among items that defendants are entitled to, once requested, are: oral incriminating statements by the defendant, written or recorded statements or confessions by the defendant,[6] results or reports of physical or mental examinations, and scientific tests made in connection with the case.[7] Once requested, however, Kentucky recognizes that the trial judge must have broad discretion to determine the extent

1 *See* Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).
2 *Id.* at 1318.
3 Massaro v. United States, 538 U.S. 500, 504 (2003).
4 Ky. R. Crim. P. 7.24.
5 *Id.* at (1).
6 *Id.* at (1)(a).
7 *Id.* at (1)(b).

of appropriate disclosure by the parties.[8] The Kentucky Supreme Court has noted that such discretion is necessary to protect the spirit underlying discovery rules the adversary system must not become "a poker game in which players enjoy an absolute right always to conceal their cards until played."[9]

As it stands, there is no mechanism for receiving any type of discovery when litigating post-conviction matters in the Commonwealth of Kentucky.[10] While the trial court has discretion to order access to some files in a limited context, there is no uniformity throughout the state. Various permutations outside of statutory authority exist for providing litigants access to the materials they require for the post-conviction process. Kentucky contemplates whether a litigant should have access to the entirety of the material that was provided to his counsel in advance of trial or the entry of a guilty plea.[11] Indeed, Kentucky has determined that counsel's file is the sole property of the defendant not trial counsel. As the Kentucky Supreme Court noted in *Hiatt v. Kentucky*,[12] a litigant seeking the file of his trial counsel is only seeking "that which is his in the first place his file."[13] Thus, Kentucky precedent establishes that a litigant should have, and is entitled to, everything his counsel had. But what happens if counsel's file is lost? What if a litigant had initial and successor counsel, each of whom was provided portions of the discovery by the prosecution at different phases prior to trial?[14] There is no guarantee that a post-conviction litigant will have access to "his file" as kept by trial counsel.[15]

Further, though the requested records would presumably be part of the trial attorney's file, if claims of ineffective assistance of counsel are brought, it is nonsensical to expect a litigant to rely on the records collected by the very attorney against whom he claims ineffectiveness, including claims that counsel failed to conduct adequate investigation. In fact, the system often pushes clients to plea deals long before adequate investigation can be conducted.

> The underfunding and understaffing of indigent defense systems, for example, places substantial pressure on counsel for indigent defendants to do what they can with what they have available . . . Both prosecutors and defense counsel are frequently pushed toward resolving a case at the

8 *See* Kentucky v. Peters, 353 S.W.3d 592, 596 (Ky. 2011) (noting that the court may make discovery orders as appropriate).

9 Kentucky v. Nichols, 280 S.W.3d 39, 44 (Ky. 2009) (quoting Williams v. Florida, 399 U.S. 78, 82 (1970)).

10 *See* Bowling v. Kentucky, 357 S.W.3d 462, 466 (Ky. 2010) (noting that "a person already convicted in a fair trial," does not have the same liberty interest as someone standing trial, and thus is not entitled to pre-conviction trial rights).

11 *See* Hawkins v. Kentucky, No. 2006-CA-001859-MR, 2007 WL 4355492 (Ky. Ct. App. Dec. 14, 2007) (underscoring the problematic nature of not providing a post-conviction litigant with access to all of the materials in trial counsel's possession at the time of the guilty plea entry). Hawkins alleged that trial counsel was ineffective for encouraging him to plead guilty without having received discovery in the case. The Court of Appeals noted, "the parties' Agreed Discovery Order required the parties to submit discovery only to each other, and not to the court." *Id.* at *2. The Court was thus unaware of what specifically had been provided to defense counsel at the time of the plea or what material was still outstanding; the Court determined that because *some* discovery had been provided, counsel had not been ineffective. Absent Hawkins having access to the actual discovery in the case, however, there was no way for Hawkins to substantiate his claim that the discovery would have led him to reject the guilty plea or that counsel failed to adequately follow up on potential lines of investigation unearthed by the discovery.

12 194 S.W.3d 324 (Ky. 2006).

13 *Id.* at 327.

14 In 119 of the 120 counties in Kentucky, discovery is completed outside of the court record. While a prosecutor may notify the court when material is provided to defense counsel, the material itself is not placed in the court record. *Compare* KY R. Jefferson Cir. Ct. Rule 803 (requiring parties to file discovery responses and materials with the court) *with* KY R. Henry, Oldham and Trimble Dist. Ct. Rule IV (providing for informal "open file" discovery) and KY R. Greenup and Lewis Dist. Ct. Rule VII (providing only that motions for discovery need be filed with the court)

15 Additionally, an unpublished case from the Kentucky Court of Appeals indicates that there is no jurisdiction to compel trial counsel to turn over their file to a defendant before a post-conviction petition is filed alleging ineffective assistance of counsel. *See* Garcia v. Howard, No. 2010–CA–000999–MR, 2012 WL 246264 (Ky. Ct. App. Jan. 27, 2012). Thus, a litigant must know what the shortcomings of counsel were without having access to the discovery in the case.

> earliest opportunity. While efficiency in resolving pending cases has benefits for both the accused and the State, the process frequently ignores whether the disposition of a case accurately reflects the accused's degree of culpability or the deservedness of the penalty . . . Insufficient discovery contributes to both wrongful convictions and unfair sentencing.[16]

The irony of this arrangement is that Kentucky provides the prosecutor with access to the bulk of the materials he will require to defend his conviction. Kentucky has implied that the attorney-client privilege is waived by the filing of a post-conviction motion[17] and has affirmed the trial court's decision to provide the prosecution with a copy of the post-conviction litigant's trial attorney file, in order that he may respond to the litigant's claims.[18] This inequity exists despite the fact that the defendant bears the burden of proof in post-conviction litigation.[19] Similarly, a wealth of cases require the petitioner to provide affidavits of proffered witnesses in the filing of the post-conviction motion,[20] rather than merely pleading a claim with specificity as the rule would appear to require.[21] Along these same lines, motions requesting funds for expert assistance in post-conviction are required to be filed in open court,[22] eliminating the *ex parte* strategic and privacy protections usually granted to indigent litigants seeking such funds.

II. The Adequacy of State Procedures: *Pinholster*

The ability to adduce information in the record in state post-conviction proceedings has never been more critical. In 1996, with the passage of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), the United States codified a series of laws designed to limit a state post-conviction litigant's access to federal habeas review. Federal habeas relief was only accessible to a state petitioner where a violation of the United States Constitution was proven, and where the state court's determination on the matter was either "contrary to . . . or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of

16 *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wis. L. Rev. 541, 552-53 (2006).

17 While a line of Kentucky cases indicate that attorney-client privilege is waived with the litigation of a post-conviction motion, the American Bar Association's more recent ethical opinions have created some doubt as to *when* in the post-conviction process such a waiver occurs. *Compare* Gall v. Kentucky, 702 S.W.2d 37, 44-5 (Ky. 1985) (articulating that when the attorney's competence is questioned the attorney-client privilege is waived), *with* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (describing how the attorney-client privilege is not completely waived but there are some limitations).

18 Sanborn v. Kentucky, 975 S.W.2d 905, 910 (Ky. 1998).

19 *See* Dorton v. Kentucky, 433 S.W.2d 117, 118 (Ky. 1968) (stating the movant has the "burden . . . to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings").

20 *See, e.g.*, Blevens v. Kentucky, No. 2010–CA–001890–MR, 2012 WL 592291, at *4 (Ky. Ct. App. Feb. 24, 2012) (finding that although the litigant stated the content of an uncalled witness' testimony, he was not entitled to a hearing as he failed to file an affidavit from that witness); *see also* Rankin v. Kentucky, No. 2008-CA-000494-MR, 2009 WL 2059429, at *3 (Ky. Ct. App. July 17, 2009) (faulting the defendant for failing to provide affidavits of the expert with the filing of his post-conviction motion); Finley v. Kentucky, No. 2006-CA-002015-MR, 2007 WL 4465579, at *2 (Ky. Ct. App. Dec. 21, 2007) (finding the petitioner was not entitled to a hearing because he failed to provide affidavits of uncalled witnesses); Roland v. Kentucky, No. 2004-CA-001461-MR, 2005 WL 1703300, at *1 (Ky. Ct. App. July 22, 2005) (finding the petitioner not entitled to a hearing because he had not provided the affidavit of uncalled witness).

21 *See* Ky. R. Crim. P. 11.42(2) (requiring only that a motion for post-conviction relief "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds").

22 *Compare* Stopher v. Conliffe, 170 S.W.3d 307, 310 (Ky. 2005) (deeming KRS 31.185, which provides for expert funding and *ex parte* filing, to be inapplicable to post-conviction proceedings), *with* Hodge v. Coleman, 244 S.W.3d 102, 105-08 (Ky. 2008) (finding that at least some portions of the KRS 31.185 funding provisions are applicable in the post-conviction context). Thus, *Stopher* and *Hodge* leave unsettled the question of whether post-conviction litigants may request funds *ex parte*, subjecting a litigant to the Hobson's choice of determining whether to one, file the motion *ex parte* with the risk that a judge may unseal such a motion finding it was improperly filed; or two disclose the particularized need for expert assistance on a particular issue to the opposing party.

the United States,"[23] or where the state's ruling was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[24] This statute placed a burden on the petitioner to rebut the presumption of correctness of factual determinations by the state court based on "clear and convincing evidence."[25] Similarly, AEDPA severely curtailed a habeas petitioner's right to an evidentiary hearing in federal court.[26] The statute required litigants to fully exhaust their claims in state court before proceeding to federal habeas review,[27] and generally limited state petitioners to one federal habeas proceeding, absent some limited exceptions.[28] Overall the message of AEDPA was clear: expedite the federal habeas corpus review process by deferring to state court determinations the validity of a conviction. However, in enacting AEDPA, President Clinton cautioned against criticisms that the bill "would undercut meaningful Federal habeas corpus review," instead entrusting federal courts to "interpret [AEDPA] to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary."[29]

The overall message of AEDPA was for federal courts to defer to the state court's determination of a petitioner's rights. In 2011, the United States Supreme Court further defined the extent to which deference would operate in a landmark habeas case that originated in California.[30] In *Cullen v. Pinholster*,[31] the Court examined a federal habeas petition where the Ninth Circuit Court of Appeals had granted relief based upon evidence adduced during an evidentiary hearing in the federal district court. The Court reversed the Ninth Circuit's decision finding that it could only consider the evidence adduced in the state court, and that habeas review under 28 U.S.C. §2254(d) was "limited to the record that was before the state court that adjudicated the claim on the merits."[32] The Court reached this conclusion by noting the AEDPA's overall purpose:

> to channel prisoners' claims first to the state courts . . . It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo.[33]

Thus, following *Pinholster*, a state petitioner bears the burden of adducing every piece of evidence on the state court record to protect his rights in federal court.

However, *Pinholster* left a gateway through which state petitioners could continue to adduce new evidence in federal court. In citing to *Williams v. Taylor*,[34] the *Pinholster* Court noted that this was not a case in the same procedural posture confronted by the *Williams* case, where the petitioner was prevented from presenting evidence in state court and was therefore entitled to an evidentiary hearing under 28 U.S.C. §2254(e)(2).[35] Remaining open is the

23 28 U.S.C. § 2254(d)(1) (2006).

24 *Id.* § 2254(d)(2).

25 *Id.* § 2254(e)(1).

26 *See id.* §2254(e)(2) (permitting evidentiary hearings in federal court for state litigants where the facts were not developed in state court, only where claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or a factual predicate that could not have been previously discovered through the exercise of due diligence." In seeking an evidentiary hearing, the state litigant in federal court must also demonstrate that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

27 *Id.* § 2254(b)(1)(A).

28 *See id.* § 2244(b) (discussing the circumstances when additional habeas petitions can be filed).

29 President Statement on Antiterrorism Bill Signing 4/24/96, 1996 WL 203049 (The White House) at *2.

30 Just three months earlier, the Supreme Court decided *Harrington v. Richter*, which similarly echoed the notion of uncanny deference to the state court adjudication, determining that where a state post-conviction petition appeared to have been adjudicated on the merits, the federal court would presume that the ruling was reasonable, absent a demonstration to the contrary. 131 S. Ct. 770, 784-85 (2011).

31 131 S. Ct. 1388 (2011).

32 *Id.* at 1398.

33 *Id.* at 1398-99.

34 529 U.S. 420 (2000).

35 *Pinholster*, 131 S. Ct. at 1399-1400 (citing *Williams*, 529 U.S. at 429) (stating "only one claim at issue in

question as to whether a litigant can present new evidence where the state court prevented him from litigating his claims. This loophole has been applied in federal habeas review to permit the adducing of evidence in federal court that was not presented to the state court. In *Smith v. Cain*,[36] the Federal Court of Appeals for the Fifth Circuit examined a claim for habeas relief based on a violation under *Batson v. Kentucky*,[37] where the prosecutor's race-neutral reasons for the exercise of his peremptory challenges did not appear on the state court record. The court recognized that the state's failure to consider evidence amounted to a due process violation such that the petitioner met the burden required for relief under §2254(d)(1), in that the state's adjudication on the merits was "an unreasonable application of, clearly established Federal Law."[38] The Ninth Circuit has also found that the bar to consideration of new evidence under *Pinholster* may be lifted where the state court has failed to consider the "side-by-side comparisons of [the] black venire panelists and the white panelists who were allowed to serve," as required under *Batson*.[39] The Fifth Circuit has applied the same exception to the *Pinholster* ban on new evidence when a petitioner was denied a hearing in state court on his claim that he was exempted from the death penalty under *Atkins v. Virginia*.[40,41] Thus, consideration of evidence by a federal court that was not adduced in the state court may be permitted wherever the petitioner "diligently tried to develop the facts . . . in state court," such that, "[t]here was nothing else [the petitioner] could have done to develop the factual record."[42] A "state court's refusal to allow [the petitioner] to develop the record, combined with the material nature of the evidence that would have been produced in state court were appropriate procedures followed, render[s] its decision unbefitting of classification as an adjudication on the merits."[43]

Indeed, in post-*Pinholster* litigation, federal courts have found that the Supreme Court's ruling was silent on the inherent conflict between federal discovery provisions made applicable in habeas proceedings, and the limitations on the consideration of new evidence outlined by the *Pinholster* decision. As the United States District Court for the District of Nevada noted, "the Supreme Court made no holding in *Pinholster* as to whether a district court may grant leave for discovery before it determines whether § 2254(d)(1) has been satisfied on the merits."[44] Thus, courts have found that:

> [D]iscretion is better exercised in not foreclosing at this stage the possibility of discovery. Were the Court to permit discovery only after it appears that *Pinholster* would not bar consideration of new evidence, the Court would be adding months of delay to the proceedings, a result that could be avoided by simply permitting discovery that otherwise appears to be warranted under Rule 6. The Court recognizes the downside of its position namely the possibility that time and money will be expended in the discovery of evidence that this Court might never consider. That is a risk the Court is willing to take. In a death penalty habeas corpus case,

that case was even subject to §2254(d); the rest had not been adjudicated on the merits in the state-court proceedings); *see Williams*, 529 U.S. at 429, 120 S. Ct. 1479 ("Petitioner did not develop or raise, his claims . . . until he filed his federal habeas petition.").

36 708 F.3d 628, 631 (5th Cir. 2013).

37 476 U.S. 79 (1986).

38 *Smith*, 708 F.3d at 634 (quoting 28 U.S.C. §2254(d)(1)).

39 Jamerson v. Runnels, 713 F.3d 1218, 1226 (9th Cir. 2013) (quoting Miller-El v. Dretke, 545 U.S. 231, 241 (2005)).

40 Blue v. Thaler, 665 F.3d 647 (5th Cir. 2011).

41 Atkins v. Virginia, 536 U.S. 304 (2002).

42 Toliver v. Pollard, 688 F.3d 853, 860 (7th Cir. 2012).

43 Winston v. Pearson, 683 F.3d 489, 502 (4th Cir. 2012); *see* Richardson v. Branker, 668 F.3d 128, 152 n. 26 (4th Cir. 2012) (internal quotation marks omitted) (citing with approval the holding in *Winston* that the state court did not adjudicate the petitioner's claims on the merits because "Virginia state courts did not afford Winston an evidentiary hearing and thus passed on the opportunity to adjudicate [his] claim on a complete record").

44 High v. Nevens, No. 2:11-CV-00891-MMD-VCF, 2013 WL 1292694, at *4 (D. Nev. Mar. 29, 2013).

> the Court prefers to err on the side of gathering too much information rather than too little.[45]

Once a petitioner arrives in federal court, assuming he has diligently sought discovery in a state post-conviction proceeding and has had the wherewithal to raise claims and exhaust them in state court based on what discovery might show were he able to receive it, a petitioner may have access to discovery under the federal rules. The federal rules permit discovery where the litigant can demonstrate "good cause" for conducting such discovery. Good cause requires a demonstration that if the facts are fully developed, the petitioner may be able to demonstrate his entitlement to relief.[46]

Finality has had its limits, however. Prior to the enactment of AEDPA, the United States Supreme Court recognized the importance of excusing a state court's exercise of procedural default in order to permit a litigant to proceed in federal habeas review.[47] A petitioner whose claims have been rejected on adequate and independent procedural grounds may bring his claims in federal court where he can demonstrate both cause for the default and prejudice resulting from the denial of his ability to litigate.[48] However, the Court rejected the notion that post-conviction counsel's failure to file a timely appeal could constitute cause for a procedural default, ruling instead that ineffective assistance of counsel could amount to cause only if it was akin to a constitutional violation.[49]

As the noose of AEDPA tightened, however, the Supreme Court became more concerned with the increased likelihood that petitioners would be wholly unable to vindicate their rights. Just two months apart, the United States Supreme Court decided two cases that appeared to breathe life back into federal habeas law. Cory Maples, an inmate on Alabama's death row, was represented in his state post-conviction proceedings by two pro bono attorneys from a law firm in New York, with an attorney in Alabama serving solely to assist private counsel in their pro hac vice admission to the Alabama court system.[50] By the time the state court denied Mr. Maples' petition, his pro bono counsel had left their firm, and the mailed denial was returned to the court. [51] The clerk of court did nothing, nor did Mr. Maples' local counsel.[52] When the prosecutor finally notified Mr. Maples that his claims had been denied, he was out of time to file an appeal in state court.[53] The habeas court thereafter denied Mr. Maples' claims, stating that they were procedurally defaulted for his failure to exhaust the claims in state court.[54] In finding that Maples had shown sufficient cause to excuse his default under *Coleman v. Thompson*,[55] the Court moved away from the holding in *Holland v. Florida*,[56] which did not excuse the procedural default on the basis of equitable tolling where the failure to timely file a pleading was the result of attorney negligence.[57] Instead, the *Maples* decision aligned itself with the concurring opinion in *Holland*, written by Justice Alito, in which he found that the procedural default should be excused because the petitioner had been utterly

45 Conway v. Houk, No. 2:07–CV–947, 2011 WL 2119373, at *4 (S.D. Ohio May 26, 2011).
46 Harris v. Nelson, 394 U.S. 286, 300 (1969).
47 *See* Coleman v. Thompson, 501 U.S. 722, 747 (1991).
48 *See id.* at 750 (reiterating that it must be shown that justice will be diverted if the claims are not considered in federal court).
49 *Id.* at 755.
50 Maples v. Thomas, 132 S. Ct. 912, 916 (2012).
51 *Id.* at 916-17.
52 *Id.* at 917.
53 *Id.* at 920.
54 *Id.* at 921 (noting that Maples forfeited his ineffective assistance claim by failing to file the claim in state court within the requisite time period).
55 501 U.S. 722 (1991) (barring prisoners who defaulted on their federal claims in state court from federal habeas review unless they can show adequate cause for the default and prejudice as a result of the claimed federal law violation).
56 *See* 130 S. Ct. 2549 (2010).
57 *See id.* at 2562-64 (suggesting that while ordinary attorney negligence does not warrant equitable tolling, the circumstances of cases which do qualify are not limited to the Eleventh Circuit's rigid ruling that gross negligence without proof of "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part" is insufficient for equitable tolling).

abandoned by his counsel.[58] When Alito had authored his concurrence just two years earlier, however, not a single other member of the Supreme Court joined in the opinion.[59]

Finally, in 2012, the Supreme Court redefined the holding of *Coleman*, determining that ineffective assistance of counsel in the first post-conviction state proceeding could excuse the procedural default of a petitioner's claims of ineffective assistance of trial counsel.[60] In reaching this decision, the Court was chiefly concerned with the idea that deference to the state adjudication would result in a complete loss of a petitioner's ability to vindicate his rights.[61] This holding was similarly expanded to states where ineffective assistance of counsel claims are not required by statute to be brought in a collateral review process, but where, for procedural reasons, it is virtually impossible to raise such claims on direct appeal.[62] In expanding its holding to include post-conviction matters originating from such states, the Court noted that the overall importance of the holding of *Martinez* was the underlying inquiry of whether the state "affords meaningful review of a claim of ineffective assistance of trial counsel" during direct appeal.[63]

III. And Along Comes Chapter 154

As a provision of AEDPA in 1996, the statute included a "fast track" provision[64] whereby habeas petitions in federal court would be resolved in an expedited fashion upon a showing that the state court procedure was adequate.[65] The statute required an inquiry into the state statutory scheme:

> This chapter is applicable if a State establishes . . . a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.[66]

State attorney generals, representing the wardens, have petitioned federal courts to apply the expedited procedures of Chapter 154 in particular habeas proceedings, alleging that counsel, as provided, met the competency and compensation requirements outlined in §2261.[67] In both *Spears v. Stewart*[68] and *Ashmus v. Woodford*,[69] the federal courts declined to apply the expedited provisions of Chapter 154 upon a finding that counsel was not promptly

58 *See Maples*, 132 S. Ct. at 923-24 (Alito, J., concurring in part and concurring in judgment) (referencing *Holland*, 130 S. Ct. at 2567-68).

59 *See Holland*, 130 S. Ct. at 2566 (arguing that while he agrees with the majority's decision, it does not do enough to set forth what "extraordinary circumstances" in cases involving attorney misconduct qualify for equitable tolling).

60 *See* Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012) (acknowledging that without adequate counsel, state proceedings may have been insufficient in ensuring that a substantial claim was given sufficient weight).

61 *Id.* at 1316 (noting that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim").

62 *See, e.g.*, Trevino v. Thaler, 133 S. Ct. 1911, 1920-21 (2013) (discussing the Texas courts' inability to provide the majority of defendants with an opportunity to bring forth claims regarding ineffective counsel on direct appeal).

63 *Id.* at 1919 (emphasis added).

64 The "fast track" provisions would require that a capital post-conviction litigant file his federal habeas petition within 180 days of the denial of his state petition for relief, and eliminates any tolling of this statute of limitations by the filing of a petition for a writ of certiorari with the United States Supreme Court. 28 U.S.C. § 2263 (1996). Furthermore, these provisions require the district court to complete review of such a petition within the lesser of 450 days of filing, or 60 days after the matter's submission for a decision. 28 U.S.C. § 2266(b)(1)(A) (2006).

65 *See* 28 U.S.C.A. § 2261(b) (2006).

66 *Id.*

67 No federal court has ever found a state post-conviction litigant to have adequate state representation such that his case could be litigated under the "fast track" provision. *E.g.* Editorial, "Congress must rewrite the law governing lawyers for poor death-row inmates," Washington Post, June 21, 2010.

68 283 F.3d 992 (9th Cir. 2002).

69 202 F.3d 1160 (9th Cir. 2000).

appointed as required by the opt-in provision.[70] In *Ashmus*, the Ninth Circuit rejected California's appointment mechanism as complying with the competency requirement of Chapter 154 because the state statutory scheme did not have mandatory guidelines for the appointment and qualifications of counsel.[71] On the other hand, in *Spears*, the Ninth Circuit found that Arizona's system provided sufficient guidelines to ensure adequate representation in that both statutes and procedural rules monitored attorney competence and compensation, as well as reasonable litigation expenses; however, the Ninth Circuit noted that in the petitioner's case, counsel had not been timely appointed as required by §2261.[72]

In 2006, with the enactment of the USA Patriot Improvement and Reauthorization Act, Chapter 154 was amended to allow for the pre-certification of particular state capital post-conviction mechanisms. Under this scheme, the Attorney General was required to promulgate regulations to implement a certification procedure for establishing whether a state "has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death."[73] The statute provides a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants."[74] However, Chapter 154, both following its initial enactment in 1996, and its amendment in 2006, contains provisions only governing the competency and compensation of counsel and the payment of litigation expenses. The rule does not contain provisions (nor does it permit regulation)[75] governing a litigant's access to any type of discovery in the state post-conviction process. But should it? Once a post-conviction litigant arrives in federal court, discovery is available where he can demonstrate "good cause" before a magistrate judge.[76] Similarly, a federal court of appeals may review the granting or denial of discovery under an abuse of discretion standard.[77] Where the district court orders the expansion of the record through discovery, it may then consider whether to grant an evidentiary hearing in light of the newly adduced evidence.[78] However, under the expedited procedures, a habeas petition must be filed within 180 days of the affirmance of the conviction by the state court.[79] This small

70 *See Spears*, 283 F.3d at 992 (9th Cir. 2002) (ruling because the State of Arizona failed to meet with the timeliness requirement of Chapter 154 of the AEDPA with regards to the counsel it appointed for the petitioner, it was not entitled to any expedited procedures with regards to his case); *Ashmus*, 202 F.3d at 1160 (9th Cir. 2000) (holding the State of California failed to meet the criteria necessary to qualify for Chapter 154 of the AEDPA with regards to capital prisoner's habeas petition).

71 *See Ashmus*, 202 F.3d at 1165-67 (rejecting California's claim that State mechanisms in place from 1989 to 1998 for the appointment of collateral counsel met Chapter 154 requirements).

72 *See Spears*, 283 F.3d at 1010-11, 1013, 1015, 1019 (noting Arizona's statutes which require that counsel have five years litigation experience including criminal litigation experience, post-conviction and appellate litigation experience; and provide for counsel's compensation at $100 an hour and the provision of "reasonable fees and costs" complied with the requirements of §2261, but finding that because counsel was not appointed until 18 months after certiorari was denied, Arizona could not apply Chapter 154).

73 28 U.S.C. § 2265(a)(1)(A) (2006).

74 Ashmus v. Calderon, 935 F. Supp. 1048, 1056 (N.D. Cal. 1996), *rev'd*, 148 F.3d 1179 (9th Cir. 1998).

75 Chapter 154 does not permit the Attorney General to outline regulations governing any other aspect of a state's post-conviction mechanism beyond the competency and compensation of counsel and the payment of litigation expenses. 28 U.S.C. § 2265(a)(3) (2006) ("There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.").

76 *See, e.g.*, Hayes v. Woodford, 301 F.3d 1054, 1065 n.6 (9th Cir. 2002); Holley v. Smith, 792 F.2d 1046, 1049 (11th Cir. 1986) (explaining that upon arriving in federal court, the burden is on the petitioner to establish that an evidentiary hearing is necessary).

77 *See* Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003) (reiterating that in habeas proceedings there is no federal right to discovery, its dispensation and scope are left entirely to the judge's discretion).

78 *See* Valverde v. Stinson, 224 F.3d 129, 135 (2d Cir. 2000) (discussing some of the discretionary powers available to the district court with regards to evidentiary hearings).

79 *See* 28 U.S.C. § 2263(a), (b)(3) (2006) (the statute of limitations will be tolled for any time that the petition is properly filed seeking a grant of certiorari from the United States

window of time renders the possibility of adequate discovery prior to filing a habeas petition a *de facto* nullity, granting litigants only seven months to request, litigate, receive, review, and plead claims related to post-conviction discovery. Nor does the fact that a petitioner could attempt to seek discovery and amend his petition after filing adequately protect federal habeas rights. The Court must decide a habeas petition under the expedited procedures on the earlier of 450 days from the filing of the initial petition, or sixty days after the submission of the matter.[80] Assuming the petitioner could be granted discovery and subsequently amend his petition in light of heretofore unknown information, the 450 days would have to be sufficient time to request, litigate, receive, review, and amend in light of discovery, while also allowing time for the prosecution to respond, all without hobbling the district court's ability to hold a hearing, if necessary, and finally adjudicate the matter.

Deference under AEDPA, *Pinholster*, and its progeny strikes a balance that states are capable of being relied upon to adequately adjudicate their own matters and protect a litigant's constitutional rights. Similarly, the entire premise upon which Chapter 154 is based is that states can provide an adequate post-conviction mechanism. The woeful inadequacy of post-conviction discovery hamstrings the litigant's ability to vindicate the critical rights at stake.

But does due process entitle a state habeas petitioner to discovery? While the due process clause of the Fourteenth Amendment affords post-conviction litigants minimal protections, it does require that the state provide adequate, effective and meaningful procedures that allow a litigant to "vindicate the substantive rights provided."[81] In determining what rights are required for this minimal due process in the post-conviction context, the Supreme Court has noted that an assessment of what is provided in other states effectively demonstrates what a particular state can be expected to provide.[82]

IV. Full Post-Conviction Discovery Mechanism

Some scholars have noted the importance of post-conviction review at detecting system errors.[83] While some may argue that full access to discovery in post-conviction may seem duplicative and disruptive of finality, "[t]he high rates of error found at each stage [of review] . . . confirm the need for multiple judicial inspections."[84]

Full access to discovery in the post-conviction process would provide petitioners with a far more complete process. This situation would allow litigants to seek materials that had not been sought by trial counsel, and were only available to the prosecution, including criminal backgrounds of witnesses, photographs of physical evidence, and the entire line of police reports underlying the state's investigation. A majority of states provide some access to discovery in their post-conviction proceedings.

California permits a litigant in capital post-conviction litigation to request discovery in the state court prior to the filing of a state habeas petition. Their statutory scheme permits state habeas litigants access to discovery materials where the petitioner is serving a life sentence or awaiting execution.[85] The state

Supreme Court or state post-conviction relief; the district court may grant one thirty (30) day continuance for "good cause").

80 *See* 28 U.S.C. § 2266(b)(1)(A) (2006).

81 *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009) (explaining that a federal court is entitled to skirt a state's post-conviction relief procedures only if the procedures are unable to uphold a substantive right).

82 *See* Herrera v. Collins, 506 U.S. 390, 410-11 (1993) (assessing what procedures were provided in a majority of states to determine whether a particular state's post-conviction process violated the Fourteenth Amendment).

83 *See* James S. Liebman, et. al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 Tex. L. Rev. 1839, 1848 (2000) (noting that error, in at least some states, is often caught in post-conviction review; in Maryland, state post-conviction led to at least 52% of the capital judgments that were reviewed being overturned "due to serious error").

84 *Id.* at 1855-56.

85 Cal. Penal Code § 1054.9 (West 2003).

permits such discovery upon a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful,"[86] and limits the defendant's access to materials that are solely "in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at the time of trial."[87] In interpreting its statute, California has noted that the rationale behind the rule is to enable defendants to have full access to discovery "as an aid in preparing the petition."[88] Furthermore, California does not limit the application of the rule to materials that were actually requested by the defense and turned over by the prosecution; instead, a defendant is entitled to materials the defense "should have possessed."[89] California's policy provides a state habeas petitioner "specific discovery that the prosecutor did provide but has become lost to petitioner, that the prosecution should have provided but failed to do so, and to which the defense would have been entitled had it requested it."[90]

Additionally, New Mexico has determined that as state habeas proceedings are part and parcel of a defendant's criminal conviction, those rules governing criminal pre-trial discovery are similarly applicable.[91] Nebraska also makes the pre-trial discovery rules applicable in the post-conviction process, but contemplates that such motions for discovery are only permissible after a state habeas petition has been filed.[92] Wyoming and South Dakota permit discovery in accordance with their civil rules of procedure.[93]

In an attempt to balance the finality of a conviction and fairness to the post-conviction litigant, a majority of states permit limited post-conviction discovery. In those contexts, the courts may consider the need for the discovery in a particular case, as well as the burden that the granting of such discovery would place upon the prosecution. In considering whether to grant post-conviction discovery, Florida expressly outlines that the trial court must evaluate "the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts."[94]

Similarly, West Virginia, Idaho, and Colorado permit a post-conviction litigant access to discovery where such a request is feasible and practicable. West Virginia outlines this standard as permitting discovery where, "a court in the exercise of its discretion determines that such process would assist in resolving a factual dispute that, if resolved in the petitioner's favor, would entitle him or her to relief."[95] Idaho's slightly more restrictive rule indicates that discovery is not required in the post-conviction process and that the trial court has sole discretion to determine to what extent discovery should be granted.[96] However, the judge abuses his discretion where the post-conviction litigant can demonstrate that the denial of access to discovery was erroneous, as such discovery was "necessary to protect an applicant's sub-

86 *Id.* § 1054.9(a).
87 *Id.* §1054.9(b).
88 *In re Steele*, 85 P.3d 444, 449 (Cal. 2004).
89 *Id.* at 450 (emphasis in original).
90 *Id.* at 449.
91 *See* Allen v. LeMaster, 267 P.3d 806, 811 (N.M. 2011) (examining whether the defendant can be compelled to produce a statement in post-conviction proceedings based on pre-trial discovery principles).
92 *See* State v. El-Tabech, 610 N.W.2d 737, 744 (Neb. 2000) (commenting that there must be a proceeding pending to make a discovery request as discovery relates to specific proceedings).
93 *See* Jenner v. Dooley, 590 N.W.2d 463, 469 (S.D. 1999); Wyoming *ex rel.* Hopkinson v. Dist. Court, Teton County, 696 P.2d 54, 72 (Wyo. 1985).
94 Florida v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994); *see also id.* (noting that "[i]n most cases any grounds for post-conviction relief will appear on the face of the record. On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are relevant and material and where the discovery is permitted the court may place limitations on the sources and scope. On review of an order denying or limiting discovery it will be the [moving party's] burden to show that the discretion has been abused").
95 West Virginia *ex rel.* Parsons v. Zakaib, 532 S.E.2d 654, 659 (W. Va. 2000).
96 *See* Merrifield v. Arave, 912 P.2d 674, 678 (Idaho 1996) (finding room to determine "on a case-by-case basis, whether and to what extent the discovery rules should be followed in pursuing habeas corpus actions").

stantial rights."[97] Colorado's rights are similarly limited, but permit a post-conviction petitioner to access discovery materials where "it is clearly shown that the matters sought to be discovered will be relevant to the very narrow issue of a habeas corpus hearing."[98] Oklahoma's post-conviction statutes limit discovery to matters that could not have been raised on direct appeal and would support a showing of either the reasonable probability of a different outcome at trial, or that the petitioner is factually innocent; the petitioner bears the burden of demonstrating that his discovery requests are so limited.[99] Similarly, Wisconsin confronts post-conviction litigants with the burden of establishing that the sought material would create a reasonable probability of a different outcome had it been utilized at trial, in order to obtain discovery.[100]

Connecticut similarly curtails the rights of a post-conviction litigant to access discovery, but the state firmly vests the trial court with discretion to make such a determination.[101] However, the Superior Court of Connecticut has cautioned trial courts that in the exercise of their discretion, they must consider, "the gravity of the rights at stake," such that a "habeas petitioner should be entitled to obtain evidence sufficient to explore his claims and present his case, but there is no carte blanche right for a petitioner to fish through a state's file in search of fodder for unspecific and unsupported claims."[102] In *Smith v. Warden*, the Connecticut Superior Court noted that the petitioner had "zealously and diligently pursued" his claims and had made good-faith efforts to obtain evidence from the prosecution and other public agencies. While denying the petitioner's discovery requests, the Connecticut Court noted that the task of successful post-conviction litigation is rendered all the more difficult, "without access to necessary or relevant evidence,"[103] thereafter engaging in a detailed analysis of whether the petitioner had shown a likelihood that the undisclosed discovery would substantiate his claims. The *Smith* court's analysis indicated that where the petitioner can meet the showing that such discovery is necessary, the trial court has discretion to order the disclosure of such materials and the superior court will analyze whether the trial court has abused its discretion where it denies discovery.

While allowing for all other post-conviction discovery requests to be subject to the sound discretion of the trial court,[104] Virginia requires that a trial court scrutinize discovery requests in cases where the post-conviction litigant is alleging the withholding of exculpatory evidence in violation of *Brady v. Maryland*.[105] Virginia courts have recognized that, "[u]nless trial judges scrutinize discovery requests in those instances where a plausible claim is made that material exculpatory evidence exists, protection of an accused's due process/*Brady* rights is left solely in the hands of the prosecutor."[106] The trial judge may thus elect to conduct an in camera review to search for material and exculpatory evidence allegedly contained in the prosecutor's file, or he may order disclosure of the previously withheld document, should the prosecution acknowledge its existence, while disputing its materiality.[107] The Virginia Court of Appeals noted that there is no procedure, other than "a mandatory 'open file' rule, that can ensure defense access to all material exculpatory information possessed by the Commonwealth. In order to extend the discovery requirement to that point would require action by the legislature or an amendment to the discovery rules by the Supreme Court."[108]

A majority of states permit discovery where the petitioner makes a showing of good

97 *Id.*
98 Hithe v. Nelson, 471 P.2d 596, 598 (Colo. 1970).
99 Okla. Stat. tit. 22, § 1089(c) (2013).
100 *See* Wisconsin v. Avery, Nos. 2004 AP 1121, 2004 AP 1395, at *9 (Wisc. App. June 20, 2006).
101 Vazquez v. Comm'r of Corr., 17 A.3d 1089, 1099 (Conn. 2011).
102 Smith v. Warden, No. CV030004228S, 2009 WL 1057529, at *1 (Conn. Mar. 24, 2009).
103 *Id.* at *2.
104 Yeatts v. Murray, 455 S.E.2d 18, 21 (Va. 1995).
105 373 U.S. 83, 87 (1963).
106 Milton v. Virginia, No. 0637-91-1, 1992 WL 441866, at *2 (Vir. Ct. App. Aug. 4, 1992).
107 *See id.*
108 *Id.* at *2 n. 1.

cause.[109] Louisiana gives the trial judge wide discretion to order post-conviction discovery once a post-conviction litigant has demonstrated "good cause:"

> Recognizing the need in some cases to go beyond the record of the proceedings, the Code of Criminal Procedure now empowers the district court to authorize oral depositions, requests for admissions of fact, and requests for admission of genuineness of documents. Such discovery techniques may be used upon a showing of "good cause" and are to be regulated by the court. The court should be guided by the Louisiana Code of Civil Procedure in specifying the conditions under which the discovery techniques are to be used.
>
> Discovery devices may be employed effectively to eliminate possible factual disputes by fully developing the petitioner's allegations. What appears to be a factually meritorious claim (when alleged in the petition) may collapse after the petitioner's deposition has been taken and, under oath, he recants some of his allegations.
>
> After the methods of expanding the record have been employed, the court may find that no evidentiary hearing is needed.
>
> Due to the obvious importance of the discovery procedures in determining the appropriateness of summary dismissal, the petitioner is entitled to the assistance of counsel if such methods are utilized.[110]

Nevada supplants this "good cause" standard with civil procedure rules for discovery in post-conviction proceedings.[111] Georgia and Ohio give trial court judges discretion to grant discovery in post-conviction proceedings.[112] Texas authorizes the trial judge to "utilize affidavits, depositions, interrogatories, personal recollections, and evidentiary hearings," to resolve contested issues in a petition for post-conviction relief.[113] Under such an analysis, the Due Process Clause of the Fourteenth Amendment would require Kentucky to provide some access to discovery mechanisms in the post-conviction process.

V. Not-So Open Records

The limited mechanism Kentucky purports to provide to the general public (and thereby post-conviction litigants) has been hobbled by the language and nonsensical interpretation of the statute itself. In Kentucky, it is well established that all public records must be disclosed, except those falling into one of the narrowly construed exceptions to the Open Records Act.[114]

109 *See* Pennsylvania v. Collins, 957 A.2d 237, 272 (Pa. 2008) (finding post-conviction discovery permitted only where "good cause" shown); *see also* Canion v. Cole, 115 P.3d 1261, 1262 (Ariz. 2005) (examining whether lower court abused discretion in finding that petitioner had shown good cause for granting post-conviction discovery); Kemp v. Mississippi, 904 So. 2d 1137, 1139 (Miss. 2004) (Mississippi Uniform Post-conviction Collateral Relief Act provides for discovery where "good cause is shown and in the discretion of the trial judge"); *Ex parte* Land, 775 So. 2d 847, 852 (Ala. 2000) (finding that "good cause" is the appropriate standard by which to judge post-conviction discovery motions); Dawson v. Delaware, 673 A.2d 1186, 1198 (Del. 1996) (affirming trial court's denial of post-conviction discovery where "good cause" was not shown); Jensen v. North Dakota, 373 N.W.2d 894, 901 (N.D. 1985) (finding litigant not entitled to post-conviction discovery where he has not met initial burden of showing "good cause").

110 Louisiana *ex rel*. Tassin v. Whitley, 602 So. 2d 721, 723 (La. 1992) (quoting Developments in the law, 1979-1980: Postconviction procedure. Cheney C. Joseph, Jr., 41 La. L. Rev. 625 (1981) and LSA-C.Cr.P. Art. 929).

111 *See* Nev. Rev. Stat. Ann. § 34.780(2) (2013) (permitting post-conviction counsel to "invoke any method of discovery under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so").

112 *See* Turpin v. Bennett, 513 S.E.2d 478, 483 (Ga. 1999) (deciding that a trial court's decision regarding discovery will only be reversed when it is clear the trial court abused its discretion); Ohio v. Wiles, 709 N.E.2d 898, 903 (Ohio Ct. App. 1998) (reiterating that the trial court decides discovery issues on post-conviction claims).

113 *Ex Parte* Patrick, 977 S.W.2d 588, 589 (Tex. Crim. App. 1998) (Baird, J., concurring).

114 *See* Ky. Rev. Stat. Ann. § 61.871 (LexisNexis 2013).

The Open Records Act provides for several exemptions, among them, records of law enforcement agencies:

> Records of law enforcement agencies . . . that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions . . . public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted.[115]

In *Skaggs v. Redford*,[116] a request was made for the Commonwealth Attorney's file while the defendant was preparing to file his federal habeas petition.[117] While the *Skaggs* court stated that a federal habeas action was considered a prospective law enforcement action, it was in the context of access to the Commonwealth Attorney's file, not police records.[118] "[T]he state's interest in prosecuting the appellant is not terminated until his sentence has been carried out. The Office of Commonwealth of [sic] Attorney . . . represent[s] the state's prosecutorial function in this case."[119] There is no mention of records from a police lab in that case, yet the case has been used repeatedly to apply the exemption to police investigative files. Further, *Skaggs* dealt with the secondary exemption in KRS 61.878(h): the records of Commonwealth's attorneys are always exempt. KRS 61.871 provides that exemptions shall be strictly construed. The exemption only exists for law enforcement agencies if they can prove harm. Until recently, the Attorney General's Office, which is responsible for issuing decisions in Open Records disputes, has continuously extended *Skaggs* to apply to police agencies.[120] This results in uneven application of the Open Records Act, as sometimes police agencies will grant requests for open records in a post-conviction action, while other times they will not. The continued denial of access to police records and lab reports based on existing case law violates defendants' due process rights and should be clarified to note that the exemptions apply only to the Commonwealth Attorney's files and not to police investigative files.

By contrast in *Courier-Journal, Inc. v. Lawson*,[121] the Courier-Journal sought disclosure under the Open Records Act of a proffer given by Lawson during the entry of a guilty plea, which was used by the Attorney General to conduct a criminal investigation. When the Courier-Journal sought disclosure, Lawson moved to enjoin the Attorney General from providing the information. On appeal, the Kentucky Supreme Court noted that *Hiatt* was inapplicable to the case because the proffer was not contained in the file of Lawson's trial counsel, which would have belonged to Lawson. Because the information was in the possession of the Attorney General, Lawson had no authority to determine what would happen to the proffer.[122] While outside of the criminal litigation context, the *Lawson* case draws a significant distinction between material physically contained in trial counsel's file and material in the prosecution's file, even if such information references the same document.

115 Ky. Rev. Stat. Ann. § 61.878(h) (West 2013) (emphasis added).
116 844 S.W.2d 389 (Ky. 1992).
117 *Id.* at 389.
118 *Id.* at 390.
119 *Id.*
120 *See* City of Ft. Thomas v. Cincinnati Enquirer, 406 S.W.3d 842 (Ky. 2013) (holding that in order to invoke the law enforcement exemption of the Open Records Act, the agency must articulate a factual basis for a showing of harm).
121 307 S.W.3d 617 (Ky. 2010).
122 *See id.* at 624.

In addition to denial of police investigative files, police investigative agencies in Kentucky have also used the Open Records Act to deny access to lab results from DNA analysis that have previously been completed because of another exemption in the Open Records Act that has been misinterpreted. KRS 17.175(4) provides that "DNA identification records produced from the samples are not public records but shall be confidential and used only for law enforcement purposes. DNA identification records shall be exempt from the provisions of KRS 61.870 to 61.884." Reliance on this exemption to deny access to already-existing reports is clearly overbroad. The plain language indicates that the exemption applies only to DNA from a person, and not to DNA from a crime scene. KRS 17.169(1) sets forth definitions for KRS 17.175(4); sample means "a blood or swab specimen from a person." Further, KRS 17.170 identifies those required to submit samples for inclusion in the database. So, while KRS 17.175(4) exempts "DNA identification records produced from samples," by definition, only those identification records produced from samples from a person are exempt. Further, the intent of the statute is expressly stated within the statute:

> The purpose of the centralized DNA database is to assist federal, state, and local criminal justice and law enforcement agencies within and outside the Commonwealth in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes, or other crimes and the identification and location of missing and unidentified persons.[123]

The purpose is not to prevent a criminal defendant from accessing lab reports produced in connection with his case. Despite this, the exemption has been used to deny access to records.[124]

Ironically, at the same time, Kentucky has noted the overall importance of DNA testing to potential exoneration in the post-conviction process. Just as Kentucky's statutes contain no right to discovery in post-conviction, until recently, Kentucky's statutes contained no provision granting post-conviction litigants access to DNA testing in non-capital cases even in cases where the litigant had the funding to conduct such testing and was only seeking access to the physical evidence. The Kentucky Supreme Court noted that the restriction of access to such evidence, which could be "substantial, if not pivotal" to the litigants' motion for a new trial, amounted to an abuse of discretion on the part of the trial court.[125] In reversing the trial court's denial of the litigants' DNA testing motion, the court further noted "that evidence admitted into criminal trials in this state belongs to the Commonwealth of Kentucky. It does not belong to the Commonwealth's Attorney. The latter is charged with the duty to preserve and protect the integrity of the evidence, not to hoard it."[126] Thus, in the narrow realm of DNA testing, Kentucky has recognized that it is grossly unfair to allow the prosecution to be the architect of a proceeding[127] seeking to maintain a conviction.

VI. Efficacious Solutions

Creating statutory authority for the provision of open file discovery would guarantee that a post-conviction litigant has access to all

123 Ky. Rev. Stat. Ann. § 17.175(2) (LexisNexis 2013) (emphasis added).

124 *See, e.g.*, Ky. Op. Atty. Gen. 03-ORD-126; Ky. Op. Atty. Gen. 13-ORD-038, FN1; Ky. Op. Atty. Gen. 05-ORD-251; Ky. Op. Atty. Gen. 10-ORD-188. The Kentucky Legislature recently passed HB 41, which expands Kentucky's DNA testing statute, Ky. Rev. Stat. Ann. § 422.285 (Wests 2013) to include access to DNA testing, as well as lab results completed in connection with DNA testing, in non-capital cases. The bill became effective June 20, 2013. Presumably, this will prevent agencies from continuing to rely on Ky. Rev. Stat. Ann. § 17.175(4) (West 2009) to deny access.

125 Hardin v. Kentucky, 396 S.W.3d 909, 914 (Ky. 2013) (quoting Bedingfield v. Kentucky, 260 S.W.3d 805, 815 (Ky. 2008)).

126 *Hardin*, 396 S.W.3d at 915.

127 See Brady v. Maryland, 373 U.S. 83, 88 (1963) (holding that due process is violated where the prosecution withholds material exculpatory evidence, as such suppression "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice").

of the materials provided to trial counsel in litigating his post-conviction claims. Under such a procedure, the prosecution would simply make their file (minus privileged thoughts and impressions work-product) available to a litigant. By comparing the file of trial counsel, to which the post-conviction litigant is entitled under *Hiatt*,[128] a defendant would have access to the full panoply of materials to determine what claims he may have. Open file discovery is routinely provided in advance of trial by prosecutors in certain counties throughout the Commonwealth of Kentucky,[129] and has been lauded by reformers of the criminal justice system for its ability to "level the playing field" and prevent wrongful convictions.[130] Applying open-file discovery to Kentucky's post-conviction process would ensure that defendants could access all of the materials to which their trial counsel had access, while not requiring the prosecution to undertake the financial burden of replicating their entire file.

Kentucky's post-conviction access to counsel limits the effectiveness of open-file discovery, which grants carte blanche access to examine the prosecution's file, but does not physically provide copies of the file to a defendant. Kentucky's statute for collateral attack, Rule 11.42, requires an inmate to file a post-conviction petition before being appointed counsel. The petition must state the grounds for relief specifically and must allege "the facts on which the movant relies in support of such grounds."[131] The rule further provides that counsel be appointed only in those cases where the court grants a hearing.[132] A hearing is required only in those cases where the defendant has raised facts that, if true, would support the finding of a violation of the petitioner's constitutional rights.[133] Thus, a *pro se* litigant must have access to the entire file, including those materials in possession of the prosecution, in order to adequately plead his claims. He must be able to outline for the court specific facts that supports those claims in order to prove that he is entitled to a hearing and thereby entitled to counsel. An incarcerated inmate, who is typically the post-conviction litigant, would not be physically able to examine the file in the prosecution's possession, nor would he have access to facilities to make copies of the necessary portions of that file. While subsequently appointed counsel may amend a litigant's petition to include additional meritorious claims,[134] reliance upon an open-file discovery proceeding would be inadequate to enable a *pro se* litigant to adequately plead a claim sufficient to meet the requirements for appointment of counsel outlined by Rule 11.42.

File recreation would require the prosecution to provide a post-conviction litigant with every item of discovery that it turned over during trial. The Kentucky Supreme Court in *Kentucky v. Bussell* implicitly upheld such access.[135] The trial court in *Bussell* required the prosecution to recreate trial counsel's file for Bussell by providing his post-conviction counsel the discovery that had been turned over prior to trial. When these materials were provided, post-conviction counsel discovered a wealth of police reports that indicated the existence of

128 194 S.W.3d 324 (Ky. 2006).

129 *See, e.g.*, Porter v. Kentucky, 394 S.W.3d 382, 387 (Ky. 2011) (holding that "parties may agree amongst themselves to provide 'open file' discovery"); *see also* Hicks v. Kentucky, 805 S.W.2d 144, 148 (Ky. App. 1990) (noting that the open file discovery policy adopted by the Commonwealth in the case "allowed the appellant and his counsel to have full access to all of the state's evidence relevant to the case").

130 *See, e.g.*, Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, 1558-59 (2010) (describing the benefits to both prosecutors and defendants with open file discovery); *see also* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 Geo. Mason L. Rev. 257, 262 (2008) (noting that full discovery would completely satisfy the Constitutional and ethical requirements); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. Rev. 275, 295 (2004) (articulating that an open discovery system will help prosecutors to remain ethical).

131 Ky. R. Crim P. 11.42(2).

132 *Id.* at 11.42(5).

133 Parrish v. Kentucky, 272 S.W.3d 161, 166 (Ky. 2008) (quoting Lay v. Kentucky, 506 S.W.2d 507, 508 (Ky. 1974).

134 Civil Rule 15.01, which allows the amendment of an initial pleading "where justice so requires," has been deemed applicable to post-conviction litigation under Ky. R. Cr 11.42. Bowling v. Kentucky, 926 S.W.2d 667, 670 (Ky. 1996).

135 226 S.W.3d 96 (Ky. 2007).

an alternate suspect, which cumulatively suggested "a reasonable probability that had the information been disclosed, the outcome of Bussell's trial would have been different."[136] After Bussell's conviction was vacated, the Commonwealth appealed, alleging that the trial court erred in ordering file recreation where such actions were purportedly prohibited by the Open Records Act. The *Bussell* Court declined to address the Commonwealth's claim that the defense was not entitled to have access to the exculpatory information for litigating the post-conviction matter where the Commonwealth had failed to turn over the exculpatory information prior to trial in violation of *Brady*. Implicitly, the Kentucky Supreme Court found that a trial judge has authority to order such file recreation subject to the discretion of the court. *Bussell*, however, was a results-oriented decision wherein the Kentucky Supreme Court examined whether a post-conviction litigant should have access to the prosecution's file after already knowing that the prosecution had withheld exculpatory information. The *Bussell* Court's silence on the issue of file recreation severely undermines that there is a requirement that other post-conviction litigants have access to the same procedure.

The *Bussell* decision itself serves as a cautionary tale demonstrating the need for adequate post-conviction discovery. The material upon which Mr. Bussell ultimately received a new trial had not been turned over by the prosecution prior to, during, or post-trial. Instead, an unwitting prosecutor, under the auspices of file recreation, inadvertently turned it over to post-conviction counsel. Following vacation of the conviction, the prosecution attempted to un-ring the bell: to resuppress the evidence that had been long-hidden in violation of *Brady*. Such violations are one of the most common errors found at the capital post-conviction phase, second only to ineffective assistance of counsel.[137] While defendants are entitled to exculpatory evidence, they are entitled only to evidence that "is material either to guilt or punishment."[138] This most often leaves prosecutors with the discretion in determining what is considered "material," as "[d]efense lawyers, for all their incentives to find exculpatory information, usually lack the 'time, resources, or expertise,' to conduct the type of massive pretrial investigation needed to ferret out this evidence."[139] Prosecutors' obligations under *Brady* are ongoing.[140] Despite this obligation, which has been in place since 1963, violations of *Brady* take place regularly.[141] "Studies have pinpointed the suppression of exculpatory evidence as a factor in many documented wrongful convictions later overturned by post-conviction DNA testing."[142]

A trial judge's determination whether to provide file recreation is subject to abuse of discretion review on appeal. Thus, an appellate court may overturn a trial court's refusal to provide file recreation where such refusal is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[143] Given the lack of authority requiring the provision of any materials to a post-conviction litigant, the denial of file recreation by the trial court is unreviewable. While this would not resolve all problems underlying the ability to bring meritorious claims in post-conviction, creating authority for file recreation would be an excellent start in allowing a *pro se* post-conviction litigant to plead his claims before the state court.

136 *Id.* at 102.
137 Liebman, et. al., *supra* note 83, at 1850.
138 *Brady*, 373 U.S. at 87.
139 Medwed, *supra* note 130, at 1541.
140 *Id.* at 1537.
141 *Id.* at 1539.
142 *Id.* at 1540.
143 Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000); *see also* King v. Kentucky, No. 2010–CA–000377–MR, 2011 WL 3516300 (Ky. Ct. App. Aug. 12, 2011) (applying the abuse of discretion standard to a trial court's ruling concerning the mechanism for providing trial counsel's file to a post-conviction litigant).

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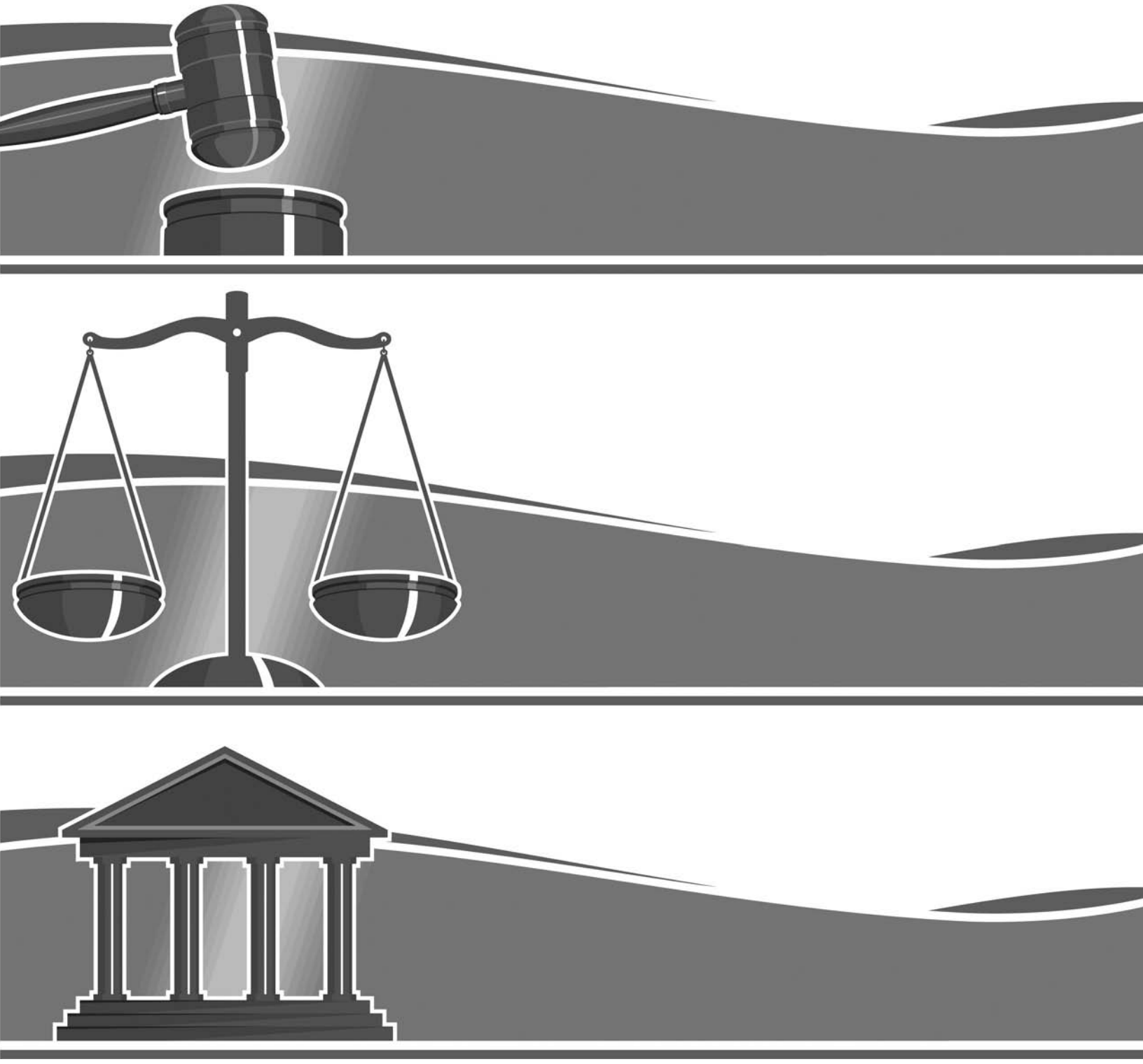

CONFRONTING THE DEAD: THE SUPREME COURT'S CONFRONTATION CLAUSE JURISPRUDENCE AND ITS IMPLICATIONS FOR AUTOPSY REPORTS

by Reid R. Allison[1]

In the past decade, the United States Supreme Court has attempted to overhaul Confrontation Clause jurisprudence. Since the Court's 2004 decision in *Crawford v. Washington*,[2] it has decided six substantive Confrontation Clause cases. As with all drastic precedential overhauls, the Court has injected an overwhelming amount of uncertainty into questions of Confrontation Clause legality.[3] This article will examine the development of the *Crawford* era of Confrontation Clause case law, with a particular focus on one of the most difficult but pressing contexts: the admissibility of forensic reports. In examining these reports, particular attention will be paid to the looming question of the admissibility of autopsy reports. Given the development of the law including a recent decision by the United States Court of Appeals for the Eleventh Circuit[4] the autopsy question is very likely to come before the Supreme Court within the next five years. After setting out the current landscape on the question in Part I, this article will discuss the significant problems with current precedent in Part II, establish autopsy reports as a worthwhile case study in Part III, and, in Part IV, make predictions and argue for ways in which the Court could and should address the autopsy report question and clarify its Confrontation Clause precedent in the field of forensic reports.

I. Confrontation Clause Precedent

A. The *Crawford* Watershed

In 2004, the Supreme Court was presented with a relatively run-of-the-mill factual scenario. A husband and wife gave similar tape-recorded statements to the police after the husband was arrested for stabbing another man.[5] At the husband's trial for assault and attempted murder, he argued that the stabbing occurred in self-defense.[6] His wife could not testify under the state's marital privilege law without his consent, "so the State sought to introduce [her] tape-recorded statement to police" that had been recorded the night of the incident.[7] The husband argued that such admission violated his constitutional right to confront witnesses against him: he would not have the opportunity to cross-examine his wife because the state's marital privilege barred her from testifying. The trial court admitted the

1 Thank you to Professor Paul Rothstein, Jessica Carter, Francis Gieringer, Paul Halliday, Michael Heckler, and Gabriel Kurcab for their invaluable feedback on drafts of this article. Thank you to the staff of the *Criminal Law Practitioner* for their tremendous work toward making this article what you read today. Thank you to Bill Larson for believing in me. Thank you also to Professor Steven Goldblatt for his mentorship throughout law school and Dr. John Rubadeau for teaching me to write and insisting that his students "scratch their itch." Finally, I must thank my parents, Cary Rouse and Chuck Allison, for—literally—everything and my brother, Kyle Allison, for being a perfect older brother and inspiring me with his writing.

2 541 U.S. 36 (2004).

3 *See* Williams v. Illinois, 132 S. Ct. 2221 (2012), for the latest decision to fail in providing sufficient, meaningful guidance.

4 United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012).

5 Crawford v. Washington, 541 U.S. 36, 38-39 (2004).

6 *Id.* at 40.

7 *Id.*

recording and the husband was convicted of assault. After the intermediate appellate court reversed, the Washington Supreme Court reinstated the trial court's verdict.[8]

Under United States Supreme Court precedent at the time, *Crawford* was a relatively easy case. *Ohio v. Roberts*[9] required that the disputed evidence for which the producing witness's testimony was unavailable have adequate "indicia of reliability," as established either by "the evidence fall[ing] within a firmly rooted hearsay exception," or "a showing of particularized guarantees of trustworthiness."[10] In *Crawford*, the Washington high court found that the wife's statement included guarantees of trustworthiness in that it was identical on the central and material points to the separate statement the husband had given police regarding the stabbing despite varying in certain other respects.[11] Her statement was potentially incriminating because she stated she saw nothing in the victim's hand after the victim was stabbed, which contrasted with the defendant's alleged belief that the victim had reached for a weapon.[12]

The Court, however, granted certiorari on the question of whether *Roberts* should be reconsidered. After briefing and argument in favor of abandoning the *Roberts* standard from the defendant, Mr. Crawford,[13] and the United States as amicus curiae,[14] the Court did just that. Mr. Crawford argued for a per se bar on the admission of testimonial statements made by a witness whom the defendant did not have an opportunity to cross-examine.[15] On the other hand, the United States asserted that Confrontation Clause is implicated only where a statement is testimonial, and argued against a per se bar on admission in favor of admissibility when the statement is inherently reliable.[16] In a quintessentially Justice Scalia opinion,[17] the Court began its analysis by referencing Roman times and sixteenth century England;[18] this must have been disconcerting for defenders of *Roberts* because of Justice Scalia's previous statements on the issue.[19] After thorough examination of pre-framing and framing era history, the Court held that the Confrontation Clause only applies to "testimonial" statements.[20] The Court, however, did not clearly define the parameters of "testimonial," opting instead to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[21] It did stress that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," and contrasted these examinations with "an off-hand, overheard remark" which "bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[22] Put generally, the Court outlined testimonial as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,"[23]

8 *Id.* at 40-42.

9 448 U.S. 56 (1980).

10 Ohio v. Roberts, 448 U.S. 56, 66 (1980).

11 State v. Crawford, 147 Wash. 2d 424, 437-39 (2002).

12 *Id.*; 541 U.S. at 38-40.

13 Brief for the Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940.

14 Brief for United States as Amicus Curiae, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 22228005.

15 *See generally* Brief for the Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940, at *9 (arguing that "the government may not convict a defendant through any testimonial statements—that is, statements given in connection with its investigation or prosecution — that have not been (or cannot be) subjected to cross-examination").

16 Brief for the United States as Amicus Curiae, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 22228005, at *5, 23.

17 Justice Scalia has told at least one interviewer that *Crawford* is his "legacy case." *See* Gaëtan Gerville-Réache, *Justice Scalia at the AJEI Summit in New Orleans*, ABA Appellate Issues (Feb. 2013), *available at* http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2013win_ai.authcheckdam.pdf.

18 *See Crawford*, 541 U.S. at 43-44.

19 As early as 1992, Justice Scalia indicated that he believed the *Roberts* standard was incorrect based on the history of the Confrontation Clause. *See* White v. Illinois, 502 U.S. 346, 358 (1992) (Thomas, J., concurring, joined by Scalia, J.) (proposing that "our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself").

20 *Crawford*, 541 U.S. at 50-54.

21 *Id.* at 68.

22 *Id.* at 50-51.

23 *Id.* at 51 (quoting 2 N. Webster, An American Dic-

and gave, as examples of testimonial evidence "affidavits, custodial examinations . . . depositions, prior testimony, or confessions."[24]

After determining that a statement's testimonial status was the touchstone of the inquiry, the Court held that, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[25] This means that, unless the defendant had a prior opportunity to cross-examine the witness who created the testimonial evidence, that evidence cannot be introduced without the testimony of that witness. If the witness is unavailable, then the evidence is inadmissible. The Court was easily convinced that the statement at issue was testimonial because it was the result of police interrogation.[26] Concurring, Chief Justice Rehnquist and Justice O'Connor chastised the Court for "cast[ing] a mantle of uncertainty over future criminal trials in both federal and state courts" by needlessly overruling *Roberts* while refusing to effectively define what evidence is "testimonial."[27] This fear has been amply borne out by the decade of subsequent Confrontation Clause tumult on questions of whether a piece of evidence is testimonial and how such evidence may still be admitted without the testimony of the original record-creator. The concurrence also exemplified how an argument based on "history" can be turned into support for conflicting positions by noting that the history points with equal force to no formal distinction between testimonial and non-testimonial, testimonial being limited to sworn statements, and such statements are not necessarily categorically excluded.[28]

However, Chief Justice Rehnquist and Justice O'Connor concurred in the judgment because they believed that the Supreme Court of Washington could and should be reversed under the *Roberts* standard.[29] The state court had given decisive weight to the interlocking nature of the statements and had deemed such interlocking sufficient indicia of reliability, but Chief Justice Rehnquist argued that such an argument was foreclosed by *Idaho v. Wright*,[30] which had held that an out-of-court statement was not admissible at trial simply because other evidence corroborated its truthfulness.[31]

B. Recent Forensic Report Cases

Five years after *Crawford*, and after having decided two other Confrontation Clause cases in the interim,[32] the Court was presented for the first time with a Confrontation Clause issue pertaining to the admissibility of a type of forensic report. The case, *Melendez-Diaz v. Massachusetts*,[33] involved a laboratory's chemical analysis of seized contraband. The analyst who conducted the chemical test did not testify at trial; instead, the results were admitted by way of "certificates of analysis" which the analyst had sworn to before a notary public.[34] The United States, supporting the respondent Commonwealth, asserted chemical tests should not be deemed testimonial and therefore should be admissible without the testimony of the laboratory technician who conducted the test.[35] In support of this proposition, the United States argued such test results could not properly be deemed statements because a machine created the results, which were merely recorded and authenticated by humans; thus,

tionary of the English Language (1828)).

24 *Id.* at 51.

25 *Id.* at 68.

26 Crawford v. Washington, 541 U.S. 36, 65-68 (2004) at 65, 68.

27 *Id.* at 69 (Rehnquist, C.J., concurring)

28 *Id.* at 69-74.

29 *Id.* at 76.

30 497 U.S. 805 (1990) (rejecting the theory that when co-defendants' respective confessions "interlock" it is determinative of the confessions' trustworthiness).

31 *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

32 Giles v. California, 554 U.S. 353, 361 (2008) (holding that unconfronted testimony is inadmissible absent a showing the defendant intended to prevent a witness from testifying); *see also* Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that statements are non-testimonial when their primary purpose is to assist police in meeting an ongoing emergency).

33 557 U.S. 305 (2009).

34 *Id.* at 308.

35 *See* Brief for United States as Amicus Curiae Supporting Respondent, Melendez- Diaz v. Massachusetts, 557 U.S. 305 (2009), 2008 WL 4195142, at *5-7.

testing machines are not witnesses in the constitutional sense.[36] Furthermore, requiring the technician's testimony would significantly hamper criminal prosecutions.

The Court was not persuaded. Again, Justice Scalia wrote for the majority and purported to ground his decision on the bright-line rule established in *Crawford*.[37] Justice Scalia once more asserted that his position was dictated by history and applied with equal force to a case whose dispute resolved a scientific analysis centuries removed from the Founding era.[38] Importantly, Justice Clarence Thomas provided the deciding fifth vote, but the scope of his agreement was very limited and came in a paragraph-long opinion. Justice Thomas stated, "I join the Court's opinion in this case because the documents at issue in this case are quite plainly affidavits."[39] For Justice Thomas, only formalized testimonial materials (e.g., affidavits, depositions, prior testimony, or confessions) implicate the Confrontation Clause, but the swearing procedure for the forensic report in this case rendered it sufficiently formal.[40] His represented the narrowest view of 'testimonial' set out in *Crawford*,[41] and thus rejected the broader proposition that evidence other than affidavits or formalized materials may still be testimonial.[42]

In dissent, Justice Kennedy joined by Chief Justice Roberts, Justice Alito, and Justice Breyer criticized the fact that the formalism of the forensic report cases is founded on a "history" that could not even fathom the types of forensic reports at issue.[43] As the dissent stressed, "laboratory analysts are not 'witnesses against' the defendant as those words would have been understood at the framing."[44] Instead, "witnesses against" contemplated conventional, in-person, eyeball witnesses to crimes.[45] The dissent reasoned that beyond being unforeseeable to the Framers lab analysts could not be considered conventional witnesses because one, analysts record their contemporaneous observations and do not rely on memory as do conventional witnesses; two, the analyst is ignorant regarding who is accused or what his or her quantum of guilt may be where conventional witnesses see a person's identity and wrongful acts; and three, the scientific protocol involved in lab tests and reports adds layers of reliability that do not attach to conventional witnesses.[46] Each of these differences convinced the dissent that the lab analysts of today were starkly different from conventional witnesses contemplated by the Framers, both in terms of their reliability and adversarial nature.

Two years later, the Court was confronted with a similar Confrontation Clause question. In *Bullcoming v. New Mexico*, the Court considered a blood-alcohol concentration lab report the state tried to admit through the testimony of another scientist worked at the same lab but did not perform or observe the test and did not sign the certification.[47] Defense counsel dubbed this "surrogate testimony."[48] The Court found this report and method of introduction was similar enough to be governed by

36 *See id.*

37 *Melendez-Diaz*, 557 U.S. at 329 (stating "[t]his case involves little more than the application of our holding in Crawford v. Washington").

38 *See id.*

39 *Id.* at 329 (Thomas, J., concurring) (asserting that extrajudicial statements implicate the Confrontation Clause only when contained in formalized testimonials).

40 *Id.* at 329.

41 *Crawford*, 541 U.S. at 51-2 (describing the "core" class of testimonial statements as including affidavits and other formalized materials).

42 *See, e.g.*, Davis v. Washington, 547 U.S. 813, 835-42 (2006) (Thomas, J., concurring in judgment in part and dissenting) (decrying the Court's extension of "testimonial" status to statements made during a 911 call).

43 *See Melendez-Diaz*, 557 U.S. at 331 (Kennedy, J., dissenting) (averring that "[t]he Court's opinion suggests this will be a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the [Confrontation] Clause").

44 *Id.* at 343 (observing the concerns of treating analysts as conventional witnesses; for example, the analyst must be in court for his or her findings to be considered by the jury).

45 *Id.* at 343-44 (arguing that the Confrontation Clause applies only to witnesses who have personal knowledge of the defendant's guilt, not to evidence analysts).

46 *Id.* at 345-46.

47 Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011) (noting that the New Mexico Supreme Court determined live testimony of another analyst satisfied the Confrontation Clause).

48 Petitioner's Brief, Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), 2010 WL 4913553, *10.

Melendez-Diaz, and then held that the type of surrogate testimony attempted here by a "scientist who had neither observed nor reviewed" the testing technician's work was insufficient to satisfy the Confrontation Clause.[49] *Bullcoming* did not, however, foreclose the possibility of acceptable 'surrogate' testimony. Indeed, Justice Sotomayor's concurrence, representing the necessary fifth vote, seemed to deliberately pave the way for such testimony to be deemed sufficient in future cases; she stressed that it "would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results."[50] She also noted, presaging *Williams v. Illinois*, that this was not a case in which an expert gave an independent opinion on a testimonial report that was not itself admitted into evidence.[51]

In dissent, Justice Kennedy again joined by Chief Justice Roberts, Justice Breyer, and Justice Alito noted that his arguments from *Melendez-Diaz* applied with equal force to this case and that other reasons particular to *Bullcoming* also weighed against the majority's decision.[52] The dissent lamented that extending *Melendez-Diaz* would cause more problems for state prosecutions and exhaust state resources.[53] For example, the dissent noted a 71% increase in subpoenas for analyst testimony in DUI cases after *Melendez-Diaz*, which caused analysts to have to travel great distances to testify in court on most working days and hindered laboratory efficiency and productivity.[54]

The dissent also believed it was unnecessary to apply *Melendez-Diaz* to this case because of the continued availability of certain safeguards. One such safeguard was the defendant's ability to obtain free re-testing of the physical evidence as well as to subpoena the test-conducting lab technician to testify.[55] Additionally, the defendant benefitted from "testing by an independent agency; routine process performed en masse, which reduce . . . targeted bias; and labs operating pursuant to scientific and professional norms and oversight."[56] Furthermore, the dissent decried that "the *Crawford* line of cases has treated the reliability of evidence as a reason to exclude it," by concentrating on formality while formality tends to support reliability, *Crawford* and its progeny have determined that formality of a statement leads to testimonial status, which in turn leads to exclusion.[57]

Finally, last year, the Court decided its most recent forensic report case. In *Williams v. Illinois*, the Court considered the admissibility of expert testimony that was based on a DNA matching test that had been performed by a lab technician who did not testify.[58] The testifying lab technician created a DNA profile of the defendant; the non-testifying technician had tested physical evidence from the rape evidence to derive DNA material and create a different profile, to which the testifying technician matched her profile.[59] Crucially, the report "was neither admitted into evidence nor shown to the fact-finder. [The testifying lab technician] did not quote or read from the [other technician's] report; nor did she identify it as the source of any of the opinions she expressed."[60]

In an intensely fractured set of opinions, the plurality was comprised of Chief Justice Roberts along with Justices Kennedy, Alito, and Breyer the dissenting bloc from both *Melendez-Diaz* and *Bullcoming*. The plurality, authored by Justice Alito, had two foundations for its opinion. First, Justice Alito determined the testimony was not introduced for the truth of the matter that is, the veracity of the DNA test conducted by the non-testifying technician and thus the Confrontation Clause was

49 *Bullcoming*, 131 S. Ct. at 2713 (holding that out-of-court testimonials may not be introduced against the accused at trial unless the witness is unavailable and the accused had the opportunity to confront him or her in the past).

50 *Id.* at 2722 (Sotomayor, J., concurring).

51 *Id.* (Sotomayor, J., concurring).

52 *See id.* at 2723 (Kennedy, J., dissenting).

53 *Id.* at 2726-28 (Kennedy, J., dissenting) (detailing evidence of the heavy burdens imposed on prosecutors as a result of the Court's Confrontation Clause holdings).

54 *Id.* at 2727-28.

55 *Id.* at 2726-27.

56 *Id.* at 2727.

57 Bullcoming v. New Mexico, 131 S. Ct. 2705, 2725 (2011) at 2725.

58 Williams v. Illinois, 132 S. Ct. 2221, 2223 (2012).

59 *See id.* at 2229-30.

60 *Id.* at 2230.

not implicated.[61] The plurality highlighted the facts that the testifying technician only testified to relying on the other lab's DNA profile, made it clear that she had not conducted the test herself and could not speak from personal knowledge to its veracity, and merely properly assumed the prosecutor's premise regarding the other lab's DNA profile.[62]

The plurality also stressed that the report in question was "neither admitted into evidence nor shown to the factfinder,"[63] while in both *Melendez-Diaz* and *Bullcoming*, "[c]ritically, the report was introduced at trial for the substantive purpose of proving the truth of the matter asserted."[64] Furthermore, the fact that this case was presented before a judge rather than a jury saved it from potential jury instruction impossibilities.[65] There was no need to rely on a jury's understanding and application of the fact that the DNA expert's testimony was not to be understood as going to the reliability of the other technician's DNA profile or its origin in the physical evidence.[66]

Second, Justice Alito argued that the Court had only applied the Confrontation Clause in cases where the statement/report had "the primary purpose of accusing [a]targeted individual of engaging in criminal conduct."[67] Here, the DNA test of the vaginal swab was not conducted with a specific suspect in mind the defendant was not in custody or even under suspicion for the rape[68] nor did the conducting lab have any idea whether the results of the test would inculpate or exculpate anyone.[69] In light of these realities, "there was no 'prospect of fabrication' and no incentive to produce anything other than a scientifically sound and reliable profile."[70]

Justice Breyer concurred to express his desire that the case be reargued on general questions of the limit of *Crawford*.[71] Justice Breyer was (and likely remains) very concerned with the Court's unwillingness to grapple with defining what evidence is and is not testimonial and what factors are involved in this determination.[72] He insisted that answering this question was of utmost importance in order to give courts real guidance regarding a massive swath of their dockets: criminal cases, including those that involve lab reports.[73] In the absence of reargument, Justice Breyer would have held that the DNA report was not testimonial, because it was conducted by technicians of an accredited lab who were behind a veil of ignorance as to the origin of the sample and the purposes for which the result may be used[74] a rationale somewhat akin to Justice Alito's targeted criminal suspect requirement.

Justice Thomas concurred in the judgment (and was the necessary vote for the result) but did not join the plurality's opinion. As ever, Justice Thomas's conception of the Confrontation Clause remained the narrowest of the nine justices as he held that the DNA report in question, though admitted here for the truth of the

61 *See id.* at 2240 (averring that there is simply no way around the fact that under *Crawford*, the Confrontation Clause applies only to out-of-court statements used to establish the truth of the matter asserted).

62 *See id.* at 2235-37 (asserting that the lab technician's presumption was taken as substantive evidence to establish where DNA profiles came from).

63 *Id.* at 2230.

64 *See Williams*, 132 S. Ct. at 2223.

65 *See id.* at 2236 (proposing that "there would have been a danger of the jury's taking [the] testimony as proof that the [other lab's DNA] profile was derived from the sample obtained from the victim's vaginal swabs. Absent . . . careful jury instructions, the testimony could not have gone to the jury").

66 *See id.* at 2236-37 (stating that "this case involves . . . a bench trial, and we must assume that the trial judge understood that the portion of . . . testimony to which the dissent objects was not admissible to prove the truth of the matter asserted").

67 *Id.* at 2242 (finding that the Confrontation Clause applies to formalized testimony by witnesses against an accused that directly links him to the crime alleged).

68 *Id.* at 2242-44.

69 *Id.* at 2243-44.

70 *Williams*, 132 S. Ct. at 2224 (avowing that the Confrontation Clause did not apply because there was no risk of malice or fabrication in the collection of the scientific evidence).

71 *Id.* at 2247 (Breyer, J., concurring) (discussing the various approaches to applying the Confrontation Clause which would be more compatible with *Crawford*).

72 *See id.* at 2244-45 (contemplating "what, if any, are the outer limits of the 'testimonial statements' rule set forth in *Crawford"*).

73 *Id.* at 2248.

74 *Id.* at 2249-52.

matter asserted, was not testimonial because it was unsworn and not otherwise formalized enough to be testimonial.[75] Justice Thomas explicitly disagreed with the plurality's "accusing a targeted individual" requirement for testimonial status after finding no grounds for it in the text and history of the Confrontation Clause.[76]

Justice Kagan, writing in dissent along with Justices Scalia, Ginsburg, and Sotomayor, viewed this case as a straightforward application of *Melendez-Diaz* and *Bullcoming*,[77] going so far as to ask, "Have we not already decided this case?"[78] To the plurality's first argument, the dissent responded that what the plurality had signed off on was the functional equivalent of the surrogacy rejected in *Bullcoming* namely, the Court allowed an expert to testify regarding an inadmissible, Confrontation Clause-deficient fact of which she had no personal knowledge. To the plurality's second argument, the dissent stated that the "primary purpose" test had never required particularized suspicion regarding a targeted individual,[79] there was no reason to add such requirement,[80] and the Court had faced and rejected similar arguments of the reliability of forensic reports in *Melendez-Diaz* and *Bullcoming*.[81] Summing up the opinions, Justice Kagan stated, "What comes out of four Justices' desire to limit *Melendez–Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is to be frank who knows what."[82]

II. Analysis and Critiques of Case Law

As Justice Kagan rightly noted, it is anyone's guess what will become of Confrontation Clause jurisprudence in the area of forensic reports; however, this problem existed long before the Court's decision in *Williams*. In terms of guidance, a major shortcoming of the *Crawford* opinion was that it did almost nothing to define the parameters of the newly-crowned operative term, "testimonial." *Crawford* conceded that there could be many, widely varying formulations of testimonial.[83] However, as discussed above, the case did not begin to answer many important questions. For example, *Crawford* did not address whether less formal conversations with police or statements made before there is any criminal suspect or even suspicion of a crime could possibly be deemed testimonial. Indeed, the Court seemed to leave open that, beyond the largely undefined "core" of testimonial statements (e.g., affidavits, depositions, prior testimony, etc.), there may be other forms of statements, which could be deemed testimonial for Confrontation Clause purposes.[84] While the Court certainly could not have conclusively defined the field regarding the new standard in the genesis case, its reliance on history as a crutch has made the forensic report cases where history has only the vaguest and most attenuated relevance all the more confused.

In the forensic report context, the confusion began with the very first case. *Melendez-Diaz* asked whether a report needed formal swearing to be deemed testimonial.[85] *Crawford* seemingly resolved this question by noting that historically, "the absence of oath was not dispositive" and the statement made against Sir Walter Raleigh, (the "paradigmatic confrontation violation") was unsworn.[86] However, Justice Thomas was the fifth vote in *Melendez-Diaz* and rested entirely on his determination that the reports at issue were sworn affidavits.[87]

Thus, after *Melendez-Diaz*, this question had significant potential ramifications, because if Justice Thomas's very formal view triumphed (a dubious proposition considering the contrary views of at least seven other justices), the definition of "testimonial" would have been quite limited. Perversely, testimonial status could be avoided by not having certain reports sworn, and would be very easily dispatched by simply

75 *Id.* at 2258-61 (Thomas, J., concurring).
76 *Williams*, 132 S. Ct. at 2262-64 (Thomas, J., concurring).
77 *Id.* at 2266 (Kagan, J., dissenting).
78 *Id.* at 2267.
79 *See id.* at 2273.
80 *See id.* at 2274.
81 *See id.* at 2274-75 (Kagan, J., dissenting).
82 *Williams*, 132 S. Ct. at 2277.
83 *Crawford*, 541 U.S. at 51.
84 *See id.*
85 Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring).
86 *Crawford*, 541 U.S. at 52.
87 *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).

examining the face of the report in question. Under this regime, much of the subsequent case law would not have reached the merits stage in the Supreme Court. However, *Bullcoming* dispatched this possibility by holding that whether a forensic report is sworn or unsworn is not determinative in the testimonial analysis.[88]

The Court, though, proceeded to leave open a potentially larger avenue for admission. Though it struck down the variety of "surrogate testimony" present in *Bullcoming*, the majority's opinion[89] as well as Justice Sotomayor's fifth-vote concurrence, made clear that the surrogate theory was not dead. Justice Sotomayor's opinion leaves the potential parameters of such testimony completely open to question by stating, "we need not address what degree of involvement [by a testifying surrogate in the forensic report at issue] is sufficient."[90] Justice Sotomayor's concurrence and the majority's carefully drafted language arguably left open potentially acceptable surrogate testimony, including: the testimony of a supervisor who has internal oversight authority for the unavailable technician who conducted the test; testimony of a peer or subordinate technician who observed the particular test; and designation of a lone technician or group of technicians who would observe the forensic tests and become experts at testifying as to the reports.

Justice Sotomayor's opinion in *Bullcoming* also left open two other potential avenues to avoid Confrontation Clause inadmissibility. First, she hinted at the possibility that "an expert witness [being] asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence," may still be permissible under Federal Rule of Evidence 703,[91] which regards bases of expert opinion testimony. This rationale was subsequently utilized by the plurality in *Williams*, though Justice Sotomayor joined the dissent in that case.

Second, she noted that the Court may have decided the case differently if the state had "suggested . . . an alternate primary purpose," such as the blood-alcohol report being "necessary to provide . . . medical treatment."[92] This strain of argument remains uncertain after *Williams*, as the Court has yet to grapple with a case in which it finds multiple primary purposes (e.g., one for use in a criminal proceeding and one for non-criminal reasons). However, the concept of an "alternate primary purpose" is arguably internally contradictory as the word "primary" is defined as "of first rank, importance, or value,"[93] which indicates that there can be only one truly primary purpose for testimonial evidence. *Williams* perhaps raises the most questions of any of the three cases, all while leaving the surrogacy issue as open as Justice Sotomayor left it. The jumble of opinions in this case is incredibly difficult to comprehend, and it remains somewhat unclear how they will be read to include or form a coherent precedent that can be cohesively followed. Regarding Justice Alito's plurality opinion, it is unclear to what extent the nuanced and complicated "not for the truth of the matter asserted" rationale would apply in a jury trial setting.[94] Justice Alito made clear that he was relying on the fact that this was a bench trial to convince himself that the nuanced admission of the evidence was fully understood by the finder of fact.[95] The legal acumen required in even this relatively straightforward evidentiary issue makes it appear unlikely that a jury instruction could

88 Bullcoming v. New Mexico, 131 S. Ct. 2705, 2716-17 (2011).

89 *See id.* at 2710 (phrasing carefully the question regarding the testimony of a scientist "who did not sign the certification or perform or *observe* the test") (emphasis added); *see also id.* at 2712 (phrasing the facts as involving a "scientist who had neither observed nor reviewed" the test in question).

90 *Id.* at 2722 (Sotomayor, J., concurring).

91 *Id.*

92 *Id.*

93 *Primary Definition*, Merriam-Webster.com, http://www.meriam-webster.com/dictionary/primary (last visited Dec. 12, 2013).

94 *Williams*, 132 S. Ct. at 2236 (proposing that "[t]he dissent's argument would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury's taking [the lab technician's] testimony as proof that the [other lab's] profile was derived from the sample obtained from the victim's vaginal swabs").

95 *Id.* at 2236-37 (asserting that "this case … involves a *bench trial*, and we must assume that the trial judge understood" for which purposes the evidence was admissible and for which it was inadmissible) (emphasis in original).

properly cure potential Confrontation Clause risks, such as the DNA expert's testimony being used for the veracity or reliability of the swab test. Indeed, Justice Alito conceded that such an argument would have force in the jury trial context,[96] because a jury may not be able to understand and follow such nuanced (and arguably "factually implausible")[97] legal arguments even with the most careful of instructions. Additionally, even before the *Williams* opinions were handed down, commentators who rightly predicted the outcome stressed that the Court would need to provide clear guidance on "the nature and quantum of independent judgment and independent basis which is required to permit testimony of an expert predicated in part upon the forensic report compiled by another analyst."[98] Unfortunately, the plurality did no such thing, and these questions remain as unclear as before.

Of even more potential import is Justice Alito's second theory namely that the Confrontation Clause is only triggered by statements/tests that are elicited or conducted when law enforcement has a particular target in a criminal investigation.[99] If this rationale were to find a fifth vote at some point, it could be of incredible significance not just for DNA test cases, but also in many autopsy report cases where the autopsy was conducted before there was any criminal suspicion at all.

Of course, the woefully unhelpful nature of these opinions is largely the result of a Court irreconcilably divided against itself: between dogged adherence to "history" on the one hand (exemplified best by Justices Scalia and Thomas) and a more realistic and pragmatic approach (exemplified by the dissenting bloc of Chief Justice Roberts, and Justices Alito, Breyer, and Kennedy). However, at this point the Court must be fully aware of this divide, and it ought to no longer act so cavalierly in this area.

The Court should be especially careful in granting certiorari in its next Confrontation Clause case granting certiorari without a willingness to resolve important questions of law serves neither criminal defendants nor the state's prosecutions. Rather, it heightens the degree of unpredictability in each new, slightly different factual situation. For example, after *Williams*, prosecutors may believe they are constitutionally safe where the statement occurred before there was any criminal suspicion; they thus may attempt to craft some form of permissible surrogate testimony through a supervisor or other informed party, or they may argue that the report in question had an alternate primary purpose other than preparation for a criminal trial. Any of these efforts may be perfectly well intentioned and optimally protective of all interests involved, and yet it is far from clear which, if any, would be acceptable.

Part IV of this paper will present the most likely methods for the state to introduce autopsy reports without the testimony of the medical examiner who conducted the autopsy, discuss the pros and cons of each way forward, and analyze the relative likelihood of success of each method in the Supreme Court. But first, Part III will detail the development of Confrontation Clause as related to autopsy reports and discuss how this field may provide an opportunity for the Court to clarify its Confrontation Clause jurisprudence as applied to forensic reports.

III. Autopsy as Case Study

Autopsy reports are a useful subset of forensic reports for Confrontation Clause purposes because they are very important to a prosecution's case, are typically involved in cases resulting in death, meaning the public has the greatest interest in effective prosecution, and the Supreme Court will likely be dealing with the question within the next few terms.

96 *Id.* at 2236 (noting that "absent an evaluation of the risk of juror confusion and careful jury instructions, the case could not have gone to the jury").

97 *Id.* at 2269 (Kagan, J., dissenting) (asserting that "the principal modern treatise on evidence variously calls the idea that such 'basis evidence' comes in not for its truth, but only to help the factfinder evaluate an expert's opinion 'very weak,' 'factually implausible,' 'nonsense,' and 'sheer fiction'") (quoting D. Kaye et al., The New Wigmore: Expert Evidence § 4.10.1, at 196-97 (2d ed. 2011)).

98 Ronald Coleman & Paul Rothstein, *Grabbing the* Bullcoming *by the Horns*, 90 Neb. L. Rev. 502, 542 (2011) [hereinafter *Grabbing the* Bullcoming].

99 *See Williams*, 132 S. Ct. at 2242-44.

An autopsy report differs materially from almost any other forensic report, and certainly from any the Court has considered. Importantly, in cases like *Melendez-Diaz* and *Bullcoming*, the police have the identity of the criminal suspect, and he or she is the source of the physical evidence is tested. On the other hand, autopsy reports in murder situations are not always tied to a suspect; instead, autopsies are performed to establish the cause of death or to add detail to a police recreation of the incident that led to the murder. Like the vaginal swab in *Williams*, the source of the physical evidence tested is the victim rather than the perpetrator.

A. The Particular Importance and Unique Challenges of the Autopsy

The fact that the source of the physical evidence tested is the victim rather than the perpetrator is important for both legal and policy reasons. First, and foremost, it means that autopsy reports are nowhere near as automatically attached to a swift prosecution and trial as the types of report present in *Melendez-Diaz*, *Bullcoming*, and *Williams*. In the first two cases, once the report was completed, prosecutors essentially had everything necessary to bring a case against the suspect, and there was little to no danger of significant delay between the test and the date of testimony. In contrast, murder investigations can lay dormant for long periods of time before a suspect is pinpointed and captured. In most cases, the existence of the autopsy will not further significantly the effort to discover the wrongdoer; it typically reveals only the cause of death, not necessarily the identity of any person who may have contributed to the death. Second, the above problem is compounded by the fact that autopsy reports are not repeatable in the same way that most other forensic reports are. In the other forensic report cases, the tested evidence is often preserved and may be retested at a later date.

This availability mitigates some of the concern that the death of a particular scientist may render vital evidence inadmissible; indeed, this has been noted in *Melendez-Diaz*[100] and *Bullcoming*.[101] Each opinion recognized that the harsh consequences for prosecutions attendant to barring introduction of these reports are significantly diminished where the physical evidence remains available and viable to be retested and admitted into evidence with the testimony of the second tester. For example in drug test cases, a sample of the drugs are typically kept through trial so there is physical evidence to present, and that evidence will not degrade and may be retested to solve potential Confrontation Clause problems.

However, the Court correctly observed that such alternatives are simply not available when dealing with autopsy reports.[102] This had led commentators to caution that barring introduction of autopsy reports could in effect create a statute of limitations for murder[103] a patently unacceptable result as indicated by the fact that states normally do not have a statute of limitations for murder.[104]

Finally, of all forensic reports, autopsy reports may provide the starkest illustration of how uncertainty in Confrontation Clause doctrine can have significantly negative effects on our system of criminal prosecution. Whereas, the three cases decided thus far respectively arose out of serious drug crimes and a heinous rape, cases in which the prosecution seeks to introduce an autopsy, as evidence will involve a criminal act or omission that resulted in death. These are precisely the kind of crimes for which the public reserves the utmost condemnation and prosecutors have the greatest desire and incentive to prosecute. Because of the importance of effective prosecution of these crimes, it is vitally important to establish ways to admit autopsy reports even when the opportunity to cross-examine is not available. Such an argu-

100 *See Melendez-Diaz*, 129 S. Ct. at 2536.

101 *See Bullcoming*, 131 S. Ct. at 2718.

102 *See Melendez-Diaz*, 129 S. Ct. at 2536 (stating that "[s]ome forensic analyses, such as autopsy reports . . . cannot be repeated, and the specimens used for other analyses have often been lost or degraded").

103 *Grabbing the* Bullcoming, *supra* note 98, at 546 (quoting Carolyn Zabrycki, *Toward A Definition of "Testimonial:" How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Calif. L. Rev. 1093, 1115 (2008)).

104 *See, e.g.*, United States v. Burke, 425 F.3d 400, 409 (7th Cir. 2005).

ment does not inexorably require diminution or sacrifice of defendant's rights at the altar of prosecution; rather, it argues in favor of other, equally-protective procedures beyond cross-examination that would still allow for introduction of a properly conducted and recorded autopsy report.

On the other hand, autopsy reports may necessitate detailed testimony more often than the tests conducted in *Melendez-Diaz*, *Bullcoming*, and *Williams*. In each of those cases, the test at issue was conducted by use of sophisticated machines according to a rote and straightforward procedure. These machines, with minimal input from the humans operating them, produced a straightforward answer to a relatively simple question.[105] In *Melendez-Diaz*, the machine revealed whether the substance was an illegal drug; in *Bullcoming*, the machine showed whether the defendant's blood alcohol concentration above the legal limit; in *Williams*, it revealed whether there was a DNA match. Less simple and straightforward, autopsies rely heavily on the expertise and experiential inferences of the conducting medical examiner. Furthermore, autopsies do not necessarily produce a definitive or simple answer to the question of cause of death. This counterargument counsels in favor of having the conducting examiners testify whenever it is reasonably feasible. However, the complexity of autopsies should not be subject to the draconian bar the Court has erected to admission, when, for example, the conducting examiner has died in the interim or his or her whereabouts are actually unknown to the prosecution. Murder prosecutions and the centrality of autopsy reports to them are simply too important to be left to the happenstance of when a suspect is found and prosecuted, let alone the significant risk of a material change in the circumstances of the medical examiner who conducted the autopsy. Examples abound of the unavailability of medical examiners from retirement, significant moves,[106] medical conditions,[107] or death and the fact that many murder prosecutions take place years after the autopsy is conducted only heightens these risks.

In analyzing this issue, the current legal backdrop (including the ebbs and flows following each Supreme Court decision) of the autopsy issue will be examined.

Finally, this article will suggest possible methods for introducing such evidence without the testimony of the medical examiner that conducted the autopsy.

B. Post-Crawford Autopsy Case Law

Two years after *Crawford* overhauled the Confrontation Clause analysis, the Second Circuit confronted the newly important question of whether autopsy reports are testimonial such that they must be barred in the absence of cross-examination of the conducting medical examiner.[108] In *United States v. Feliz*, the Second Circuit panel confronted a case in which nine autopsy reports had been admitted in a homicide prosecution without the testimony of the conducting medical examiner. The defendant had run a violent drug distribution organization, but the autopsies were conducted without targeting a specific individual for suspicion. On appeal of his conviction, the defendant did not challenge the District Court's decision that the autopsy reports were admissible as business records.[109] Instead he argued that *Crawford* rendered the autopsy reports inadmissible as testimonial evidence submitted without the opportunity to cross-examine the medical examiner that had conducted the autopsies and

105 *But see* Paul F. Rothstein & Ronald J. Cohen, Williams v. Illinois *and the Confrontation Clause: Does Testimony by a Surrogate Witness Violate the Confrontation Clause*, at n.1, (Dec. 6, 2011), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1740&context=facpub (noting, in a piece featuring a debate between the authors, the myriad complications that can arise even with mechanical forensic testing, and arguing that forensic testers have their own self-interest, namely, to prove that their job requires significant expertise and machines do not do the lion's share of the work).

106 *See, e.g.*, United States v. Williams, 740 F. Supp. 2d 4, 6 (D.D.C. 2010) (noting autopsy-conducting medical examiner had moved overseas).

107 *See, e.g.*, Nardi v. Pepe, 662 F.3d 107, 109 (1st Cir. 2011) (explaining that the autopsy-conducting medical examiner had retired to Florida and could not testify at trial due to a medical condition).

108 *United States v. Feliz*, 467 F.3d 227, 229 (2d Cir. 2006).

109 *Id.* at 230.

drafted the reports. The panel first found that "the sole relevant inquiry under the Confrontation Clause is whether the autopsy reports are testimonial,"[110] and that labeling the reports as a business record without inquiry into testimonial status would not be sufficient.[111]

The Second Circuit then held that a properly admitted business record "cannot be testimonial because a business record is fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence."[112] In reaching this conclusion, the panel reasoned that business records "cannot be made in anticipation of litigation" and thus "bear[] little resemblance to the civil-law abuses the Confrontation Clause targeted."[113] In holding that the autopsy reports were not testimonial, the panel noted that the reports were "reports kept in the course of a regularly conducted business activity; the Office of the Chief Medical Examiner of New York conducts thousands of routine autopsies every year, without regard to the likelihood of their use at trial."[114]

Interestingly (particularly after *Williams*), the court admitted, "Certainly, practical norms may lead a medical examiner reasonably to expect autopsy reports may be available for use at trial, but this practical expectation alone cannot be dispositive on the issue of whether those reports are testimonial."[115] The panel justified this apparent logical conflict by stating, "Given that the Supreme Court did not opt for an expansive definition that depended on a declarant's expectations, we are hesitant to do so here."[116] In light of subsequent Confrontation Clause precedent particularly the development of the "primary purpose" inquiry[117] the Second Circuit's admission that parties would reasonably expect autopsy reports to be used at trial could be fatal to this rule's continued vitality, as this statement tends to indicate that the primary purpose of autopsies in homicide cases is for use in a subsequent criminal proceeding.

The First Circuit also addressed the question after *Crawford* but before *Melendez-Diaz* and *Bullcoming*.[118] In *De La Cruz*, the panel was confronted with a challenge to the admissibility of an autopsy in a case in which drug distribution allegedly resulted in the death of one of the drug buyers.[119] The testifying medical examiner had not conducted the autopsy in question, but rather based his testimony on the autopsy report, crime scene photographs, and a general review of the whole investigative record.[120] The court agreed with the Second Circuit reasoning, "[A]n autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy;" the report thus was admissible as a non-testimonial business record.[121]

The business record exception noted in and relied on (to varying degrees) by *Feliz* and *De La Cruz* no longer ends the analysis, as the *Melendez-Diaz* Court made clear. There, the Court asserted, "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial they are not testimonial."[122] The *Feliz* reasoning may retain some life because it relied on the Supreme Court's general interpretations of "testimonial" rather than the blanket business re-

110 *Id.*
111 *Id.* at 233-34, n.4.
112 *Id.* at 233-34.
113 *Id.* at 234 (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004)).
114 United States v. Feliz, 467 F.3d 227, 236 (2d Cir. 2006) (internal citation omitted) (internal quotation marks omitted).
115 *Id.* at 235.
116 *Id.* at 236.
117 *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 n.12 (2009) (excluding "medical reports created for treatment purposes" from testimonial status); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring) (hinting that a primary purpose argument could have rendered the blood alcohol report non-testimonial).
118 United States v. De La Cruz, 514 F.3d 121 (1st Cir. 2008).
119 *Id.* at 125-27.
120 *Id.* at 132.
121 *Id.* at 133 (asserting that "business records are expressly excluded from the reach of *Crawford*").
122 *Melendez-Diaz*, 557 U.S. at 324.

cord exception used by the First Circuit, which the *Melendez-Diaz* passage specifically sought to clarify. The *Feliz* court noted that merely labeling evidence as a business record was not sufficient to exclude it from testimonial status, and it instead embarked on a searching discussion of what the Supreme Court meant by "testimonial" and how it applied to autopsies. For this definitional argument to retain any strength, a reviewing court would have to distinguish autopsy reports from the chemical test conducted in *Melendez-Diaz* and the blood alcohol concentration test from *Bullcoming*, because each of those varieties of forensic reports have clearly been deemed testimonial. However strong *Feliz* may be in a broad legal sense, it may be undermined on its facts, because the autopsies were conducted following homicides and, as noted above, were likely carried out for the primary purpose of providing evidence at a future trial. Autopsy reports in this context are likely testimonial.

Early last year, the Eleventh Circuit addressed the autopsy question with the added benefit of the Supreme Court's decisions in *Melendez-Diaz* and *Bullcoming*.[123] *Ignasiak* involved a doctor convicted of illegally dispensing controlled substances. Autopsy reports had been admitted some with and some without the testimony of the conducting medical examiner to show that the doctor was providing controlled substances in unnecessary or excessive quantities without a legitimate medical purpose and that such dispensation had resulted in the deaths of some of his patients.[124]

The autopsy reports were performed pursuant to Florida state statute and were carried out before the investigation into the doctor's practice began.[125] The court relied heavily on *Melendez-Diaz* and *Bullcoming* to issue blanket statements such as "forensic reports constitute testimonial evidence," and "the scientific nature of forensic reports does not justify subjecting them to lesser scrutiny."[126] The court then looked to the state's autopsy statute to bolster the proposition that autopsy reports in Florida are testimonial. Most notably, the court considered certain reporting requirements between law enforcement and medical examiners[127] that may not exist in the same way in every jurisdiction.

Finally, cutting back in the non-testimonial direction, the Supreme Court of Illinois recently decided that an autopsy was non-testimonial and admissible without the testimony of the conducting medical examiner.[128] The court examined a case in which an autopsy report was introduced, without the testimony of the medical examiner, to help prove intentional homicide after the defendant had admitted to killing his wife but claimed it was an accident.[129] When the autopsy was conducted, the state had criminal suspicion and a particular, targeted suspect. The court detailed the significant rift in authority between the states on this question, but determined that the autopsy in this case was not testimonial. First, the court noted that autopsy reports are "not usually prepared for the sole purpose of litigation,"[130] and the "primary purpose of preparing an autopsy report is not to accuse a targeted individual of engaging in criminal conduct."[131] Next, the court contrasted the autopsy with a DNA match in stating that "the autopsy report did not directly accuse [the] defendant." Other evidence was required to tie the defendant to the particular body; all the autopsy proved was that the death was in fact a homicide.[132] Even in cases where "the police suspect foul play and the medical examiner's office is aware of this suspicion, an autopsy might reveal that the deceased died of natural causes and, thus, exon-

123 United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012).

124 *Id.* 667 F.3d at 1219.

125 *See generally* Brief of Plaintiff-Appellee United States, United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012), 2009 WL 5635077.

126 *Ignasiak*, 667 F.3d at 1230.

127 *Id.* at 1231-32 (citing Fla. St. § 406.13, which requires the medical examiner to "notify the appropriate law enforcement agency" upon receipt of a dead body to be autopsied).

128 People v. Leach, 980 N.E.2d 570 (Ill. 2012).

129 *Id.* at 572-73.

130 *Id.* at 592.

131 *Id.* (quoting Williams v. Illinois, 132 S. Ct. at 2242 (2012) (citation omitted) (internal quotation marks omitted)).

132 *Leach*, 980 N.E.2d at 592.

erate a suspect."[133] Finally, the court advanced an imminently reasonable, though almost entirely pragmatic, rationale: "the potential for a lengthy delay between the crime and its prosecution could severely impede the cause of justice if routine autopsy reports were deemed testimonial merely because the cause of death is determined to be homicide."[134] The Illinois Supreme Court's holding in *People v. Leach* is not terribly convincing. It leans heavily on the *Williams'* plurality "targeting" rationale even though that rationale did not win five votes in the United States Supreme Court. Furthermore, in *Leach*, there was a targeted individual the husband when the autopsy was conducted. What *Leach* will likely do, though, is speed up the development of Confrontation Clause questions regarding autopsies in the lower courts, and may ultimately encourage the Supreme Court to clarify the issue.

As of the time this article was written, Missouri,[135] Texas,[136] and the Eleventh[137] and D.C.[138] Circuits have held that autopsy reports (conducted under the circumstances set out in the corresponding footnotes) are deemed testimonial for Confrontation Clause purposes. On the other hand, as discussed above, Illinois and the First and Second Circuits appear to hold that autopsy reports are not testimonial, relying on a business record rationale that may be on shaky footing after *Melendez-Diaz* and *Bullcoming*. Depending on how the Supreme Court approaches the issue, these decisions could be reconcilable; however, if the Court seeks a categorical, bright-line rule, rather than a case-by-case determination, it will have to choose between the two alternatives put forth by the lower courts.

133 *Id.* at 591.

134 *Id.* at 592.

135 State v. Davidson, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007) (holding that autopsy performed at request of law enforcement is testimonial).

136 Martinez v. State, 311 S.W.3d 104, 111 (Tex. Ct. App. 2010) (holding that autopsy at which law enforcement took pictures and which was conducted pursuant to statute because death was suspected to be caused by unlawful means was testimonial).

137 *Ignasiak*, 667 F.3d at 1229-30.

138 United States v. Moore, 651 F.3d 30, 73 (D.C. Cir. 2011) (holding autopsy requested by law enforcement and attended by law enforcement to be testimonial).

IV. Analysis and Possible Ways Forward

This article proposes that the Confrontation Clause holdings are trending in the wrong direction. *Melendez-Diaz* and *Bullcoming* appear to have convinced some courts that all varieties of forensic reports are testimonial, regardless of the actual circumstances or the comparable import of the reports. Indeed, even in Second Circuit trial courts, where F*eliz* remains good law, there is uncertainty about its continued vitality after *Melendez-Diaz* and *Bullcoming*.[139] *Leach*, the recent Illinois decision, will likely spur further development of the issue in state and federal courts, eventually leading to a well-defined split of authority involving many jurisdictions, making it ripe for Supreme Court review.

There are a few ways forward when the Court is eventually confronted with the issue. First, it is important to separate the potential situations in which autopsy reports may be introduced. This is necessary, because the legal grounds for admitting autopsy reports may diverge significantly between the three broadly framed groups of cases. These three situations are: one, cases in which the autopsy is conducted without particularized criminal suspicion, but is conducted instead under a non-criminal provision of a state's autopsy statute (e.g., *Ignasiak*); two, cases in which law enforcement have criminal suspicion but no suspect (e.g., *Feliz*); and three, cases in which law enforcement have criminal suspicion and a suspect prior to or contemporaneous with the autopsy (e.g., *Leach* and *De La Cruz*).

The Eleventh Circuit in *Ignasiak* sufficiently illustrated the first set of cases. In a non-homicide context, this case provides a perfect example of how harmful a strict and unreflective application of the Confrontation Clause to bar the introduction of autopsy reports can be. There is a strong argument that such an autopsy report is not testimonial. Autopsy reports conducted in cases before there is suspicion of any criminal wrongdoing are typically conducted pursuant to state law requiring au-

139 *See, e.g.*, Vega v. Walsh, 2010 WL 2265043, *4 (E.D.N.Y. May 28, 2010).

topsy reports in certain situations even before any sort of criminal component exists. State statutes provide many reasons to conduct autopsies that extend well beyond obvious circumstances of criminal wrongdoing.[140] In each of the state statutes listed below that provide for autopsy in the public interest or at the discretion of the medical examiner, there are alternative grounds for explicit criminal suspicion-related autopsies, including autopsies conducted at the request of the prosecutor's office. Clearly, then, there is significant room in state statutes for autopsies to be conducted in cases without criminal suspicion. If the autopsy reports were conducted years before the underlying criminal investigation even began, it strains credulity to claim that the autopsy reports were somehow conducted with a primary purpose for use in litigation. To adopt this broad of an interpretation would mean that every single case would involve a testimonial statement; in an *ex post* view, if the prosecution attempts to introduce the evidence, the evidence must be intended for litigation, rendering it testimonial and therefore barred, absent the testimony of the party who created the evidence.

The second set of cases, where there is criminal suspicion but no targeted individual, is left somewhat indeterminate after *Williams*. This confusion comes from the distinction between Justice Alito's view that the lack of a particularized suspect renders a report non-testimonial[141] and the dissent's view that only a primary purpose for use in litigation, rather than in litigation against a particular suspect, is required to render a report testimonial.[142] Going forward, the latter argument seems more likely to prevail. Indeed, arguably, it did prevail in *Williams* itself because Justice Thomas seems to have joined the dissent on this point.[143] Accordingly, this variety of autopsy reports is most safely dealt with in the same way as the third and final variety.

The third set of cases, exemplified by *Leach* and *De La Cruz*, are those in which there is both criminal suspicion and an actual suspect, and these are probably the most straightforward. Any argument that such an autopsy was not testimonial i.e., was not conducted with the primary purpose of use in criminal prosecution is unpersuasive. Under current Supreme Court precedent, neither the second nor third variety of autopsies would be admissible without the testimony of the conducting medical examiner. Even so, as discussed above, there are compelling reasons why the Court should be receptive to different ways of introducing the evidence found in an autopsy report so long as the means of admission protects defendants' interests as well as (or better than) cross-examination. Here, I suggest three potential methods of introducing autopsy

140 *See, e.g.*, Alaska Stat. § 12.65.020(a) (providing for autopsy where the medical examiner determines that the death occurred under circumstances that warrant investigation); Ariz. Rev. Stat. § 11-597 (providing for autopsy when medical examiner determines it is in public interest); Ark. Code § 12-12-315(a)(1)(A) (providing myriad reasons for autopsies beyond criminal suspicion); Cal. Gov. Code § 27491 (providing myriad reasons for autopsies beyond criminal suspicion)); Conn. Gen. Stat. § 19a-406 (same); Del. Code § 4707(b) (providing for autopsy in the public interest); D.C. Code § 5-1409(b) (same); Haw. Rev. Stat. § 841-14 (same); Idaho Code § 19-4301B (same); Ind. Code § 36-2-14-6 (providing for autopsy in non-criminal situations where the medical examiner deems an autopsy necessary); Iowa Code § 331.802 (providing for autopsy in the public interest, including many enumerated non- criminal circumstances); Kan. Stat. § 22a-233 (providing for autopsy where coroner deems one necessary); Maine Rev. Stat. § 3028(8) (providing for autopsy in the public interest); Mass. Gen. Laws 38 §§ 3(1)-(19), 4 (providing for notification and autopsy in myriad non-criminal contexts); Minn. Stat. § 390.11 (providing for autopsy in the public interest, including many enumerated non-criminal circumstances); Miss. Code §§ 41-61-65(1), 41-61-59 (same); N.H. Rev. Stat. 611-B:17 (providing for autopsy where medical examiner deems one necessary); N.J. Stat. 52:17B-88 (same); N.C. Gen. Stat. § 130A-389(a) (providing for autopsy in the public interest); 63 Okla. Stat. § 944 (same); Tenn. Code §§ 38-7-108, 38-7-109 (providing for notification and autopsy in myriad non-criminal contexts); Utah Code § 26-4-6 (providing for autopsy where medical examiner deems on necessary); Va. Code § 32.1-285 (providing for autopsy in the public interest); W.V. Code § 61-12-10 (same).

141 Williams v. Illinois, 132 S. Ct. 2221, 2242 (2012).

142 *Id.* at 2273-74 (Kagan, J., dissenting).

143 *See id.* at 2262 (Thomas, J., concurring in judgment) (arguing that the plurality's targeted primary purpose test "lacks any grounding in constitutional text, in history, or in logic"); *see also id.* at 2273 (Kagan, J., dissenting) ("Justice Thomas rejects the plurality's views for similar reasons as I do, thus bringing to five the number of Justices who repudiate the plurality's understanding of what statements count as testimonial.").

reports of the second and third variety, which could each apply equally to the first variety if the non-testimonial argument fails.

First, the possibility of surrogate testimony remains alive, though perhaps not "well."[144] After *Bullcoming* particularly in light of Justice Sotomayor's concurrence it seems any allowable surrogate testimony would have to be closely tied to the examiner who conducted the autopsy. If the testifying witness had in fact observed or supervised the autopsy in question, it is likely that the Court would be satisfied with his or her testimony. One possibility for jurisdictions with available resources would be to videotape the examination room. It appears that at least Florida,[145] Indiana,[146] North Carolina,[147] North Dakota,[148] and South Carolina[149] already contemplate photography and videography to some degree during autopsies. In so doing, the jurisdiction would provide a means of admission where testimony is needed but the conducting examiner is not available for whatever reason. Another member of the same lab would be able to view the autopsy after the fact in much the same way as if he or she had been present during the autopsy, and this viewing would then qualify the examiner to testify as a proper surrogate. This route has the virtue of simplicity and efficiency, as it preserves resources and medical examiners' time. In the vast majority of autopsy reports, no future testimony will be required, so it would be an incredible burden to require contemporaneous observation by another examiner during each autopsy just in case examiner testimony were later needed at trial. Video also allows the lab to avoid having to guess which exams may result in evidence that will be necessary for later prosecutions.

This solution would also likely provide for even better cross-examination fodder than would the testimony of the conducting examiner were he or she to proceed without the benefit of the videotape. Medical examiners conduct hundreds of autopsies per year and it is incredibly unlikely that an individual medical examiner will remember anything about a single autopsy conducted months (or longer) before. Instead, any examiner who testifies without the aid of video would likely testify as to what the report says and would claim to have followed typical lab protocol neither of which provides much fruit for cross-examination. Indeed, cross-examination in many circumstances is unlikely to effectively protect a defendant's rights.[150] With or without the ability to cross-examine, the best possible forensic evidence will only come through rigorous laboratory accreditation standards, vigilant internal oversight, and inquisitive public organizations. To the extent that the Court can incentivize or bolster these three things, it should, but they are best addressed through legislation, funding, and public scrutiny.

Second, and perhaps more likely to succeed in the Court, the prosecution could attempt the *Williams* form of introduction. In short, the prosecution could have an expert testify regarding the cause of death after reviewing the autopsy report without attempting to introduce the report itself. Such testimony would be the expert's own opinion, and it should not be allowed to be used as an end-run around the Confrontation Clause.[151] That is to say, a

144 *See, e.g.*, *Grabbing the* Bullcoming, *supra* note 98, at 545-46.

145 *See* Fla. Stat. § 406.135 (providing for disclosure of autopsy video and/or audio recordings to certain parties).

146 *See* Ind. Code 16-39-7.1-3 (providing for disclosure of autopsy video and/or audio recordings to certain parties).

147 *See* N.C. Gen. Stat. § 130A-389.1 (entitled "Photographs and video or audio recordings made pursuant to autopsy").

148 *See* N.D. Cent. Code § 44-04-18.18 (providing for disclosure and use of autopsy photographs or videos to certain parties for particular reasons).

149 *See* S.C. Code § 17-5-535 (providing for disclosure and use of autopsy photographs or videos to certain parties for particular reasons, including for use by the prosecutor's office in pressing charges).

150 *See, e.g.*, *Williams*, 132 S. Ct. at 2250 (Breyer, J., concurring) (noting the ineffectiveness of cross-examination to root out faulty evidence, and citing studies, concluding that, "[i]n the wrongful-conviction cases to which this Court has previously referred, the forensic experts all testified in court and were available for cross-examination").

151 *See id.* at 2272 (Kagan, J., dissenting) (cautioning that this approach would "allow prosecutors to do through subterfuge and indirection what we previously have held the

court must be satisfied that the testimony was introduced as a permissible expert opinion relying on foundational, though inadmissible, evidence, rather than for the truth of the matter asserted.

Similar to the surrogacy option, the permissible scope of such a procedure is unclear. All that is known is that the report itself could not be admitted, and that the expert's testimony as it directly pertains to the report could not be introduced for the truth of the matter asserted. Defense counsel will undoubtedly argue that an autopsy report is more nuanced than the simple "does this 'match' in your expert opinion" presented in *Williams* regarding DNA matching. This added complexity may confuse the jury and perhaps render a saving jury instruction impossible. The complexity also may undermine the expert's ultimate opinion since he or she is only operating from the written notes of the conducting medical examiner. These types of arguments could force the Court to confront more directly the parameters of expert opinion admissibility under the Confrontation Clause, where it is based on forensic reports.

Another significant and, perhaps, fatal concern with the admission of such testimony is that it is not clear that it sufficiently protects defendants' rights. Unlike the video option presented above, the defendant is not afforded an opportunity to confront the specially-informed examiner (i.e., one who has reviewed the tape of the report in question) and instead is stuck with the worst possible scenario: an expert who relies entirely on the report itself, without any requirement of personal knowledge as to the lab in question, the conducting examiner, or how the particular autopsy report was created. Furthermore, though the report itself is ostensibly not admitted, as the discussion above (as well as the discussion in *Williams*) makes clear, it is nearly impossible to disentangle assumptions about the veracity and reliability of the substance of the report from jury's minds once it has been discussed, even tangentially, by the expert. Accordingly, the video option is far superior, and the Court should be very reluctant to expand the first theory of *Williams* to other contexts.

Finally, there is the least realistic (from a current "five-votes" perspective) but potentially appealing proposition raised very briefly by Justice Breyer in *Williams*. He argued that there might be room for state regulation where the evidence at issue is not particular testimonial statements that occupy a "constitutional heartland" described by *Crawford*.[152] In particular, he argued "the states could create an exception that presumptively would allow introduction of DNA reports from accredited crime laboratories." However, this presumption would vanish where "there [is] significant reason to question a laboratory's technical competence or its neutrality."[153] Though it is unclear to what extent his argument was conditioned on a determination that DNA profiles were not testimonial, his brief argument arguably distinguished between "core" testimonial and other testimonial evidence, and states could regulate the latter. It is also unclear whether Justice Breyer would expand this practice beyond DNA laboratories. Despite the uncertainties, there is much to support Justice Breyer's idea.

If done properly, both prosecutors and defendants could benefit from this approach. First, prosecutors would appreciate clarity and ease of introduction of often- vital forensic evidence, as compared to the current uncertain approach. There would be no danger of the court flatly barring important evidence; rather, it would be introduced when the testing lab lived up to the accreditation standards. If the lab did not, the prosecution would still have an opportunity to present testimony sufficient to introduce the evidence. Additionally, lab accreditation and monitoring would not unduly burden the state from a resource perspective, because if a state chooses to operate its own labs there can be no argument of unfairly draining resources. The labs would simply be required to meet the standards of good practice established by stat-

Confrontation Clause prohibits").

152 *See Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring in judgment).

153 *Id.*

ute and upheld by courts.

Defendants, on the other hand, would have a better way to attack the reliability of technicians and tests than cross-examination. In making the argument for cross-examination, defendants have pointed out the many examples of labs around the country that have significant internal problems regarding storage, labeling, and testing of physical evidence.[154] In *Melendez-Diaz*, amici argued that cross-examination is necessary because "forensic laboratories are not even required to maintain accreditation with a standard-bearing organization."[155] If accreditation were required, stringent, and closely monitored, defendants and defense counsel should be pleased.

Though this approach is certainly unrealistic with the current composition of the Court, developments in the next few presidential terms may change the outlook. The Court's current quagmire on Confrontation Clause questions in forensic report cases is largely traceable to Justice Scalia: by authoring the majority in *Crawford* he took the Court away from reliability concerns, and by authoring the opinion in *Melendez-Diaz* (the first of the forensic report cases) he arguably enlarged the Confrontation Clause beyond its bounds,[156] firmly entrenching forensic reports in the uncomfortable, unclear, and unwieldy position of having "testimonial" status. Sometime within the next decade, Justice Scalia will likely leave the Court. As he does, he will leave behind at least Justices Kagan and Sotomayor, who voted with him in *Bullcoming*. But neither of these Justices seems likely to take up the banner for the formal, "historical" approach that Scalia championed. If Justice Thomas has also left the bench (or if he is unable to marshal four votes on divisive issues), the Court may make a significant shift in its forensic report Confrontation Clause jurisprudence. Justice Breyer's suggestion, if fleshed out and properly implemented, could satisfy both prosecutor-friendly pragmatists (particularly Chief Justice Roberts and Justice Alito) and defendant-friendly Justices (Justices Kagan and Sotomayor). Combined with the fact that any new Justices are very unlikely to be as chained to "history" as Justice Scalia, Justice Breyer's suggestion could presage what a differently-comprised Court will do long term.

V. Conclusion

The Supreme Court should temper its approach to granting Confrontation Clause cases as long as it retains an unwillingness (or inability) to answer important questions of law and give sufficient guidance to the criminal justice system. The current state of the law, after *Williams* a case with no apparent majority opinion[157] is untenably vague, confusing, and uninformative for prosecutors, defendants, and trial judges. But this should not persuade the Court to continue making it worse before it makes it better.

Within the next few terms, the Court may be confronted with an opportunity to clarify or put an outer bound on Confrontation Clause questions when it addresses what to do with the admissibility of autopsy reports. In addition to the rationale of maintaining stability in the legal process, there is ample reason for the Court to hold that autopsy reports are not testimonial or that they may be admitted without the conducting examiner's testimony. The most significant hurdle to this holding is the 'historical' wing of the Court, and its complete lack of interest in pragmatic considerations. At least one commentator has cautioned against the strict historical approach to autopsy questions regarding autopsy reports.[158] The historical ap-

154 *See generally*, Brief for National Innocence Network as Amicus Curiae Supporting Petitioner, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), 2008 WL 2550614.

155 Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), 2008 WL 2550612 at *8.

156 *See, e.g.*, *Melendez-Diaz*, 557 U.S. at 346-47 (Kennedy, J., dissenting) (arguing that the majority, without any reasoning or supporting authority, stretched the Confrontation Clause beyond the "conventional witnesses" to which it was meant to apply).

157 *See Williams*, 132 S. Ct. at 2265 (Kagan, J., dissenting) (stating "[i]n the pages that follow, I call Justice Alito's opinion 'the plurality,' because that is the conventional term for it. But in all except its disposition, his opinion is a dissent").

158 *See* Stephanos Bibas, *Two Cheers, Not Three, For*

proach does not fit as comfortably in the autopsy case because there is little historical evidence that seems to require confrontation, the nature of murder prosecution often entails significant delays that seriously risk the unavailability of the examiner, autopsy reports cannot be re-conducted when a prosecution arises, and cross-examination of examiners is largely unhelpful they will almost certainly not have memory of a particular autopsy and is likely unnecessary to avoid injustices the Confrontation Clause is designed to prevent.[159]

The Court should retreat from the blind "historical" track it has taken and provide much-needed clarity to the Confrontation Clause analysis in cases involving forensic reports this author hopes that the eventual autopsy case will present an appropriate and adequate vehicle to do just that.

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Sixth Amendment Originalism, 34 HARV. J. L. & PUB. POL'Y 45, 50-52 (2011).

159 *See id.* (citing David A. Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 40).


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A PROPOSED FRAMEWORK FOR ANSWERING FOR THE *LAFLER* QUESTION

by Jamie Pamela Rasmussen

Some initial reviews of the United States Supreme Court's opinions in *Lafler v. Cooper*[1] and its companion case *Missouri v. Frye*[2] treated the decisions as either expected or necessary: as one commentator noted, "The only surprise about the Supreme Court's recent decisions in *Missouri v. Frye* and *Lafler v. Cooper* is that there were four dissents."[3] Nevertheless, *Lafler*'s discussion of the remedy for ineffective assistance of counsel during plea negotiation raised more questions than it answered. Based on the facts before it, the Court ordered reinstatement of the plea offer and gave the trial court discretion regarding sentencing after acceptance of the guilty plea.[4] Yet in announcing that decision, the Court failed to discuss the contours of the rule it applied.[5] This approach ignored the history of guilty plea jurisprudence and the long record of lower court cases that struggled with the issue of an appropriate remedy to afford a defendant who has received ineffective assistance of counsel during plea negotiations.

In *Frye* and *Lafler*, the Supreme Court recognized that the criminal justice system is no longer based primarily on a system of trials. It did so by deciding that prejudice from ineffective assistance of counsel can be demonstrated even if the defendant cannot prove he would have gone to trial. The Supreme Court, however, failed to provide adequate guidance for fashioning a remedy. This failure has left lower courts without a compass for navigating the murky waters of providing an appropriate remedy in these types of cases. Such difficulties gives rise to what one jurist has called "the *Lafler* question."[6]

The *Lafler* question is narrow in two respects: first, it arises only after the prisoner has proven ineffective assistance of counsel under *Strickland v. Washington*;[7] and second, it arises only in the context of a lost plea agreement. That is, the defendant alleges his counsel's ineffectiveness caused him to reject or miss out on a favorable plea agreement. Under these circumstances, the problematic policy issue is determining the best way to ensure that a defendant's constitutional right to effective assistance of counsel during plea negotiations is vindicated, while not unduly infringing on the government's competing interest in the administration of justice. In *Lafler*, the Supreme Court noted the difficulties in providing such a remedy but essentially left the determination to the discretion of the lower courts.

Other commentators have suggested justifications for the enunciation of a single specific remedy that would apply in all cases

1 132 S. Ct. 1376 (2012).

2 132 S. Ct. 1399 (2012).

3 Gerard E. Lynch, Frye & Lafler, *No Big Deal*, 122 Yale L.J. Online 39, 39 (June 21, 2012); *see also* Craig M. Bradley, *Effective Counsel for Plea Bargains*, 48 Trial 56, 58 (June 2012); Norman L. Reimer, Frye & Lafler, *Much Ado About What We Do – And What Prosecutors and Judges Should Not Do*, 36 Champion 7, 7 (April 2012).

4 *Lafler*, 132 S. Ct. at 1391.

5 *Id.* at 1389.

6 Titlow v. Burt, 680 F.3d 577, 595 (6th Cir. 2012) (Batchelder, J., dissenting).

7 466 U.S. 668 (1984).

presenting a *Lafler* question.[8] Yet, as the Supreme Court recognized, to enunciate a uniform remedy for a problem that could present itself in myriad ways would unfairly impinge on competing interests. Thus, instead of offering a justification for one particular remedy, this article attempts to provide a framework for answering the *Lafler* question on its own terms. As the Supreme Court recognized in *Lafler*, trial courts need discretion to fashion appropriate remedies to account for the fact that plea agreements, unlike most trials, determine not only guilt but also the appropriate sentence in a single judicial proceeding without the safeguards of a full trial on the merits. That discretion, however, should be guided by explicit consideration of: one, the government's interest as measured by the nature of subsequent proceedings; and two, the defendant's interest as measured by the defendant's actions during the plea negotiation. By enunciating these factors and giving each its appropriate weight, courts will be able to fashion appropriate remedies for ineffective assistance of counsel during plea bargaining, that is, remedies that are tailored to each case and that do not infringe upon the competing interests at stake.

To explain the development of such a rule and how it should be applied, this article proceeds in four parts. The first two parts examine the legal background which gave rise to the problem presented by the *Lafler* question. Part I examines the Supreme Court case law regarding the constitutional validity of guilty pleas and the evaluation of ineffective assistance of counsel claims. Part II discusses the lower courts' struggle to provide remedies for ineffective assistance of counsel during plea negotiations. Part III then discusses the *Lafler* opinion, showing how it failed to adequately address the problem of remedy. Finally, Part IV uses the principles in *Lafler* and the earlier lower court cases to create an explicit balancing test for providing a remedy to a defendant who has received ineffective assistance of counsel during plea negotiations.

I. Supreme Court Precedent

In a series of cases decided in the early 1970s, the Supreme Court recognized the changing circumstances surrounding defendants' bargaining power and approved the practice of plea bargaining.[9] These decisions relied heavily on the availability of competent representation for the defendant. Despite the lack of an explicit constitutional guarantee of effective assistance of counsel during plea negotiations, such a guarantee is inferred from the Sixth Amendment, which provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence."[10] The use of the phrase "all criminal prosecutions" rather than "all criminal trials" suggests the intention of a broad interpretation. Many Supreme Court decisions also hinted at a right that applied to proceedings other than the trial itself.[11] That is, while the Sixth Amendment is often seen as a guarantee of trial rights,[12] its text is broad enough to en-

8 *See, e.g.*, Todd R. Falzone, *Ineffective Assistance of Counsel: A Plea Bargain Lost*, 28 Cal. W. L. Rev. 431, 456 (1992) (arguing the remedy should be specific performance); David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 Yale L.J. 1532, 1553 (2011) (arguing the remedy should be a grant of a new trial); Aaron K. Friess, *Soothsaying with a Foggy Crystal Ball: A Critique of the U.S. Supreme Court's Remedy for Ineffective Assistance of Counsel When a Criminal Defendant Rejects a Plea Bargain*, 52 Washburn L.J. 147, 172 (2012) (arguing the remedy should be specific performance).

9 Albert Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 40 (1979) (citing Santobello v. New York, 404 U.S. 257 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 743 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970)).

10 U.S. Const. amend. VI; *see also* Donna Lee Elm, Lafler & Frye, *Constitutionalizing Plea Bargaining*, 36-Aug Champion 30, 31 (2012) (examining the expansion of the Sixth Amendment); George Dery & Anneli Soo, *Turning the Sixth Amendment Upon Itself: The Supreme Court in* Lafler v. Cooper *Diminished the Right to Jury Trial with the Right to Counsel*, 12 Conn. Pub. Int. L.J. 101, 105 (2012) (citing Strickland v. Washington, 466 U.S. 668, 685 (1984)).

11 *See* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. Pa. J. Const. L. 1161, 1169 (2012).

12 *See* Nix v. Whiteside, 475 U.S. 157, 184 (1986) ("The touchstone of a claim of prejudice is an allegation that counsel's behavior did something 'to deprive the defendant

compass a guarantee of the right to counsel in a prosecution that ends in a guilty plea because its guarantee applies in "all criminal prosecutions[.]" While this doctrine was not explicit at the time the Supreme Court began to develop rules governing plea negotiations, the Court's reasoning in the cases relied on the practical effects of plea negotiations and the presence of effective assistance of counsel to support the conclusion that a plea negotiation was not coercive.

For example, in *Brady v. United States*,[13] the Court distinguished a leading Fifth Amendment case by pointing to the fact that the defendant in *Brady* had the advice of counsel when deciding whether to plead guilty.[14] That advice gave the defendant a "full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty," and so "there was no hazard of an impulsive and improvident response to a seeming but unreal advantage."[15]

The decision in *Brady* paved the way for what one jurist has called the administrative system of criminal justice, i.e., a system of criminal justice based on guilty pleas as opposed to trials.[16] The analysis for determining the validity of a guilty plea in this system was practical rather than doctrinal. For example, in *North Carolina v. Alford*,[17] a defendant facing strong evidence of guilt decided to accept a plea agreement so he would receive a lesser sentence even though he would not admit he was guilty of the offense charged.[18] The Court discussed the issue of "whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt."[19] The Court concluded a confession of guilt was not constitutionally necessary to a valid guilty plea, so long as the record contained strong evidence of guilt.[20] Instead of discussing the intricacies of Fifth Amendment doctrine, the Court emphasized the practical effects of the plea stating, "The Constitution is concerned with the practical consequences, not the formal categorizations, of state law."[21]

The next important decision in the development of the Supreme Court's plea negotiation theory was *Tollett v. Henderson*.[22] In *Tollett*, the defendant, advised by counsel, pleaded guilty to first-degree murder and was sentenced to ninety-nine years in prison.[23] Many years after his conviction, the defendant challenged his conviction through a federal habeas corpus action, arguing he had been deprived of his constitutional rights because African-Americans had been systematically excluded from the grand jury that returned the indictment against him.[24] In the district court, the defendant focused on the fact that his lawyer failed to inform him of the possibility of a successful challenge; the court of appeals held that based on this lack of knowledge, there could be no valid waiver.[25]

The Supreme Court reviewed the case to determine "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury."[26] The majority answered

of a fair trial, a trial whose result is reliable.'"); Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair."); *see also* Dery & Soo, *supra* note 10, at 105.

13 397 U.S. 742 (1970).

14 *Id.* at 754.

15 *Id.*

16 Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev 2117, 2118 (1998); *see also* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 720 (2005); Ronald F. Wright and Marc L. Miller, *Honesty and Opacity in Charge Bargaining*, 55 Stan. L Rev. 1409, 1409 (2003).

17 400 U.S. 25 (1970).

18 *Id.* at 27-28.

19 *Id.* at 33.

20 *Id.* at 37.

21 *Id.*

22 411 U.S. 258 (1973).

23 *Id.* at 259.

24 *Id.*

25 *Id.* at 260.

26 *Id.*

that question in the negative by relying on *Brady*.[27] The Supreme Court opined that the court of appeals interpreted *Brady* and its companion cases too narrowly.[28] Those cases were not simply about whether a guilty plea after an involuntary confession was invalid; instead, the reasoning in those cases applied in any case where the "petitioner alleged some deprivation of constitutional rights that preceded his decision to plead guilty."[29] Thus, to be entitled to relief after a guilty plea, the petitioner would have to prove a constitutional violation *and* that his counsel's "advice was not 'within the range of competence demanded of attorneys in criminal cases[.]'"[30] Under this reasoning, almost all challenges to guilty pleas became, of necessity, challenges alleging ineffective assistance of plea counsel.

These decisions implicitly recognized the differences between a criminal justice system that makes the factual determination of guilt via trial and a criminal justice system that makes the factual determination of guilt via plea. In the latter, prosecutors serve two functions: first, they make the initial determination of guilt;[31] second, they determine what sentence is appropriate.[32] Unfortunately, this allocation of authority does not comport with the traditional norms of our system of justice.[33] The result is that the procedures that govern the finding of guilt and the imposition of sentences i.e., plea negotiations are very informal and not always followed. While plea negotiations can provide powerful opportunities for zealous defense counsel to improve the position of his or her client,[34] the informality of the process makes it even more difficult than in trial situations to determine what constitutes effective representation. Furthermore, as the system hinged on the availability of competent counsel for the defense, it was inevitable that defendants would begin to challenge their attorneys' performance.

Thus, the next step in the development of the administrative system of criminal justice was enunciating standards for determining when a criminal defendant had received ineffective assistance of counsel. When the Supreme Court addressed the issue of evaluating the effectiveness of counsel during plea negotiations in *Hill v. Lockhart*,[35] it went back to familiar ground. Although the opinions in *Brady*, *Alford*, and *Tollett* had begun to recognize that plea negotiations were best governed by practical considerations, the analysis in *Hill v. Lockhart* looked to the constitutional guarantee of a fair trial to provide guidance for evaluating claims of ineffective assistance of counsel prior to a guilty plea. At the same time, the decision in that case set the stage for the conflict that would create the questions presented in *Lafler* and *Frye*.

In *Hill v. Lockhart*, the Supreme Court addressed the question of whether a post-conviction movant was entitled to an evidentiary hearing on a claim for post-conviction relief. The movant claimed his guilty plea was involuntary because his attorney had failed to advise him that the applicable law would require him to serve fifty percent of the sentence he would receive after the guilty plea before he would become eligible for parole.[36] In addressing this question, the Court first looked at whether the standard enunciated in *Strickland v. Washington* applied in the context of guilty pleas and determined that it did for two reasons: one, in both types of cases the government was unable to prevent ineffective assistance of counsel and two, in both types of cases the public had the same interest in the finality of a conviction.[37] Based on this reasoning, and without discussion of the ways in which determination of guilt by plea negotiations is different from determination of guilt by trial, the Court decided the

27 *Id.* at 267.
28 *Tollett*, 411 U.S. at 265.
29 *Id.*
30 *Id.* at 266.
31 Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2123 (1998).
32 *Id.* at 2127.
33 *Id.* at 2124.
34 *See id.* at 2129.
35 474 U.S. 52 (1985).
36 *Id.* at 53.
37 *Id.* at 57-58.

same test for ineffective assistance of counsel applied in cases where guilt was determined by plea as in cases where guilt was determined by trial.

In addressing the prejudice prong of the *Strickland* test, the Court in *Hill* relied primarily on the trial model of the criminal justice system. The Court stated the determination "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process."[38] It attempted to clarify this pronouncement by stating that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[39] Since the defendant in *Hill* did not allege he would have gone to trial, the Supreme Court held that the lower court did not err in denying the claim without an evidentiary hearing. Thus, the result in the *Hill* case suggested a defendant had to prove he would have gone to trial in order to prove prejudice from ineffective assistance of counsel during plea negotiations. At the same time, the broader language regarding a different result left open the possibility of other tests for prejudice.

Where a conviction is the result of a guilty plea, the most critical phase of the prosecution is not the presentation of evidence or the cross-examination of the government's star witness, but the decision of the terms on which the defendant will plead guilty.[40] A guilty plea, unlike a trial, is the result of a negotiation. After a jury trial, assuming there has been no significant error in the trial, the conviction is supported by the decision of a group of twelve citizens who believed the evidence proved the defendant's guilt beyond a reasonable doubt.[41] No such assurances exist in the case of a guilty plea. Furthermore, after a trial, the government has expended considerable resources prosecuting the defendant.[42] These factors alter the interests at stake when evaluating a claim of ineffective assistance of counsel.[43] Because the Court in *Hill* did not pause to consider the ways in which a plea of guilty differs from a trial finding of guilt, the Court enunciated a test for ineffective assistance of counsel that did not effectively balance the interests at stake. This situation caused much confusion in the lower courts.

II. Lower Court Confusion

After *Hill*, lower courts split regarding which test to apply to determine whether a defendant who had pleaded guilty was prejudiced by his attorney's deficient performance. Some courts followed the more general statement that prejudice was shown when the deficient performance affected the outcome of the plea process.[44] Other courts took a more narrow approach, relying on the Supreme Court's hold-

38 *Id.* at 59.

39 *Id.*

40 Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

41 *See* Lafler v. Cooper, 132 S. Ct. 1376, 1397-98 (2012) (Scalia, J., dissenting) (noting "there is no doubt that the respondent here is guilty of the offense with which he was charged" because "he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence the prosecution can bring forward"); In re Winship, 397 U.S. 358, 363 (1970) (noting that proof of guilt beyond a reasonable doubt "is a prime instrument for reducing the risk of convictions resting on factual error").

42 *See Lafler*, 132 S. Ct. at 1388-89 ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already taken place[.]") (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)).

43 *See* Ana Maria Gutierrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 Denv. U. L. Rev. 695, 703 (2012).

44 *See, e.g.*, Riggs v. Fairman, 178 F. Supp. 2d 1141, 1150 (C.D. Cal 2001) (noting that "a large body of federal case law holds that a defendant who rejects a plea offer due to improper advice from counsel may show prejudice under *Strickland* even though he ultimately received a fair trial.") (quoting Wanatee v. Ault, 259 F.3d 700, 703 (8th Cir. 2001)); Carmichael v. Colorado, 206 P.3d 800, 807 (Colo. 2009) (holding that to prove prejudice the defendant "must demonstrate there is a reasonable probability that, but for counsel's errors, he would have accepted the plea offer rather than going to trial"); *see also* Illinois v. Curry, 687 N.E.2d 877, 879 (Ill. 1997) (finding prejudice where the defendant was not made aware of mandatory consecutive sentences if found guilty at trial).

ing in the *Hill*. Those courts found prejudice could not be proven after a guilty plea unless the petitioner would have insisted on trial.[45] This conclusion was also supported by the proposition that the right to effective assistance of counsel was a right designed merely to assist the defendant in obtaining a fair trial.[46] Thus, if the defendant obtained a fair trial, he could not have been prejudiced by any ineffective assistance of counsel during the plea negotiation stage.

This split in authority over how to determine prejudice after ineffective assistance of counsel in the plea negotiation phase also resulted in discrepancies in the appropriate remedy afforded to defendants who could prove their attorneys had been ineffective.[47] The lower courts dealt with the complex problem of providing a remedy to a defendant who received ineffective assistance of counsel but nevertheless was convicted after fair proceedings in a variety of ways. The most common remedies ordered in cases of lost plea bargains include ordering a new trial, ordering the government to reoffer the plea, or ordering specific performance of the lost plea bargain.[48] Each of these remedies, if chosen as the exclusive remedy for cases presenting a *Lafler* question would strike an unfair balance between the defendant's interests and the government's interests because they do not take into account the manner in which the balancing of the parties' interests differ after a trial as opposed to after a guilty plea.

Ordering a new trial is by far the most popular of these options.[49] The reasoning for such a remedy is generally based on the premise that a new trial returns the parties to a stage prior to any constitutional error.[50] The corollary of this reasoning is that ordering a new trial allows resumption of plea bargaining with effective assistance of counsel for the defendant.[51] A second fairly popular remedy is specific performance of the lost plea offer.[52] Some courts reasoned specific performance is an authorized remedy and made an analogy to *Santobello*.[53] In support of this analogy, courts asserted the remedy was narrowly tailored and restored the defendant to the position he would have been in without the constitutional error.[54]

Somewhere between the remedy of ordering a new trial and ordering specific performance of the lost plea agreement was the remedy of ordering the government to reinstate the plea offer.[55] Generally, courts choosing this

45 *See, e.g.*, United States v. Miell, 711 F. Supp. 2d 967, 988 (N.D. Iowa 2010); Beach v. Missouri, 220 S.W.3d 360, 364 (Mo. Ct. App. 2007).

46 *See* Nix v. Whiteside, 475 U.S. 157, 184 (1986); Strickland v. Washington, 466 U.S. 668, 687 (1984); *Beach*, 220 S.W.3d at 364; *see also* George Dery and Anneli Soo, *Turning the Sixth Amendment upon Itself: The Supreme Court in* Lafler v. Cooper *Diminished the Right to Jury Trial with the Right to Counsel*, 12 Conn. Pub. Int. L.J. 101, 105 (2012); Donna Lee Elm, *Lafler and Frye: Constitutionalizing Plea Bargaining*, 36 Champion 30, 31 (2012).

47 Todd R. Falzone, Note, *Ineffective Assistance of Counsel: A Plea Bargain Lost*, 28 Cal. W.L. Rev. 431, 442-43 (1992) (discussing In re Alvernaz, 282 Cal. Rptr. 601 (Cal. Ct. App. 1991)).

48 Riggs v. Fairman, 178 F. Supp. 2d 1141, 1151-52 (C.D. Cal. 2001) (collecting cases).

49 *See, e.g.*, United States v. Gordon, 156 F.3d 376 (2d Cir. 1998); *Riggs*, 178 F. Supp. 2d at 1152 (citing In re Alvernaz, 830 P.2d at 759); Carmichael v. State, 206 P.3d 800 (Colo. 2009); In re Alvernaz, 830 P.2d 747, 759 (Cal. 1992); Pennsylvania v. Napper, 385 A.2d 521 (Pa. Super. Ct. 1976); Revell v. Florida, 989 So.2d 751 (Fla. Dist. Ct. App. 2008); Feldpausch v. Florida, 826 So.2d 354 (Fla. Dist. Ct. App. 2002).

50 *See, e.g.*, *Riggs*, 178 F. Supp. 2d at 1154; *Carmichael*, 206 P.3d at 809. Other cases employing this remedy offer little or no reasoning for their choice of remedy. *See, e.g.*, *Napper*, 385 A.2d at 524; *Revelle*, 989 So.2d at 753.

51 *See Riggs*, 178 F. Supp. 2d at 1154 ("The parties then will be free to engage in plea bargaining or to decline to do so."); *Curry*, 687 N.E.2d at 890 ("The remedy of a new trial may include the resumption of the plea bargaining process."); *Carmichael*, 206 P.3d at 810 ("[T]he parties may, of course, reengage in plea negotiations.").

52 *See, e.g.*, Williams v. Maryland, 605 A.2d 103 (Md. 1992); Alvernaz v. Ratelle, 831 F. Supp. 790 (S.D. Cal 1993); Becton v. Hun, 516 S.E.2d 762 (W.Va. 1999); Sanders v. Comm'r of Corr., 851 A.2d 313 (Conn. App. Ct. 2004); Ebron v. Comm'r of Corr., 992 A.2d 1200 (Conn. App. Ct. 2010).

53 *Ebron*, 992 A.2d at 1215.

54 *Id.* at 1217; *Williams*, 605 A.2d 110-11; *Becton*, 516 S.E. 2d at 768.

55 *See, e.g.*, Tucker v. Holland, 327 S.E.2d 388 (W. Va. 1985); Iowa v. Kraus, 397 N.W.2d 671 (Iowa 1986); Ex parte Lemke, 13 S.W.3d 791 (Tex. Crim. App. 2000); United States v. Carmichael, 216 F.3d 224 (2d Cir. 2000); Turner v. Texas,

remedy did so because other remedies were unsatisfying. For example, in *Iowa v. Kraus*, the Supreme Court of Iowa held that a new trial was not appropriate because it did not restore the lost chance of a bargain and specific performance was not appropriate because if a defendant knew that was the remedy, there would be no risk for a defendant who chose to go to trial.[56] In economic terms, if the law provided specific performance as a remedy, then the defendant could demand the government expend resources on a trial and yet still obtain the benefit of a plea agreement in the form of a sentencing discount that was supposed to reflect the savings the government obtained from not having to go to trial. Additionally, the court in *Ex parte Lemke* reasoned that reinstating a plea offer put the defendant in the position he would have been in had the constitutional violation not occurred.[57]

A frequently overlooked option is the option of resentencing.[58] In *Davie v. South Carolina*, defense counsel failed to convey a favorable plea offer and the defendant pleaded guilty under a later, less favorable offer.[59] The court held that a new trial would not be an appropriate remedy because the defendant never indicated he wanted to go to trial.[60] On the other hand, the court found specific performance would also not be an appropriate remedy because the defendant could not have relied on the earlier, more favorable offer or any advice related to the offer in his later decision to plead guilty. *Davie* differs from earlier remedy cases because it examined the particular facts in the case before the court rather than doctrinal considerations.

Other cases that have come closer to the appropriate remedy also rely on the particular facts and circumstances of the case before them, but they begin their analysis by skipping the Supreme Court's guilty plea jurisprudence and relying on general Sixth Amendment principles. For example, in *United States v. Gordon*,[61] the court, relying on the balancing test enunciated in *United States v. Morrison*,[62] considered the following factors: whether a subsequent trial was infected with constitutional error, whether the witnesses would be available for a new trial, and a comparison of the time already served by the defendant with the sentence in the lost plea bargain.[63] The court found the trial had not been infected with constitutional error but there was no significant lapse of time between the first trial and the collateral attack.[64] Because of the short period of time between the criminal trial and the collateral attack, there were no significant practical barriers to a retrial.[65] The court found that a new trial was an appropriate remedy in such a case.[66]

Some courts, most notably those that found no prejudice where the defendant could not prove he would have gone to trial, would order no remedy. At first, this might seem to be problematic. In his dissent in *Lafler*, Justice Scalia expressed disdain "that the remedy could *ever* include no remedy at all."[67] This is less of a problem than it appears. The requirement of proving prejudice itself recognizes that not all constitutional violations are so egregious as to require reversal of a conviction.[68] Furthermore, in many cases, courts affirm convictions despite improper procedures. A conviction may stand despite a constitutional error if that error was harmless beyond a reasonable doubt.[69] In some cases, as will be shown be-

49 S.W.3d 461 (Tex. Ct. App. 2001); Leatherman v. Palmer, 583 F. Supp. 2d 849 (W.D. Mich. 2008).

56 *Kraus*, 397 N.W.2d at 674.

57 *See, e.g.*, *Lemke*, 13 S.W.3d at 797-98; *see also Leatherman*, 583 F. Supp. 2d at 871.

58 *See, e.g.*, Davie v. South Carolina, 675 S.E.2d 416 (S.C. 2009).

59 *Id.* at 605-06.

60 *Id.* at 615.

61 156 F.3d 376 (2d Cir. 1998).

62 499 U.S. 361, 364 (1981).

63 *Gordon,* 156 F.3d at 381.

64 *Id.*

65 *Id.* at 381-82.

66 *Id.* at 382.

67 Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).

68 Strickland v. Washington, 466 U.S. 669, 689 (1984).

69 *See, e.g.*, Chapman v. California, 386 U.S. 18, 24 (1967) (stating the standard for reviewing whether or not a constitutional error is harmless is whether the error was

low, no remedy will be appropriate even if the defendant can show he would have received a better outcome based on the lost plea bargain.

The proliferation of remedies demonstrates the confusion created by the Supreme Court's guilty plea jurisprudence. The Court at first carefully delineated the various functions and doctrinal justifications for the practice. Then, as the differences between the trial system and the guilty plea negotiation system became more apparent, the Court abandoned the doctrinal justifications one by one without providing alternative guidelines. The only guidance was the central importance of effective assistance of counsel. The decision in *Hill* inadequately addressed the problem of ineffective assistance of counsel during plea negotiations by failing to recognize the difference between plea negotiations and trial as a mechanism for proving guilt. The Supreme Court began to recognize that important difference in *Frye* and *Lafler*.

III. *Lafler* and *Frye*

In *Missouri v. Frye* and *Lafler v. Cooper*, the Supreme Court definitively resolved the split regarding the appropriate test for determining prejudice after finding ineffective assistance of counsel during plea negotiations. In each case, the defendant satisfied the first prong of the *Strickland* test so the only issue remaining was a determination of prejudice. Thus, in each case, the Court had to determine what facts a defendant had to prove to show prejudice arising from ineffective assistance of counsel during plea negotiations. While this was an important step forward, the Court obscured the different interests at stake by using the phrase "constitutionally adequate procedures." If the Court had used the phrase "a fair trial" or "a constitutionally valid guilty plea" it would have drawn attention to the different interests at stake in each situation and would have made it easier to craft an appropriate remedy.

The defendant in *Frye* had been charged with driving with a revoked license, an offense for which he had been convicted three times before. For that reason, the fourth offense was a felony and it carried a maximum possible punishment of four years in prison.[70] The prosecutor offered a choice of plea offers with an expiration date, and defense counsel failed to inform his client of those offers prior to their expiration date. When the defendant was subsequently arrested for the same offense, he decided to plead guilty to the first charge without the benefit of a plea agreement. The court imposed a three-year prison sentence.[71] In his state-level post-conviction case, Frye argued he had received ineffective assistance of counsel when his attorney failed to inform him of the initial plea offer before it had expired.[72]

The Supreme Court granted certiorari to determine the appropriate standard for determining prejudice arising from ineffective assistance of counsel in a case involving the entry of a guilty plea.[73] The Court discussed *Strickland*, *Hill*, and *Padilla*, distinguishing the latter two. It noted that in *Hill* and *Padilla* the plea was entered based on erroneous advice, while the defendant in *Frye* received correct advice. The Court stated, "The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers."[74] In rejecting the government's argument that the entry of a knowing and voluntary plea cured any prejudice arising from prior errors, the Court emphasized the prevalence of guilty pleas in today's criminal justice system to support its conclusion that the plea process must be fair.

Instead, relying on *Glover v. United States*,[75] the Court held that "[t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by

harmless beyond a reasonable doubt).

70 Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012).
71 *Id.* at 1404.
72 *Id.* at 1405.
73 *Id.* at 1404.
74 *Id.* at 1406.
75 531 U.S. 198, 203 (2001).

reason of a plea to a lesser charge or a sentence of less prison time."[76] The Court also relied heavily on the general *Strickland* test for prejudice, i.e., whether in the absence of the errors of counsel "the result of the proceeding would have been different."[77] Based on this analysis, the Court determined that the relevant issue in the case was whether the plea agreement would have resulted in a lesser sentence; this required analysis of whether the prosecutor would have withdrawn the agreement and whether the trial court would have been obligated to accept it. The Court remanded those questions for consideration by the lower court.

In *Lafler*, defense counsel advised the defendant in an attempted murder case to reject a plea agreement. The attorney explained that the government could not prove the defendant intended to kill the victim because the victim had only been shot below the waist.[78] The defendant proceeded to trial, was convicted, and received a harsher sentence than he would have received under the rejected plea agreement. The defendant sought state post-conviction relief, claiming his counsel was ineffective in advising him to reject the plea offer, and the state court denied the claim on the grounds that the defendant had made a knowing and voluntary decision to proceed to trial. He renewed his claims in a federal habeas corpus action, and the federal district court granted relief, ordering specific performance of the original plea offer.[79]

The Supreme Court again rejected the government's reliance on *Hill*, stating that "here the ineffective advice led not to an offer's acceptance but to its rejection."[80] The Court rejected the related argument that there could be no *Strickland* prejudice because the defendant had received a fair trial. The Court concluded that "[f]ar from curing the error, the trial caused the injury from the error."[81] In summarizing its rejection of the government's arguments, the Court further laid bare the rationale underlying its decision:

> In the end, petitioner's three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.[82]

That is, the Court justified its decision primarily on the practical functioning of the criminal justice system rather than on doctrinal considerations. However, the mere fact that most convictions are obtained by guilty plea does not mean that the interests that must be balanced to remedy ineffective assistance of counsel after a guilty plea are the same as those existing after a trial.

The Court's discussion of the prevalence of guilty pleas is important for two reasons: one, it recognizes the administrative nature of our current system of criminal justice; and two, it paves the way for development of more appropriate standards standards that are not based on the assumption that the trial is the normative procedure. The discussion stopped short of a clearly enunciated test for determining the appropriate remedy. In *Frye*, the Court did not address the issue of remedy, and in *Lafler* it did so only briefly. This difference, as Justice Scalia points out in his dissent, may account for the Court's lack of clarity when it comes to a

76 *Frye*, 132 S. Ct. at 1409.
77 *Id.* at 1410.
78 Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).
79 *Id.* at 1383-84.
80 *Id.* at 1385.
81 *Id.* at 1386.
82 *Id.* at 1388 (citations omitted).

remedy.[83]

In *Lafler*, the Court began its discussion of remedy with general Sixth Amendment principles, quoting *United States v. Morrison*. The goal of the remedy is to "'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution."[84] The Court then noted the injury the defendant suffered could be a greater sentence to the same charges, or a conviction of more charges than under the lost plea agreement; therefore, different remedies would be appropriate in different circumstances.[85] It held, "Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion."[86] The Court did mention two factors that should be considered: the defendant's willingness to plead guilty and the existence of new information discovered after the lost plea bargain.[87] Then, without analysis, the Court simply stated, "The correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement."[88]

The decisions in *Lafler* and *Frye* advanced the state of the law by acknowledging that a trial is not the normative procedure for determining guilt and refusing to base the test for prejudice on the issue of whether the defendant can prove he would have gone to trial. Unfortunately, the opinions in those cases do not recognize important differences between a conviction and sentence based on a guilty plea and a conviction and sentence based on a trial. Any balancing test must consider these differences yet the Supreme Court glossed over such differences by looking at the constitutional requirements rather than the practical effects. This disconnect gave the Court little to work with when it tried to enunciate factors for determining the remedy. The lower courts that have addressed the *Lafler* question have looked at those differences and granted different remedies accordingly. Thus, a balancing test for answering the *Lafler* question can be seen by applying the factors enunciated in *Lafler* to the results from the lower court cases.

IV. Proposed Details for the Balancing Test

In *Lafler*, the Supreme Court suggested a factor-based, totality of the circumstances test to determine the remedy in cases of ineffective assistance of counsel in plea negotiation but did not explain how the factors and circumstances should be balanced. The skeleton of an appropriate balancing framework can be seen by looking at the lost plea agreement and the subsequent proceedings to determine what factual questions were resolved and then determine a remedy that balances the interests implicated by those facts.

In determining a remedy, many cases, including *Lafler*,[89] begin with a discussion of Supreme Court precedent in *United States v. Morrison*.[90] In *Morrison*, federal agents spoke to the represented defendant in a drug case without her attorney's knowledge.[91] The defendant entered a conditional guilty plea and raised a Sixth Amendment challenge on appeal. The Third Circuit found a violation and ordered dismissal of the indictment as a remedy. The government appealed. The Supreme Court assumed a Sixth Amendment violation and went on to discuss the appropriate remedy. The Court began by noting the importance of both the right to counsel and the government's interest "in the administration of criminal justice."[92]

83 *Id.* at 1392 (Scalia, J., dissenting).

84 *Lafler v. Cooper,* 132 S. Ct. 1376, 1388-89 (2012) (citations omitted).

85 *Id.* at 1389.

86 *Id.*

87 *Id.*

88 *Lafler*, 132 S. Ct. at 1391.

89 *Id.* at 1388.

90 449 U.S. 361 (1981); *see, e.g.*, Turner v. Tennessee, 858 F.2d 1021, 1207 (6th Cir. 1988) (stating that remedies for the deprivation of the right to the effective assistance of counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests") (quoting *Morrison,* 449 U.S. at 364).

91 *Morrison*, 449 U.S. at 362-63.

92 *Id.* at 364.

The Court continued, stating, "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[93] It noted that instead of dismissing the indictment, the proper approach was "to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial."[94] The Court reversed the decision of the Court of Appeals, observing that in other constitutional cases, the remedy is not dismissal of the charges but is "limited to denying the prosecution the fruits of its transgression."[95]

From this case, two important general principles emerged for determining the appropriate remedy for a Sixth Amendment violation. First, the remedy must be tailored to the violation alleged. Second, in cases where the government is not at fault, the interests of the government must be given more consideration than in cases where the violation was based on government wrongdoing.[96] This suggests the appropriate analysis of the *Lafler* question must consider what type of procedures occurred after the lost plea agreement because those procedures reveal the strength of the government's interest. If the subsequent proceedings involved a guilty plea, the government's interest is lower because it expended fewer resources, while the defendant's interest is greater because he waived important procedural rights.

Morrison also states that a remedy must neutralize the taint of the constitutional violation.[97] Thus, it is imperative to consider how the constitutional violation wronged the defendant. As the Court stated in *Lafler*, one factor to consider is the defendant's prior expressions of a willingness to plead guilty,[98] but the Court did not explain how it should be weighed. This creates confusion for practitioners. Below, the weight to be given to these factors is assessed in light of the practical effects of each possible remedy.

A. Specific Performance as a Remedy

Specific performance is almost never an appropriate remedy for ineffective assistance of counsel during plea negotiation. One popular justification for specific performance as a possible remedy is to make an analogy to *Santobello*.[99] However, an analogy to *Santobello* is grossly inappropriate in cases involving ineffective assistance of counsel. In *Santobello*, the government breached a plea agreement to stand silent at sentencing.[100] That is, the prosecution bore moral responsibility for the violation of the defendant's rights. In the case of ineffective assistance of counsel, however, the government does not bear such moral responsibility.[101]

An analogy between cases where there is prosecutorial fault and cases where there is no prosecutorial fault ignores the precept that the remedy for ineffective assistance of counsel must be narrowly tailored and not unduly infringe on competing interests.[102]

Furthermore, the underlying assumption in *Santobello* that plea negotiation is like

93 *Id.*

94 *Id.* at 365.

95 *Id.* at 365-66.

96 *See* Strickland v. Washington, 466 U.S. 668, 693 (1984) (holding that a prisoner seeking relief based on a claim of ineffective assistance of counsel must affirmatively prove prejudice in part because the government is not able to prevent the constitutional violation).

97 *Morrison*, 449 U.S. at 365.

98 *Lafler*, 132 S. Ct. at 1389.

99 *See, e.g.*, United States. v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994); Arizona v. Donald, 10 P.3d 1193, 1206 (Ariz. Ct. App. 2000); Ebron v. Comm'r of Corr., 992 A.2d 1200, 1215 (Conn. Ct. App. 2010); *cf.* United States v. Gordon, 156 F.3d 376, 381-82 (2d Cir. 1998) (noting that while specific performance may be appropriate where there are obstacles to a new trial, such logic is not necessarily applicable in other circumstances); Davie v. South Carolina, 675 S.E.2d 416, 423 (S.C. 2009).

100 Santobello v. New York, 404 U.S. 257, 259 (1971); *see, e.g.*, *Ebron*, 992 A.2d at 1215.

101 *See* Strickland v. Washington, 466 U.S. 668, 693 (1984) ("The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence.").

102 United States v. Morrison, 449 U.S. 361, 365 (1981).

contract negotiation does not always result in a proper balancing of the various interests involved. One major effect of *Santobello* has been to dramatically increase the use of contract theories in deciding plea negotiation cases. By employing the term "specific performance" the Court in *Santobello* invoked a well-established area of law that attorneys and courts would quickly begin to employ.[103] The invocation of this established body of law had several advantages, the first of which is a body of principles, i.e., contract law, for settling disputes. True, contract law is a factual fit for plea bargaining in many ways. First, like a contract, a plea bargain rests on a theory of exchange. Defendants exchange expensive procedural rights for a less severe sentence or for a less severe charge.[104] Second, it grants trial courts the authority to order specific performance as a remedy.[105]

However, as some scholars have pointed out, the nature of a negotiation for a plea of guilty is fundamentally different from the nature of arm's length negotiation between parties engaged in commercial enterprises.[106] Duress and conflicts of interest abound in plea negotiations and are especially relevant in considering claims of ineffective assistance of counsel.

Probably the most problematic difference is the pervasive existence of duress in plea negotiations.[107] If a commercial negotiator faces a bad deal, he can simply walk away. With a criminal defendant, on the other hand, the government can impose restrictions on his liberty until a disposition is reached.[108] Further, "[d]efendants who bargain for a plea serve lower sentences than those who do not."[109] For a defendant facing serious charges, a plea bargain that dramatically reduces the prison time he is likely to serve is often irresistible, regardless of the existence of suppressible evidence or a better than fair possibility of acquittal after trial.[110] That is, unlike ordinary commercial negotiation, plea negotiation is to some extent inherently coercive.

A second problem with employing analogies to contract law in the plea negotiation setting is that the institutions involved in guilty plea negotiation create inherent conflicts of interest.[111] Appointed attorneys are often paid a low flat rate for each case.[112] Thus, they have a financial incentive to resolve the case quickly through a guilty plea even if that course of action may not be in their client's best interest.[113] Public defenders may also be motivated to resolve cases quickly as they often work under crushingly large caseloads.[114] These constraints may cause attorneys to exert pressure on defendants to plead guilty.[115] These problems mean a criminal defendant is not as able to protect his own interests as an ordinary economic actor. Because of these problems, regulating plea bargains under the same rubric as contract cases is not appropriate.

Mandating specific performance or reinstatement of the plea offer also confuses the nature of the deprivation. As one court observed:

> To focus the remedy on the foregone plea offer is to confuse the nature of the injury suffered. Rather than losing the benefit of the potential plea bargain, the defendant

103 *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1910 (1992).
104 *Id.* at 1913-16.
105 *See*, *e.g.*, *Santobello*, 404 U.S. at 263.
106 *See* Emily Rubin, Note, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 Va. L. Rev. 1699, 1716-17 (1994); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1986-90 (1992).
107 Scott & Stuntz, *supra* note 103, at 1919.
108 *Id.*; Paul Larkin, *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 722 (2013).
109 Scott & Stuntz, *supra* note 103, at 1951-52; Rubin, *supra* note 106, at 1716-17.
110 Scott & Stuntz, *supra* note 103, at 1952 (citing William J. Stuntz, *Waiving Rights in Criminal Procedure,* 75 Va. L. Rev. 761, at 830-31 (1989)); Rubin, *supra* note 106, at 1716-17.
111 Schulhofer, *supra* note 106, at 1987-88.
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*

> has lost the effective assistance of counsel to which he is constitutionally entitled. Thus, a restoration of that counsel, rather than a mandated sentencing outcome, is the most narrowly tailored way to address the prejudice[.][116]

B. Ordering a New Trial as a Remedy

Some observers have suggested that a new trial is always the most appropriate remedy.[117] Nonetheless, the courts have criticized this remedy. The main criticism has been that a new trial does not eliminate the constitutional error because the constitutional error did not occur during the trial.[118] This reasoning is flawed because when the court orders a new trial, the parties do not proceed directly to jury selection. Instead, the defendant again receives an expensive set of procedural rights, which he may later decide to exchange in a guilty plea for sentencing concessions.[119] Thus, ordering a new trial encourages the parties to return to the negotiation phase the precise phase where the constitutional error occurred.[120] Ordering a new trial effectively turns the clock back to before the constitutional deprivation.[121]

On the other hand, the remedy of a new trial allows for consideration of intervening circumstances. Because the case will have to be tried again, intervening circumstances, such as the potential new crimes or the discovery of new evidence, can be accounted for through the ordinary process of negotiation. For these reasons, the remedy of a new trial should be favored, especially where the lost plea offer contemplated conviction of different charges from the charges of which the defendant was ultimately convicted or where the ineffectiveness of counsel involved a failure to convey a plea offer.

At least one commentator has suggested that an order of a new trial does not cure the prejudice suffered by a defendant because of the problem of overcharging or charge stacking.[122] Overcharging or charge stacking is the practice of filing multiple charges or more serious charges regarding a single event. Many commentators condemn this practice because it allows prosecutors to up the ante and coerce defendants to enter plea agreements.[123] This practice should not be considered in determining the appropriate remedy for lost or rejected plea bargains for a number of reasons. First, prosecutors are ethically bound to not file charges for which they do not believe there is probable cause.[124] For this reason, courts must indulge a presumption that prosecutors charge legitimately.[125] Second, and more importantly, the principles of double jeopardy prevent multiple punishments for the same offense.[126] Thus, if the defendant's conduct constitutes more than one offense, it is more blameworthy. To the extent that the available crimes listed in the statues of the jurisdiction could allow more punishment for a particular act than observers believe is fair, the problem is not one of prosecutorial overreaching, but rather one of legislation and politics.[127] Finally, a prosecutor's

116 Carmichael v. People, 206 P.3d 800, 809-10 (Colo. 2009).

117 David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 Yale L.J. 1532, 1577 (2011).

118 *See, e.g.*, Turner v. Tennessee, 858 F.2d 1201, 1207-08 (6th Cir. 1988); Ex parte Lemke, 13 S.W.3d 791, 797-98 (Tex. Ct. App. 2000); Osborne v. Kentucky, 992 S.W.2d 860, 865 (Ky. Ct. App. 1998).

119 *See* Perez, *supra* note 117, at 1555.

120 *See, e.g.*, Riggs v. Fairman, 178 F. Supp. 2d 1141, 1154 (C.D. Cal. 2001).

121 Perez, *supra* note 117, at 1553.

122 *See* Gutierrez, *supra* note 43, at 709.

123 *See, e.g.*, *id.*; *see also* William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 594 (2010).

124 Model Rules of Prof'l Conduct R. 3.8(a) (2013) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

125 *See* United States v. Armstrong, 517 U.S. 456, 464 (2008).

126 U.S. Const. amend. V; United States v. Dixon, 509 U.S. 668, 695-96 (1993).

127 *See* Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 Cal. L. Rev. 1573, 1627-29 (2012) (explaining why analysis of the interaction between the substance of the charge and the likelihood of a guilty plea should be considered when adopting new criminal legislation); Stuntz, *supra* note 123, at 579 (arguing that depoliticizing criminal law by taking the

charging decision is ultimately backed by the threat of a jury trial. After plea negotiations fail, the defendant has all the protections the Constitution affords, including the due process right that his guilt be proven beyond a reasonable doubt. After a trial resulting in a guilty verdict on all charges, any argument that the prosecutor overcharged the case is merely an argument that the legislature should not view the conduct as blameworthy.

Unfortunately, as the *Lafler* Court recognized, the cost of a new trial infringes on the government's interest in the efficient administration of justice.[128] This is why courts must consider whether the proceedings following the ineffective assistance of counsel involved a guilty plea or a trial. If the subsequent proceedings involved a trial, the cost of a second trial might be seen to unnecessarily infringe on the government's interest. Contrariwise, if the subsequent proceedings did not involve a trial, the infringement on the government's interest would be less.

C. Reoffering the Plea Agreement as a Remedy

Forcing the government to reoffer the plea agreement presents many of the same advantages of an order of a new trial. Like an order of a new trial, it forces the parties back to the negotiation phase. Unlike the order of a new trial, however, it unnecessarily discounts consideration of intervening factors, which the Court in *Lafler* specifically mentioned.[129] For example, if a defendant were convicted of a more serious offense after trial than the offense to which the plea offer would have allowed him to plead guilty to, allowing the defendant the benefit of the plea offer not only ignores the cost of the trial, but also ignores the fact that the defendant has been proven guilty beyond a reasonable doubt of a more serious offense and is consequently more deserving of punishment. Furthermore, "[f]orcing the prosecution to reoffer a plea bargain that it initially offered to avoid the expense and risk of trial that it has already won would violate basic fairness principles enshrined in the separation of powers doctrine."[130] Thus, this remedy should be avoided.

D. Resentencing as a Remedy

Resentencing is attractive because it avoids the necessity of expending additional resources, especially where there has been a trial.[131] On the other hand, this remedy would not be appropriate in a case involving charge-bargaining, i.e., the practice of dismissing some charges of a multi-count charging document in exchange for the defendant's guilty plea to the remaining charges. That is because resentencing assumes guilt has been determined correctly on all the charges in the case. In the case of charge bargaining, the government may have relinquished some charges it could have proved, so it cannot be assumed that guilt was appropriately determined.[132]

In sum, the framework for determining a remedy after a criminal defendant has received ineffective assistance of counsel during plea negotiation should involve a balancing test. The court must balance the defendant's interest in vindicating his right to effective assistance of counsel against the government's interest in the efficient administration of justice. In this test, the government's interest is weighed by looking at the nature of the subsequent proceedings and the defendant's interest is weighed by looking at his or her actions during plea negotiation. If the government's interests are more weighty, i.e., where there has been a trial resulting in a finding of guilt on all charges or on more charges than contemplated in the lost plea offer, the error should be considered harmless and the defendant should not be afforded a remedy. If the defendant's interests are more weighty, i.e., where there was a subsequent guilty plea to more serious charges

power to define crimes away from the legislatures is the only way to solve the problem of over-inclusive criminal codes).

128 *See Lafler*, 132 S. Ct. at 1388-89.

129 *Id.* at 1389.

130 Perez, *supra* note 117, at 1551.

131 *Lafler*, 132 S. Ct. at 1389.

132 *See id.* at 1389.

than contemplated in the lost plea offer, the defendant should be afforded resentencing or a new trial.

V. Conclusion

The decisions in *Frye* and *Lafler* were important, not because they were unexpected, but because the Supreme Court began to recognize that our system of criminal justice is administrative in nature and announced rules that reflect this circumstance. The decisions, however, stopped short of what was necessary. Instead of precisely addressing the issue of remedy, the Court simply gave two possible factors without clear guidance on how to weigh each one. Most importantly, the Court overlooked how the nature of subsequent proceedings can affect the relative interests of the parties. By looking at prior lower court cases that have already addressed the *Lafler* question, practitioners can see how the factors enunciated in *Lafler* should be weighed. A balancing test which would mandate a new trial when the defendant's interests are weightier, while leaving open the possibility of no remedy or only resentencing when the government's interest is weightier is the best way to vindicate the defendants' right to counsel without unfairly infringing on society's interest in the efficient administration of criminal justice.

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DO THE FEDERAL COURTS SWEEP *BUIE* CLEAN?

by Jeffrey T. Wennar

The development of exceptions to the Fourth Amendment's warrant requirement represents a balance between safety and privacy. Often they are designed to grant arresting police officers an opportunity to secure a person, area, or items that represent a threat to the individual officer or public. Alternately, these exceptions can be viewed as an encroachment on individual rights that enable police to skirt the Fourth Amendment. Over the years, the United States Supreme Court and federal circuits have emphasized that searches and seizures outside the narrow exceptions are presumptively invalid. While many articles and analyses of these exceptions review the incentives, impacts, and influences these exceptions have on criminal procedure, the words used by federal courts have become increasingly indicative of a permissive approach to criminal procedure. This article reviews those developments with particular attention to verbiage used by courts in applying the decision *Maryland v. Buie* and the underlying rationale for the "protective sweep" exception to the Fourth Amendment.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

A point of departure for any understanding of the Fourth Amendment was established in *Coolidge v. New Hampshire* when the Supreme Court held that "[t]he most basic constitutional role in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well defined exceptions."[2]

Over the years the Supreme Court has recognized certain exceptions to the warrant requirement of the Fourth Amendment including: searches incident to arrest;[3] automobile searches;[4] the plain view exception;[5] the inven-

1 U.S. Const. amend. IV.

2 Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (citing Katz v. United States, 389 U.S. 347, 357 (1967)).

3 *See* Chimel v. California, 395 U.S. 752, 768 (1969) *abrogation recognized by* Davis v. United States, 131 S. Ct. 2419 (2011) (implying that in the absence of a warrant, a warrantless Fourth Amendment search may be valid if confined to the immediate person and area in which an arrested suspect may have obtained a weapon or something that could be used as evidence against him).

4 *See* Chambers v. Maroney, 399 U.S. 42, 52 (1970) (holding with regard to the search of accused's car, "[t]he blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search . . . In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained").

5 *See Coolidge*, 403 U.S. at 467-68 (noting that the plain-view doctrine does not run afoul of Fourth Amendment

tory exception;[6] the consent exception;[7] *Terry* stops;[8] the abandoned property exception;[9] the hot pursuit exception[10] or the exigent circumstances exception;[11] the community-caretaking exception;[12] the suitcase or container exception;[13] and the protective sweep exception.[14] The following text surveys the current status of protective sweeps throughout the federal circuits.

I. The *Buie* Decision

In *Maryland v. Buie*, a Godfather's pizza restaurant in Prince George's County, Maryland was robbed by two men.[15] One of the robbers wore a red running suit. The police developed Jerome Edward Buie as a suspect and subsequently obtained a warrant for his arrest and that of his accomplice. The warrant for Buie was executed at his residence, and Buie was arrested as he emerged from the basement of the home. After the arrest an officer entered the basement "in case there was someone else [there]," and in doing so, the officer observed the red running suit in plain view and he seized it.[16]

Buie made a motion to suppress the red running suit prior to trial, which the trial court denied.[17] On appeal to the intermediate appellate court, the trial judge's ruling was affirmed. The Maryland Court of Appeals subsequently reversed the Court of Special Appeals holding that the running suit was inadmissible as the state failed to satisfy the probable cause requirement. The United States Supreme Court granted certiorari and framed the issue as one of determining "what level of justification the Fourth Amendment required before [the detective] could legally enter the basement to see if someone else was there."[18] The Court acknowledged that until the moment Buie was arrested "the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement."[19]

requirements in that such a search is made only incident to a lawful search or some other lawful law enforcement activity, and that the scope of such a search is inherently narrow and does not expand into a general or exploratory search).

6 *See* South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (holding a search of an impounded car did not violate the Fourth Amendment when such search occurred incident only to the taking of inventory of the contents of the vehicle).

7 *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (holding that when a suspect is not in custody, a search will not violate the Fourth Amendment if it is voluntarily consented to in the absence of duress or coercion).

8 *See* Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (holding that there is no Fourth Amendment violation where, "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him").

9 *See* Abel v. United States, 362 U.S. 217, 241 (1960) (noting that there was no Fourth Amendment violation when hotel management consented to an FBI search of the room after a suspect abandoned property in a hotel room trash can and checked out of the hotel).

10 *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring) (commenting "[t]here are exceptions to this [warrant] rule. Searches may be made incident to a lawful arrest, and—as today's decision indicates—in the course of 'hot pursuit'").

11 *See* Mincey v. Arizona, 437 U.S. 385, 394 (1978) (citing McDonald v. United States, 335 U.S. 451, 456 (1948)) (noting that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment").

12 *See* Cady v. Dombrowski, 413 U.S. 433, 447-48 (1973) (holding that searches conducted in the course of an officer's caretaking duties are not facially unreasonable in the absence of a warrant).

13 *See generally* United States v. Chadwick, 433 U.S. 1, 14-15 (1977) *abrogated by* California v. Acevedo, 500 U.S. 565 (1991) (recognizing that warrantless searches of luggage may be conducted, so long as the search occurs incident to an arrest, or there is an exigent circumstance).

14 *See* Maryland v. Buie, 494 U.S. 325, 336-37 (1990) (holding that to require a warrant for a protective sweep would be an unnecessarily strict Fourth Amendment standard).

15 *Id.* at 328.

16 *Id.*

17 *Id.*

18 *Id.* at 330.

19 *Id.*

Justice White, writing for the majority, analogized *Terry v. Ohio* and *Michigan v. Long*,[20] to the case at hand. With regard to *Terry*, Justice White noted:

> [W]e held that an on-the-street "frisk" for weapons must be tested by the Fourth Amendment's general proscription against unreasonable searches because such a frisk involves "an entire rubric of police conduct-necessarily swift action predicated upon the on-the-spot observations of the officer on the beat-which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.[21]

Similarly as it related to *Long*, Justice White reflected:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.[22]

Justice White noted that "[t]he ingredients to apply the balance struck in *Terry* and *Long* are present . . . . Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found."[23] The Court further acknowledged the risk of officers' safety in the home and found "[it] is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter."[24] The Court's rationale for this safety risk was due in large part to being an officer's disadvantage of on his "adversary's turf.'"[25]

The Court limited the search "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be launched."[26] The Court then went on to place further restrictions on what officers could do beyond a precautionary sweep noting, "just as in *Terry* and *Long*, there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger."[27] The Court cautioned, however, that such a sweep is not the equivalent of a search; it must be swift and last only long enough to dispel any reasonable suspicion of danger.

Further, a protective *Buie* sweep is a more limited intrusion than that articulated in *Chimel v. California*.[28] Unlike a *Chimel* search, allowing the immediate area of the arrestee to be searched, which is essentially automatic, a *Buie* sweep may only be conducted "when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene."[29] Thus, the underlying rational for the protective sweep doctrine is the principle that police officers should be able to ensure their safety when they lawfully enter a private dwelling.[30] The officer must have a rea-

20 *See* Michigan v. Long, 463 U.S. 1032, 1051 (1983) (holding that "the balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous").

21 *Buie*, 494 U.S. at 331-32 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

22 *Buie*, 494 U.S. at 332 (quoting Michigan v. Long, 463 U.S. at 1049-50).

23 *Id*. at 332-33.

24 *Id*. at 333.

25 *Id*.

26 *Id.* at 334.

27 *Id*.

28 *See generally Buie*, 494 U.S. at 336 (distinguishing the facts of *Chimel* from those of *Buie*).

29 *Id.*

30 Leaf v. Shelnutt, 400 F.3d 1070, 1087 (7th Cir. 2005) (quoting United States v. Burrows, 48 F.3d 1011, 1015-16 (7th Cir. 1995)).

sonable suspicion of danger.[31] For an officer to harbor a reasonable suspicion of danger there must be "articulable facts, which taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[32]

II. Articulable Suspicion

The circuit courts differ on what circumstances are constitutionally sufficient to justify a *Buie* sweep. In *United States v. Winston*, the First Circuit Court of Appeals was presented with an interlocutory appeal from the government regarding the District Court of Massachusetts' suppression of evidence holding that the *Buie* doctrine had been violated.[33] The circuit court addressed the facts known to the agents:

> First, the agents had information to believe that Winston was armed and dangerous and possibly with armed cohorts. Winston was indicted, along with twenty-five others, for distribution of cocaine as part of an investigation of a large-scale cocaine trafficking organization. One of the other defendants informed agents that he had sold Winston two handguns and a bullet-proof vest. One of the agents present had also previously arrested Winston after a traffic stop for possession of a handgun. Second . . . that Winston's girlfriend initially denied having knowledge of Winston's car."[34]

In reversing and remanding the case, the majority of the court held that the agents had the right to protect themselves from Winston and other circumstances "reasonably within the scope of the dangers they were facing, i.e., an arrest involving a member of a drug organization with multiple constituents, not all of whom had been accounted for, who were likely to be armed, as Winston was, in a setting which presented an opportunity for ambush or similar violent conduct against the arresting officers."[35]

On the other hand, in *United States v. Moran Vargas*, the Second Circuit concluded there was no objective basis, nor evidence of subjective fear, when it found that an agent's testimony alone was not sufficient to amount to articulable facts that would lead a "reasonably prudent officer" to believe that a dangerous individual was hiding in the bathroom.[36] In addressing reasonable belief, in *Perkins v. United States*, the Sixth Circuit Court of Appeals stated, "[i]n the fifteen years since *Buie*, this circuit has had several opportunities to apply the decision. And in each instance that the officers had a reasonable belief that another person (besides the seized individual) was on the premises and posed a threat to the officers who were making the arrest the court has upheld a protective sweep incident to the arrest."[37] An earlier decision by that circuit suppressed evidence located during a protective sweep, stating there was no specific basis to believe anyone else was in the house.[38] Along these same lines, *United States v. Johnson*, the Seventh Circuit reminded lower courts and law enforcement officers that "although the Supreme Court has found exceptions to the warrant requirement in a number of compelling situations, it has never deviated from the rule that generalized suspicion alone is not enough to justify a warrantless search of a home, or a seizure of a person incident to such a search."[39]

31 *See generally Buie*, 494 U.S. at 335-36 (inferring the need for a reasonable suspicion of danger to exist before conducting a sweep).
32 *Id.* at 334.
33 444 F.3d 115,116 (1st Cir. 2006).
34 *Id.* at 118.
35 *Id.* at 120.
36 376 F.3d 112, 116 (2d Cir. 2004).
37 127 F. App'x 830, 834 (6th Cir. 2005).
38 *See* United States v. Akwari, 920 F.2d 418, 420 (6th Cir. 1990) (holding a protective sweep of a residence was improper because officers faced no resistance when entering, received no threats after arrests were made, and heard no voices or noises after arrests indicating any potential danger).
39 170 F.3d 708, 710 (7th Cir. 1999).

III. Arrests

Buie identifies two types of warrantless protective sweeps of a residence that are constitutionally permissible immediately following an arrest.[40] The first type allows officers to "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."[41] The second type of sweep goes 'beyond' immediately adjoining areas, but is confined to 'such a protective sweep aimed at protecting the arresting officers.' While the first type of sweep requires no probable cause or reasonable suspicion, the second requires "'articulable facts which, taken together with the rational inferences from the facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.'"[42] The Tenth Circuit noted, "*Buie* applies to both protective searches and protective detentions because the Court's reasoning in *Buie* supports treating protective sweeps and protective detention similarly."[43]

A. Closets and Spaces

Courts have struggled with allowing officers to justify "protective sweeps" in certain spaces. A common issue among many circuits is the search between the mattress and box spring of a bed. "It may well be that during the course of an otherwise justified protective sweep for a dangerous individual, thought to be hiding, the Fourth Amendment permits a simultaneously conducted limited search of places which might contain a weapon readily accessible to that as-yet-undiscovered individual."[44] Police officers escorted the defendant through his house to his bedroom so he could get dressed. A quick sweep of the bed and closet, along with a look into an unlocked cabinet on the top shelf of the closet, resulted in the court eschewing the application of *Buie*: "The cabinet searched was too small to accommodate a person."[45] Having declined to authorize the search pursuant to the "protective sweep" exception, the First Circuit proceeded to analyze the search under the search incident to arrest doctrine.[46]

In the Second Circuit, however, in *United States v. Blue*,[47] when officers looked between the mattress and box spring, the court found that because it was within the immediate reach of the defendant, such a search was permissible.[48] An earlier case in the Second Circuit focused on two questions when addressing this issue: "one, whether the search was 'properly limited;' and two, whether it was reasonable for the deputy marshal to conclude that [the suspect] posed a danger to those on the arrest scene."[49] The court reasoned that the deputy marshal could search the immediate area to "'neutralize the threat of physical harm' by determining whether there were weapons within [the suspect's] reach."[50]

In two unpublished opinions, the Fourth Circuit approved the search of a bedroom closet after an in-house arrest, but cautioned, "that is not to say, however that *Buie* condones a top-to-bottom search of a private residence simply because law enforcement officers have carried out a valid custodial arrest on the premises."[51] In a more recent decision, the Fourth Circuit accepted the testimony of a deputy United States marshal, and found it an objectively reasonable action for the deputy to

40 United States v. Archibald, 589 F.3d 289, 295 (6th Cir. 2009).
41 *Archibald*, 589 F.3d at 295 (citing Maryland v. Buie, 494 U.S. 325, 334 (1990)).
42 *Id.*
43 United States v. Maddox, 388 F.3d 1356, 1362 (10th Cir. 2004).
44 Crooker v. Metallo, 5 F.3d 583, 585 (1st Cir. 1993).
45 United States v. Nascimento, 491 F.3d 25, 50 (1st Cir. 2007).
46 *See id.* (referring to Chimel v. California, 395 U.S. 752 (1969)).
47 United States v. Blue, 78 F.3d 56, 58 (2d Cir. 1996).
48 *Id.* at 60 (citing *Chimel*, 395 U.S. at 763) (defining the within the immediate reach to mean "the area from within which [the defendant] might gain possession of a weapon or destructible evidence").
49 United States v. Hernandez, 941 F.2d 133, 136 (2d Cir. 1991).
50 *Id.* at 137.
51 United States v. Pettiford, No. 94-5391, 1995 WL 151863, at *3 (4th Cir. Apr. 7, 1995).

search a bedroom where he had previously discovered an individual hiding under a mattress.[52] Similarly, the District of Columbia Circuit has found that an agent was justified in looking in a bedroom immediately adjoining the place of arrest.[53] The agent's subjective intentions are not relevant as long as the protective sweep was objectively reasonable.[54]

In 2005, the Second Circuit was presented with the question whether a *Buie* protective sweep may be conducted when officers are lawfully present in a home for a reason other than the in-home execution of an arrest warrant.[55] The court, in applying *Buie* held:

> [A] law enforcement officer present in a home under lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party, may conduct a protective sweep when the officer possesses 'articulable facts which, taken together with the rational inferences from the facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the . . . scene.[56]

In a commonsense approach the court stated, "The restriction of the protective sweep doctrine only to circumstances involving arrests would jeopardize the safety of officers in contravention of the pragmatic concept of reasonableness embodied in the Fourth Amendment."[57]

Having said this, the question of consent leading to subsequent sweeps also found its way to the Second Circuit. In *United States v. Gandia*, the defendant gave consent to officers to enter a kitchen. As the officers entered the area, they looked into the living room and observed a bullet. In response, they conducted a protective sweep prior to placing the defendant under arrest.[58] The Southern District of New York held, "limited pre-arrest protective sweeps of a home for officer safety are lawful where there are specific articulable facts supporting a reasonable suspicion of risk to the officers' safety."[59] The circuit court then remanded the case to the district court to decide the issue of consent,[60] warning the trial court that "generously construing *Buie* will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home."[61] The Sixth Circuit approved a search of an upstairs area where the defendant was observed coming from the upstairs and followed by his son from upstairs shortly thereafter.[62]

Analogizing *Terry*, the Eighth Circuit found that "since an officer approaching a suspected drug trafficker in the open is justified in conducting a *Terry* stop and frisk out of concern that the suspect may resort to violence to thwart the encounter, it follows that an officer arresting a suspected drug trafficker in one room of a multi-room residence is justified in conducting a *Buie* sweep out of concern that there could be individuals lurking in the other rooms who may resort to violence to thwart the

52 United States v. Williamson, 250 F. App'x 532, 533 (4th Cir. 2007).

53 *See* United States v. Ford, 56 F.3d 265, 266 (D.C. Cir. 1995) (stating that a sweep of the bedroom immediately adjoining the hallway where the defendant was arrested was permitted, but only items in plain view could be seized).

54 *See* United States v. Lawlor, 406 F.3d 37, 43 n.8 (1st Cir. 2005) (citing Whren v. United States, 517 U.S. 806, 813 (1996) (holding that an officer's subjective belief is irrelevant to Fourth Amendment analysis)).

55 *See* United States v. Miller, 430 F.3d 93, 94-95 (2d Cir. 1995) (considering whether an officer, lawfully at defendant's apartment to execute a protective order issued to his roommate, could sweep defendant's bedroom).

56 *Id*. at 98.

57 *Miller*, 430 F.3d at 100.

58 United States v. Gandia, 424 F.3d 255, 259 (2d Cir. 2005).

59 *Id*. at 260 (citing United States v. Gandia, No. S1 03 Cr. 1503, 2004 WL 1396164 at *3 (S.D.N.Y. June 18, 2004)).

60 *Gandia*, 424 F.3d at 265.

61 *Id*. at 262.

62 United States v. Stover, 474 F.3d 904, 910-11 (6th Cir. 2007). *But see* United States v. Waldner, 425 F.3d 514, 517 (8th Cir. 2005) (finding no need for officers to search where officers had accompanied a husband to his home to retrieve his belongings and positioned themselves between the man and his in-house office).

arrest."[63] The Tenth Circuit, on the other hand, only finds protective sweeps valid when performed incident to an arrest.[64]

B. Arrest Outside the Home

Although *Buie* addresses an in-home arrest and protective sweep, various federal circuits have been presented with situations where the arrest took place outside of the home followed by a protective sweep inside the home. The First Circuit took a pragmatic approach to this predicament: "an arrest that occurs just outside the home can pose an equally serious threat to arresting officers as one that occurs in the home."[65] In similar fashion, the Second Circuit approved a sweep of an apartment following the arrest of the suspect just outside.[66] In *Sharrar v. Felsing*, a Third Circuit case, all individuals were arrested outside the home, and the police had no information that was anyone else in the home; the court declined to limit *Buie* sweeps to in home arrests, but found that the standard was not met in this case.[67] The Fifth Circuit upheld a protective sweep of the home after an arrest on a porch outside the home occurred.[68] Similarly, the Sixth Circuit approved a protective sweep of a motel room after an arrest in a parking lot outside of the motel room.[69]

In *United States v. Davis*,[70] an Eighth Circuit case, a team of officers entered the front door as the defendant was exiting the rear door. As the defendant was exiting, he was placed under arrest.[71] Officers did a protective sweep of the home and the barn, a building that did not adjoin the house. Because the officers had observed Davis make two trips between the house and the barn located approximately 100 yards apart, the court upheld the protective sweep of the barn.[72] Though "the barn did not immediately adjoin the area of arrest, the barn was not so far removed from the house that a reasonable prudent officer could dismiss the potential danger."[73]

In a 2006 Ninth Circuit case, the facts presented a situation with the police observing the defendant exiting the establishment with a brown bag. He then reentered the building. Two people then exited the building, and shortly thereafter the defendant exited without the bag. The police had observed the defendant when he reentered the building and saw him pause, take the bag off his shoulder and put it down. Police conducted a protective sweep.[74] Citing an earlier decision from that circuit (that predates *Buie*) which upheld a protective sweep of the interior of a house when an arrest had been made outside of the house,[75] the court reasoned that "'[a] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another.'"[76] In dicta, the court, concurring with other circuits, stated, "[T]he location

63 United States v. Cash, 378 F.3d 745, 749 (8th Cir. 2004).

64 *See* United States v. Garza, 125 F. App'x 927, 931 (10th Cir. 2005) (holding officers' sweep of a hotel bathroom improper because it was not executed incident to an arrest and because officers had no reasonable belief that the bathroom contained individuals posing danger to anyone).

65 *United States v. Lawlor*, 406 F.3d 37, 41 (1st Cir. 2005).

66 *See* United States v. Oguns, 921 F.2d 442, 446-47 (2d Cir. 1990) (holding officers' sweep of an apartment valid following an arrest outside the apartment because officers had a reasonable belief that individuals posing an immediate threat were inside).

67 Sharrar v. Felsing, 128 F.3d 810, 825 (3d Cir. 1997) (concluding the standard was not met and reasoned, "[w]e see no reason to impose a bright line rule limiting protective sweeps to in-home arrests . . . " but acknowledged that they "must consider whether there was an articulable basis for a protective sweep . . . ").

68 United States v. Watson, 273 F.3d 599, 603 (5th Cir. 2001).

69 United States v. Biggs, 70 F.3d 913, 914 (6th Cir. 1995); *see also* United States v. Colbert, 76 F.3d, 773, 778 (6th Cir. 1996).

70 *See* United States v. Davis, 471 F.3d 938 (8th Cir. 2006).

71 *Id.* at 942.

72 *Id.* at 941-42.

73 *Id.* at 945.

74 United States v. Paopao, 465 F.3d 404, 407 (9th Cir. 2006), *amended*, 469 F.3d 760 (9th Cir 2006).

75 *See generally* United States v. Hoyos, 892 F.2d 1387 (9th Cir. 1989).

76 *Paopao*, 465 F.3d at 409 (quoting *Hoyos*, 892 F.2d at 1397).

of the arrest, inside or outside the premises, should only bear on the question of whether the officers had a justifiable concern for their safety."[77]

Four years later, in *United States v. Lemus*,[78] the Ninth Circuit denied a request for an en banc hearing. In *Lemus*, an arrest had occurred just outside the home. The defendant attempted to return inside and was arrested before fully entering the home, and a sweep was done of the home, which the court upheld.[79] In a strongly worded dissent, Chief Judge Kozinski wrote, "The panel says the police could enter the house-with no suspicion whatsoever-because Lemus's living room 'immediately adjoined' the place surrounding the arrest, but *Buie* only authorizes a suspicion-less search when the police make an 'in-house-arrest' (and then only for a small area near the arrest, not a grand tour of the entire apartment)."[80] Chief Judge Kozinski continued:

> The *Buie* exception is particularly toxic to Fourth Amendment values because it permits a search with zero individualized suspicion-with nothing at all but the presumption that the home is a dangerous place for the police. This is a fair presumption if the police are already inside the home and exposed to danger. But to use the exception as a wedge for entering the home turns *Buie* inside out.[81]

The dissent notes *Lemus* should be distinguished from *United States v. Paopao*, another case in which the court dealt with an arrest made outside the home, by noting that in *Paopao* the court upheld a sweep of the home "*only* because the officers had 'a reasonable suspicion of danger.'"[82]

A Tenth Circuit opinion, in *United States v. Maddox*, differs from the aforementioned cases as it does not expressly limit the protective sweep areas within the home, and further the court concluded "that it is proper to consider . . . reasonable threats posed to . . . officers when drawing the boundaries of the arrest scene in an individual case."[83] Additionally, in the Eleventh Circuit, the court found appropriate the sweep of a house conducted once the suspect had been ordered outside and was placed under arrest.[84]

In a doorway threshold situation, the District of Columbia Circuit also declined to narrowly define the place of arrest stating, "merely in order to avoid permitting the police to sweep the entirety of a small apartment. The safety of the officers, not the percentage of the home searched, is the relevant criterion."[85] The same circuit opined, "Although *Buie* concerned an arrest made in the home, the principles enunciated by the Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence."[86] The court went on to explain that the officers' exact location, whether in or outside of a home at the time of arrest, does not change the nature of the appropriate inquiry, which is: "Did articulable facts exist that would lead a reasonably prudent officer to believe a sweep was required to protect the safety of those on the arrest scene?"[87]

IV. Exigency

"It is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search

77 *Paopao*, 465 F.3d at 410.
78 United States v. Lemus, 596 F.3d 512 (9th Cir. 2010).
79 *Id.* at 514 (Kozinski, C.J., dissenting).
80 *Id.*
81 *Id.* at 515.
82 *Id.*
83 388 F.3d 1356, 1363 (10th Cir. 2004) (involving a situation where federal marshals and local deputies were executing an arrest warrant, Maddox, as well as approximately four others, arrived at the house while law enforcement officers were inside the residence; Maddox's actions warranted his pat down by the officers).
84 *See generally* United States v. Kimmons, 965 F.2d 1001 (11th Cir. 1992).
85 United States v. Thomas, 429 F.3d 282, 287 (D.C. Cir. 2005).
86 United States v. Henry, 48 F.3d 1282, 1284 (D.C. Cir. 1995).
87 *Id.*

without first obtaining a warrant."[88] However, "although exigent circumstances may justify a warrantless probable cause entry into the home, they will not do so if 'the exigent circumstances were manufactured by the agents.'"[89] *United States v. Hassock* is the most recent Federal appellate decision to examine *Buie*.[90] An interagency task force received information that an individual had a semiautomatic handgun at a specific address in the Bronx. Task force members went to the apartment to conduct a "knock and talk" to interview the resident in order to obtain information regarding the person they were seeking. A woman answered the door who stated, in response to an agent's question, that she did not know if anyone else was in the residence. Agents asked to look around and the woman consented. In a bedroom, beneath a bed, the agent recovered a .380 caliber pistol.

At the suppression hearing, the government argued the task force members were conducting a lawful protective sweep pursuant to *Buie*.[91] In granting the defendant's Motion to Suppress, the district court observed, "by making a voluntary decision to enter the [a]partment . . . the task force put themselves at risk of the very danger that necessitated the protective sweep."[92] The government based its appeal on the holding in *Buie*. In reaching its holding, the Second Circuit made a thorough examination of its sister circuits.[93] The Court concluded:

> [T]he agents here had no legal process and, although they went to the Hassock apartment with a legitimate purpose the questioning and possible arrest of Hassock when Hassock did not answer the door, that purpose could not be pursued until Hassock was found. Under these circumstances, the sweep cannot be viewed as a reasonable security measure incident to Hassock's interrogation or arrest. Instead, the 'sweep' itself became the purpose for the agents' continued presence on the premises insofar as they thereby searched the location for Hassock.[94]

The Fifth Circuit "has created a non-exhaustive five-factor list to determine whether exigent circumstances exist: one, the degree of urgency involved and the amount of time necessary to obtain a warrant; two, the reasonable belief that contraband is about to be removed; three, the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought; four, the information indicating that the possessors of the contraband are aware that the police are on their trail; and five, the ready destructibility of the contraband and knowledge that efforts to dispose of it and to escape are characteristics in which those trafficking in contraband generally engage."[95]

V. Conclusion

"The legality of the protective sweep is a difficult question. It requires balancing two deeply important interests the lives of law enforcement officers and the constitutional right of the people to be secure in their homes under the Fourth Amendment."[96] Courts remain concerned with the physical well being of officers placed in harm's way. "On the Government's side of the balance, we have the substantial and important interest in preserving officer safety."[97] "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[98] The *Buie* decision, which created the "protective sweep" exception to the Fourth Amendment, is alive,

88 Kentucky v. King, 131 S. Ct. 1849, 1853-54 (2011).
89 United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004).
90 United States v. Hassock, 631 F.3d 79 (2011).
91 *Id.* at 80-83.
92 *Id.* at 83-84 (quoting United States v. Hassock, 676 F. Supp. 2d 154, 161-62 (S.D.N.Y. 2009)).
93 *Hassock,* 631 F.3d at 89.
94 *Id.* at 88.
95 United States v. Mata, 517 F.3d 279, 287 (5th Cir. 2008) (citing United States v. Gomez-Moreno, 494 F.3d 350, 354-55 (5th Cir 2007)).
96 United States v. Delancy, 502 F.3d 1297, 1307 (11th Cir. 2007).
97 United States v. Enslin, 327 F.3d 788, 796 (9th Cir. 2003).
98 United States v. Gould, 364 F.3d 578, 583 (5th Cir. 2004) (quoting Payton v. New York, 445 U.S. 573, 585 (1980)).

well, and thriving. Federal Circuit Courts have not dismantled *Buie*, but rather expanded the practicality of its holding for law enforcement officers with articulated reasonable suspicion.

About the AUTHOR

JEFFREY T. WENNAR has been practicing law since 1979. He began his legal career as an Assistant State's Attorney in Prince George's County, Maryland. Mr. Wennar has been a Senior Assistant State's Attorney in Montgomery County, Maryland since August 2001. Mr. Wennar has lectured to many legal, civic, and educational groups. He has also lectured throughout the United States on Community/Gang Prosecution. Mr. Wennar writes and is a published author. He has participated in writing the national legal considerations curriculum on behalf of the Bureau of Justice Assistance for both Basic and Advanced Training for Street Gang Investigators. In 1995 he was recognized by Federal Bureau of Investigation Director, Louis Freeh, for his successful prosecution of the Hester drug gang. In 2003 and 2004, Mr. Wennar received the prestigious Frederic Milton Thrasher Award from the National Gang Crime Research Center, for superior community service. In 2005, the Maryland General Assembly, House of Delegates recognized Mr. Wennar's contribution to Montgomery County and the State of Maryland by passing a Resolution congratulating him on his services to the County and State. Mr. Wennar is a member of the Executive Board of the Mid Atlantic Gang Investigators Network, and is the Legislative Chair for the National Alliance of Gang Investigators Associations. He is currently an Adjunct Professor at American University. While at American University Mr. Wennar developed and taught the course *Gangs and Gang Violence in America.* Mr. Wennar is also an Adjunct Professor at Washington College of Law where he developed and teaches two courses: an advanced trial advocacy class that focuses on prosecuting the gang homicide as well as an ethics course regarding the challenges and obligations of a prosecutor.

NOTES

D.C. DUI DISTURBIA: THE INTENDED POLICY AND ITS EXPLOSIVE EFFECTS

by Monika Mastellone

Many articles written on the topic of drunk driving often focus on the negative impact and consequences of drunk driving, and emphasize the need to crackdown on intoxicated drivers by implementing harsher laws and more severe punishments. In response to the public outcry over drunk driving, state law enforcements have been pushing forward efforts to enforce stricter laws that conform to the public's desire to catch intoxicated drivers and punish them for breaking the law.[1] In 2012, the District of Columbia amended its DUI Statute to include harsher penalties and stricter standards as a means to deter drinking and driving, while simultaneously broadening its definitions of impairment.[2] In effect, D.C. law enforcement is granted the authority to arrest and prosecute persons for driving under the influence who have blood-alcohol content (BAC) levels well below the "legal limit" of 0.08 percent.[3]

As a result of this new policy, not only has law enforcement successfully broadened its ability to catch intoxicated drivers, but the D.C. criminal justice system has allowed for arrests, charges, and even convictions of drivers who were either driving within the legal limit, or who were not under any influence of alcohol (or drugs) at all.[4] While no one contests the vital importance of thwarting the serious, harmful effects caused by drunk driving, a new issue has evolved that deserves some focus: the negative repercussions that result from over-zealous attempts to catch intoxicated drivers.

When these statutory changes were passed and enacted, the President of the Washington Regional Alcohol Program, Kurt Erikson, stated "[w]ith more than a quarter of the District's traffic deaths being caused by drunk drivers, these are necessary if not lifesaving new laws."[5] The fact is, however, that the imple-

1 *See, e.g.*, Journal Editorial Board, *Editorial: Habitual Drunk Drivers: State Senate Must Follow House in Crackdown*, Winston-Salem Journal (Oct. 20, 2013), http://www.journalnow.com/opinion/editorials/article_23147d6e-3824-11e3-bf11-001a4bcf6878.html (summarizing DUI crackdown efforts in North Carolina); T&D Staff Report, *State, Local Officials Plan DUI Crackdown*, The Times and Democrat (Aug. 17, 2013), http://thetandd.com/state-local-officials-plan-dui-crackdown/article_233c4a82-07ab-11e3-a719-001a4bcf887a.html (discussing DUI crack down efforts in South Carolina); Staff Report, *NJ Police Begin Drunk Driving Crackdown Effort*, NJ Today (Aug. 16, 2013), http://njtoday.net/2013/08/16/nj-police-begin-drunk-driving-crackdown-effort/ (explaining the DUI crackdown initiative in New Jersey).

2 *See generally*, Comprehensive Impaired Driving and Alcohol Testing Program Emergency Amendment Act of 2012, *available at* http://dcclims1.dccouncil.us/images/00001/20120712151430.pdf (describing the changes in the new DUI law including an increase in mandatory-minimum sentences for certain DUI offenses).

3 *See id.*

4 Although convictions have been upheld where the defendant produced a breath score of 0.00 percent because evidence indicated that the defendant was under the influence of drugs rather than alcohol, *see, e.g.*, *Derrick Carrington v. District of Columbia*, No. 11-CT-698 (D.C. Oct. 17, 2013), this article focuses solely on instances where the defendant contained a BAC level of 0.00 percent and where the police failed to indicate any suspicion of drugs.

5 Robert Thomson, *D.C. Toughens Drunk Driving Law, Restores Breath Test*, Wash. Post (July 31, 2012), http://www.washingtonpost.com/blogs/dr-gridlock/post/dc-

mentation of these changes does not just save lives, but can ruin them as well. When a person is charged with and subsequently convicted of driving under the influence, certain consequences result: court dates; large fines; lawyers' fees as well as other costly fees; loss of license; probation requirements; potential jail time; and perhaps the most difficult hardship the loss of one's job or the inability to pursue certain career endeavors due to a potentially erroneous DUI conviction. Particularly, D.C. police authorities[6] have arbitrarily failed people during field sobriety tests,[7] prosecutors are charging people under the DUI statute who have produced breath test scores of well below 0.08 percent (the 'alleged' legal limit)[8] and worst of all, judges are convicting these individuals.[9] Indeed, it appears that the District of Columbia has reached the point where completely sober people should fear driving in the District.

Accordingly, this article sheds light on the issue of overreaching DUI laws that often result in unjust DUI prosecutions. This article also discusses the policy implications of the specific D.C. DUI Statute, issues with law enforcement training, problems that these efforts have caused, and suggestions for possible future resolution. While a complete fix of the problem may not be immediately foreseeable, the more awareness and knowledge that D.C. DUI attorneys possess on the issue, the greater chance that progress will be made toward achieving a solution.

I. D.C.'s DUI Dilemma

In 2010, there were seven deaths in the District of Columbia caused by drunk driving.[10] In 2011, this number increased by one, resulting in a total of eight deaths caused by drunk driving throughout the District of Columbia.[11] The next year, in 2012, the D.C. legislature responded by introducing new legislation that included stricter standards and harsher penalties. Specifically, in July 2012, the D.C. City Council passed the Comprehensive Impaired Driving Act of 2012 ("Act"), signed into law by Mayor Vincent Gray.[12]

The Act cracks down on drunk driving by implementing greater maximum penalties for first-time offenders, while increasing the mandatory minimum sentences for repeat offenders. The maximum jail times for first-time offenders increased from 90 days to 180 days, and the maximum fine for first-time offenders increased from $300 to $1,000.[13] Repeat offenders now face a mandatory minimum sentence of ten days in jail if their BAC is 0.20 percent or higher, and twenty days in jail if their BAC level reaches 0.30 percent.[14] Moreover, should these mandatory minimum terms of incarceration apply in a particular case, the

toughens-drunk-driving-law-restores-breath-test/2012/07/31/gJQAD0r7MX_blog.html (referring to the stricter standards and harsher penalties implemented through the 2012 amendments to the D.C. DUI Statute as the "new laws").

6 D.C. Police authorities include the Metropolitan Police Department (MPD), the United States Park Police (USPP), the United States Capitol Police (USCP), the Metro Transit Police, and the Secret Service—all vested with the authority to perform DUI stops and arrests. Washington Peace Center, http://www.washingtonpeacecenter.org/dccops (last visited Dec. 18, 2013) (listing the numerous law enforcement agencies that have jurisdiction in Washington, D.C.).

7 D.C. DUI Attorney Bryan Brown, for example, tried a case in D.C. Superior Court a few years ago in which a police officer testified that the defendant had failed the Horizontal and Vertical Nystagmus tests in both eyes. This testimony proved to be fabricated during cross-examination when the defendant then popped out his glass eye in open court. Telephone Interview with Bryan Brown, Esquire, Law Office of Bryan Brown (Oct. 24, 2013) (notes on file with author).

8 *See* David J. Hanson, *DWI Arrests at Zero BAC in DC*, Alcohol Problems and Solutions, *available at* http://www2.potsdam.edu/hansondj/Drivingissues/1133276608.html#.UrOA1PRDt8E (discussing officers' habit of arresting persons for DUI who have produced breath scores well below 0.08 percent, and focusing on one particular instance in which a woman was arrested for DUI after having one glass of chardonnay and producing a breath score of only 0.03 percent).

9 Telephone interview with Bryan Brown, *supra* note 7 (noting that in the summer of 2013, for instance, a D.C. Superior Court judge convicted a man of DUI who had produced a breath score of 0.02 percent).

10 MADD, *2011 Drunk Driving Fatalities by State*, http://www.madd.org/blog/2012/december/2011-State-data.html (last visited Nov. 4, 2013).

11 *Id.*

12 *See* Thomson, *supra* note 5.

13 D.C. Code § 50-2206.13 (2013).

14 *Id.*

Act now precludes the possibility of serving incarceration terms on weekends or in a halfway house setting.[15] Thus, all incarceration terms must be served consecutively and no part of the mandatory minimum sentence may be suspended.[16]

In addition, the Act "establishe[d] new oversight for the D.C. police department's breath-testing programs and a certification program for officers using the equipment."[17] The purpose behind this provision was to allow officers to resume breath testing, so that convictions were no longer based merely on urinalysis[18] and standardized field sobriety test[19] (SFST) results.[20]

While the noble intentions of the D.C. legislature are recognized, the actual implications of this new legislation are unsettlingly astounding. Particularly, D.C. Police authorities are continuously pulling over motorists, concluding that these motorists have failed the SFSTs, and then once the motorist is arrested and taken to the police station for a breathalyzer test, these officers will cite the motorist for DUI even when the motorist produced a breath score below 0.08 percent.[21] In effect, prosecutors charge these individuals with DUI, despite their low breath scores, resulting in many individuals receiving their first criminal conviction.

In one particularly noteworthy case, a D.C. Superior Court judge convicted a man of DUI who had produced a breath score of a mere 0.02 percent.[22] Additionally, D.C. law enforcement has the ability to charge individuals with DUI who have produced a breath score of 0.00 even when there is neither any chemical evidence of alcohol nor any general suspicion of drugs being present in the motorist's system.[23] Accordingly, the statute's intended goal of catching intoxicated drivers is instead being perverted; the law is allowing innocent persons to be arrested, charged, and convicted of DUI.

The root of this problem stems from multiple factors. First, despite the fact that the statute prescribes new breath testing regulations, officers do not breath test on the scene.

15 *See* D.C. Code § 50-2206.01(11) (2013) (defining "Mandatory minimum term of incarceration"); D.C. Code §50-2206.57 (2013) (expanding on the meaning of "Mandatory minimum periods"); *see also* Michael Bruckheim, *District of Columbia's New DUI Law Part 3: No More Weekends*, BruckLaw.com (May 7, 2013), http://www.brucklaw.com/part-3-no-more-weekends (describing the "severe financial or occupational consequences" that individuals may face due to the fact that the weekend program is no longer available).

16 *See* § 50-2206.57(b).

17 *See* Thomson, *supra* note 5.

18 There is a current debate over the accuracy of urinalysis. Dr. Lucas Zarwell, the Chief Toxicologist for the District of Columbia, has testified to the D.C. Council that urine does not provide an accurate means for measuring a person's level of intoxication because there is no scientific correlation between the concentration of alcohol in the urine sample and the person's actual blood alcohol concentration. *See Zarwell Testimony on Urine*, YouTube (Sept. 26, 2013, 00:44), http://www.youtube.com/watch?v=FUmhJ_jPF1E ("If you're going to look at urine concentrations of alcohol and science, there is a very loose correlation.").

19 SFSTs commonly include the Horizontal Gaze Nystagmus Test, the Walk and Turn test, and the One Leg Stand test, having accuracy rates of 77%, 68%, and 65%, respectively. *See* 2006 NHTSA SFST Manual (2006), *available at* http://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/2006%20NHTSA%20SFST%20Manual.pdf.

20 The Metropolitan Police Department had suspended breath testing the previous year after a consultant found that faulty testing equipment had inflated test results, resulting in nearly 400 convictions based on inaccurate results. *See* Mary Pat Flaherty, *400 DWIs in D.C. based on faulty data*, Wash. Post, June 10, 2010, at A1, A7, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060906257.html ("Nearly 400 people were convicted of driving while intoxicated in the District since fall 2008 based on inaccurate results from breath test machines, and half of them went to jail[.]"); Thomson, *supra* note 5. This sparked civil suits that resulted in the city paying out $368,000 to select convicted DUI drivers who chose to pursue the civil suit; however, very few drivers were able to get rid of their criminal convictions. *See* Mike Debonis, *Three Years After Breathalyzer Scandal, D.C. Police Restart Alcohol Breath Testing*, Wash. Post (Jan. 9, 2013), http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/01/09/three-years-after-breathalyzer-scandal-d-c-police-restart-alcohol-breath-testing/ (stating that of the 50 drivers who challenged their DUI convictions, only two ultimately prevailed in getting their charges tossed).

21 *See* Hanson, *supra* note 8.

22 Telephone interview with David Akulian, Criminal Defense Attorney, Law Offices of David Akulian (Oct. 24, 2013) (noting that this case is presently pending appeal in front of D.C. Superior Court Judge Marisa DeMeo).

23 *See* Hanson, *supra* note 8.

Rather, they require motorists to perform a series of SFSTs and then proceed to arrest them based on the results of these field sobriety tests. After the arrest, the motorist is taken to the police station and given a breath test. Notably, many times this breath score is not admitted at trial because of either defective equipment or faulty procedure.

A reading of the National Highway Traffic Safety Administration manual, used for all D.C. police authorities' DUI detection and SFST training, uncovers where the problem begins to unfold.[24] In the course of their training, officers are first and foremost taught that a primary way to prevent people from driving under the influence is to instill the "fear" of being arrested into the public.[25] The manual explains that "unless there is a real risk of arrest, there will not be much fear of arrest."[26] This policy, alone, appears to encourage officers to arrest as many motorists as they can; the question that arises then is how far will officers go in meeting this goal?

As with any traffic-stop based arrest, to conduct a DUI arrest based on probable cause, officers first must pull over the vehicle. According to their manual, an officer's suspicion may be initially raised by witnessing either a traffic violation, or "behavior that is unusual, but not necessarily illegal."[27] This is referred to as "phase one."[28] Thus, according to the officers' training, unusual behavior in and of itself can raise suspicion that someone is intoxicated. Once an officer comes into initial contact with the motorist, "phase two" begins. In phase two, the officer can observe the driver by interacting with him face-to-face. During this phase, the officer will often ask interrupting or "unusual" questions in order to observe the driver's ability to react to such questioning.[29] Unlike with SFSTs, the results of these tests merely provide the officer with clues as to the person's potential intoxication, but usually cannot themselves establish probable cause. Thus, officers facilitate phase two in order to collect enough reasonable suspicion to conduct the SFSTs.

In "phase three," officers will conduct the SFSTs.[30] Unlike in other jurisdictions, D.C. police authorities do not typically perform breath tests on the scene. In effect, if a completely sober person requests to be breathalized on the spot to show the officer his or her sobriety, he or she will likely be denied this request.[31] Instead, he or she will be required to perform SFSTs, a series of tests that officers use to determine if a motorist is intoxicated, which is often required to obtain the probable cause necessary for the arrest.

The problem with SFSTs is that the results are unreliable.[32] It is conceivably the case

24 2006 NHTSA SFST Manual, *supra* note 19.

25 *See id.* § II-3 (describing the technique of "general deterrence" as instilling in the public a "fear of being arrested").

26 *Id.*

27 *Id.* § IV-1.

28 *Id.* §§ IV-2, IV-4.

29 *Id.* §§ IV-2, IV-4.

30 *See id.* §§ VII-1 - VII-7 (SFSTs include the Horizontal Gaze Nystagmus test, the Vertical Gaze Nystagmus test, and Divided Attention tests such as the Walk and Turn test and the One Leg Stand test).

31 Telephone Interview with Bryan Brown, *supra* note 7 (explaining that officers likely prefer not to perform breath tests on the scene since they are not admissible in court as well as an added expense and inconvenient for the officers' zero-tolerance arrest prerogative).

32 *See*, *e.g.*, Steven J. Rubenzer, *The Standardized Field Sobriety Tests: A review of Scientific and Legal Issues*, 32 Law & Hum. Behav. 293, 293 (2008), *available at* http://www.thecrimestoppers.com/mse2012/SFST%20additional%20materials/2008%20Rubenzer%20SFSTs%20-%20Scientific%20&%20Legal%20Issues.pdf (concluding that "the research that supports their use is limited, important confounding variables have not been thoroughly studied, reliability is mediocre, and that their developers and prosecution-oriented publications have oversold the tests"); Patrick T. Barone & Jeffery S. Crampton, *Do "Standardized" Field Sobriety Tests Reliably Predict Intoxication?*, 84 Mich. Bar J., 23-26 (2005), *available at* http://www.michbar.org/journal/pdf/pdf4article882.pdf (describing the problems with SFST studies and emphasizing that the original SFST study conducted in 1977 produced an error rate of 47%, and another study later indicated that the HGN test is incorrectly performed by officers 95% of the time); *The Accuracy of the Standardized Field Sobriety Test*, STSF.US, http://sfst.us/raw.html#top (last visited Jan. 3, 2014) (providing raw data from an earlier study, indicating that SFSTs are extremely inaccurate predictors of BAC because almost everyone fails the SFSTs); Chad Maddox, *Standardized DUI Tests Are*

that any sober, medicated, or injured person could easily fail them. Moreover, these tests have error rates ranging from twenty-three to thirty-five percent.[33] Studies have shown that false positives are extremely common, which create an abundance of problems when D.C. police authorities are using this standard to arrest individuals.[34] Specifically, SFSTs are designed to provide an indication to officers that a person is intoxicated; for example, if a person hits four of the six clues on the horizontal gaze nystagmus (HGN) test, this is supposed to indicate to the officers that the person likely has a blood-alcohol concentrate of at least 0.10 percent.[35] In 2007, however, a study assessing the reliability of the HGN test found that persons with blood-alcohol levels below 0.05 percent produced false positives numerous times, in some cases displaying all six of the intoxication "clues."[36]

When a person fails the SFSTs, which many people often do, the officer will usually arrest the person for DUI and bring him or her to the police station either to conduct further SFSTs or to take a breath sample. This practice differs from other jurisdictions, many of which will usually perform a breath test at the scene to corroborate the SFST results prior to making an arrest. Despite the fact that the option for performing the breath test at the scene is provided in the officers' manual, D.C. officers often skip this test, knowing that the results are not admissible in court.[37]

II. Difficulties with the D.C. DUI Law

The core issue with the D.C. DUI law occurs when the arrestee provides a breath sample at the police station that results in a breath score reading below 0.08 percent. Notwithstanding the fact that there may have been no suspicion of drugs recorded or implied in the police report, prosecutors often go forward with bringing charges of DUI against these motorists. The first question raised is how can prosecutors charge people with DUI who have produced breath results below 0.08 when 0.08 is supposed to be the "legal limit?" The answer, albeit vague, is written in the statute. According to D.C.'s DUI Statute, "impairment" is defined by consumption of alcohol "in a way that can be perceived or noticed."[38] In other words, despite the fact that a person may be completely sober or very close to it, e.g., having produced a breath score of 0.02 percent, a prosecutor may nevertheless press charges against the motorist based on the officer's subjective testimony that he "perceived" or "noticed" drunken behavior. As such, this standard appears extremely subjective given that the basis for prosecuting a person for DUI can be based solely on an individual officer's personal observations and opinions regarding the person's behavior. While prosecutors argue that the standard is objective, this contention is highly contested by defense attorneys, who argue that the standard is too subjective, arbitrary, unconstitutional, and one that should not be tolerated by our legal system.

Furthermore, there is a clause in D.C.'s DUI Statute that stipulates that a person who produces a breath score below 0.05 percent (0.04 and below) is presumed not intoxicated.[39]

Unreliable Indicators for Determining Driving Impairment, Gototrial.com (Feb. 2012), http://gototrial.com/standardized-dui-tests-are-unreliable-indicators-for-determining-driving-impairment/ (stating that "'not a single study' links SFSTs to driving impairment").

33 *See* NHTSA SFST Manual, *supra* note 19, § VIII-1 (including statistics that that Horizontal Gaze Nystagmus (HGN) test is 77% accurate; the Walk and Turn test is 68% accurate; and the One Leg Stand test is 65% accurate).

34 *See, e.g.*, Marcelline Burns, *The Robustness of the Horizontal Gaze Nystagmus Test*, Nat'l Highway and Traffic Safety Admin. (2007), at 18-22, http://sfst.us/KanePDF/The_Robustness_of_the_Horizontal_Gaze_Nystagmus_Test.pdf.

35 NHTSA SFST Manual, *supra* note 19, § VII-3.

36 *See* Burns, supra note 34, at 18 ("Table 13").

37 *See* Koenig Pierre, *Is a Field Breathalyzer Test Administered During a Stop Admissible in Court?*, PierreLawFirm.com (Feb. 4, 2013), http://www.pierrelawfirm.com/2013/02/04/is-a-breathalyzer-test-taken-immediately-after-a-stop-admissible-in-court/ (explaining that roadside breathalyzer results are not admissible in court because the technology of a roadside breathalyzer is not as accurate as those kept at the station, which are calibrated and provide a more exact reading of a person's BAC).

38 D.C. Code § 50-2206.01(8) (2013).

39 *See* D.C. Code § 50-2206.51(a)(1) (2013). While it is neither considered intoxicated per se nor presumed not

Overzealous law enforcement can overcome this 'rebuttable presumption,' however, by using their 'experience' and 'training' to "perceive" or "notice" impairment.[40] It is extremely troubling that the "legal limit" of 0.08 has been undermined by the discretionary decisions made by police, prosecutors, and even judges to arrest, charge, and convict persons based on this distorted interpretation of the law.[41]

Unfortunately, the subjective standards written into the statute do not stop at intoxication; the D.C. DUI Statute further states that a person is impaired when there is "evidence that a person is impaired by a drug."[42] Again, this standard is troubling because, as far as the law is concerned, "evidence" of drugs could essentially mean anything. This vague and unclear wording puts a motorist at risk of being considered under the influence of drugs by a mere subjective interpretation of the individual's actions or behavior. Rather than this ambiguous subjective standard, the statute should require chemical testing to prove the presence of drugs in a person's system.

Also noteworthy is the provision of the D.C. DUI Statute that has been found unconstitutional by judges presiding over repeat offender cases.[43] Specifically, the Act included a clause stating that a person with a prior DUI conviction who refuses to submit to chemical testing will be presumed to be intoxicated.[44] In other words, under this section of the Act, the potential repeat offender's refusal results in per se guilt of DUI and requires the state to fulfill no further burden in proving its case.[45] Accordingly, this clause is essentially "burden shifting," making it the defense's responsibility to prove that the person was not intoxicated.[46]

III. Disharmony Between D.C. DUI Law and Its Intended Policy

The policy driving the overbroad discretionary strictness of the D.C. DUI Statute is the "zero-tolerance" mindset of law enforcement.[47] Originally, the D.C. DUI Statute did not contain any language regarding the presumption of non-intoxication if a breath score below 0.05 percent was produced. In fact, D.C. police authorities proactively enforced their idea of a "zero-tolerance" DUI policy by arresting anyone with a blood-alcohol content of 0.01 percent and above.[48] Additionally, officers would even arrest motorists with BACs of 0.00 if they

intoxicated, the "grey area" of breath scores between 0.05 and 0.07 percent can still survive a Motion of Judgment for Acquittal if not otherwise resulting in a conviction based on the subjective testimony of the officers.

40 Specifically, if an officer decides that a person is intoxicated based on his personal observations and perception that the person is acting in a way consistent with intoxication, the officer can arrest the person for DUI notwithstanding the fact that the person produced a breath score below 0.05 percent.

41 Currently, all fifty states have implemented a legal limit of 0.08 percent; no state has a legal limit that is either above or below 0.08. *See* DMV.org, http://www.dmv.org/automotive-law/dui.php (last visited Jan. 3, 2014). D.C., however, is not the only jurisdiction to prosecute DUI cases with blood-alcohol contents below 0.08 percent. *See, e.g.*, George Fredrick Mueller, *Alcohol Level .07% or Less Yet Still Arrested in California for DUI/ DWI, How?*, http://www.avvo.com/legal-guides/ugc/alcohol-level-07-or-less-yet-still-arrested-for-dui--drunk-driving--dwi--how-in-california (last visited Jan. 3, 2014) (discussing how California citizens are routinely being prosecuted for DUI after having produced breath scores of 0.05 percent or higher). In fact, there has even been a national push to lower the legal limit to 0.05 percent, arguing that people can be impaired with BACs at this level. *See* Mike M. Ahlers, *Tougher Drunk-Driving Threshold Proposed to Reduce Traffic Deaths*, CNN.com, (May 15, 2013, 6:36 AM), http://www.cnn.com/2013/05/14/us/ntsb-blood-alcohol/.

42 D.C. Code § 50-2206.51(b)(1) (2013).

43 *See* Bryan Brown, Esquire, Law Office of Bryan Brown, & Thomas Lester, Esquire, Law Office of Thomas Lester, *Handling DUI Cases in DC*, Continuing Legal Education class powerpoint presentation, at slide 15 (Sept. 10, 2013) (on file with author).

44 D.C. Code § 50-1905(b) (2013) ("If a person under arrest refuses to submit to specimens for chemical testing as provided in §50-1904.02(a), and the person has had a conviction for a prior offense under §50-2206.11, §50-2206.12, or §50-2206.14, there shall be a rebuttable presumption that the person is under the influence of alcohol or a drug or any combination thereof.").

45 *See id.*

46 *See id.*

47 *See* Hanson, supra note 8.

48 *Id.* ("If you get behind the wheel of a car with any measurable amount of alcohol, you will be dealt with in DC. We have zero tolerance . . . Anything above .01, we can arrest.").

admitted to having a drink earlier in the evening.[49] In one famous instance, a forty-five year old lawyer was handcuffed, searched, arrested, put in a jail cell, and charged with DUI after she admitted to police officers that she had one glass of chardonnay wine with dinner producing a breath score of just 0.03.[50] Shortly after the case of the "chardonnay lady," as some people familiar with her story have referred to her, the D.C. Council amended the D.C. DUI Statute to include a clause declaring that a person is presumed not intoxicated when he or she produces a breath score below 0.05 percent.[51]

Despite the intentions to relax the extremely stringent "zero-tolerance" policy, the actual practices of law enforcement have not seemed to change. Motorists with breath scores below 0.05 percent and well below the "legal limit" of 0.08 are being arrested and charged with DUI. DUI attorneys in the District are retaining clients who have been charged under the DUI statute after producing breath scores as low as 0.017 percent,[52] and even 0.00.[53] Clearly, the "zero-tolerance" policy held by officers in the field remains strong, despite the Act's attempt to create a more reasonable law. Additionally, the government continues to prosecute these cases, hinging its hope on the idea that judges will convict based on their biases against drunk drivers.

IV. Defenses for the DUI Disaster

DUI defense attorneys dealing with cases in which their clients have been charged with DUI after producing breath scores below (and above) 0.08 have several defenses available to them.

A. Statutory Interpretation

First, defense attorneys can look to the very language used in the statute to define the standards that should be applied by the court. "Impaired," for example, is defined as "a person's ability to operate or be in physical control of a vehicle is affected, due to consumption of alcohol or a drug or a combination thereof, in a way that can be perceived of noticed."[54] Defense attorneys can thus argue that the required standard of proof has changed; specifically, that a direct correlation must be shown between the person's intoxication and his inability to operate a vehicle in order to prove that the motorist was 'impaired.' Essentially, the defense should ask for a new jury instruction that clarifies this standard of proof to the triers of fact when it is a jury trial case.

B. Knowing the Law Better than the Adversary

Next, defense attorneys will often find portions of the Act buried in the statute that law enforcement ignores, and then can use this knowledge against the government at trial. D.C. Code § 50-2206.52(b), for instance, states that "[a]ny person upon whom a breath specimen is collected shall be informed, in writing, of the provisions of §50-2206.52 and §50-2206.52(a) at the time that the person is charged." However, this requirement is not always met. Another issue defense attorneys can stress is the new foundational requirements prescribed in §50-2206.52, allowing defense attorneys to expand the materials included in their *Rosser* requests.[55]

49 *Id.* ("The DC's Attorney General says that it's legal for drivers to be arrested for DUI (driving under the influence of alcohol) with 'no registered BAC.' Indeed, DC police do arrest people with 0.00 BAC if they admit to having had a single drink with dinner.").

50 *Id.*

51 *See* D.C. Code § 50-2206.51(a)(1) (2013); Telephone interview with Bryan Brown, *supra* note 7 (discussing the details of this highly talked about case and noting its significance in the evolution of D.C. DUI law) (notes on file with author).

52 Case received by D.C. criminal defense attorney David Benowitz.

53 Case on file with author (confidential).

54 D.C. Code § 50-2206.01(8) (2013).

55 Pursuant to Rosser v. United States, 281 A.2d 598 (D.C. 1977), defense attorneys memorialize their discovery requests in a letter, asking for more information from the government, including any evidence deemed exculpatory under Maryland v. Brady, 373 U.S. 73 (1963).

Moreover, §50-1904,[56] §5-1501.06(h)(3),[57] and §5-1501.07[58] allow defense attorneys access to extensive records. It is vital that defense attorneys proactively ask for these specific items and hold the government to its obligations under the Act.

With these items at their fingertips, defense attorneys can begin to build defenses based on faulty machinery, incorrectly administered tests sometimes conducted by uncertified officers, or incorrectly calibrated breathalyzer machines.[59] If defense attorneys become knowledgeable enough on what the stringent requirements are and can point out faults, they will likely be successful in suppressing breath scores. One example is that the United States Park Police require a twenty-minute observation period prior to administering a breath test; without fulfilling this requirement, the breath scores are not valid.[60] The government would then have to prove its case solely on SFST results and other observations mentioned by the testifying officers. In addition, if the prosecution fails to provide any of these requested documents, or fails to respond to a video preservation request, a defense attorney may move to dismiss the entire case.

C. Learn the NHTSA SFST Manual

Under the D.C. DUI Statute, defense attorneys are entitled to all of the manuals used by law enforcement. Accordingly, one of the most effective defenses becomes the defense attorney's ability to learn the manual better than the officers, providing for an extremely thorough cross-examination that adversely affects officer credibility. In the manual, for instance, officers are taught word-for-word (literally in quotations) what they are to say while administering the SFSTs. What defense attorneys will often be able to successfully point out, however, is that the officers have not memorized these directions. The most effective way to display this lack of memorization in open court is to ask the officer to recite the directions as the manual prescribes. In doing so, defense attorneys will be able to point out the errors made during the officer's administration of the SFSTs, thereby discounting the alleged results produced by the SFSTs when the tests were conducted.[61] Even more compelling, once the officers have performed the SFST directions incorrectly in court, defense attorneys can then argue that the particular officer would not have passed his course, and is therefore unqualified to testify as an expert witness.

Further, even if the SFSTs were administered correctly, defense attorneys will want to

56 D.C. Code §50-1904 (2013) ("Full information concerning the chemical test results administered in this chapter, including records as provided in §5-1501.06(h)(3), shall be made available to the person from whom specimens were obtained pursuant to Rule 16 of the District of Columbia Superior Court Rules of Criminal Procedure.").

57 D.C. Code §5-1501.06(h)(3) (2011) entitles the defense to collect records of: lab notes and bench notes; worksheets, graphs, and charts; photographs; raw data; reports; statistical information used to calculate probabilities and uncertainty; any logs related to the equipment materials used in testing; any written communications or records of oral communications regarding a specific individual case between the department and any other agency or between the department and any person not employed by the department; proficiency test results for individual examiners involved in the analysis.

58 D.C. Code §5-1501.07(b)(1)-(3) (2013) ("In addition to the requirements under subsection (a) of this section, the Department shall: (1) Develop a program for District law enforcement personnel to become trained and certified as a breath test instrument operator; (2) Develop policies and procedures for the operation and maintenance of al breath test instruments utilized by District law enforcement personnel; and (3) Develop policies and procedures for maintenance of records demonstrating that the breath test instruments utilized by District law enforcement personnel are in proper operating condition.").

59 Defense attorneys should look for machine error, breathing pattern error, core body temperature error, hematocrit error, partition ratio error, mouth alcohol error, and extrapolation error.

60 *See* United States Park Police Traffic Safety Unit Intoximeter EC/IR II Operator Manual, at 11 ("To eliminate the possibility of mouth alcohol contaminating a breath sample, United States Park Police's breath test procedures require the safeguard of a 20 minute observation period.").

61 For example, prior to administering the SFSTs, officers should be asking whether the motorist has had any injuries, accidents, or inner ear issues. Additionally, defense attorneys will want to point out the positive information detailed in the officer's reports, the errors documented in the paperwork, and the omitted details the officer is trained to document.

point out the lack of credibility of the tests, as well as alternative explanations for the results. For instance, the motorist may have been suffering from a pathological disorder, from dry-eyes, or from an injury hindering his ability to balance correctly. Moreover, external factors such as wind, traffic, light, and dust may play a role in the reliability of the SFST results.

Finally, in building a successful DUI defense especially for those cases in which the government relies heavily upon the officer's observational testimony pointing out the overbroad "indicators" in the officers' manual for DUI detection is very effective. For instance, according to the officers' manual, the most common and reliable initial indicators of DUI include almost all traffic offenses.[62] As such, defense attorneys will want to point out that these traffic violations are extremely common and are committed by sober drivers on a daily basis. Then, defense attorneys will want to discount the government's contention that the defendant was unable to "divide his attention" by pointing out factors such as the motorist's ability to operate a manual vehicle, requiring divided attention to shift gears while operating a clutch.

V. Diminishing the D.C. DUI Debacle

Ultimately, the only way to solve the current overzealous prosecution problem is to create enough awareness to initiate change. D.C. Council members should work toward revising the D.C. DUI Statute and amending the Act to be less overbroad and vague. Clearer definitions and narrower standards for determining the point of impairment are necessary to shield innocent drivers from being prosecuted for DUI. Moreover, local law enforcement authorities should create better training programs for identifying intoxicated persons and relax their "zero-tolerance" policy, as was intended by the Act. Motorists with blood-alcohol contents below 0.05 percent should not be prosecuted for DUI unless a suspicion of drugs exists, that is then proven with chemical testing. Additionally, a higher standard should be implemented when prosecuting motorists for DUI who have produced breath scores between 0.05 and 0.07 percent.

The bottom line is that changes must take place, and that further reform of the current D.C. DUI Statute must be initiated. If the current practices of DUI law continue, many will begin to fear driving, even while sober, if such fear has not already set in. In the meantime, the strongest defense against the problem is zealous representation provided by DUI defense attorneys who can use preparation and perseverance to defeat erroneous DUI charges against innocent motorists in the District.

62 Specifically, turning with a wide radius, weaving, turning abruptly or illegally, stopping inappropriately, accelerating/decelerating rapidly, swerving, following too closely, driving too fast, driving too slow, or braking erratically. *See* 2006 NHTSA SFST Manual, *supra* note 19, §§ V-4 - V-6 (listing the "visual cue descriptions" to look for when pulling a motorist over for a DUI potential stop).

About the AUTHOR

MONIKA MASTELLONE, a Senior Staffer on WCL's *Criminal Law Practitioner*, an Article›s Editor for the *American University Business Law Review*, and a member of WCL's Criminal Law Society, has dedicated her law school experiences to the specific field of criminal law. During her time in law school, she has interned for the Maryland Office of the Public Defender, the D.C. Public Defender Service, a Maryland Circuit Court Judge, and is presently working as a law clerk at a private criminal defense office in downtown D.C., where she has learned invaluable information regarding D.C. DUI law. Special thanks to her supervisors and mentors, Thomas A. Key and Bryan Brown. In the spring of 2014, Monika will work as a student defense attorney at the WCL Criminal Justice Clinic. Before law school, Monika graduated from The College of New Jersey with a B.S. in Business.

INDEMNIFICATION AGREEMENTS & RIGHT TO COUNSEL FOR INDIVIDUALS AND CORPORATIONS:

Implications and Pitfalls for Prosecutors and Defense Counsel in Complex White-Collar Enforcement and Asset Forfeiture Actions

by Joseph Hernandez

Forfeiture laws have enormous implications for small and medium sized corporations accused of criminal activity. For instance, a white-collar money laundering or fraud enforcement action may be very broad due to the interconnections between criminal activity and financial transactions. Defendants often use financial institutions and other property to facilitate their activities. In these cases, it is normal to include a criminal and/or civil forfeiture count against property representing the proceeds or means that advanced the fraudulent conduct. Those assets that are "involved in" or "facilitate" the fraudulent conduct are forfeitable[1] and may be seized in an *ex parte* hearing pending the outcome of a criminal or civil enforcement action. Consequently, bank accounts, cars, planes, real property, among other things, may be subject to forfeiture that assists with developing, advancing, concealing, or otherwise enabling criminal activity.

Assume the following set of facts. A medium-sized corporation (twenty to fifty employees) operates a business that generates several million dollars of revenue each year. For several years, though, a few executives and employees allegedly conducted criminal activity that benefitted the corporation and individuals. Both are indicted with a criminal forfeiture count against the individuals, plus a parallel civil forfeiture complaint is filed against the corporation. The government has seized nearly all of the corporation's assets and the corporation is barely able to continue operating. Similarly, the individuals have had nearly all their personal assets seized pending the outcome of their prosecutions. It is the corporation's policy to indemnify its executives and employees pursuant to state corporate law; however, the corporation is unable to indemnify because the underlying asset seizure prevents it.

Is a pretrial hearing available regarding the seized corporate assets? What are the standards to securing the release of corporate assets? Who has standing to pursue that claim? What occurs when both parties claim they need those assets, which have been subject to an *ex parte* seizure to secure defense counsel? These are the challenges white-collar criminal practitioners must be prepared to manage when the ocurrence of a corporate asset seizure affects an indemnification agreement.

I. Forfeiture and *Kaley v. United States*

A. Civil and Criminal Forfeiture

The United States federal government and most states have adopted broad civil and criminal forfeiture statutes.[2] These laws subject all forms of property that either facilitate

1 18 U.S.C. §§ 981(a)(1)(A)-(B) (2006); *see also* 18 U.S.C. § 982(a)(1) (2006).

2 This article will not provide an in-depth analysis and review of forfeiture. It will be limited to analyzing the general procedural and substantive issues that prosecutors and defense counsel will likely confront when managing a complex white-collar action involving the pretrial seizure of assets that are claimed to be necessary to pay for corporate and individual legal defense costs.

or are the proceeds of criminal activity to forfeiture. Forfeiture is designed, *inter alia*, to deter criminal activity by serving as a form of punishment[3] and to combat the incentives that may make criminal activity valuable by disgorging illicit gains.[4]

Civil forfeiture is an *in rem* action against property used to facilitate or represent the proceeds of criminal activity.[5] There are several federal civil forfeiture laws; however, two commonly used statutes include 18 U.S.C. § 981 (financial crimes) and 21 U.S.C. § 881 (narcotics). For purposes of white-collar crime, 18 U.S.C. § 981(a)(1)(A) renders forfeitable all real and personal property relating to money laundering, currency transaction reporting crimes, financial transaction crimes, or fraud against the United States. These statutes provide that the government may, in certain circumstances, seize and take control of property prior to securing forfeiture upon the demonstration of probable cause.[6] Pursuant to the Relation Back Doctrine, the government is vested with title to the property upon the commission of the act giving rise to forfeiture.[7] The government's burden to secure forfeiture is by a preponderance of the evidence.[8]

Criminal forfeiture, on the other hand, is an *in personam* proceeding designed to serve as a form of punishment in the penalty phase.[9] Typically, it is attached to an indictment as a separate count. There are a range of statutes that involve criminal forfeiture but three prevalent statutes are: 18 U.S.C. § 982 (money laundering and financial crimes); 18 U.S.C. § 1963 (RICO); and 21 U.S.C. § 853 (narcotics). Additionally, each statute permits "substitute assets" to be used in the event the assets subject to forfeiture are not located or available.[10]

The structure of both civil and criminal forfeiture permits the government to pursue parallel enforcement actions. Under 28 U.S.C. § 2461(c), when a civil forfeiture action is authorized, a successful criminal conviction can serve as the predicate for action on the civil forfeiture if no specific statutory provision is available for criminal forfeiture. This enables the government to combine a criminal conviction and civil forfeiture in a consolidated proceeding.[11] Additionally, the government may stay a civil forfeiture proceeding pending the outcome of the criminal case.[12]

To assure assets are not used, concealed, lost, or destroyed prior to the completion of a civil or criminal action, the government seizes the property. Typically, this is achieved through an *ex parte* proceeding via a grand jury indictment in the case of a criminal forfeiture or a warrant based on probable cause in the context of a civil forfeiture.[13]

3 *See* 18 U.S.C. § 982(a)(1) (mandating that a person convicted of certain offenses be ordered to forfeit property involved in the offense).

4 S. Rep. No. 98-225, at 84 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3267.

5 *See, e.g.*, United States v. One 1998 Tractor, 288 F. Supp. 2d 710 (W.D. Va. 2003).

6 18 U.S.C. § 981(b)(1)-(4) (2006); 21 U.S.C. § 881(b) (2006).

7 18 U.S.C. § 981(f) (2006).

8 18 U.S.C. § 983(c)(1) (2006).

9 United States v. Voigt, 89 F.3d 1050, 1082 (3d Cir. 1996).

10 18 U.S.C. § 1963(m) (2006); 21 U.S.C. §§ 853(p)(1)-(2) (2006).

11 *See, e.g.*, United States v. Ali, 619 F.3d 713, 720 (7th Cir. 2010) (asserting that criminal forfeiture is available for convictions of mail and wire fraud, not just circumstances affecting financial institutions); United States v. Schlesinger, 514 F.3d 277, 277-78 (2d Cir. 2008);

12 18 U.S.C. § 981(g)(1) (2006).

13 Under the Civil Asset Forfeiture Reform Act (CAFRA), the government must show a "substantial connection" between the assets and criminal activity. *See* Pub. L. No. 106-185 (2000) *codified as* 18 U.S.C. § 983(c)(3) (2006). Previously, courts had applied two general approaches in assessing probable cause: "substantial connection" and "facilitation." Under the "substantial connection" standard the government must show that that the property was actively involved in perpetuating criminal activity. *See* United States v. $252,000 U.S. Currency, 484 F.3d 1271, 1274-75 (10th Cir. 2007) (affirming that in a civil forfeiture action the government demonstrated probable cause that currency was "substantially connected" to illegal drug trafficking when it was lawfully discovered in a box and briefcase, bundled in stacks and wrapped in cellophane smelling of marijuana, and the driver initially denied knowledge and then later claimed it was for a business venture). *Contra* United States v. One 1989 Jaguar XJ6, No. 92 C 1491,WL 157630 (N.D. Ill. May 13, 1993), at *2-3 (holding that a "substantial connection" was *not*

B. Constitutional Implications

The seizure of property implicates the Fifth and Sixth Amendment rights of individuals and corporations.[14] When a defendant claims he or she needs those assets to secure counsel of choice, courts have recognized that individuals have an opportunity to a post-indictment hearing.[15] However, the scope of that hearing has led to a split across the federal circuits. On October 16, 2013, the United States. Supreme Court heard arguments in *Kaley v. United States*.[16] The question presented was whether the Fifth and Sixth Amendments require that a defendant have the opportunity to challenge the underlying charges of an indictment or merely the traceability of assets to criminal activity. The majority view, colloquially known as a *Jones-Farmer* hearing, provides a defendant who has been indicted with a pretrial hearing to demonstrate that property is not traceable to criminal activity.[17] The minority view holds that the due process issues implicated require a more comprehensive hearing that permits a defendant to present evidence attacking the basis for the underlying criminal indictment.[18]

In *Kaley*, the facts involve a white-collar enforcement action where *personal* assets have been subject to pretrial seizure. The alleged facts, highly summarized, are that Kerri and Brian Kaley were involved in a scheme stealing and reselling medical devices.[19] A criminal forfeiture count led to the seizure of property that a grand jury determined was the proceeds of criminal activity. The Kaleys claimed they needed those assets to retain their defense counsel.[20] At the *Jones-Farmer* hearing, the trial court limited the scope of review to traceability without permitting inquiries into the review of the grand jury's indictment. When the Kaleys failed to present evidence and requested an opportunity to challenge the basis for the indictment, the district court affirmed its protective order to seized assets.[21]

Based on questioning at the Supreme Court, the Justices appeared flummoxed as how to resolve the due process and Fifth and Sixth Amendment issues presented.[22] While

shown when a vehicle that provided transportation between the locations where alleged fraudulent transactions occurred to sustain a seizure of the vehicle). Alternatively, if the statutory language includes the language "to facilitate," it grants a more permissive degree of forfeiture to forfeit legitimate funds or property that have been commingled with illicit funds or property. *See* U.S. v. Coffman, 859 F.Supp.2d 871, 875-76 (E.D. Ky. 2012) (holding that under 18 U.S.C. § 982 "clean" funds commingled with tainted funds are forfeitable because the commingling enables and disguises money laundering). *Contra* United States v. $448,342.85 U.S. Currency, 969 F.2d 474, 476-77 (7th Cir. 1992) (holding that pooling tainted funds with legitimate funds was not sufficient to forfeit property).

14 *See* Caplin & Drysdale v. United States, 491 U.S. 617, 624-27 (1989) (holding that a defendant does not have a Sixth Amendment right to use assets subject to a pretrial restraining order to retain counsel of choice); *see also* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (holding that in weighing due process considerations a court should assess three factors: one, the private interest that will be affected; two, the risk of erroneous deprivation of such interest through the procedures used and value represented by additional or substitute procedural safeguards; and three, the government's interest at stake, including the burdens of additional or substitute procedures).

15 United States v. Jones, 160 F.3d 641, 645-49 (10th Cir.1998); United States v. Monsanto, 924 F.2d 1186, 1191-94 (2d Cir.1991); United States v. Long, 654 F.2d 911, 915 (3d Cir.1981); United States v. Lewis, 759 F.2d 1316, 1324-25 (8th Cir.1985); United States v. Moya-Gomez, 860 F.2d 706, 724-26 (7th Cir. 1988).

16 Kaley v. United States, Docket No. 12-464 (U.S. Oct 16, 2013).

17 United States v. Jones, 160 F.3d 641, 646-47 (10th Cir. 1998) (holding that a proper balance of private and government interests requires a post-restraint, pre-trial hearing only upon defendant's motion); United States v. Farmer, 274 F.3d 800, 805 (4th Cir. 2001) (holding that due process requires a hearing to challenge probable cause on the limited grounds of traceability).

18 *See* United States v. Monsanto, 924 F.2d 1186, 1195, 1197 (2d Cir. 1991) (holding that additional safeguards are necessary to protect a defendant's due process rights); United States v. E-Gold, Ltd., 521 F.3d 411 (D.C. Cir. 2008) (holding that pre-deprivation hearings are required unless there are extraordinary circumstances).

19 United States v. Kaley, 79 F.3d 1246, 1249 (11th Cir. 2009).

20 *Id.* at 1250-51.

21 United States v. Kaley, 677 F.3d 1316, 1326 (11th Cir. 2012) *cert. granted*, 133 S. Ct. 1580 (2013).

22 *See generally* Transcript of Oral Argument, Kaley v. United States (2013) (No. 12-464), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-464_j3ko.pdf [hereinafter Kaley Oral Argument].

the Justices seemed to agree that a defendant has a right to be heard in a meaningful manner at an appropriate time, the extent of that opportunity to be heard was largely unclear from the dialogue at oral arguments.[23]

The longstanding tradition and constitutional mandate is that a grand jury's determination is presumptively valid for a criminal indictment.[24] To this issue, Justice Alito expressed concern that a pretrial hearing could aggravate the government's case by requiring the revelation of sensitive information and witness identification.[25] This was a key point emphasized in the government's petition for certiorari and brief.[26] Justice Ginsburg similarly expressed reservation as to whether a judge could preside over a case when a judge determines probable cause does not exist.[27] Alternatively, Justices Roberts and Scalia seemed skeptical of the government's position, with Justice Scalia asking whether courts should demand more than probable cause when seized assets are necessary for securing counsel of choice.[28] Justice Breyer seemed to present a possible compromise between the positions when he suggested that defendants could have greater opportunities to explore the nexus between assets and an indictment subject to greater control by the judge.[29] With such control, the judge can impose restriction that avoids a "mini-trial" that the federal government argued would arise.

C. *Jones-Farmer* Hearing Requirements

The law currently requires a defendant show three factors to succeed in a *Jones-Farmer* hearing.[30] First, the defendant must demonstrate he has standing to challenge the seizure.[31] Second, he must allege and then show he has *no* other assets available to pay for his criminal defense.[32] Any valuable property that a defendant owns must be expensed or committed towards legal defense fees. An exception may be available upon a showing that procedural due process rights are at stake,[33] or evidence that seized property is owned by a third-party.[34] Third, the defendant bears the burden of showing by a preponderance of the evidence that the underlying property did not facilitate or is not the proceeds of criminal activity.[35]

II. Indemnification Agreements: Implications for the Seizure of Corporate Assets

A question implicated, but not specifically addressed by *Kaley*, is the impact asset seizure may have on the ability to honor an indemnification agreement when both corporate and individual asset seizures disable securing counsel of choice. An indemnification agreement is provided pursuant to state corporation law by protecting corporate agents executives, officers, and employees from liability associated with decisions committed within the scope of their employment.[36] The limitation on these agreements is that an agent must act in "good faith" and not be convicted of a criminal violation.[37]

23 *See generally id.*

24 Costello v. United States, 350 U.S. 359, 363 (1956) (stating "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits").

25 Kaley Oral Argument at 12-13, 46-47.

26 Brief for the United States at 11, Kaley v. United States, 677 F.3d 1316 (2013) (No. 12-464).

27 Kaley Oral Argument at 9-10.

28 *See id.* at 30-32

29 *See id.* at 32-34, 48-49.

30 *Jones*, 160 F.3d at 647-68 (10th Cir.); *Farmer*, 274 F.3d at 803-04; *Monsanto*, 924 F.2d at 1195-96 (2d Cir. 1991).

31 *Id.*

32 *Jones*, 160 F.3d 641, 647-68 (10th Cir.); *Farmer*, 274 F.3d at 803-04; *Monsanto*, 924 F.2d 1195-96 (2d Cir. 1991).

33 *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 52-53 (1993) (holding that government violated procedural due process rights by seizing real property *ex parte* without notice or hearing for the owner, reasoning that property cannot be moved or hidden, thus concerns about defendant moving, losing, or hiding property are not present); *see also* 18 U.S.C. § 985 (codifying the position articulated in *James Daniel Good Real Prop*).

34 18 U.S.C. § 983(d)(1) (innocent-owner defense); 18 U.S.C. § 983(d)(3)(A)(i) (bona-fide purchaser for value).

35 18 U.S.C. § 983(d)(3)(B)(iii).

36 *See generally* Mass. Gen. Laws Ann. ch. 156D, § 8.51 (West); Del. Code Ann. tit. 8, § 145 (West); N.Y. Bus. Corp. Law § 725 (McKinney).

37 *See* Waltuch v. Conticommodity Servs., Inc., 88 F.3d 87, 92-93 (2d Cir. 1996) (denying indemnification to a

Criminal or civil forfeiture action represents a threat to the ability of a corporation to uphold an indemnification agreement. A seizure of nearly all of a corporation's assets raises the question of whether a corporation could make a claim to assets on behalf of itself *and* an individual claiming indemnification; or whether a corporation may only assert a claim for itself. Unique risks are presented that prosecutors and defense counsel will likely need to consider when an individual claims that a corporation owes them a duty to indemnify but is denied indemnification because of the seizure of corporate assets. Depending upon the extent of the government's pretrial seizure, the cooperation of the individual defendant and corporation, and the complexity of a given case, strategic decisions made by defense counsel and prosecutors must weigh a range of potential factors.

The standards for a *Jones-Farmer* hearing would apply to a corporation asserting a claim to seized corporate assets: standing, no other available assets, and preponderance of the evidence that assets are not traceable to criminal activity. With respect to standing, the operative question is, "to whom are corporate assets vested?" This is almost always the corporation itself, which means only the corporation has standing to challenge the seizure of corporate assets and not the individual defendants or shareholders.[38] Thus, the question becomes what additional recourse an individual may have to secure the release of assets pursuant to an indemnification agreement.

A. Defense Counsel: Strategy and Considerations

When the interests of the individual and corporation align, the optimal strategy for defense counsel and the corporation is cooperation. The individual wants to avoid being convicted of the underlying crime; similarly, the corporation does not want to be liable under *respondeat superior*. The corporation could assert a *Jones-Farmer* claim for itself and the defendant by claiming the government seizure of corporate assets causes a breach of contract. Because the corporation is the party in breach in this instance, it could attach as part of a *Jones-Farmer* motion, an invoice detailing what is necessary to pay the legal fees of both parties. This enables the individual defendant to avoid being subject to a *Jones-Farmer* hearing and the concomitant requirement that he have no personal assets available to pay legal defense fees.[39]

On the contrary, when the interests of the individual and corporation diverge, the corporation may assert that the individual defendant has failed to uphold his duty of "good faith" and will only pursue a *Jones-Farmer* motion to advance the interest of the corporation. The corporation is asserting as an affirmative defense that public policy permits it to deny indemnification. This claim would raise contract and corporate law disputes that could involve complex statutory and legal questions regarding the terms of the agreement. The individual defendant's recourse in this situation is likely twofold: one, sue for enforcement of the indemnification agreement, or two, move for a *Jones-Farmer* hearing releasing personal assets that have been seized and then seek indemnification in the event of success on the merits.[40] Clearly, the best strategy in this situation de-

vice-president for failure to demonstrate "good faith" under Delaware corporate law).

38 *See, e.g.*, United States v. Wyly, 193 F.3d 289, 304 (5th Cir. 1999) (denying standing to shareholders who challenged seizure of corporate assets because under Louisiana law shareholder's interest is in stock issued and not corporate assets); United States v. $20,193.39 U.S. Currency, 16 F.3d 344, 346 (10th Cir. 1994) (holding that unsecured creditors, unlike secured creditors, lacked standing to challenge civil forfeiture of property seized from businesses, even when all assets were seized); United States v. New Silver Palace Rest., 810 F.Supp. 440, 442 (E.D.N.Y. 1992) (holding shareholders of restaurant used to facilitate drug transactions did not have standing, since shareholders were not owners or lienholders with respect to corporate assets).

39 To the author's knowledge, there has been no case where this has occurred in the context of a *Jones-Farmer* forfeiture proceeding.

40 Delaware law provides that when an agent has been "successful" on the merits, that person shall be indemnified for expenses including attorneys' fees. Del. Code Ann. tit. 8, § 145(c); *see also* Mass. Gen. Laws Ann. ch. 156D, § 8.52 (mandating indemnification when a defendant is "[w]holly successful, on the merits or otherwise").

pends upon individual circumstances.

B. Prosecution: Strategy and Considerations

The prosecutor's goal is to assure that forfeitable assets are maintained pending the outcome of a criminal prosecution or civil action. While needing to be mindful of their actions on interfering with a defendant's access to counsel, a prosecutor could argue that an indemnification agreement is itself forfeitable. A prosecutor could reasonably argue that an indemnification agreement represents a means to facilitate criminal activity. In a sophisticated corporate fraud scheme, the individuals involved may consider the legal risks of their actions and be prepared for the possibility of subsequent liability. Thus, indemnification is not available but instead should be considered, along with other means that facilitate criminal activity, to be forfeitable.

For instance, in *United States v. Wittig*, the prosecution brought a forty count indictment with a forfeiture count for numerous pieces of property, including the right to advanced payment of legal fees, as mandated in the company's Articles of Incorporation.[41] The prosecution claimed that Wittig and a co-conspirator joined the company, Westar Energy, with the intent to defraud the company of millions of dollars.[42] Prior to trial, the government argued that the right to advancement was only available if the defendant "came on board with the proper intent," but they failed to present extrinsic evidence, relying only on argument at a *Jones-Farmer* hearing.[43] The court denied the motion, ruling argument alone was insufficient to support a probable cause determination that the indemnification agreement was connected to the alleged criminal activity.[44] Following a mistrial and the full presentation of the government's case-in-chief, the prosecution moved again to restrain the advancement of legal fees.[45] At this time, the court granted the government's motion, reasoning the evidence presented at trial supported this argument.[46] Thus, an indemnification agreement can be subject to pretrial seizure when the right facts present themselves. As demonstrated by *Wittig*, a prosecutor has to calculate the risks of exposing information relating to his case-in-chief, a point emphasized during oral arguments in *Kaley*.

A prosecutor should also be cautious when seeking to block advancement of legal fees. There is a fine line between an argument that indemnification is forfeitable and interference with a defendant's Sixth Amendment right to counsel. Specifically, a prosecutor should limit his arguments to those subjects relating to the enforcement of forfeiture laws in a specific case rather than advancing other policy or legal goals. For instance, in *United States v. Stein*,[47] the U.S. Department of Justice adopted a policy that an employer's payment of an employee's attorney fees would count as a lack of cooperation. The government's policy, and statements to the company during litigation, led the corporation to cease paying legal fees. The court dismissed the case citing violations of the employees' due process rights.

III. Conclusion

The decision in *Kaley* will help resolve the procedural parameters that a criminal defendant has in seeking to unfreeze assets subject to a pretrial seizure order to pay for legal defense costs. It is inevitable that there will be unanswered questions regarding issues of indemnification rights when a corporation *and* individual defendant argue they need corporate assets to secure defense counsel pursuant to an indemnification agreement. However, it is not unreasonable to foresee such a case given the sweeping nature of forfeiture statutes.

41 *See* United States v. Wittig, 333 F.Supp.2d 1048, 1053-54 (D. Kan. 2004).
42 *See id.* at 1051-52.
43 *Id.* at 1052.
44 *Id.*
45 *See* United States v. Wittig, No. 03-40142JAR, 2005 WL 1227914, at *1 (D. Kan. May 23, 2005).
46 *Id.* at *4.
47 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd* 541 F.3d 130 (2d Cir. 2008).

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FROM SELFIES TO SHACKLES: WHY THE GOVERNMENT MAY BE ABLE TO SEARCH YOUR CELL PHONE WITHOUT A WARRANT

by Rochelle Brunot

Can you hear me now? This phrase is more than just a Verizon commercial catch phrase; it has been said by almost everyone with a cell phone at one time or another. Cell phones are everywhere, and most individuals have an abundance of personal information on their phone. Consequently, if the police are able to look through an individual's phone, they will have instant access to a significant amount of personal information. Looking through an individual's cell phone without a warrant is undoubtedly an invasion of privacy and presents clear Fourth Amendment issues. However, this invasion of privacy may be permissible when the cell phone search falls under one of the exceptions to the general warrant requirement. The following facts describe a situation where the police used their search incident to arrest authority to search through an arrestee's phone without a warrant.

I. A Proposed Scenario: Recitation of Facts from *United States v. Wurie*[1]

Consider the following set of facts: a motorist pulls into a parking lot, picks up another person, and engages in what appears to be a drug sale. Police officers involved in routine surveillance of the area stop the motorist immediately after observing this interaction. When the officers search his car, they find two plastic baggies with crack cocaine inside his pocket. The motorist tells the officers he got the drugs from "B," who sells crack.

The police subsequently arrest the motorist after he allegedly engaged in what the officers suspect is a drug deal. While at the station the police seize two cell phones, a set of keys, and a lump sum of cash. Before completing the booking process, however, they notice that one of the arrestee's phones is repeatedly receiving calls from a number identified as "my house." The contact name and phone number are in plain view. After five minutes of repeated calls, the officers look through the arrestee's call log, without consent. The police identify the phone number associated with "my house" by looking at the call logs and pressing one additional button. When the officers type the phone number into the online white pages, they are then able to track down the address that coincides with that phone number.

The officers advise the man of his *Miranda* rights, which he waives, and then subsequently question him further: they ask him if he lives at the South Boston address associated with the "my house" number. He denies living at that address in South Boston. Skeptical of his story, the officers take the keys they found and go to the address associated with the "my house" phone number. When they arrive at the house, they notice that the mailboxes contain "his name along with another person's." The officers enter the house to "freeze" the scene

1 See United States v. Wurie, 728 F.3d 1 (1st Cir. 2013), petition for cert. filed, 2013 WL 4404658 (U.S. Aug. 15, 2013) (No. 13-212) (the fact pattern created by the author in this section is based generally on the circumstances found in Wurie).

while they obtain a search warrant. After obtaining the search warrant, the officers search the house and find 215 grams of crack, a firearm, ammunition, four bags of marijuana, drug paraphernalia, and $250 in cash. Officers subsequently charge the arrestee with intent to distribute, distributing cocaine base, and being a felon in possession of a firearm and ammunition.

The main question in the aforementioned scenario, which essentially mirrors the facts of *United States v. Wurie*, is whether the police had the authority to look through the arrestee's cell phone specifically his call log and contact information without consent. Neither party disputes that the police lawfully arrested the individual and could search him pursuant to that lawful arrest. What is also undisputed is that looking through his cell phone constituted a search. The question that remains, however, is whether the officers could actually search through the cell phone as part of a search incident to arrest? Does seeing a specific number in plain view repeatedly ring on a cell phone provide sufficient justification for a warrantless search incident to arrest?

The First Circuit Court of Appeals answered this question in the negative, holding that police do not have the authority to search through a suspect's cell phone without a warrant, simply based on their power to conduct a search incident to arrest.[2] The First Circuit, in reversing the lower court's decision, reasoned that the government did not present enough evidence to show a search of a cell phone was necessary to either protect officer safety or to prevent the destruction of evidence.[3] The government appealed and petitioned the United States Supreme Court for review.[4] If cert is granted, the Supreme Court's holding on this issue would inevitably lead to changes in law enforcement procedure, and would help to clarify what degree of privacy citizens can expect in their cell phones.

II. History of Search and Seizure Laws

The Fourth Amendment established broad protections against unreasonable search and seizure. The United States Supreme Court has interpreted the Fourth Amendment requirements to mean that any search without a warrant is presumptively unreasonable.[5] Before the search of a person or place can be conducted, a neutral judge or magistrate must determine there is probable cause to search in a particular location ors a particular person.[6] Though any search without a warrant is presumptively unreasonable, the Court has carved out numerous exceptions to this requirement.[7] One exception to the warrant requirement is a search of an individual incident to his arrest; however, the definition of what constitutes this type of search has expanded over time. With new developments and changing technology, the boundaries of this doctrine have become particularly unclear.

Throughout the years, the Supreme Court has examined the doctrine of search incident to arrest in several cases and created rules that define this type of search. In *Chimel v. California*,[8] the Court found that while a search incident to arrest was permissible, the limited search authority did not permit officers to search a suspect's entire house.[9] The Court

2 *See Wurie*, 728 F.3d at 14 (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

3 *Id.* at 12.

4 *See Wurie*, 728 F.3d at 1.

5 *See* U.S. Const. amend. IV (regarding reasonableness and the warrant requirement); Katz v. United States, 389 U.S. 347, 357 (1967) (noting that searches conducted without a warrant have been held unlawful "notwithstanding facts unquestionably showing probable cause") (quoting Agnello v. United States, 269 U.S. 20, 33 (1925)).

6 *See Katz*, 389 U.S. at 357 (citing Wong Sun v. United States, 371 U.S. 471, 481-82 (1963)); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (noting that the most basic constitutional rule is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject to only a few exceptions).

7 *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 936 (1995) (regarding the exigent circumstances exception); *Coolidge*, 403 U.S. at 465–471 (1971) (regarding the plain view exception).

8 Chimel v. California, 395 U.S. 752 (1969), *abrogated by* Davis v. United States, 131 S.Ct. 2419 (2011).

9 *See id.* at 768 (noting that the scope of the search

concluded that a search incident to arrest was limited to the "grab" area of a suspect because the primary reason for allowing this type of warrantless search was to ensure officer safety.[10] In *United States v. Robinson*,[11] the Court expanded the boundaries of this authority to include a search inside the pocket of a suspect after an arrest, even though the officer knew the object was not a weapon.[12] The Court reasoned such a search is permissible because the search incident to arrest doctrine is necessary to prevent suspects from destroying evidence.[13] Thus, if an individual is lawfully arrested, the Fourth Amendment permits a warrantless search of the individual, with no additional justification required.[14]

Over the years, the type of search permissible under the search incident to arrest doctrine continued to expand; in 1974 the Court found that a search incident to arrest did not have to occur immediately at the time of arrest. In *United States v. Edwards*,[15] officers searched a suspect's clothes after arresting the suspect and seizing his clothes.[16] The Court deemed the search reasonable because the search would have been legal if conducted at the time of the arrest.[17] The Supreme Court's most recent case regarding search incident to arrest dealt with the search of a car and, unlike previous decisions, seemed to limit the doctrinal scope with respect to the search of automobiles. In *Arizona v. Gant*,[18] the Court found that a search of a car incident to arrest of the motorist operating it is only permissible when the suspect is not restrained by officers and is within reaching distance of the passenger compartment of the car.[19] A limited search is warranted in such cases to prevent the destruction of evidence and to promote officer safety, but these two concerns are not present if the suspect cannot reach into the car.[20]

While these rules regarding the search incident to arrest doctrine are firmly established, the Supreme Court has not yet addressed how the doctrine applies to cell phones. Though the doctrine permits officers to search a person or car for a cell phone, it does not state the limits, if any, placed on officers when looking through the contents of that phone, a device that, in this day and age, often contains personal, private information.

III. Search Incident to Arrest and Cell Phone Searches

In *Wurie*, the First Circuit held that officers must obtain a warrant to search contents of a suspect's cell phone.[21] While the search to find a cell phone was permissible, the subsequent search through the contents of the cell phone required more than the power authorized under the search incident to arrest doctrine; the First Circuit reasoned that searching a cell phone's contents did not relate to officer safety or to the preservation of evidence.[22] Though the court expressed concern that the contents of a cell phone could be remotely destroyed, the court went on to list several techniques officers could use to prevent this destruction.[23] In *Wurie*, the officers simply looked

extended beyond the scope of the area where a petitioner could have obtained a weapon or where officers could find evidence that could be used against him).

10 *Id.* at 764.

11 *See generally* United States v. Robinson, 414 U.S. 218 (1973).

12 *Id.* at 235.

13 *Id.* at 234 (citing Abel v. United States, 362 U.S. 217 (1960)).

14 *Id.* at 235.

15 United States v. Edwards, 415 U.S. 800 (1974).

16 *Id.* at 801–802.

17 *Id.* at 806.

18 Arizona v. Gant, 556 U.S. 332 (2009).

19 *Id.* at 343 (applying the rationale regarding search incident to arrest from *Chimel*, 395 U.S. 752). The passenger component of the car includes the entire interior of the car.

20 *Id.* at 339 (citing Preston v. United States, 376 U.S. 364, 367-68 (1964)).

21 *See Wurie*, 728 F.3d at 12 (asserting that warrantless cell phone data searches are categorically unlawful under the search-incident-to-arrest exception).

22 *See id.* at 9-11 (stating that the cell phone can be inspected to ensure that it is not actually a weapon, but no further search on the cell phone should be permitted).

23 *See id.* at 11 (suggesting officers could simply remove the battery from the phone or place the phone in a Faraday box which would shield the phone from external electromagnetic radiation).

through the call log, a less invasive intrusion than a search of text messages, photographs, or emails; however, the rule applies equally to all cell phone searches in the First Circuit; as stated by the court in its opinion, it is necessary for all cell phone searches to be governed by the same rule, without regard for the invasiveness of the search.[24]

In its petition to the Supreme Court in *United States v. Wurie*, the government argued that the power given to officers for a search incident to an arrest should be defined broadly because not only is the search premised on safety and evidentiary concerns, but there is also a diminished expectation of privacy.[25] The government argued that when a cell phone is found as part of a legitimate search incident to arrest, case law clearly allows for the phone to be searched.[26] Cell phones are not unique in that they are the only items that store personal, private information. Rather, there are other items an individual can have on their person that would contain such personal information.[27]

Further, the government argued that not going through cell phones could potentially lead to the destruction of crucial evidence.[28] The government analogized the search of an individual's cell phone to the permissible buccal DNA swab the Court recently permitted in *Maryland v. King*.[29] Both types of searches can provide identifying information to the police.[30] Consequently, the government disagreed with the First Circuit's blanket rule that cell phones found in a search incident to arrest may not be searched without a warrant. Part of the government's argument was based on the connection between cell phone use and drug transactions, and that having a blanket rule would hinder officers' ability to investigate crimes.[31]

The following state and federal cases provide reasons for allowing and disallowing the search of cell phones seized incident to an arrest.

IV. The Current Circuit Split: Arguments For and Against the Warrantless Search of Cell Phones

A. Arguments and Cases in Support of the Warrantless Search

The Seventh Circuit upheld the search of a cell phone in *United States v. Flores-Lopez*.[32] In that case, law enforcement used an informant to buy drugs from a drug dealer, who received his drugs from the defendant. The police were able to overhear a conversation between the drug dealer and the defendant organizing a delivery of drugs at a specific garage; officers then arrested the defendant in front of the garage where the drug delivery was to take place. In a subsequent search of the defendant and his truck, the officers discovered and seized two cell phones. The officers searched one of the cell phones for its number, which they used to subpoena three months of the phone's call history.[33]

The Seventh Circuit acknowledged that though an individual's cell phone may be a useful source for obtaining incriminating in-

24 *Id.* at 13.

25 Brief for Petitioner at 11-12, United States v. Wurie, 2013 WL 4404658 (2013) (No. 13-212) (noting the prior treatment of safety, evidence preservation, and diminished expectation of privacy in *Robinson*, 414 U.S. 218; and *Edwards*, 425 U.S. 800).

26 *Id.* at 14 (asserting the validity of such searches based on *Robinson*, 414 U.S. 218; and *Edwards*, 425 U.S. 800).

27 *Id.* at 16.

28 *Id.* at 15 (noting that some remote-wiping techniques exist which allow co-conspirators to wipe data from cell phones).

29 *See id.* at 13-14 (quoting Maryland v. King, 133 S. Ct. 1958, 1971 (2013)) ("[The] constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence.").

30 Brief for Petitioner, *supra* note 25, at 19 (quoting *King*, 133 S. Ct at 1972) ("Like a DNA test, the search of a cell phone's call log can provide 'metrics of identification used to connect the arrestee with his or her public person, as reflected in records of his or her actions that are available to the police.'").

31 Brief for Petitioner, *supra* note 25, at 25.

32 670 F.3d 803 (7th Cir. 2012).

33 *Id.* at 804 (facts of *Flores-Lopez* described).

formation, it will also have a lot of private information, thus making a search of a cell phone a greater privacy invasion than the search of a conventional container. Because of technological advances, a cell phone is more analogous to a computer than a simple container. The court also noted that the officers could have taken some steps to avoid the cell phone's data from being remotely wiped, but nevertheless concluded that the risk of evidence destruction outweighed the minimally intrusive search. Consequently, the court found the search to be lawful because the officers simply wanted to look through the cell phone to find the phone's number.[34]

Similarly, the Fourth Circuit upheld a warrantless search of a cell phone seized pursuant to a search incident to arrest. In *United States v. Murphy*,[35] an officer initiated a traffic stop when he observed a car driving down the road at about ninety-five miles per hour.[36] None of the occupants of the car provided proper identification when asked and all were subsequently arrested for providing officers with false names and for obstruction of justice.[37] After all of the suspects in the car were arrested, the officers conducted a thorough search of the vehicle and found a cell phone.[38] Law enforcement agents sent the phone to the Drug Enforcement Agency for processing and an examination revealed several texts from a man later identified as a drug dealer. This dealer was interviewed and identified the defendant as his drug supplier.

The Fourth Circuit allowed the search of the phone, basing the validity of the search on the need to preserve evidence.[39] The court relied on another Fourth Circuit opinion, which held that it was permissible for officers to retrieve text messages pursuant to a search incident to arrest.[40] In addition, the court was not persuaded by Murphy's argument that a cell phone should only be searched if the phone has a small storage capacity, as it would be too burdensome to require officers to determine the exact storage capacity for each phone before a search could be conducted.[41] It opined that such a rule would be unworkable and unreasonable. Accordingly, the warrantless search of the cell phone was permissible.[42]

The Fifth Circuit has also addressed the issue of a cell phone search, and has found it to be permissible when the phone was seized pursuant to a valid search incident to arrest.[43] In *United States v. Finley*, police officers took two suspects into custody after conducting a controlled buy of methamphetamines. Officers seized the defendant's phone incident to arrest.[44] While questioning the defendant, officers looked through call records and text messages on the phone, and the content was then used to confront the defendant during questioning.[45]

The court in *Finley* allowed the search of the phone because the phone had been lawfully seized. The court first determined that though the defendant's employer issued the cell phone, he did have a reasonable expectation of privacy in the phone's contents.[46] However, the phone was lawfully seized pursuant to a search incident to arrest and this type of search is permissible for not only weapons, but also for evidence.[47] Consequently, because the phone was seized with valid authority the warrantless search of the phone was permissible.[48]

34 *Id.* at 810.
35 522 F.3d 405 (4th Cir. 2009).
36 *Id.* at 407.
37 *Id.* at 407-08.
38 *Id.* at 408-09.
39 *Id.* at 411.
40 United States v. Young. 278 Fed. Appx. 242, 245-46 (4th Cir. 2008).
41 *Murphy*, 522 F.3d at 411.
42 *Id.* at 412.
43 United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).
44 *Id.* at 254 (noting that although the defendant's phone was issued through his work, he was allowed to use the phone for personal reasons as well).
45 *Id.*
46 *Id.* at 259 (holding that the defendant took normal precautions to maintain his privacy interest in the cell phone even if the phone was not password protected).
47 *Id.* at 259-60.
48 *Id.* at 260.

In addition to the decisions of the Fourth, Fifth, and Seventh Circuits,[49] several state courts have also upheld the search of a suspect's cell phone incident to arrest, including the Massachusetts Supreme Court.[50] In *Phifer*, the court held that the limited search of the defendant's call list was valid.[51] The court found the officers had reason to believe the call list would contain evidence because the officers had seen the defendant using the phone to facilitate a drug transaction.[52] The court also acknowledged that the search must be reasonable. Reasonableness is determined by balancing the particular search against the invasion of privacy.[53] The decision by the Massachusetts Supreme Court is particularly important as it stands in direct opposition to the *Wurie* decision from the First Circuit Court of Appeals. As a consequence of this conflict, officers working in Massachusetts are left with conflicting guidance on the issue.

Further, the Georgia Supreme Court found the search of a defendant's cell phone to be permissible.[54] In *Hawkins v. Georgia*, the defendant set up a buy with an undercover officer to purchase drugs.[55] The undercover officer arrived at the specified location and observed the defendant enter data in her phone; the undercover officer then received a text from the defendant saying she had arrived. The cell phone was found in the defendant's purse pursuant to a search incident to arrest, and the officer found the text messages the defendant had exchanged with the undercover officer. The prosecution subsequently used this text message evidence in court.

49 *See* Silvan v. Briggs, 309 Fed. Appx. 216, 225 (10th Cir. 2009) (holding that a warrantless search for child protective purposes falls under the exigent circumstance exception).

50 Massachusetts v. Phifer, 979 N.E.2d 210, 211-12 (2012); *see also* Massachusetts v. Berry, 979 N.E.2d 218, 219-23 (2012) (following the court in *Phifer* and reversing defendant's motion to suppress the evidence found from a cell phone).

51 *Phifer*, 979 N.E.2d at 215-16.

52 *Id.*

53 *See id.* at 216 (suggesting that a more invasive search into the cell phone may require a different assessment).

54 Hawkins v. Georgia, 723 S.E.2d 924, 925-26 (2012).

55 *Id.* at 925.

The Georgia Supreme Court analogized a cell phone seized incident to arrest to a search of a container. It concluded that, similar to the rule regarding a traditional container, which permits a search for tangible evidence, a cell phone could also be searched.[56] Though a cell phone may contain personal information, it may also contain evidence of the crime for which the suspect has been arrested. The potentially high volume of information that could be stored on a phone should not control whether the search should be permissible. Nevertheless, it is clear the court did not endorse officers going on a fishing expedition to search through the entire phone for evidence.[57] The search must be narrow in scope; thus, if the officer is searching for text messages the officer cannot look through the photographs or internet browsing history.[58]

The California Supreme Court also upheld the search of a cell phone found incident to arrest.[59] In *California v. Diaz*, the defendant participated in a controlled buy with a confidential informant.[60] The officers listened to the controlled buy via a wire, then stopped the defendant, and found drugs on him. The officers then looked through the defendant's cell phone and found a text message that read "6 4 80."[61] From the officer's previous experience working drug cases, he knew this text message indicated a sale of six Ecstasy pills for eighty dollars.[62]

The California Supreme Court found the cell phone could be considered personal property immediately associated with the defendant; because the contents of the cell phone were not deemed distinguishable from the arrestee's person, the warrantless search was permissible.[63] Like the Georgia Supreme Court,

56 *Id.* at 926.

57 *Id.*

58 *Id.*

59 California v. Diaz, 244 P.3d 501, 511 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

60 *Id.* at 502.

61 *Id.*

62 *Id.* at 502-03.

63 *Id.* at 505, 509-10.

the California Supreme Court did not find the sheer quantity of information that could be found on a cell phone to be determinative of whether the search was permissible.[64] Moreover, allowing searches based on the storage capacity of the cell phone would be an unworkable rule for the officers and the courts, as has been found by other courts.[65]

The Maryland Court of Special Appeals upheld the search of a defendant's cell phone in *Sinclair v. Maryland*.[66] Here, the defendant was arrested for an armed carjacking, and a cell phone was recovered following a search incident to arrest.[67] The officers, within minutes of the arrest, looked at the screensaver and saw a photograph that matched the rims from the victim's car.[68] Before discussing the specific facts of the case, the court reiterated that because the cell phone had an enormous amount of data, a cell phone could not be evaluated in the same way as other items seized pursuant to a search incident to arrest.[69] Nevertheless, the court admitted the screensaver and photographic evidence at trial because it was direct evidence of the crime, seized during a limited and immediate search.[70]

B. Arguments and Cases Against the Warrantless Search

In every challenge to the warrantless search of the cell phone, the defense has acknowledged that the search for the cell phone was allowed, but contended that the search through the cell phone's contents was not. While it appears that the First Circuit is the only Circuit Court of Appeals to hold a warrant is required for the search of a cell phone, many lower state and federal courts using similar reasoning as the First Circuit have also found the warrantless search improper.[71]

In *Smallwood v. Florida*, a man was arrested for armed robbery of a convenience store.[72] When the defendant was arrested, his cell phone was seized incident to that arrest; however, the officer did not mention the seized cell phone or mention the data observed on the cell phone in his report.[73] More than a year after the arrest, but before the trial started, the officer told the prosecutor he had searched the phone and found several incriminating photographs.[74]

In deciding *Smallwood*, the Florida Supreme Court held that the Supreme Court's decision in *United States v. Robinson*,[75] allowing the search incident to arrest of a suspect's cigarette pack, was not applicable to the search of an electronic device found incident to an arrest.[76] The *Robinson* case did not involve a cell phone, and the court noted that at the time that case was decided, in 1973, cell phones were not commonly used nor did they carry the immense amount of information they do now.[77] The court also expressed concern about allowing law enforcement to have access to this immense amount of information without a warrant.[78] Accordingly, the court distinguished a cell phone from the cigarette pack searched in *Robinson*.[79]

64 *See id.* at 508 (finding the search was not presumptively unreasonable because of the storage capacity of the phone).
65 *Id.* at 508.
66 Sinclair v. State, 214 Md. App. 309, 76 A.3d 442, 454 (Md. 2013).
67 *Id.* at 446-47.
68 *Id.* at 447.
69 *Id.* at 453.
70 *Id.* at 454.
71 *See* Smallwood v. Florida, 113 So. 3d 724, 738 (Fla. 2013); Ohio v. Smith, 920 N.E.2d 949, 956 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010); United States v. Mayo, No. 2:13-CT-48, 2013 WL 5945802, at *12 (D. Vt. Nov. 6, 2013); United States v. Aispuro, No. 13-10036-01-MLB, 2013 WL 3820017, at *13-14 (D. Kan. July 24, 2013); United States v. McGhee, No. 8:09CR31, 2009 WL 2424104, at *3 (D. Neb. July 21, 2009); United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *11 (N.D. Cal. May 23, 2007).
72 *Smallwood*, 113 So. 3d at 726.
73 *Id.* at 726-27.
74 *Id.* at 727.
75 414 U.S. 218 (1973).
76 *Id.* at 730.
77 *Id.* at 731-32.
78 *See id.* at 732 (noting that the "most private and secret personal information and data is contained in or accessed through small portable electronic devices").
79 *Id.*

Instead, the court found that the facts of *Arizona v. Gant* were more applicable to this case.[80] The court stated that the officer was allowed to remove the cell phone from the defendant's person, but once the device was no longer in the defendant's possession, the search of the phone was not permitted because the phone could not be used as a weapon nor could the defendant destroy any evidence on the phone.[81] The absence of evidence to indicate those two interests required the officers to get a warrant before searching the phone.[82]

Similarly, in *Ohio v. Smith*, a woman who was taken to a hospital for a drug overdose agreed to call her drug dealer to arrange a drug buy.[83] The woman identified the defendant as her drug dealer, and the officers showed up at the buy and arrested him.[84] During the search they found a cell phone on his person.[85] While it is not clear when exactly the defendant's phone was searched, at some point the officers did search the call records and confirmed that he was the individual the woman from the hospital called to arrange the drug buy.[86]

The court disagreed with the characterization of a cell phone as analogous to a container because of the wealth of personal information that can be stored on the phone.[87] Again, the court was concerned about allowing the warrantless search of a cell phone because it would give the police access to this immense amount of personal information.[88] Though a cell phone is not the same as a computer, it carries with it a higher level a privacy interest than the typical container an individual may carry.[89] Further, the police can take steps to ensure the information from the phone is not destroyed.[90] The court rejected the state's argument that a search of the cell phone was necessary because the call records could be deleted, since the records could be obtained by the cell phone service provider.[91] In addition, the circumstances in this case did not justify the warrantless search of the cell phone in order to determine the identity of the suspect.[92]

In *United States v. Mayo*, an officer stopped a vehicle because he suspected the driver was on his cell phone in violation of Vermont law.[93] After the stop was initiated, the officer asked for consent to search the vehicle, but when consent was not given, the officer stated he would simply get a search warrant.[94] The defendant then allowed the officer to search the vehicle, and drugs and paraphernalia were found in the car. In addition, a cell phone was seized, and the contents of the phone were downloaded for officer use, including the phone number, contacts lists, texts, call records, and other images.[95]

The Vermont court found that because cell phones can connect to the Internet, the phones have an almost unlimited storage capacity and, thus, do not fit within the container doctrine.[96] It instead makes more sense to compare cell phones to computers.[97] In this particular case, the court found the extreme invasive nature of the search was not justified as the government failed to demonstrate the need for the search.[98] Accordingly, the court created a bright-line rule finding that because of the technological advances in cell phones a war-

80 *Id.* at 735. In Arizona v. Gant, the Court found that the search incident to arrest was not permissible because the arrestee was separated from the item or thing to be searched.
81 *Id.*
82 *Id.*
83 920 N.E.2d 949, 950 (Ohio 2009).
84 *Id.*
85 *Id.*
86 *Id.* at 950-51.
87 *Id.* at 954.
88 *See id.* (discussing even though the defendant had a standard cell phone, it still had other capabilities besides making phone calls, including text messaging and camera capabilities).
89 Ohio v. Smith, 920 N.E.2d 949, 955 (Ohio 2009).
90 *Id.*
91 *Id.* at 955-56.
92 *Id.* at 956.
93 *Mayo*, 2013 WL 5945802, at *1.
94 *Id.* at *2.
95 In Vermont, consent or a warrant is needed to search a cell phone, but for federal investigations the search incident to arrest authority is sufficient. *Id.*
96 *Id.* at *8.
97 *Id.* at *9.
98 *Id.* at *11.

rant is required before a search.[99]

In *United States v. Aispuro*, a federal district court in Kansas granted a defendant's motion to suppress the evidence found after a search was done of the contents of his phone.[100] Though the phone was found as part of a search incident to arrest, the phone's contents were downloaded when the phone was in the officer's custody, and therefore, no risk of evidence destruction by the defendant existed.[101] Further, there was no specific threat of remote evidence destruction.[102] As a result, there was no evidence that exigency existed as the downloaded contents of the phone was not searched until five days after it was received.[103] The officers could have asked for a warrant before examining the information.[104] The court noted that allowing a warrantless search in this situation would have been completely contrary to the reasonable expectation of privacy people have in their cell phones. Here, the police were either required to obtain a warrant or to demonstrate the existence of some sort of exigency.[105]

In *United States v. McGhee*, the defendant was arrested in January 2009, pursuant to an arrest warrant, for conspiracy to distribute and distribution of drugs, though the actual crimes were committed in March 2008.[106] A cell phone was seized incident to the defendant's arrest, and the contact list was scanned. The officer who put the scanned contact list into an FBI report did not know the arrest warrant was for a 2008 incident. As in most cases, the court began by detailing the vast personal information that cell phones contain and noted that because of this vast information there is an inherent expectation of privacy in one's cell phone.[107] Because the defendant was arrested in January 2009, there was no reason to believe that this cell phone would still have evidence, almost a year later, from crimes committed in March 2008. Also, as the cell phone was in the immediate control of the officer, there was no risk of harm to the officer or risk of evidence destruction that warranted the search.[108] Accordingly, the court found the warrantless search of the phone was not justified.[109]

In *United States v. Park*, officers executed a search warrant on a building in California and uncovered a marijuana grow operation, and the defendant was determined to be part of this operation.[110] Though the defendant's cell phone was not seized as part of a search incident to his arrest, his phone was placed in evidence for safekeeping as part of the routine booking procedure when he was taken to the police station. The officers were not clear on when the search of the phone happened; however, it was clear that searching cell phones was not part of the routine booking procedure.[111] The court concluded the search of the phone was purely investigatory and was not conducted pursuant to the rationales for search incident to arrest, officer safety, or evidence destruction.[112] Consequently, the search was found to be impermissible.[113]

V. Conclusion

The search of cell phones found incident to an arrest is not a novel issue. As demonstrated by the cases above, the Supreme Court has been asked to review a number of these cases, but has failed to grant certiorari. The Supreme Court should grant certiorari in *United States v. Wurie* because the different sets of rules that apply in Massachusetts as a result of the First Circuit's ruling merit review.

99 *Id.* at *12-13.
100 *Aispuro*, 2013 WL 3820017, at *15.
101 *Id.* at *12.
102 *Id.* at *13.
103 *Id.* at *14.
104 *See id.* (finding that getting a warrant is consistent with exigency circumstances and privacy concerns as cell phones contain personal data).
105 *Id.* at *14.
106 *McGhee*, 2009 WL 2424104, at *1.
107 *Id.* at *3.
108 *Id.*
109 *Id.*
110 2007 WL 1521573, at *2.
111 *Id.* at *2-3.
112 *Id.* at *8.
113 *Id.* at *11-12.

Moreover, because there are conflicting rulings among the courts at the state and federal level across the country, a clear rule on the issue is needed for officers and suspects alike.

When the Founders drafted the Fourth Amendment, and the Supreme Court subsequently interpreted its requirements, cell phones were not yet invented, let alone part of the consideration for the warrant requirement. In addition, with ever-advancing technology in cell phones, more and more personal information can be stored on the phone, and law enforcement can use that information to investigate and prosecute crimes. With this changing landscape in mind, it is up to the Court to determine if cell phones require a special consideration. The Court has already interpreted the Fourth Amendment as requiring different rules for the home and car. Therefore, the Court must determine if a cell phone is more analogous to a container found in a car, or to a computer. Further, in determining if a search should be allowed, the Court will have to balance privacy interests with law enforcement interests.

Based on the rationales adopted by the lower courts, the Supreme Court seems to have three different ways it could rule on *Wurie*. The Court could find that the warrantless search of a cell phone is per se unreasonable, and even if found pursuant to a search incident to arrest, a warrant is required. Alternatively, the Court could hold that when a cell phone is found pursuant to a search incident to arrest, the search is always permissible. Finally, the Court could also limit what the officers could search for in the phone and then require a showing of exigency to do a full search of the phone's content without a warrant.

In the interim, even in jurisdictions where the search is allowed, prosecutors should caution law enforcement officers about doing complete searches of cell phones found incident to arrest. While the search may be allowed in those jurisdictions, the courts have often expressed concerns in their opinions about the abundance of information that can be found on a cell phone. In addition, usually when the search has been upheld it is because the officer conducted a limited search of the contents of the phone. Nevertheless, defense attorneys must continue to challenge law enforcement's searches of these phones.

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NOTES

TOWARD A CONCEPTUAL FRAMEWORK FOR TRAUMA-RESPONSIVE PRACTICE IN COURTS

by Shawn C. Marsh, Ph.D. & Honorable Joan Byer

Courts across the United States have become increasingly interested in how to develop trauma-responsive practices, particularly among juveniles. For example, the National Council of Juvenile and Family Court Judges ("NCJFCJ")[1] has received a surge of requests for training on trauma in the last several years. Since the start of 2013 alone, NCJFCJ staff, member judges, and partners such as the National Child Traumatic Stress Network (NCTSN)[2] have provided trauma-related training to well over 2500 juvenile and family court professionals across the country.

Although courts' efforts to understand and address trauma is noteworthy, important questions remain regarding the definition and scope of trauma-responsive practice. To what degree are courts responsible for identifying and considering trauma as a part of a case? Are there unintended consequences of screening for and introducing trauma history into a case? Further, at a practice level, what is actually meant by trauma-responsive practice in juvenile courts and how difficult will it be to achieve? Perhaps not surprisingly, justice and human service professionals have yet to reach a consensus on the answers to these questions. Rather, it is clear that remains substantial debate between social scientists and legal experts regarding the definition of trauma-responsive practices, the use of information about adverse experiences, and what our understanding of toxic stress means specifically for court policy and practice.

Fortunately, this important debate and courts' efforts to become trauma-responsive does not need to occur in a vacuum. Much of what we know about the long-term impact of trauma on child and adult development, including involvement in justice systems, is likely best understood and applied through a public health approach.[3] Put simply, early adversity in life particularly multiple adversities like abuse and neglect puts children at risk for later involvement in the juvenile and criminal justice systems; ultimately this leads to negative psychosocial and physical health outcomes later in life. With this trajectory in mind, there are steps courts can take to better serve those that become system-involved. For example, moving from a sick well or victim offender dichotomy to one of viewing those appearing in court as injured[4] in some manner begins to change how

1 The NCJFCJ is currently developing and testing a protocol to conduct "trauma audits" in juvenile and family courts with a focus on assessing environment, practice, and policy; supporting subsequent changes desired by the court through intensive technical assistance; and evaluating how these changes might improve outcomes for children, youth, and families. *See* National Council of Juvenile and Family Court Judges, www.ncjfcj.org (last visited Dec. 18, 2013).

2 *See* Nat'l Child Traumatic Stress Network, www.nctsn.org (last visited Dec. 18, 2013).

3 *See* Centers for Disease Control and Prevention: Adverse Childhood Experiences Study (ACES), http://www.cdc.gov/ace/ (last visited Dec. 18, 2013) (demonstrating a thorough treatment of a public health approach to limiting the negative outcomes associated with adverse childhood experiences and detailing what constitutes adversity).

4 The term "injured" represents a public health orientation. It is considered a neutral and inclusive term that captures a range of adverse experiences and associated nega-

we conceptualize human behavior and subsequently seeks to promote healing in children and adults who become system-involved.

Through a public health lens, when one views individuals appearing before the court as likely injured in some way, it then becomes necessary to use a universal precautions approach in our work. Specifically, a universal precautions approach to trauma in justice systems assumes that all people appearing in courts have experienced adversity in some manner. Thus, the focus for courts then becomes ensuring that physical and social environments are sensitive to limiting unnecessary arousal (e.g., reducing stress), practices reflect an understanding of trauma triggers (e.g., well-designed security procedures), and policies are designed to help promote healing (e.g., screening and treatment). Inherent in this approach is that all system professionals, whether injured or not, benefit from the focus on safety and well-being that is instilled in trauma-responsive court environments.

Together with efforts to better define trauma-responsive practices in courts and what it means for environments, practices, and policies, there has recently been a call at the federal level for a developmentally-responsive juvenile justice system.[5] Suggested key features of such a system include integration of developmental science with trauma-responsive interventions and the utilization of implementation science to achieve this integration in a meaningful and lasting way. Foundationally, a developmentally-informed justice system recognizes that adolescents are different from adults and need to be treated as such. This requires that practices and policies reflect our understanding of those differences that exist across age, gender, and culture. Advances in neuroscience have fundamentally changed our work with youth, as witnessed by recent Supreme Court decisions[6] that reinforce the need to view "adolescence as a mitigating factor."[7] Developmental science has also taught us that risk taking is normal in adolescence and serves an adaptive purpose; that adolescents have a less mature future orientation; and that there is an increased susceptibility to peer influences at this early stage of development.

When striving to implement a developmentally-responsive approach to court practice, this effort is by definition inclusive of trauma-informed practice because trauma and development are inextricably linked. In other words, being attuned to what a child, youth, or family needs in order to promote well-being and healthy development should incorporate consideration of prior adversities, regardless of the type of case before the court (e.g., dependency, domestic violence, divorce, or criminal). Further, this approach recognizes the thematic issues that system-involved children, youth, and families tend to encounter: mental health, substance abuse, domestic violence, educational disengagement, and trauma or adverse experiences. Approaching injured parties through this holistic and contextual lens encourages responsiveness to the needs of children and families, versus processing based on the needs of institutions (e.g., hearing schedule preferences). Responding in a developmentally informed and thus a trauma-responsive manner has been hypothesized to enhance a sense of procedural justice by putting in place supports and interventions that are tailored to the needs of children, youth, and families, which ultimately improve case outcomes in general.

tive outcomes without unnecessarily stigmatizing consumers as sick, victims, or offenders, among other defaming labels.

5 *See generally* Nat'l Research Council, Reforming Juvenile Justice: A Developmental Approach (Richard J. Bonnie, et al. eds., 1st ed. 2013) *available at* http://www.nap.edu/openbook.php?record_id=14685&page=R1.

6 *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012) (the Court issued a joint opinion for *Miller* and Jackson v. Hobbs, 132 S. Ct. 548 (2011)).

7 *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. Law & Criminology 1, 137-89 (1997); 137-189; *see also* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Children 2 (2008).

Much work certainly remains to integrate our current understanding of human development and the impact of trauma into our work in courts across the nation. These are exciting times and it is essential to incorporate recent developmental science findings in crafting effective intervention with our most vulnerable populations. This emergence of a science-informed call for reform is evidenced not only by the work of courts such as those in Tucson and Gila River, Arizona; Louisville, Kentucky; Canton, Ohio; and others but also by major federal initiatives such as the Defending Childhood Initiative[8] and the Task Force on Children Exposed to Violence.[9] With thoughtful education, planning, and a sense of urgency, we are now poised to initiate a paradigm shift in efforts to improve outcomes for all individuals who appear in courts across the nation. Stakeholders, such as judges, prosecutors, public defenders, court administrators, social workers, and probation officers, now often need little convincing that trauma is an issue impacting many system-involved children and families and that system-involvement itself can be traumatic. Instead, we are now striving to aid in defining, implementing, and evaluating trauma-responsive environments, practices, and policies *for* courts *by* courts.[10] Our conceptual framework for these exciting next steps in trauma-responsive practice as briefly elucidated here (e.g., a public health orientation), will be developmentally appropriate and grounded in science, with the ultimate goal of improving the long-term health and well-being of children, their families, and in turn, disrupting intergenerational cycles of adversity.[11]

8 *See* USDOJ: Defending Childhood, http://www.justice.gov/defendingchildhood/ (last visited Dec. 19, 2013).

9 Robert L. Listenbee, Jr. et al., Report of the Attorney General's Nat'l Task Force on Children Exposed to Violence (2012), *available at* http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf.

10 *See* Michael L. Howard & Robin R. Tener, *Children Who Have Been Traumatized: One Court's Response*, 59 Juvenile & Family Court J. 4, 21-34 (2008); *see also* Kristine Buffington et al., *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency*, 61 Juvenile & Family Court J. 3, 13-23 (2010).

11 For a copy of a bench card on the topic of trauma that was jointly developed by the NCTSN and the NCJFCJ, visit http://www.ncjfcj.org/resource-library/publications/nctsn-bench-card-trauma-informed-judge.

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PASSPORT

GIVE US YOUR HUDDLED MASSES YEARNING TO BREATHE FREE: A CRIMINAL DEFENDER RESOURCE GUIDE TO ADVISING THE NON-CITIZEN CRIMINALLY ACCUSED

by Rita M. Montoya

Give me your tired, your poor
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door!

-Inscription at the base of the Statue of Liberty

For a variety of reasons, voluntary and involuntary, some non-citizens find themselves in the United States criminal justice system accused of a myriad of federal, state, or municipal criminal law violations. Though a criminal conviction carries a variety of consequences for those who find themselves in the criminal justice system, a criminal conviction for a non-citizen can affect their very existence in the United States. For some, it may mean simply being returned to a home country where family and friends reside. Yet, for others, it results in being returned to a country they have never really known, perhaps to a language they do not speak, or to a place where they may possibly be tortured or killed.

A recent article published in *The Atlantic* highlights the story of Ronald Sylvain, a long-time permanent legal resident married to a U.S. citizen with whom he has children.[1] After a few understandable but unwise traffic ticket-related moves, Mr. Sylvain found himself labeled as an "aggravated felon" by U.S. Immigrations and Customs Enforcement (ICE); he now faces the possibility of deportation to a country he does not even know. It is unclear whether Mr. Sylvain had criminal defense counsel or received any general advisement regarding the immigration consequences of his criminal convictions. What is clear, however, is the devastating effect that a criminal conviction can have for non-U.S. citizens such as Mr. Sylvain.

As criminal defense attorneys, we have an affirmative duty to advise our clients about immigration consequences, namely the risk of deportation, for potential criminal convictions.[2] Specifically, in *Padilla v. Kentucky*, the Court found that "when the deportation consequence is truly clear…the duty to give correct advice is equally clear."[3] This begs the important question of what action to take when the law is unclear. According to *Padilla*, attorneys may simply "do no more than advise a noncitizen client that pending criminal charges may carry

1 Why Are Immigrants Being Deported for Minor Crimes? Steven Patrick Ercolani, Nov. 20, 2013, *available at* http://www.theatlantic.com/national/archive/2013/11/why-are-immigrants-being-deported-for-minor-crimes/281622/ (last accessed November 24, 2013).

2 *See generally* Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

3 *Id.* at 369.

a risk of adverse immigration consequences."[4] Attorneys who do not engage in this dialogue with clients run afoul of the standard for effective assistance of counsel embedded in the Sixth Amendment of the United States Constitution. While the *Padilla* Court acknowledges the complex nature of the Immigration Code and the difficulty that non-Immigration-focused attorneys may have in understanding it, the Court maintained that deportation is so entwined with criminal convictions that to consider advisement of a deportation risk outside the scope of effective assistance of counsel would be a grave injustice of constitutional magnitude.[5] And they are correct. But does that make it any more tenable an advisement?

While it may seem fair to the Court that members of the Criminal Defense Bar be required to educate themselves about another area of related law on their personal or professional time, public servants representing indigent individuals accused of a crime oftentimes do not have this luxury. I have known of Public Defenders carrying caseloads between 200-300 misdemeanors or 100-150 felonies *at a time*. I personally have carried 100 misdemeanor case files to court with me for a single docket day.

These numbers far exceed the American Bar Association guidelines for Public Defender caseloads and make it practically impossible to provide the standard of legal assistance that those clients deserve. The individual Public Defenders know it's too many; their supervisors know it's too many; and the clients definitely know it's too many. Yet, there is simply not enough funding allocated to hire more Public Defenders, leaving them to do the best they can. Still, despite their willingness to regularly work twelve-plus hours, six to seven days a week, Public Defenders struggle to return client phone calls, complete case investigation, file motions, and visit their incarcerated clients for no other reason than that they are stretched thin and there are only twenty-four hours in a day. An environment like this makes a requirement to learn and know an additional (and complex) area of law, such as immigration, a professional nightmare.

Though the Immigration Code[6] is supposed to be user-friendly, such that those affected should not need legal counsel to navigate it, the reality is that it is a complicated and conflicting set of laws. The language is broad and vague with little to no guidance as to what a certain phrase means or what qualifies under a particular provision. Some provisions are even in direct conflict with others and there is no certain resolution. Moreover, interpretation of the provisions often varies from one jurisdiction to another so a non-citizen in immigration court in the Ninth Circuit may face a very different environment than a non-citizen in the Fourth Circuit. Even seasoned lawyers may find themselves unable to provide a clear and definite answer to what may seem like the most basic of legal immigration questions. So where does this leave the indigent non-citizen criminally accused client who needs to know how a criminal conviction could affect his or her right to stay in the U.S.?

While many Public Defender systems do the best they can to provide their staff with training and resources so they can advise their clients appropriately regarding potential immigration consequences, the stark reality is that most are likely not going far enough. Offices such as the Bronx Defenders and Brooklyn Defender Services have been fortunate to be able to create and implement independent immigration units within their offices.[7] These units are staffed with attorneys who are solely immigration focused. They often engage in policy work as well as direct client representation in the immigration law arena. These units serve the clientele in their particular office while working

4 *Id.*

5 *Id.* at 369-71.

6 *See* Immigration and Nationality Act (INA), 8 U.S.C.A. § 1101 (West 2013).

7 *See* The Bronx Defenders, http://www.bronxdefenders.org/who-we-are/how-we-work/ (last visited Jan. 20, 2014) (immigration attorneys work alongside criminal defense attorneys to advise non-citizen clients); Brooklyn Defender Serv., http://www.bds.org/aboutus/ImmigrationUnit.aspx (last visited Jan. 20, 2014).

in tandem with the client's Public Defender and any other individuals on the client's team, such as social workers or family advocates.

It is understandable, however, that given a lack of funding, resources, time and staff attorneys, most Public Defender systems, especially statewide systems, simply cannot operate on such a specialized level. Other offices employ immigration attorneys who take residence in select offices across the state so as to provide statewide clientele and their Public Defenders with a resource to assist their immigration needs. Most offices, however, can only provide trainings and written materials to facilitate proper immigration advisement. Presumably, there are also some offices that provide very little in this vein. It is not unheard of for a client to simply be advised that there may be some immigration consequences, but that his or her attorney is not familiar with immigration law and should contact an immigration attorney. This, unfortunately, does not appear to comply with *Padilla*.

So what is an exhausted and over-burdened Public Defender to do? There are many resources and sources of funding available to criminal defense attorneys and legal advocates in their education and provision of immigration legal services.

I. Practitioner Resources

Many legal and advocacy organizations provide training, resources, advice, and sometimes even direct representation. The Immigration Advocates Network[8] (IAN) maintains a library of substantive materials and manuals as well as trainings, webinars, podcasts, and teleconferences. The National Immigrant Justice Center[9] (NIJC) provides webcasts, practitioner tips, and legal materials. Additionally, the Defenders Initiative, created by NIJC, "provides trainings and responds to e-mail inquiries from criminal defense attorneys who have questions regarding potential immigration consequences that their immigrant defendant clients may face."[10]

Another valuable resources is the Immigrant Defense Project (IDP), which assists the criminal bar in carrying out their duties pursuant to *Padilla* by providing a hotline where attorneys can get advice on criminal-immigration issues, request trainings or obtain other support.[11] The IDP also produces practice advisories that are accessible on their website to assist in defending immigrants as well as an essential "Immigration Consequences of Convictions" checklist, specifically for determining whether a criminal offense may be deemed an "aggravated felony" under immigration law and quick reference guides for a limited number of states. The website also contains a link to a strategy guide produced by the Law Offices of Norton Tooby focusing on how to avoid deportation at all stages of a criminal case.

The Immigrant Legal Resource Center (ILRC) provides a variety of resources that criminal defense attorneys may find useful in advising non-citizen clients.[12] There are quick reference guides to California[13] and Arizona[14] convictions, a practice advisory for those considering the Deferred Action for Childhood Arrivals program,[15] and many practice adviso-

8 *See* Immigration Advocates Network, http://www.immigrationadvocates.org/nonprofit/login/?membersonly&returnto=%2Fnonprofit%2Flibrary%2F (library available for members with log in information) (last visited Jan. 20, 2014).

9 *See* Nat'l Immigrant Justice Ctr., http://www.immigrantjustice.org/ (last visited Jan. 20, 2014).

10 Nat'l Immigrant Justice Ctr., *Contact The Defenders Initiative*, http://immigrantjustice.org/resources/defendersinitiative (last visited Jan. 20, 2014) (through an online form, individuals may contact the Equal Justice Works *Padilla* Fellow to ask questions or schedule training).

11 *See* Immigrant Defense Project, http://immigrantdefenseproject.org/criminal-defense (last visited Jan. 20, 2014) (individuals may also phone a hotline at 212-725-6422).

12 *See* Immigrant Legal Resource Ctr. (ILRC), www.ilrc.org (last visited Jan. 20, 2014).

13 *See* ILRC, *The Quick Reference Guide to California Convictions* (Jan. 2013) http://www.ilrc.org/resources/the-quick-reference-guide-to-california-convictions-updated-january-2013 (last visited Jan. 20, 2014).

14 *See* ILRC, *Quick Reference Chart and Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (Oct. 2012) http://www.ilrc.org/files/documents/ilrc-arizona_chart_2012-10.pdf.

15 *See* ILRC, *Practice Advisory for Criminal Defend-*

ries pertaining to specific court rulings related to immigration consequences of criminal convictions. The ILRC also provides seminars, additional publications, and consultation services to criminal defenders. The Washington Defender Association Immigration Project[16] provides case assistance, immigration attorney referrals, as well as practice advisories and immigration resources including a practice guide for representing juvenile non-citizens, negotiating and crafting pleas for non-citizens and immigration analysis of Washington specific crimes. The National Immigration Project of the National Lawyer's Guild's website provides specific guides to understanding immigration detainers and defending juvenile non-citizens, among others.[17] Its Legal Resources webpage contains quick reference charts for immigration consequences of criminal convictions in many states.

Defending Immigrants Partnership[18] is a collaborative effort by the Immigrant Defense Project (IDP), the Immigrant Legal Resource Center (ILRC), and the National Immigration Project of the National Lawyers Guild to assist public defender offices and criminal defense organizations in provision of their services. "[T]he Partnership offers defender programs and individual defense counsel critical resources and training about the immigration consequences of crimes, actively encourages and supports development of in-house immigration specialists in defender programs, forges connections between local criminal defenders and immigration advocates, and provides defenders technical assistance in criminal cases."[19] Its website hosts a list of trainings around the U.S. as well as a members-only library.

II. Academic, Policy, and Funding Resources

The *ImmigrationProf Blog*[20] provides up-to-date thoughts, opinions, summaries, and reviews of issues in immigration policy. Those looking for funding to support implementation or expansion of an immigration program in their office can start by looking at the website: www.GrantWatch.com. There, practitioners can search for a wide variety of grants including Refugee/Immigration and Justice & Juvenile Justice, among other opportunities. The website also includes tips for writing grant proposals and other resources practitioners may find helpful.

Additionally, if an office is willing to sponsor a legal fellow, there are many existing legal fellowships that an individual could apply for to serve this endeavor. For example, the Soros Justice Fellowship funds "projects that advance reform, spur debate, and catalyze change on a range of issues facing the U.S. criminal justice system," including immigration-related projects.[21] Projects sponsored by Equal Justice Works can also be tailored to serve the non-citizen criminally accused.[22]

The inscription at the base of the Statue of Liberty welcomes immigrants to the U.S. with the promise of a golden entryway to freedom. For the non-citizen criminally accused, who have no right to court-appointed counsel in immigration proceedings, their last stop before being pushed out of the golden door often lies with a Public Defender office. Despite great strides as a result of relentless self-advocacy, these offices across the U.S. remain overburdened. Adding an imperative duty, such as advisement of immigration consequences upon the already buckling backs of Public Defenders, may appear to be the ultimate straw. But

ers, http://www.ilrc.org/files/documents/ilrc-practice_advisory_for_criminal_defenders_deferred_action.pdf.

16 *See* The Wash. Defender Assoc. Immigration Project, http://www.defensenet.org/immigration-project (last visited Jan. 20, 2014).

17 *See* Nat'l Immigration Project, http://www.nationalimmigrationproject.org/publications.htm (last visited Jan. 20, 2014).

18 *See* Defending Immigrants Partnership, http://defendingimmigrants.org/about/ (last visited Jan. 20, 2014).

19 *Id.*

20 *See* ImmigrationProf Blog, http://lawprofessors.typepad.com/immigration/ (last visited Jan. 20, 2014).

21 *See* Soros Justice Fellowships, Open Society Founds., http://www.opensocietyfoundations.org/grants/soros-justice-fellowships (last visited Jan. 20, 2014).

22 *See* Equal Justice Works Fellowships, Equal Justice Works, http://equaljusticeworks.org/post-grad/equal-justice-works-fellowships (last visited Jan. 20, 2014).

our backs are strong and with the assistance of others in the legal and public interest community, we can provide our non-citizen clients with the justice they deserve.

Timeline of Immigration Law Regarding Convictions and Deportation/Removal

1875: Congress bars convicts and prostitutes from entering the United States. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

1891: Congress bars those convicted of felonies or other infamous crimes or misdemeanors involving moral turpitude from entering the United States. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

1917: Congress passes the Immigration Act of 1917 making classes of noncitizens deportable for crimes committed in the United States. Immigration Act of 1917, ch. 29, 39 Stat. 874 (current version at 8 U.S.C.A. § 1227 (West 2013).

1917: Judicial Recommendation Against Deportation (JRAD) is implemented as a form of judicial relief whereby judges can make a recommendation about whether the noncitizen should be deported. It effectively prevented deportation. There were no automatic deportations. Each decided on case-by-case basis. JRAD codified as amended at Immigration and Nationality Act, 8 U.S.C. § 1251(b)(2) (1988) (repealed 1990).

1952: Immigration and Nationality Act (INA) modified JRAD to be applicable only to crimes of moral turpitude. *Id*.

1986: Second Circuit finds that failing to seek JRAD relief constitutes ineffective assistance of counsel ruling that convictions and their impact on a noncitizens ability to stay in the United States is a central issue resolved in the sentencing process and not a collateral consequence. Janvier v. United States, 792 F.2d 449 (2d Cir. 1986).

1990: JRAD eliminated in its entirety. *See* Immigration Act of 1990, Pub. L. No. 101-649, Title V, § 505(b), 104 Stat. 5050 (1990).

1996: Congress eliminates the Attorney General's authority to grant discretionary deportation relief. Immigration and Nationality Act, 8 U.S.C. § 1229c(a)(2)(D) (1996).

Post 1996: Little relief from mandatory deportation due to criminal conviction; namely, cancellation of removal, asylum, deferral/withholding of removal.

About the AUTHOR

RITA M. MONTOYA is an attorney licensed in the State of Colorado. Born and raised in Sacramento, CA, she is currently pursuing a LL.M. in Public Policy from the University of the Pacific, McGeorge School of Law and is serving as a Volunteer Attorney at the Maryland Office of the Public Defender. Ms. Montoya attended law school at American University in Washington D.C. where she focused on Criminal Defense of underserved communities. As a former Colorado Public Defender, Ms. Montoya had the privilege of representing juveniles and adults, unable to afford a lawyer, who were accused of crimes ranging from traffic and property crimes to violent offenses, including homicide. During her time at the Public Defender's Office, Ms. Montoya provided legal assistance to thousands of clients in their pursuit of justice and, after only one year as a lawyer, she was chosen to second chair a capital case. Ms. Montoya also wrote a brief for and made oral argument to the Colorado Supreme Court. As a member of the Pacific McGeorge Immigration Clinic, she advocated for non-citizens seeking the protection of the United States, including victims of crimes and those brought to the U.S. as children; she also successfully represented a detained noncitizen in removal proceedings by invoking the Convention Against Torture thereby preventing his torture and execution by the government of his home country. Ms. Montoya strongly believes that educating people about their rights is the first step in ensuring that all people are treated with respect and dignity. She is a firm believer in "liberty and justice for all!"

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